FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2011 TO JUNE 30, 2011

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD JANUARY 1, 2011 TO JUNE 30, 2011

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2011, TO JUNE 30, 2011

IN THE MATTER OF

NESTLÉ HEALTHCARE NUTRITION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4312; File No. 092 3087
Complaint, January 12, 2011 – Decision, January 12, 2011

This consent order relates to allegations that Nestlé Healthcare Nutrition, Inc. ("Nestlé HCN"), a subsidiary of Nestlé S.A., the world's largest food and nutrition company, made deceptive advertising claims about the health benefits of its BOOST Kid Essentials fortified drink product ("BOOST"), in violation of Sections 5 and 12 of the FTC Act. According to the complaint, respondent made false and unsubstantiated claims regarding the health benefits of BOOST for children. The order prohibits respondent Nestlé HCN from claiming that BOOST will reduce the risk of colds, flu, and other upper respiratory tract infections unless the claim is supported by the Food and Drug Administration. The order further prohibits respondent from claiming that BOOST will reduce a child's sick-day absences and the duration of acute diarrhea in children under age 13, unless the claims are true and backed by at least two well-designed human clinical studies. The order also prohibits respondent from making any claims about the health benefits, performance, or efficacy of any probiotic or nutritionally complete drinks that it sells at retail, unless the claims are true and backed by competent and reliable scientific evidence, and bars respondent from misrepresenting any tests or studies.

Participants

For the Commission: *Richard Cleland, Christine DeLorme, Mary K. Engle, Karen Mandel, Janis K. Pappalardo,* and *Margaret Patterson.*

For the Respondent: *Lewis Rose* and *Dana Rosenfeld, Kelley Drye & Warren, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nestlé HealthCare Nutrition, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nestlé HealthCare Nutrition, Inc. is a Delaware corporation with its principal office or place of business at 12 Vreeland Road, Florham Park, New Jersey 07932-0697.

2. Respondent has labeled, advertised, promoted, offered for sale, sold, and distributed BOOST Kid Essentials to consumers.

3. BOOST Kid Essentials is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

5. Respondent has disseminated or caused to be disseminated advertisements for BOOST Kid Essentials, including but not limited to the attached Exhibits A through E. These advertisements contain the following statements and depictions, among others:

a. **Television Advertisement**: "Straw Power" (Complaint Exhibits A1 (Storyboard) and A2 (Video))

(A girl pops into frame and takes a big enjoyable sip of Kid Essentials.)

Female Announcer: Introducing NEW Boost Kid Essentials, the only nutritionally complete drink that gives kids the power of immune strengthening probiotics.

ON SCREEN: *L. reuteri Protectis* has been clinically shown to help strengthen the immune system when consumed daily. For more information about clinical trials involving *L. reuteri Protectis*, go to

www.kidessentials.com.

(The girl runs along playfully as the straw twirls around her. She encounters a boy who sneezes. The straw quickly forms a protective barrier around her. The girl continues on her way and as she approaches a basketball net, the straw forms stairs for her to step up on.)

ON SCREEN: muscle-building protein

Female Announcer: Plus the power to grow strong – with muscle-building protein and 25 vitamins and minerals.

(She takes a shot and hits a perfect swoosh.)

ON SCREEN: 25 vitamins & minerals

(Cut to straw popping back into drink box. The vortex of wellness swirls around the box, highlighting product attributes.)

ON SCREEN: Immunity strengthening probiotics/7 g protein/25 vitamins & minerals

Female Announcer: NEW Boost Kid Essentials: complete nutrition for your child's healthy growth, and probiotics clinically shown to help strengthen the immune system.

(The straw bends forwards, and probiotics titles emerge, followed by animated probiotic bubbles and a twirling arrow.)

ON SCREEN: Probiotic straw/Clinically shown to help strengthen the immune system

(Close up of the girl grabbing the drink box and enjoying another sip)

Female Announcer: And that means the power to do anything is possible every day.

(She finishes her sip, turns and skips out of frame.)

ON SCREEN: Boost Kid Essentials Nutritionally Complete Drink KidEssentials.com....

b. **Product Packaging** (Exhibit B)

Front Panel:

BOOST®

Kid Essentials

Nutritionally Complete Drink

Immunity Protection*

Patented PROBIOTIC straw

Nutritionally Complete Drink with PROBIOTICS to **Help Keep Kids **Healthy**...*

Side Panel:

Complete, Balanced Nutrition for Your Child's **Healthy Growth** and **Strong Immune System**!

BOOST®Kid Essentials provides complete, balanced nutrition for kids 1-13.

Only BOOST Kid Essentials has the vitamins and minerals kids need plus immune-supporting probiotics and antioxidants to help keep them healthy!...

Talk to your pediatrician about using BOOST Kid Essentials as a supplement with a meal or as a snack. To learn more about immunity, probiotics, and antioxidants, visit www.kidessentials.com...

c. **Internet Website www.kidessentials.com** (excerpt) (Exhibit C)

FAQ:

Q: What exactly do probiotics protect my kids from?

A: Probiotics are healthy bacteria that must be consumed in order to build up in our digestive system - in the lining of the GI tract. While they occur throughout nature, they are less likely to be

present in large numbers in our own GI tract, and therefore need to be consumed to derive a benefit. They help balance and keep the levels of bad bacteria in check. Most importantly, they help keep our immune system healthy by increasing disease-fighting antibodies.[1,2]

References:
1. Tuohy KM *et al*. Using probiotics and prebiotics to improve gut health. *DDT* 2003;8(15):692-700.
2. Isolauri E *et al*. Probiotics: effects on immunity. *Am J Clin Nutr* 2001;73(suppl):440S-50S.

Q: Are probiotics effective against viruses?

A: Yes, certain probiotics have been shown to help fight viruses such as Rotaviral diarrhea.[1] *Lactobacillus reuteri Protectis* (the probiotic found in BOOST Kid Essentials Drink) has been shown to reduce the duration of diarrheal illness in children[3] and reduce the number of days that infants miss daycare due to illness.[2]

References:
1. Szajewska H *et al*. Probiotics in gastrointestinal diseases in children: hard and not-so-hard
evidence of efficacy. *J Pediatr Gastroenterol Nutr* 2006;42 (5):454-75.
2. Weizman Z *et al*. Effect of a probiotic infant formula on infections in child care centers:
comparison of two probiotic agents. *Pediatrics* 2005;115;5-9.
3. Shornikova AV *et al*. Bacteriotherapy with Lactobacillus reuteri in rotavirus gastroenteritis.
Pediatr Infect Dis J. 1997;16:1103-7.

Q: Are probiotics safe for my young child?

A: Absolutely. The safety and efficacy of probiotic use has been documented for 100 years all around the world. Probiotic supplemented infant formula has been available for over 15 years, in over 30 countries. *Lactobacillus reuteri Protectis* specifically has been thoroughly tested in infants, children and adults and has shown to be safe and effective.

d. **Pamphlet Advertisement to Health Care Practitioners** (Exhibit D)

Front Cover:
The essential facts: a comparison of **BOOST® Kid Essentials Nutritionally Complete Drink** with probiotic immunity protection vs. **PediaSure®.***
***Only* BOOST Kid Essentials Drink provides immune-supporting probiotics** in its patented straw to help keep kids healthy....

Inside Pamphlet:
....**The immunity support every kid needs**.
Only BOOST® Kids Essentials Nutritionally Complete Drink delivers ***immunity-supporting probiotics***. PediaSure® does not.
Clinical studies of *L. reuteri Protectis* showed the following:

***Faster* Resolution of Acute Diarrhea In Young Children**
[Depiction of a bar graph showing that 81% of patients in a control group had watery diarrhea compared with 26% of patients in the treatment group on day 2 of treatment]
Adapted from Shornikova *et al*.[1]

***Fewer* Absences Among Infants From Child Care**
[Depiction of a graph showing a 67% relative risk reduction of absences among infants from child care]
Adapted from Weizman *et al*.[2]

***Fewer* Days with Fever Among Infants**
[Depiction of a graph showing a 79% relative risk reduction of days of fever among infants]
Adapted from Weizman *et al*.[2]**…**

Back Cover:
Strong growth and immunity
protection every child deserves....

Only BOOST Kid Essentials Drink's patented straw offers the immune support of the probiotic *L. reuteri Protectis*.

Studies in *L. reuteri Protectis* demonstrate the ability to support the body's defenses, resulting in reduced sick days, fever, and the duration of diarrhea.[1,2]...

1. Shornikova A *et al*. *Lactobacillus reuteri* as a therapeutic agent in acute diarrhea in young children.
   JPGN 1997;24(4):399-404.
2. Weizman Z *et al.* Effect of a Probiotic Infant Formula on Infections in Child Care Centers:
   Comparison of Two Probiotic Agnes. *Pediatrics* 2005;115(1):5-9.

e. **People Magazine Advertisement** (Exhibit E)

First Page:

Do your kids
have the
power?

[Depiction of Boost Kid Essentials package with the probiotic straw,
which reads:
NEW!
BOOST
Kid Essentials
Nutritionally Complete Drink
Immunity Protection*
Patented PROBIOTIC Straw
*Nutritionallly Complete Drink
with PROBIOTICS to Help
Keep Kids Healthy]

Second Page:

The power of immune-strengthening probiotics[1, 2]

Probiotic straw to help keep kids healthy

[Depiction of the probiotic straw (continued from the previous page) forming a complete circle around a girl, while a boy sneezes in her direction]

1. Weizman Z et al. Effect of a Probiotic Infant Formula on Infection in Child Care Centers: Comparison of Two Probiotic Agents. *Pediatrics*
2005; 115(1) 5-9.
2. Shornikova AV et al. Lactobacillus reuteri as a therapeutic agent in acute diarrhea in young children. JPGN 1997;24(4);399-404.

Third Page:

The power to grow strong

25 vitamins & minerals
7g of muscle-building protein

[Depiction of the probiotic straw (continued from the previous page) forming stairs for the girl to climb, as she tosses a basketball into a basketball hoop]

Fourth Page:
The power
to do anything!
Every day.

NEW BOOST® Kid Essentials
Nutritionally Complete Drink:
- Immune-strengthening probiotics in the straw
- 25 vitamins & minerals + 7g of protein to support healthy growth
- Kid preferred taste vs. Pediasure®...

6. Through the means described in Paragraph 5, including the statements and depictions contained in the advertisements attached as Exhibits A through E, among others, respondent has represented, expressly or by implication, that drinking BOOST Kid Essentials:

a. Prevents upper respiratory tract infections in children;

b. Strengthens the immune system, thereby providing protection against cold and flubviruses; and

c. Reduces absences from daycare or school due to illness.

7. Through the means described in Paragraph 5, including the statements and depictions contained in the advertisements attached as Exhibits A through E, among others, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6 at the time the representations were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made. Therefore,

the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, including the statements and depictions contained in the advertisements attached as Exhibits A, C, and D, among others, respondent has represented, expressly or by implication, that clinical studies prove that drinking BOOST Kid Essentials:

a. Reduces the general incidence of illness in children, including upper respiratory tract infections;

b. Reduces the duration of acute diarrhea in children up to the age of thirteen; and

c. Strengthens the immune system, thereby providing protection against cold and flu viruses.

10. In truth and in fact, clinical studies do not prove that drinking BOOST Kid Essentials reduces the general incidence of illness in children, including upper respiratory tract infections, reduces the duration of acute diarrhea in children up to the age of thirteen, or strengthens the immune system, thereby providing protection against cold and flu viruses. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

11. The acts and practices of respondent 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 Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this twelfth day of January, 2011, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comment, and having duly considered the comments filed thereafter by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, and having modified the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nestlé HealthCare Nutrition, Inc. ("Nestlé HCN") is a Delaware corporation with its principal office or place of business at 12 Vreeland Road, Florham Park, New Jersey 07932-0697.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" means Nestlé HealthCare Nutrition, Inc., a corporation, its successors and assigns and their officers, and each of the above's agents, representatives, and employees.

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

3. "Adequate and well-controlled human clinical study" means a human clinical study conducted by persons qualified by training and experience to conduct such study. Such study shall be randomized, and, unless it can be demonstrated that blinding or placebo control cannot be effectively or ethically implemented given the nature of the intervention, shall be double-blind and placebo-controlled.

4. "Covered product" means BOOST Kid Essentials, any drink product containing probiotics, or any nutritionally complete drink, other than infant formula, medical foods, and any product not sold primarily through conventional retail channels.

5. "Essentially equivalent product" means a product that contains the identical ingredients, except for inactive ingredients (*e.g.*, inactive binders, flavors, preservatives, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (*e.g.*, orally, sublingually), as the covered product; provided that the covered product may contain additional ingredients or other differences in formulation to affect taste, texture, or nutritional value (so long as the other differences do not change the form of the product or involve the ingredients from which the functional benefit is derived), if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount of additional ingredients, combination of additional ingredients, and any other differences in formulation are unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.

6. "Dosage" means the quantity of the substance taken in or absorbed over a specified, biologically relevant time period to achieve the intended effect.

7. The term "including" in this order means "without limitation."

8. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a

product name, endorsement, depiction, or illustration, that such product prevents or reduces the risk of upper respiratory tract infections, including, but not limited to, cold or flu viruses, unless the representation is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that such product:

A. Reduces the duration of acute diarrhea in children up to the age of thirteen; or

B. Reduces absences from daycare or school due to illness;

unless the representation is non-misleading and, at the time of making such representation, the respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Part, competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. Respondent shall have the burden of proving that a product satisfies the definition of essentially equivalent product.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, other than representations covered under Parts I or II of this order, about the health benefits, performance, or efficacy of any covered product, unless the representation is non-misleading, and, at the time of making such representation, the respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, studies, or other evidence that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

V.

IT IS FURTHER ORDERED that nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

IT IS FURTHER ORDERED that respondent Nestlé HCN, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VII.

IT IS FURTHER ORDERED that respondent Nestlé HCN, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent Nestlé HCN, and its successors and assigns, shall deliver this order to current personnel within thirty (30) days after

the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

IT IS FURTHER ORDERED that respondent Nestlé HCN, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent Nestlé HCN, and its successors and assigns, learn less than thirty (30) days prior to the date such action is to take place, respondent Nestlé HCN, and its successors and assigns, shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Nestlé HCN, and its successors and assigns, shall, within sixty (60) days after service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

X.

This order will terminate on January 12, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

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

This matter involves the advertising and promotion of BOOST Kid Essentials, a children's nutritional drink that also delivers probiotics via an attached straw. According to the FTC complaint, respondent represented, in various advertisements, that BOOST Kid Essentials prevents upper respiratory tract infections in children; strengthens the immune system, thereby providing protection against cold and flu viruses; and reduces absences from daycare or school due to illness. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act.

The FTC complaint further charges that respondent represented that clinical studies prove that BOOST Kid Essentials reduces the general incidence of illness in children, including upper respiratory tract infections; reduces the duration of acute diarrhea in children up to age thirteen (the age group for which the product is marketed); and strengthens the immune system, thereby providing protection against cold and flu viruses. The complaint alleges that these claims are false and thus violate the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. The order covers representations made in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting

commerce. The order defines a covered product as BOOST Kid Essentials, any drink product containing probiotics, or any nutritionally complete drink, other than infant formula, medical foods, and any product not sold primarily through conventional retail channels.

Part I of the consent order is designed to address the complaint allegations concerning respondent's allegedly unsubstantiated representations that its products prevent upper respiratory tract infections (URTIs). Part I prohibits respondent from making representations that a covered product prevents or reduces the risk of URTIs, including, but not limited to, cold or flu viruses, unless the representation is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration (FDA) pursuant to the Nutrition Labeling and Education Act of 1990 (NLEA). Under this provision, therefore, respondent cannot make a claim of URTI risk reduction unless the FDA has issued a regulation authorizing the claim based on a finding that there is significant scientific agreement among experts qualified by scientific training and experience to evaluate such claims, considering the totality of publicly available scientific evidence. As noted in the Commission's Enforcement Policy Statement on Food Advertising, "[t]he Commission regards the 'significant scientific agreement' standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim." Enforcement Policy Statement on Food Advertising (1994), *available at* http://www.ftc.gov/bcp/policystmt/ad-food.shtm. Thus, although the Enforcement Policy Statement does not say that the only way a food advertiser can adequately substantiate a disease risk-reduction claim is through FDA authorization, the Commission has determined that requiring FDA pre-approval before respondent makes a URTI risk-reduction claim for its covered products will facilitate compliance with the order and is reasonably related to the enforcement of this order.

Respondent may decide to make an advertising claim

characterizing limited scientific evidence supporting the relationship between a covered product and URTIs. However, if the net impression is that a covered product prevents or reduces the risk of URTIs, and not merely that there is limited scientific evidence supporting the claim, the advertisement would be covered under Part I. The Commission notes that its experience and research show that it is very difficult to adequately qualify a disease risk-reduction claim in advertising to indicate that the science supporting the claimed effect is limited. In other words, reasonable consumers may interpret an advertisement to mean that the product will prevent or reduce the risk of URTIs, even if respondent includes language indicating that the science supporting the effect is limited in some way. However, if respondent possesses reliable empirical testing demonstrating that the net impression of an advertisement making a qualified claim for a covered product does not convey that it will prevent or reduce the risk of URTIs, then that claim would be covered under the relevant subsequent parts of the order.

Although Part I requires FDA approval before respondent can make claims that a covered product prevents or reduces the risk of URTIs, the Commission does not intend Part I to limit respondent to using the precise language specified in an FDA-approved health claim. To the contrary, if the FDA has approved a claim that a covered product can prevent or reduce the risk of URTIs, respondent may use a variety of words and images to communicate that claim in its advertising. Likewise, regardless of the particular words or images used, if the net impression of an advertisement is that a covered product prevents or reduces the risk of URTIs, then for the ad to comply with the order, the FDA must have authorized a health claim based on significant scientific agreement that such product provides such a benefit.

Part II of the consent order prohibits respondent from making representations that a covered product reduces the duration of acute diarrhea in children up to the age of thirteen, or reduces absences from daycare or school due to illness, unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable

scientific evidence that substantiates that the representation is true. For purposes of Part II, competent and reliable scientific evidence means at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. For purposes of the order, essentially equivalent product means a product that contains the identical ingredients, except for inactive ingredients (*e.g.*, inactive binders, flavors, preservatives, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (*e.g.*, orally, sublingually), as the covered product; provided that the covered product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.

Part III of the consent order prohibits respondent from making representations, other than representations covered under Parts I or II, about the health benefits, performance, or efficacy of any covered product, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of Part III, competent and reliable scientific evidence means tests, analyses, research, studies, or other evidence that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results.

Part IV of the consent order prohibits respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part V of the consent order provides that nothing in the order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the NLEA.

Parts VI, VII, VIII, and IX of the consent order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part X provides that the order will terminate after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF

SIMON PROPERTY GROUP, INC.

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

Docket No. C-4307; File No. 101 0061
Filed November 10, 2010 – Decision January 13, 2011

This consent order addresses the acquisition of Prime Outlets Acquisition Company ("Prime") by Simon Property Group, Inc. ("Simon"). According to the Complaint, the proposed acquisition of Prime's outlet centers, valued at approximately $2.3 billion, would substantially lessen competition in the provision of retail space at outlet centers in the Southwest Ohio; Chicago, Illinois; and Orlando, Florida areas. The order requires Simon to divest either its Cincinnati Premium Outlets or Prime's Outlets-Jeffersonville, both located in Southwest Ohio. In order to ensure the divestiture is successful, the order requires Simon to maintain the Southwest Ohio outlet centers at full economic viability, marketability, and competitiveness until the divestiture to a Commission-approved acquirer is complete. The order also prohibits Simon from enforcing any radius restriction with respect to any lease with any tenant in either the Chicago or Orlando metropolitan areas. The order also allows all tenants in Prime Outlets Orlando, Prime Outlets Orlando Marketplace, and Orlando Premium Outlets to opt unilaterally to extend any lease under its existing terms, without penalty, until January 1, 2015.

Participants

For the Commission: *Joseph Lipinsky* and *Robert Schroeder*.

For the Respondent: *Bernard A. Nigro, Jr., Esq., Fried, Frank, Harris, Shriver & Jacobson LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Simon Property Group, Inc. ("Simon"), a real estate investment trust ("REIT") subject to the jurisdiction of the Commission, has agreed to acquire Prime Outlets Acquisition Company LLC ("Prime"), a Delaware limited liability company subject to the jurisdiction of the Commission, in violation of Section

7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent is a REIT headquartered at 225 West Washington Street, Indianapolis, Indiana 46204. Simon is engaged in the business of developing and managing retail real estate. In particular, Simon develops and operates outlet centers under the Premium Outlets and Mills brands.

2. Respondent is a person subject to the jurisdiction of the Commission.

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

II. THE ACQUIRED COMPANY

4. Prime, a REIT, is a privately-held subsidiary, jointly owned by entities controlled by David Lichtenstein and the Lightstone Group. Headquartered at 217 East Redwood Street, 20th Floor, Baltimore, Maryland 21202, Prime is a developer and operator of outlet centers under the Prime Outlets brand.

III. THE PROPOSED ACQUISITION

5. On December 8, 2009, Simon and Prime entered into a contribution agreement (the "Acquisition") whereby Simon would acquire the entire Prime portfolio of outlet centers, consisting of 22 properties, from entities controlled by David Lichtenstein and the

Lightstone Group. The total value of the transaction, including the assumption of $1.6 billion of debt, was approximately $2.3 billion. On June 28, 2010, the parties amended the agreement to remove Prime's St. Augustine, FL, outlet center, and its development projects at Livermore, CA, and Grand Prairie, TX, from the schedule of properties to be acquired by Simon under the original agreement.

IV. THE RELEVANT MARKETS

6. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is retail space at outlet centers. Both Simon and Prime develop and operate outlet centers throughout the United States.

7. For the purposes of this Complaint, the relevant geographic markets in which to analyze the effects of the Acquisition are the following geographic areas in the United States: Orlando, FL; the Chicago, IL, metropolitan area; and Southwest Ohio. Outlet centers generally attract customers from large geographic areas, often exceeding 60 miles. In geographic areas with more than one outlet center, tenants are able to use competition between landlords to get more favorable price and non-price terms in leases.

V. MARKET STRUCTURE

8. Simon owns one outlet center – Cincinnati Premium Outlets in Monroe, OH – that serves Southwest Ohio. Prime owns one outlet center – Prime Outlets-Jeffersonville in Jeffersonville, OH – that serves Southwest Ohio. These are the only outlet centers in Southwest Ohio.

9. Simon owns three outlet centers that serve the Chicago metropolitan area. The centers are Lighthouse Place Premium Outlets in Michigan City, IN; Chicago Premium Outlets in Aurora, IL; and Gurnee Mills in Gurnee, IL. Prime owns two outlet centers that serve the Chicago metropolitan area. The centers are Prime Outlets-Huntley in Huntley, IL; and Prime Outlets-Pleasant Prairie in Pleasant Prairie, WI. These are the only outlet centers serving the Chicago metropolitan area.

10. Simon owns one outlet center – Orlando Premium Outlets in Orlando, FL – that serves Orlando, FL. Prime owns two outlet centers – Prime Outlets-Orlando in Orlando, FL, and Prime Outlets-Orlando Marketplace in Orlando, FL – that serve Orlando, FL. These two outlet centers are very close to each other, less than a mile apart, and are often marketed as one outlet center. Three other outlet centers not owned by either Simon or Prime are located in Orlando, FL – Lake Buena Vista Factory Stores, Festival Bay Mall, and the Kissimmee Value Outlet Shops.

11. The markets for retail space at outlet centers in the geographic areas listed in Paragraphs 7 - 10 are highly concentrated, and this Acquisition significantly increases concentration in those markets.

VI. ENTRY BARRIERS

12. Absent relief, entry into the relevant markets described in Paragraph 7 would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because it takes more than two years to develop an outlet center, or to reposition another type of shopping center into an outlet center. In addition, entry is not likely because of radius restrictions, which are common lease terms between outlet centers and tenants that prevent or make it very expensive for outlet tenants to open an outlet store within the designated proscribed radius of an existing outlet center. This has the effect of preventing potential entry because new developers cannot sign tenants subject to radius restrictions to leases.

VII. EFFECTS OF THE ACQUISITION

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

a. by eliminating actual, direct and substantial competition between Respondent and Prime in the relevant markets; and

b. by increasing the likelihood that Respondent will unilaterally exercise market power in the relevant markets.

VIII. VIOLATIONS CHARGED

14. The allegations contained in paragraphs 1-13 are repeated and re-alleged as though fully set forth here.

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of November, 2010, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Prime Outlets Acquisition Company LLC by Simon Property Group, Inc. ("Simon" or "Respondent"), and Respondent having been furnished with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as

amended, 15 U.S.C. § 45; and

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

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

1. Respondent Simon is a real estate investment trust 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 225 West Washington Street, Indianapolis, Indiana 46204.

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

ORDER

I.

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

A. "Simon" or "Respondent" means Simon Property Group, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Simon Property Group, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, the terms "Simon" or "Respondent" shall include Prime Retail.

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means an Entity that receives the prior approval of the Commission to acquire one of the Southwest Ohio Outlet Center Assets and Businesses required to be divested pursuant to this Order.

D. "Acquisition" means the acquisition of Prime Retail by Simon contemplated by the Acquisition Agreement.

E. "Acquisition Agreement" means the Contribution Agreement by and among, *inter alia*, Simon, on the one hand, and David Lichtenstein and Lightstone Group, on the other hand, dated as of December 8, 2009, and all amendments, exhibits, attachments, agreements, and schedules thereto, including, but not limited to, Amendment No. 2 to the Contribution Agreement, dated June 28, 2010.

F. "Acquisition Date" means the date on which the Respondent closes on the Acquisition pursuant to the Acquisition Agreement.

G. "Agency(ies)" means any government regulatory authority or authorities responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the operations of an Outlet Center.

H. "Appurtenances" means all rights, titles and interests of Respondent in and to the following:

1. All land lying in the bed of any street, highway, road or avenue, open or proposed, public or private, in front of or adjoining the Land, to the center line thereof; and

2. All rights of way, highways, public places, easements, appendages, appurtenances, sidewalks, alleys, strips and gores of land adjoining or appurtenant to the Land which are now or hereafter used in connection with the relevant Southwest Ohio Outlet Center Assets and Business.

I. "Cincinnati Premium Outlets" means the Outlet Center Assets and Business relating to or necessary for the operation of the Outlet Center located at 400 Premium Outlets Drive, Monroe, OH 45050.

J. "Closing Date" means the date on which the Respondent (or a Divestiture Trustee) consummates a transaction to divest, assign, grant, license, transfer, deliver, or otherwise convey the relevant Southwest Ohio Outlet Center Assets and Business to an Acquirer pursuant to this Order.

K. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

L. "Entity(ies)" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business, or Government Entity or Agency, and any subsidiaries, divisions, groups or affiliates thereof.

M. "Excepted items" means:

1. All items of personal property owned by Tenants, subtenants, independent contractors, business invitees or utilities;

2. All items of personal property used in connection with the Southwest Ohio Outlet Center Assets and Businesses that are not owned but are leased by the Respondent;

3. All cash on hand, checks, money orders, accounts receivable, and prepaid postage in postage meters, and other prepaid items such as real estate taxes, utility charges and other costs and expenses to be prorated as of closing; and

4. Any software, hardware or similar items of personal property which contain proprietary computer programs, marketing programs, and other similar information proprietary to the Respondent or its affiliates.

N. "Governmental Approval(s)" mean any approvals, registrations, permits, licenses, consents, authorizations, or certificates issued, granted, given or otherwise made available by or under the authority of any Government Entity or Agency, or pursuant to any Law, and all

pending applications therefor or renewals thereof, required by applicable Government Entities or Agencies related to the operation of an Outlet Center.

O. "Government Entity(ies)" means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

P. "Improvements" means all buildings, facilities, structures, and improvements located as of the Acquisition Date or thereafter erected on the Land, and all fixtures constituting a part thereof, excluding those improvements, facilities and fixtures installed by Tenants and that remain the property of Tenants pursuant to their respective Leases.

Q. "Intangible Personal Property" means all rights, titles, and interests of the Respondent in and to all intangible personal property used in connection with the operation of the relevant Southwest Ohio Outlet Center Assets and Business and including, without limitation:

1. Good will, going concern value, Radius Restrictions, and operating agreements of Tenants;

2. All telephone numbers listed after the name of the relevant Southwest Ohio Outlet Center Assets and Business;

3. All names, trade names, designations, logos and service marks, and the appurtenant good will, used in connection with the operation of the relevant Southwest Ohio Outlet Center Assets and Business (but specifically excluding all Simon, Simon Property Group, Premium Outlets and Prime Outlets names, trade names, trademarks, service marks, websites, and logos);

4. All warranties and guarantees associated with the relevant Southwest Ohio Outlet Center Assets and Business;

5. The right to own, develop, Lease, and manage the relevant Southwest Ohio Outlet Center Assets and Business; and

6. All similar items of intangible personal property owned by Respondent and utilized in connection with the operation of the relevant Southwest Ohio Outlet Center Assets and Business (excluding items that would constitute Excepted Items).

R. "Interim Monitor" means any monitor appointed pursuant to Paragraph IV of this Order or Paragraph III of the related Order to Maintain Assets.

S. "Land" means all those certain lots, pieces, or parcels of land situate, lying, and being at:

1. For Cincinnati Premium Outlets: 400 Premium Outlets Drive, Monroe, OH 45050, more particularly described in Appendix A of this Order; and

2. For Prime Outlets - Jeffersonville: 8000 Factory Shops Blvd., Jeffersonville, OH 43128, more particularly described in Appendix B of this Order.

T. "Law" means all laws, statutes, rules, regulations, legal requirements, ordinances, and other pronouncements by any Government Entity having the effect of law.

U. "Lease" means any lease, license, concession or other form of agreement, written or oral, however denominated, wherein Respondent (as the party named therein or successor thereto) grants to any Third

Party(ies), the right of exclusive use or occupancy of any portion of Improvements or other retail space in an Outlet Center, and all renewals, modifications, amendments, guaranties and Other Agreements affecting the same.

V. "MSA" means Metropolitan Statistical Area as defined by the U.S. Office of Management and Budget (OMB) and updated as of November 2008 pursuant to OMB Bulletin No. 09-01.

W. "Order Date" means the date on which this Decision and Order becomes final.

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

Y. "Orlando Outlet Centers" means the Outlet Centers owned prior to the Acquisition Date by:

1. Prime Retail, operating as:

   a. Prime Outlets - Orlando, located at 4951 International Drive, Orlando, FL 32819; and

   b. Prime Outlets - Orlando Marketplace, located at 5269 International Drive, Orlando, FL 32819; and

2. Simon, operating as Orlando Premium Outlets, located at 8200 Vineland Avenue, Orlando, FL 32821.

Z. "Other Agreements" means all contracts, agreements, and documents pertaining to an Outlet Center to which Respondent or its predecessors in interest are a party and by which Respondent is bound, other than Leases, and including without limitation, all service contracts,

construction contracts, leases of personal property, and utility agreements.

AA. "Outlet Center" means a commercial retail center that features Outlet Stores with gross leasable area that exceeds 200,000 square feet.

BB. "Outlet Center Assets and Business" means all of Respondent's rights, titles, and interests in and to all Land, Improvements, Appurtenances, Leases, Other Agreements, Personal Property, Intangible Personal Property, and any other property and assets, tangible or intangible, of every kind and description, and any improvements or additions thereto, relating to the business of operating the relevant Southwest Ohio Outlet Center Assets and Business(es) at the specified location(s), and including, but not limited to:

1. All Government Approvals; and

2. All books and records; Tenant and customer files, lists and records; vendor files, lists and records; cost files and records; credit information; distribution records; business records and plans; studies; surveys; and all files related to the foregoing;

   provided however, that where documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to the relevant Southwest Ohio Outlet Center Assets and Business and to other businesses of the Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the relevant Southwest Ohio Outlet Center Assets and Business; or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents

and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that the Respondent provides the Acquirer with the above-described information without requiring the Respondent completely to divest itself of information which, in content, also relates to businesses that Respondent is not required to divest pursuant to this Order;

3. *Provided, however,* the term "Outlet Center Assets and Business" shall not include the Excepted Items.

CC. "Outlet Stores" means retail stores, shops and other establishments in which manufacturers sell their stock and other merchandise directly to the public through factory-direct-to-consumer branded store locations at discounted prices, and which are often used by manufacturers to liquidate stock.

DD. "Personal Property" means all apparatus, machinery, devices, appurtenances, equipment, furniture, furnishings, promotional and marketing fund accounts, and other items of personal property (other than Intangible Personal Property and the Excepted Items) owned by the Respondent and located and used in connection with the ownership, operation, or maintenance of the relevant Southwest Ohio Outlet Center Assets and Business.

EE. "Prime Outlets - Jeffersonville" means the Outlet Center Assets and Business relating to or necessary for the operation of the Outlet Center located at 8000 Factory Shops Blvd., Jeffersonville, OH 43128.

FF. "Prime Retail" means Prime Outlets Acquisition Company LLC, a Delaware limited liability company, which is the general partner and 99% limited partner of Prime Retail, L.P., a Delaware limited partnership, with its office and principal place of business located at 217 East Redwood Street, 20th Floor, Baltimore, Maryland 21202.

GG. "Radius Restriction" means any clause or provision of any kind (including but not limited to absolute bans, financial penalties, forfeitures or other charges) in a Lease relating to the use and/or occupancy of retail space in an Outlet Center that prevents or has the effect of preventing a Tenant from, or otherwise increases the Tenant's cost of, operating or opening additional locations within a specified distance of a Tenant's existing Outlet Store.

HH. "Relevant Chicago Area" means the Chicago-Naperville-Joliet, IL-IN-WI MSA.

II. "Relevant Geographic Areas" means the Relevant Chicago Area and the Relevant Orlando Area.

JJ. "Relevant Orlando Area" means the Orlando-Kissimmee, FL MSA.

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

1. any agreement between the Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant Southwest Ohio Outlet Center Assets and Business to be divested, assigned, granted, licensed, transferred, delivered, or otherwise conveyed, and

that has been approved by the Commission to accomplish the requirements of this Order; and/or

2. any agreement between the Respondent and a Third Party to effect the assignment of assets or rights related to the relevant Southwest Ohio Outlet Center Assets and Business for the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

LL. "Southwest Ohio Outlet Center Assets and Business(es)" means Cincinnati Premium Outlets and Prime Outlets - Jeffersonville, individually or collectively.

MM. "Tenant(s)" means any tenant, licensee, concessionaire, or other user or occupant of Improvements or other retail space in an Outlet Center pursuant to a Lease.

NN. "Third Party(ies)" means any Entity other than the Respondent or the Acquirer.

II.

IT IS FURTHER ORDERED that:

A. Not later than one hundred eighty (180) days after the Order Date, Respondent shall divest, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, one of the Southwest Ohio Outlet Center Assets and Businesses, specifically, either:

1. Prime Outlets - Jeffersonville; or

2. Cincinnati Premium Outlets.

B. Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit the Respondent to divest the relevant Southwest Ohio Outlet Center Assets and Business to an Acquirer, and/or to permit such Acquirer to continue the operations of such Southwest Ohio Outlet Center Assets and Business at the relevant location;

provided, however, that the Respondent may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

C. The purpose of the divestiture of one of the Southwest Ohio Outlet Center Assets and Businesses and the related obligations imposed on the Respondent by this Order is to ensure the continued use of the relevant Southwest Ohio Outlet Center Assets and Business in the operation of an Outlet Center at that location, to maintain a viable and effective competitor that is independent of the Respondent, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that, until the Closing Date for divestiture of one of the Southwest Ohio Outlet Center Assets and Businesses, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of both of the Southwest Ohio Outlet Center Assets and Businesses, to minimize any risk of loss of their competitive potential, and to prevent the destruction, removal, wasting, deterioration, or impairment of such assets and businesses except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair either of the Southwest Ohio Outlet Center Assets and Businesses (other than to facilitate the divestiture

contemplated by this Order) nor take any action that lessens their full economic viability, marketability or competitiveness. Respondent's responsibilities shall include each of the responsibilities enumerated in the Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of the Respondent, which consent shall not be unreasonably withheld. If the Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after receipt of written notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, then the Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

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

D. If an Interim Monitor is appointed, the Respondent shall consent to the following terms and conditions regarding

the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. the Interim Monitor shall have the power and authority to monitor the Respondent's compliance with the asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

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

3. the Interim Monitor shall serve until the date of completion by Respondent of the divestiture of the relevant Southwest Ohio Outlet Center Assets and Business in a manner that fully satisfies the requirements of the Decision and Order; *provided, however,* that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to the Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to the Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. The Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor the Respondent's compliance with the Orders.

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

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

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

I. The Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants,

attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

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

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

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

M. The Interim Monitor appointed pursuant to this Paragraph and/or the Order to Maintain Assets may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED that:

A. If the Respondent has not fully complied with its obligation to divest, assign, grant, license, transfer, deliver or otherwise convey the relevant Southwest Ohio Outlet Center Assets and Business as required by this

Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest, assign, grant, license, transfer, deliver or otherwise convey one of the Southwest Ohio Outlet Center Assets and Businesses required to be divested pursuant to Paragraph II. of this Order in a manner that satisfies the requirements of such Paragraph. 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, the Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

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

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the

Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

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

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

2. the Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times;

3. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such

financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

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

5. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other

representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

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

7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Entity appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter;

8. the Divestiture Trustee shall report in writing to the Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

10. 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.

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

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

VI.

IT IS FURTHER ORDERED that Respondent:

A. Shall not, for a period of four (4) years from the Order Date, directly or indirectly, through subsidiaries, partnerships, or otherwise, enforce any Radius Restriction regardless of when entered into within the Relevant Geographic Areas with respect to any Lease with any Tenant; and

B. Shall send written notification to all Tenants with Leases in Outlet Centers within the Relevant Geographic Areas of the prohibitions and requirements set forth in Paragraph VI.A of this Order, together with a copy of this Order and the Commission's Complaint, by certified mail with return receipt requested, as follows:

1. To all Tenants as of the Order Date, no later than ten (10) days after the Order Date; and

2. To all Tenants with whom Respondent enters into a Lease at any time within four (4) years after the Order Date, no later than ten (10) days prior to entering into such Lease; and

C. Shall send the written notifications to Tenants required by Paragraph VI.B of this Order to either: (i) the person designated in the Lease to receive notices from the Respondent, or (ii) the Chief Executive Officer and General Counsel of the Tenant. Respondent shall keep a file of such return receipts for five (5) years after the Order Date.

VII.

IT IS FURTHER ORDERED that Respondent shall:

A. For a period of time commencing on the Order Date and continuing through January 1, 2015 (the "Optional Lease Renewal Period"), offer all Tenants at the Orlando Outlet Centers who are parties to existing Leases as of the Order Date, whose Leases expire prior to the end of the Optional Lease Renewal Period, and who do not currently have options to renew, a one-time option to extend any applicable Lease(s) at any one or all of the Orlando Outlet Centers, unilaterally and without penalty, forfeiture or other charge, on the same terms and conditions as exist in each such Tenant's existing Lease, from the current expiration date through to a specified time period within or coextensive with the end of the Optional Lease Renewal Period; *provided, however,* that the Respondent may require: (i) Tenants whose Leases expire more than two hundred ten (210) days after the Order Date to provide the Respondent with not more than one hundred eighty (180) days prior written notice of their intent to exercise their unilateral option; and (ii) Tenants whose Leases expire two hundred ten (210) days or less after the Order Date to provide the Respondent with written notice of their intent to exercise their unilateral option within sixty (60) days of their receipt of the notification required by Paragraph VII.B of this Order; and

B. No later than ten (10) days after the Order Date, send written notification to all Tenants at the Orlando Outlet Centers who are parties to existing Leases as of the Order Date of their unilateral option rights and Respondent's obligations pursuant to Paragraph VII.A of this Order, together with a copy of this Order and the Commission's Complaint, by certified mail with return receipt requested, to: (i) the person designated in the

Lease to receive notices from the Respondent, or (ii) the Chief Executive Officer and General Counsel of the Tenant. Respondent shall keep a file of such return receipts for five (5) years after the Order Date.

VIII.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by the Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondent shall include in each Remedial Agreement related to the relevant Southwest Ohio Outlet Center Assets and Business a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of the Respondent's obligations to the Acquirer pursuant to this Order.

D. Respondent shall also include in each Remedial Agreement a representation that it shall use commercially reasonable efforts to assist the Acquirer to secure any Governmental Approval(s) necessary to operate the relevant Southwest Ohio Outlet Center Assets and Business.

E. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to the Southwest Ohio Outlet Center Assets and Businesses, a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.

F. Respondent shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

IX.

IT IS FURTHER ORDERED that:

A. Not later than thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II.A. and B., VI.B.1, and VII.B of this Order, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II.A. and B., VI.B.1, and VII.B of this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II.A and B of this Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the Order Date, annually for the next four (4) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

X.

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

A. any proposed dissolution of the Respondent;

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

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

XI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Decision and Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the Respondent made to its principal offices or headquarters address, the Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with the Orders, which copying services shall be provided by the Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and

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

XII.

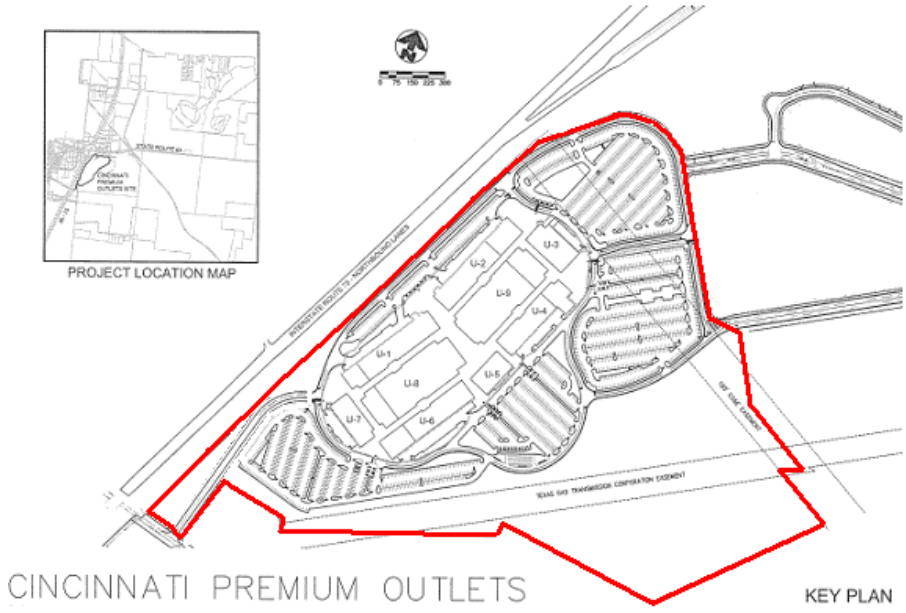
IT IS FURTHER ORDERED that this Order shall terminate on January 13, 2016.

By the Commission.

APPENDIX A

Description of Cincinnati Premium Outlets, Monroe, Ohio

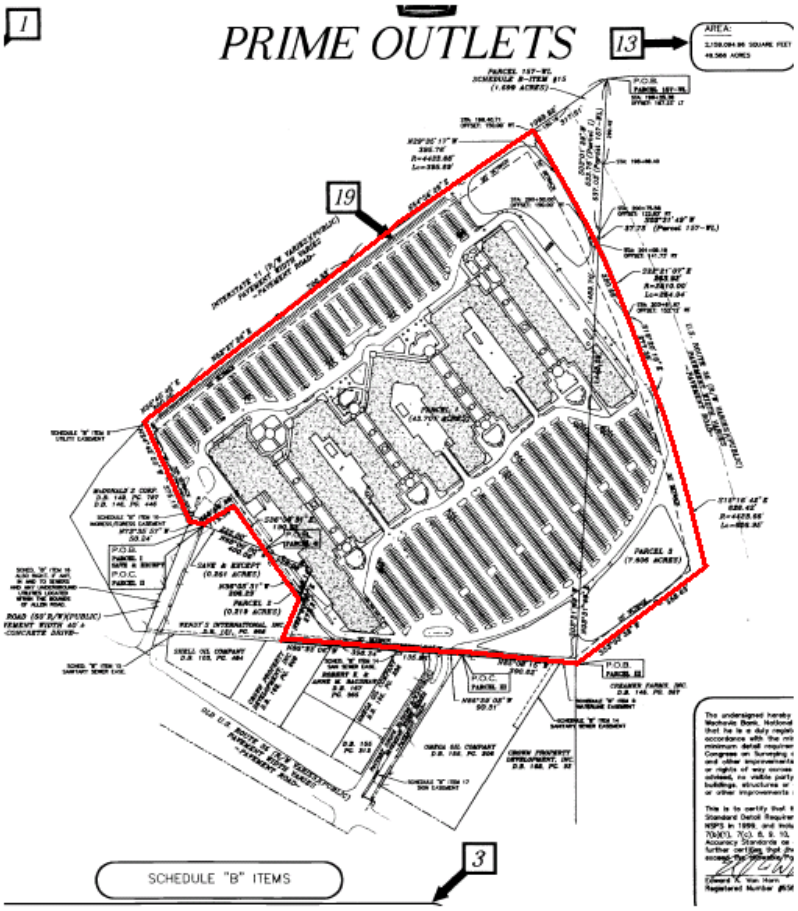
That certain lot known as lot 4 (82.502 acres) in the Cincinnati Premium Outlets Subdivision situated in the Township of Monroe, Butler & Warren Counties, State of Ohio at the intersection of U.S. Route 63 and Interstate 75 and shown bounded by a solid red line below:



APPENDIX B

Description of Prime Outlets, Jeffersonville, Ohio

That certain 49.566 acres of land situated in the Township of Jefferson, County of Fayette, State of Ohio at the intersection of U.S. Route 35 and Interstate 71 and shown bounded by a solid red line below:



ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission" or "FTC") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Simon Property Group, Inc. ("Simon") that will remedy the anticompetitive effects likely to result from Simon's acquisition of Prime Outlets Acquisition Company, LLC ("Prime"). Under the terms of the proposed Consent Agreement, Simon is required, among other things, to divest either Prime Outlets-Jeffersonville or Simon's Cincinnati Premium Outlets, both located in Southwest Ohio. Additionally, the proposed Consent Agreement prohibits Simon from enforcing any radius restriction with respect to any lease with any tenant in either of the following geographic areas: the Chicago, IL, metropolitan area or Orlando, FL. Finally, from the time when the Order becomes final through January 1, 2015, all tenants in Prime Outlets Orlando, Prime Outlets Orlando Marketplace, and Orlando Premium Outlets may unilaterally opt to extend any existing lease under its existing terms, without penalty, until January 1, 2015. The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement, and will decide whether to withdraw from the proposed Consent Agreement, modify it, or make it final.

On December 8, 2009, Simon and Prime entered into an acquisition agreement under which Simon would acquire the entire Prime portfolio of outlet centers, consisting of 22 properties. The total value of the transaction was approximately $2.3 billion. On June 28, 2010, the parties amended the agreement to remove Prime's St. Augustine, FL, outlet center and its development projects at Livermore, CA, and Grand Prairie, TX, from the schedule of properties to be acquired by Simon. The acquisition was

consummated on August 30, 2010. The Commission's complaint alleges that Simon's acquisition 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 eliminating an actual, direct, and substantial competitor from certain local markets in the United States.

Description of the Parties

Simon, a publicly traded real estate investment trust, is based in Indianapolis, Indiana. Simon is engaged in the business of developing and managing real estate. In particular, Simon develops and operates outlet centers under the Premium Outlets and Mills brands. Simon also develops and operates other real estate platforms.

Prime is a privately held subsidiary, jointly owned by entities controlled by David Lichtenstein and the Lightstone Group, a real estate investment company. Headquartered in Baltimore, MD, Prime is a developer and operator of outlet centers under the Prime Outlets brand.

The Complaint

The Commission's complaint alleges that Simon's acquisition of Prime may substantially lessen competition in the provision of retail space at outlet centers in the Southwest Ohio; Chicago, IL; and Orlando, FL, areas in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

The complaint alleges that the relevant product market in which to analyze the effects of the acquisition is retail space at outlet centers. Outlet centers are shopping centers featuring outlet stores, which sell discounted brand name merchandise. By clustering together, outlet tenants derive strong benefits from the network effect of creating a shopping destination, which is strengthened by the presence of tenants with desirable brands.

The complaint also alleges that the relevant geographic markets are local in nature. Competition between owners and developers of outlet centers occurs in local areas where more than one outlet center exists. In local overlap areas, tenants are able to use competition between landlords to get more favorable price and non-price terms in leases. The three geographic areas of concern outlined in the complaint are: (1) Southwest Ohio; (2) the Chicago, IL, metropolitan area; and (3) Orlando, FL.

In Southwest Ohio, Simon owns one outlet center, Cincinnati Premium Outlets in Monroe, OH, and Prime owns one, Prime Outlets-Jeffersonville in Jeffersonville, OH. These are the only outlet centers serving Southwest Ohio. Absent the proposed divestiture of one of these outlet centers, Simon's acquisition of Prime would give Simon a monopoly in the retail space in outlet centers market in Southwest Ohio, increasing the risk that Simon would unilaterally raise rents or reduce non-price benefits provided to tenants.

In the Chicago metropolitan area, the acquisition of Prime's Huntley, IL, and Pleasant Prairie, WI, outlet centers would give Simon ownership of all five outlet centers currently serving the Chicago metropolitan area market. However, there are two other outlet centers planned for this market: Craig Realty Group's planned outlet center in Country Club Hills, IL; and AWE Talisman's planned outlet center in Rosemont, IL. Absent the proposed relief in the Chicago metropolitan area, Simon may be able to prevent or limit this planned entry. Many of the tenants at the current Chicago area outlet centers have radius restrictions in their leases. This prevents or makes it very expensive for these outlet tenants to open additional stores within the Chicago, IL metropolitan area, which has the effect of preventing potential entry because the new developers cannot sign many of the tenants that are subject to radius restrictions.

In Orlando, the acquisition of Prime's outlet centers would give Simon ownership of three of the six outlet centers serving the Orlando area. However, Simon is acquiring the two closest

competitors for many tenants. Absent the proposed relief in Orlando, Simon's acquisition of Prime would increase the risk that Simon would unilaterally raise prices or otherwise reduce tenant benefits due to lost competition.

Based on the above facts, the complaint alleges that Simon's acquisition of Prime could eliminate actual, direct, and substantial competition between Simon and Prime in the relevant markets, and increase Simon's ability to unilaterally exercise market power in Southwest Ohio; Chicago; and Orlando.

As stated in the complaint, entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of this acquisition. It takes more than two years to develop an outlet center, or to reposition another type of shopping center into an outlet center. In addition, entry is not likely because the relevant markets affected by this transaction are protected by radius restrictions, which prevent or make it very expensive for outlet tenants to open additional stores within a certain proscribed radius of an existing outlet center. This has the effect of preventing potential entry because new developers cannot sign tenants already bound by radius restrictions.

The Terms of the Proposed Consent Agreement

The proposed Consent Agreement will remedy the likely competitive effects resulting from Simon's acquisition of Prime's outlet centers in each of the relevant markets discussed above. Pursuant to the proposed Consent Agreement, Simon will divest one outlet center in Southwest Ohio. This will remedy the competitive harm in that market by ensuring that Simon will not have a monopoly. The proposed Consent Agreement also requires Simon to waive enforcement of radius restrictions in the Chicago metropolitan area, which will eliminate a significant entry barrier that otherwise would likely preclude entry in Chicago. Finally, in Orlando, the proposed Consent Agreement requires Simon to waive enforcement of radius restrictions, which will make new entry substantially easier. Additionally, the proposed Consent Agreement requires Simon to provide tenants at all three outlet centers it will

own in Orlando with the unilateral right to extend existing leases under existing lease terms up to January 1, 2015, with no penalty.

Finally, the proposed Consent Agreement requires Simon to maintain the Southwest Ohio outlet centers at full economic viability, marketability, and competitiveness until the divestiture of one of the outlet centers to a Commission-approved acquirer is complete.

Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the comments received, and decide whether to withdraw from the proposed Consent Agreement, modify it, or make it final. By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to inform and invite public comment on the proposed Consent Agreement, including the proposed divestiture, and to aid the Commission in its determination of whether to make the proposed Consent Agreement final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement, nor to modify the terms of the proposed Consent Agreement in any way.

IN THE MATTER OF
THE DANNON COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5(A) AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4313; File No. 082 3158
Filed January 31, 2011 – Decision January 31, 2011

This consent order relates to allegations that The Dannon Company, Inc. ("Dannon") made false and deceptive advertising claims about the health benefits of its DanActive and Activia products in violation of Sections 5(a) and 12 of the Federal Trade Commission Act. According to the complaint, Dannon made false and unsubstantiated claims that drinking DanActive, a probiotic dairy drink, reduces the likelihood of getting a cold or the flu. The complaint also alleges that Dannon made false and unsubstantiated claims that eating one serving of Activia, a probiotic yogurt, relieves temporary irregularity and helps with slow intestinal transit time. The order prohibits Dannon from making representations that any yogurt, dairy drink, or any food or drink that contains a probiotic reduces the likelihood of getting a cold or the flu unless the representation is specifically permitted in labeling by the Food and Drug Administration pursuant to the Nutritional Labeling and Education Act of 1990. The order also prohibits respondent from claiming that eating one serving of Activia yogurt daily relieves temporary irregularity and helps with slow intestinal transit time unless the representation is non-misleading and conveys that eating three servings a day is required to obtain the benefit. The order also prohibits respondent from misrepresenting any tests or studies or from making representations about the health benefits, performance, or efficacy of any yogurt, dairy drink, or any food or drink that contains a probiotic, unless the claims are non-misleading, and backed by competent and reliable scientific evidence.

Participants

For the Commission: *Keith Fentonmiller, Theodore H. Hoppock,* and *Shira D. Modell*.

For the Respondent: *William Baer* and *Randal Shaheen, Arnold & Porter LLP;* and *Thomas B. Leary, Steven B. Steinborn,* and *Robert Winters, HoganLovells.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Dannon Company, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent The Dannon Company, Inc., is a Delaware corporation with its principal office or place of business at 100 Hillside Avenue, White Plains, NY, 10603.

2. Respondent has labeled, advertised, promoted, offered for sale, sold, and distributed DanActive and Activia to consumers.

3. DanActive, a probiotic dairy drink, is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Activia, a yogurt, is also a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

DANACTIVE

5. Respondent has disseminated or caused to be disseminated advertisements for DanActive, including but not limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

a. **Television Advertisement**: "Backpack" (Exhibit A - CDROM and storyboard)

On screen: A boy is shown taking a test in school, playing baseball in the rain, and being thrown to a mat repeatedly in martial arts training.

Female VO:	"Between exams, after-school activities, and tons of homework, my kid never stops."
On screen:	The boy arrives home looking tired; he drops his backpack inside the front door, as his mother kneels down and greets him, and the color drains from his face and body.
Male VO:	"Your kids have a hectic life and don't always eat right, and you don't want their defenses to be weak."
On screen:	Mom's hand reaches into refrigerator and removes a DanActive.
Male VO:	"Delicious DanActive can strengthen them."
On screen:	The boy drinks the DanActive; graphic shows small yellow circles going from the bottle down his throat; the circles are identified as L. casei immunitas.
	Print superscript: As part of a balanced diet and healthy lifestyle. Learn more at DanActive.com.
Male VO:	"Only DanActive has L. casei Immunitas cultures and
On screen:	The yellow circles encircle pink balls, forming a barricade that stops all but one of the fuzzy green, germ-like globs that attempt to penetrate the barricade.
Male VO:	is clinically proven to help strengthen your body's defenses."
On screen:	The boy finishes the DanActive, returns to full color, surrounded by a newly acquired yellow penumbra, and runs out of the house the next morning surrounded by his yellow penumbra,

which then morphs into a yellow DanActive bottle.

Female VO: "And a little strengthening can really help."

On screen: DanActive bottle with tag line "Help strengthen your family's bodies defenses" and "clinically proven" banner

Male VO: "Help strengthen your family's bodies defenses."

On screen: "Dannon."
"Today. For Tomorrow."

b. **Television Advertisement**: "Backpack- New" (Exhibit B - CDROM and storyboard)

On screen: A boy is shown taking a test in school, and being thrown to a mat in martial arts training. He arrives home looking tired, and drops his backpack inside the front door as his mother kneels down and greets him.

Male VO: "Exams, activities, homework; your kids never stop and don't always eat right

On screen: The color drains from the boy's face and body.

Male VO: and you don't want their defenses to be weak."

On screen: A bottle of DanActive rolls toward the viewer.

Male VO: "DanActive can help. How?"

On screen: Dramatization of the body appears, with circles simulating food going down into the gastrointestinal tract. At the bottom of the screen is a yellow band with the question "How are your defenses challenged?"

Male VO: "Unwanted substances enter your body every day, reaching your intestines

On screen:	Visual shows the percentage 70% emerging from the digestive tract in the middle of a sunburst
Male VO:	where about 70% of your immune system is located."
On screen:	Dramatization of the inside of the intestine shows holes appearing, and purple balls entering those holes. At the bottom of screen is the yellow band with the question "How are your defenses challenged?"
Male VO:	"When your defenses are weak, gaps may occur in your intestine wall allowing unwanted substances to pass."
On screen:	The boy drinks the DanActive. Dramatization shows small yellow circles going from the bottle down his throat. Fine print superscript: "When consumed daily as part of a balanced diet and healthy lifestyle"
Male VO:	"DanActive, with L. casei Immunitas works right there
On screen:	Dramatization shifts to inside of the intestine, where the yellow circles, which are identified as L. casei Immunitas, clump together to block the holes in the intestinal wall, so that the purple balls bounce off, instead of penetrate. At the bottom of the screen is the yellow band with the question "How does DanActive help?"
Male VO:	which may help your body close the gaps

On screen:	The boy runs out of the house the next morning. He has returned to full color, and is surrounded by a newly acquired yellow penumbra, which then morphs into a yellow DanActive bottle.
Male VO:	and help strengthen his body's defenses."
On screen:	DanActive bottle with tag line "Help strengthen your family's bodies defenses" and "clinically proven" banner. Print superscript: "Learn more at DanActive.com"
Male VO:	"Which makes you feel good, too."
On screen:	"Dannon." "Today. For Tomorrow."

c. **Print Advertisement (free standing insert)**: (Exhibit C)

DANNON

DanActive™

L. CASEI IMMUNITAS™

IMMUNITY

Helps strengthen your body's defenses.*

CLINICALLY PROVEN

[Depiction of child and mother drinking DanActive and two containers of DanActive with "DanActive, L. Casei

IMMUNITAS™, Helps Strengthen Your Body's Defenses, Immunity" on the labels.]

* as part of a balanced diet and healthy lifestyle

DanActive is a delicious, probiotic-cultured dairy drink that is clinically proven to help strengthen your body's defenses as part of a balanced diet and healthy lifestyle.

d. **Product Packaging**: (Exhibit D)

Appearing on the overwrap for the 8-bottle weekly pack:

DANNON

DanActive™

L. CASEI IMMUNITAS™

IMMUNITY

Helps Strengthen Your
Body's Defenses

7 + 1 Weekly Pack

6. Through the means described in Paragraph 5, including, but not limited to, the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that drinking DanActive reduces the likelihood of getting a cold or the flu.

7. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, including, but not limited to, the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that DanActive is clinically proven to reduce the likelihood of getting a cold or the flu.

10. In truth and in fact, DanActive is not clinically proven to reduce the likelihood of getting a cold or the flu. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

ACTIVIA

11. Respondent has disseminated or caused to be disseminated advertisements for Activia, including, but not limited to, the attached Exhibits E through G. These advertisements contain the following statements and depictions:

a. **Television Advertisement**: "Mother & Daughter" (Exhibit E - CDROM and storyboard)

On screen:	A young woman enters an antiques or curios shop, where an older woman is working.
Daughter:	"Hey, mom. All work and no play?"
On screen:	Older woman stands up, walks behind store counter, and gestures toward open boxes of restaurant take-out food.

Mother:	"And too much take-out. I feel irregular. Bloated."
Bird:	"Bloated."
On screen:	Daughter hands her mother a carton of Activia
Daughter:	"Here. Try Dannon Activia."
Mother:	"Activia. . ."
Bird:	"Activia."
On screen:	Strawberries falling into white yogurt.
Female VO:	"Delicious Dannon Activia,
On screen:	Woman's mid-section, on which are super-imposed yellow-green balls moving together in a clump " CLINICALLY PROVEN WITH BIFIDUS REGULARIS" Print superscript: "Scientifically proven to help with slow intestinal transit when consumed daily for two weeks."
Female VO:	with the natural culture Bifidus Regularis,
On Screen:	The yellow-green balls merge into a downward-facing arrow; calendar from which 14 separate pages are torn off in sequence.
Female VO:	it's clinically proven to help regulate your digestive system
On screen:	The arrow moves downward, off the screen.

Female VO: in two weeks."

On screen: Mother tastes Activia.

Mother: "Mmm. Delicious."

Daughter: "Soon you'll be back to your regular self."

Bird: "Regular!"

On screen: overwrap from 4-pack of Activia with tag line "Helps naturally regulate your digestive system in 2 weeks"

Female VO: "Activia" (singing).

On screen: "Dannon."
"Today. For Tomorrow."

b. **Television Advertisement**: "News" (Exhibit F - CDROM and storyboard)

On screen: green screen with Dannon and Activia logos.

On screen: green screen divides horizontally, to show Jamie Lee Curtis (JLC) sitting on couch holding newspaper, with headline that says "87% of Americans Have Occasional Digestive Issues."

JLC: "First the bad news: Eighty-seven percent of this country suffers from digestive issues like occasional irregularity."

On Screen JLC on couch.
Fine print superscript: "Helps relieve temporary symptoms of irregularity."

JLC "No wonder. Our busy lives sometimes force us to eat the wrong things at the wrong time."

On Screen close-up of JLC

JLC "Now the good news. I just discovered a yogurt called Activia that can help."

On screen: Woman's mid-section, on which are super-imposed yellow-green balls moving together in a clump
" CLINICALLY PROVEN WITH BIFIDUS REGULARIS"

Fine print superscript: "Scientifically proven to help with slow intestinal transit when enjoyed daily for two weeks as part of a balanced lifestyle and healthy diet."

Male VO: "With the natural culture, Bifidus Regularis,

On Screen: The yellow-green balls merge into a downward-facing arrow; calendar from which 14 separate pages are torn off in sequence.

Male VO: Activia eaten every day is clinically proven to help regulate your digestive system

On screen: The arrow moves downward, off the screen

Male VO: in two weeks."

On Screen: JLC on couch holding container of Activia, and then tasting spoonful.

JLC "The other good news: Activia tastes great."

On screen: overwraps from 4-packs of Activia and Activia Light, and Activia tub, with tag line "Helps

naturally regulate your digestive system" and "clinically proven" banner

Female VO: "Activia" (singing).

On screen: "Dannon."
"Today. For Tomorrow."

c. **Internet Advertisement**: "Activia by Dannon" (Exhibit G, at p. 1)

Activia with Bifidus Regularis is scientifically proven to help with slow intestinal transit when eaten daily, as part of a balanced diet and healthy lifestyle.
LEARN MORE

12. Activia's webpage, www.activia.us.com, contains a link labeled "For Health Care Professionals" (Exhibit G, at p. 1). Clicking on that link takes the viewer to a page (Exhibit G, at p. 2) that is also entitled "For Health Care Professionals," and that says in part:

Scientific Resources
For health care professionals, who'd like to learn more about Activia and **Bifidus Regularis**, here is a link to a detailed scientific resource that will provide in-depth information about **Bifidus Regularis** and its effect on slow **intestinal transit**

[pdf icon] "Scientific Summary For Health Care Professionals" (1024 kb)

The "Scientific Summary For Health Care Professionals" is a four-page document that includes a discussion entitled "Effects of Activia on total transit time in elderly subjects," which reviews the results of two clinical studies by Meance et al. The reviews refer specifically only to the effects on transit time among elderly subjects given different daily doses of Activia.

The "For Health Care Professionals" page on the Activia website also contains a link labeled "View List of Peer-Reviewed Scientific Summaries," which leads to a two-page document (Exhibit G, at pp. 7-8) entitled "Studies on Bifidobacterium DN-173 010 from Danone." This pdf file contains four summaries of transit time studies, including summaries of the same two studies by Meance et al. The reviews of the Meance et al. studies also refer specifically only to the effects on transit time among elderly subjects given different daily doses of Activia.

13. Neither discussion in Exhibit G of the two studies by Meance et al. discloses that the studies, as conducted, employed a placebo group or that statistical significance was not achieved when the results of the placebo group and the matching active group were compared in both studies. In addition, the document entitled "Studies on Bifidobacterium DN-173 010 from Danone" does not include a summary of a peer-reviewed study by Nishida et al., or summaries of five unpublished studies that measured transit time of subjects consuming Activia or a placebo. Neither the Nishida study nor the five unpublished studies showed a statistically significant improvement in transit time when the Activia group was compared to its respective placebo group.

14. Through the means described in Paragraphs 11 and 12, including, but not limited to, the statements and depictions contained in the advertisements attached as Exhibits E through G, among others, respondent has represented, expressly or by implication, that eating one serving of Activia daily relieves temporary irregularity and helps with slow intestinal transit time.

15. Through the means described in Paragraphs 11 and 12, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 14, at the time the representation was made.

16. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 14, at the time the representation was made. Therefore, the representation set forth in Paragraph 15 was, and is, false or misleading.

17. Through the means described in Paragraphs 11 and 12, including, but not limited to, the statements and depictions contained in the advertisements attached as Exhibits E through G, among others, respondent has represented, expressly or by implication, that eating one serving of Activia daily is clinically proven to relieve temporary irregularity and help with slow intestinal transit time.

18. In truth and in fact, eating one serving of Activia daily is not clinically proven to relieve temporary irregularity and help with slow intestinal transit time. For example, as described in Paragraphs 12 and 13, (1) the two Meance et al. studies utilized placebo groups but that information was withheld from the scientific journal to which the studies were submitted for publication, thereby concealing the fact that there was no statistically significant difference in transit time between the active and placebo groups, and (2) eight of ten scientific studies conducted on Activia showed no statistically significant effect of Activia on transit time when compared to a placebo. Therefore, the representation set forth in Paragraph 17 was, and is, false or misleading.

19. The acts and practices of respondent 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 Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this thirty-first day of January, 2011, has issued this complaint against respondent.

By the Commission.

EXHIBIT A

CODE # 080401233 TIME 06:53 AM
TITLE Boy Taking A Test, Playing Baseball/Vo REV OF # 0803209

ICKING/BELL RINGS)
ANNCR: Between exams
EACHER: Pencils down.

(SFX: CHEERING/CRACK) after-school activities.

(SFX: KARATE PRACTICE SOUN

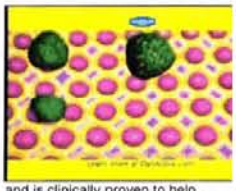
s of homework, my kid never
SFX: THUD)

MALE ANNCR: Your kids have a hectic life and don't always eat right, and you don't want their defenses to be weak.

(MUSIC IN) Delicious DanActive c
help strengthen them.

nActive has

L. casei Immunitas cultures



and is clinically proven to help strengthen your body's defenses.

ANNCR: And a little
ening can really help. (AUDIO
CHILDREN (UNISON):
e.

MALE ANNCR: Help strengthen your family's bodies defenses.

(MUSIC OUT)

EXHIBIT B


vms
CODE # 090301831
TITLE Boy Takes a Test, Karate, Takes Off
TIME 06:12 PM
IALE ANNCR: Exams,
(SFX: THUD) activities, homework; your kid's never stop
and don't always eat right and you don't want their defenses
SFX: POWER DOWN) to be weak.
DanActive can help. How?
(SFX: HISS IN) Unwanted substances enter your body every day
HOW ARE YOUR DEFENSES CHALLENGED ?
aching your intestine where about SFX: HISS OUT)
70 percent of your immune system is located.
70%
When your defenses are weak, (SFX: BOUNCE) gaps may occur in your intestine wall allowing unwanted substances to pass.
USIC IN) DanActive with L. Casei mmunitas
works right there
HOW DOES DANACTIVE HELP ?
which may help your body (SFX: SPRING) close the gaps and help
VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

EXHIBIT B (continued)

vms

PRODUCT Dannon DanActive
MARKET Cincinnati, OH
PROGRAM The King of Queens
CODE # 090301831
TITLE Bcy Takes a Test, Karate, Takes Off

LENGTH :30
STATION WXIX
DATE 03/02/2009
TIME 06:12 PM

(SFX: WHOOSH) strengthen his body's defenses.

(SFX: STAMP) Which makes you feel good too.

CHILDREN (SINGING): DanActive. (MUSIC OUT)

EXHIBIT C


DANNON
DanActive
L.CASEI IMMUNITAS™
IMMUNITY
Helps strengthen your body's defenses.*
CLINICALLY PROVEN
DANNON
DanActive
L.CASEI IMMUNITAS™
Helps Strengthen Your Body's Defenses
IMMUNITY
PROBIOTIC DAIRY DRINK
Strawberry FLAVORED
3.1 FL OZ (93 mL)
DANNON
DanActive Light
L.CASEI IMMUNITAS™
Helps Strengthen Your Body's Defenses
IMMUNITY
PROBIOTIC DAIRY DRINK
Strawberry FLAVORED
NEW Light!
DanActive® Light: 35 calories, 0g Fat; Regular Probiotic Dairy Drink: 90 Calories, 1.5g Fat per 3.1 FL OZ
*as part of a balanced diet and healthy lifestyle
DanActive® is a delicious, probiotic-cultured dairy drink that is clinically proven to help strengthen your body's defenses as part of a balanced diet and
MANUFACTURER'S COUPON
EXPIRES 6/29/08
DO NOT DOUBLE
SAVE $1.00 when you buy any DanActive® or DanActive® Light
21254

Complaint

EXHIBIT D

Complaint

EXHIBIT E

vms

PROGRAM Today
CODE # 060806735
TITLE Daughter Tells Mom To Try It

DATE 08/20/2006
TIME 08:41 AM

IUSIC IN) DAUGHTER: Hey mom!

(SFX: DOOR CLOSING IN & OUT) All work and no play?

MOM: Oh, and too much take out,

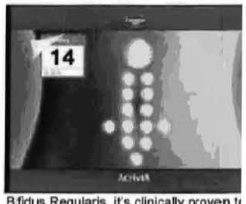
eel irregular, bloated.

PARROT: Hawk! Bloated!

(SFX: DAUGHTER GIGGLES IN & CUT) DAUGHTER: Here, try Dannon Activia. MOM: Activia.

ARROT: Activia!

FEMALE ANNCR: Delicious Dannon Activia, with the natural culture of



Bifidus Regularis, it's clinically proven t help regulate your digestive system in two weeks.

OM: Um! Delicious. DAUGHTER: oon you'll be back to your regular self. ARROT: Regular!

(SFX : LAUGHTER IN & OUT) FEMALE ANNCR: Dannon Activia, help naturally regulate your

digestive system. (MUSIC OUT)

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

EXHIBIT F

vms

MARKET Huntsville/Decatur/Florence, AL
PROGRAM Comics Unleashed with Byron
CODE # 080215014
TITLE Jamie Lee Curtis: Good & Bad

STATION WAAY
DATE 02-23-2008
TIME 01:03 AM

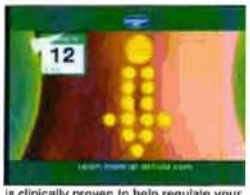
JSIC IN)

JAMIE LEE CURTIS: First the bad news: 87 percent of this country suffers from digestive issues like occasional irregularity.

No wonder. Our busy lives sometimes force us to eat the wrong things at the wrong times.

w the good news: I just discovered a jurt called Activia that can help.

MALE ANNCR: With a natural culture, bifidus regularis, Activia eaten every day



is clinically proven to help regulate your digestive system in two weeks.

MIE LEE CURTIS: The other good vs. Activia tastes great.

FEMALE SINGERS: Activia.

(MUSIC OUT)

EXHIBIT G


DANNON
ACTIVIA
ACTIVIA IN THE NEWS
ESPAÑOL / SPANISH
HOME
ABOUT ACTIVIA
PRODUCTS
ABOUT BIFIDUS REGULARIS
WHAT ARE PROBIOTICS?
MAINTAINING DIGESTIVE HEALTH
FOR HEALTH CARE PROFESSIONALS
TAKE THE CHALLENGE
FAQs
Take the 14 DAY ACTIVIA Challenge
Click for Coupon!
START TODAY
great flavors and sizes
LEARN MORE
clinical proof
Activia with Bifidus Regularis is scientifically proven to help with slow intestinal transit when eaten daily for two weeks, as part of a balanced diet and healthy lifestyle.
LEARN MORE
what are probiotics?
Well-known to nutritionists and health editors for years, these helpful natural cultures are behind a new wave of "functional foods."
LEARN MORE
ACTIVIA IN THE NEWS
Read News
ACTIVIA ON THE AIR
If you haven't seen our latest television commercial, you can watch it here.
Watch now
SEND TO A FRIEND
EMAIL UPDATES
NEWS | DANNON.COM | CONTACT US | PRIVACY INFO | STORE LOCATOR | TV ADS | SITE MAP | ACTIVIA IN OTHER COUNTRIES

EXHIBIT G (continued)

EXHIBIT G (continued)

A lowfat yogurt that helps naturally regulate the digestive system

Presenting—ACTIVIA® by Dannon®

Clinically proven to help regulate the digestive system when eaten daily for two weeks.

- ACTIVIA® is a creamy, blended, probiotic-cultured, lowfat yogurt.
- ACTIVIA® helps with slow intestinal transit and contains a unique culture – *Bifidus Regularis.*™
- ACTIVIA® has the great taste and quality that you expect from Dannon.®

ACTIVIA® helps naturally regulate your digestive system

ACTIVIA® is a probiotic, lowfat yogurt that contains a unique culture, *Bifidus Regularis,*™ clinically proven to survive passage through the gastrointestinal tract and scientifically known as *Bifidobacterium animalis* DN-173 010.

Daily consumption of ACTIVIA® helps with slow intestinal transit, particularly in women and the elderly. ACTIVIA® also possesses the standard nutritional qualities of a dairy product, thanks to the proteins and calcium it contains.

What are probiotics?

Probiotics are living microorganisms that, upon ingestion in sufficient numbers, exert health benefits beyond basic nutrition.

EXHIBIT G (continued)

The gastrointestinal (GI) tract and the intestinal microflora

The GI tract is an extremely complex environment with multiple functions. The small intestine acts as the main site of enzymatic digestion of foods and absorption of nutrients. The colon or large intestine absorbs large quantities of water and electrolytes and allows evacuation of waste matter and toxic substances. The colon also appears to be responsible for regulation of intestinal well-being, particularly through its complex bacterial microflora and maintenance of intestinal balance.

The intestinal microflora of each individual is highly specific and remains remarkably stable over time.[1] However, it develops in stages throughout the individual's lifetime as a result of diet, host health status and environmental conditions. The intestinal tract of an adult human contains microflora comprising approximately 10^{11} microorganisms per gram of stool, with approximately 400 to 500 different bacterial species. The dominant population consists of strict anaerobic bacteria: *Bacteroides, Bifidobacterium, Eubacterium* and *Peptostreptococcus.*[2]

A balanced intestinal microflora rich in bifidobacteria helps ensure optimal functioning of the digestive system.[3,4] Research suggests that when the intestinal microflora is out of balance, it may affect overall health. This balance can be disturbed during physical or psychological stress, with age, in menopause, during drug treatment (e.g., antibiotics) and in the event of acute or chronic intestinal diseases.[5,6,7] The intestinal microflora balance can be temporarily restored by ingestion of certain probiotics.[8]

Intestinal transit

Intestinal transit is the process by which gut intestinal contents pass through the digestive system. The average transit time from mouth to anus in a healthy adult takes under 72 hours and most of this transit time is spent in the colon. Transit time varies significantly between individuals in spite of identical diet and also varies within specific individuals. In addition, it appears that transit time is longer in women than in men and increases with age.[9]

Intestinal transit is affected not only by the quality of the diet and by environmental parameters (e.g., age, stress, etc.), but also by the intestinal microflora.

Slow transit is not necessarily pathological and it corresponds to the upper limit of normal transit time and is between 48 and 72 hours. However, slow intestinal transit is a source of daily discomfort for a large proportion of the population and the physical and physiological consequences on the quality of life should not be underestimated. Bloating, heaviness, difficult and painful defecation are all troublesome symptoms when they become chronic.[10]

A total transit time exceeding 72 hours is considered abnormally long and normally gives rise to a diagnosis of constipation, also involving excessive dehydration of stools. Maintaining a regular intestinal transit is therefore essential for health and general well-being.

Interaction between intestinal microflora and transit

Several studies have attempted to determine the mechanisms by which the intestinal microflora stimulates transit. These studies focus particularly on the effects of products from bacterial fermentation, such as Short-Chain Fatty Acids (SCFA), and on physicochemical modifications induced by the microflora. Various hypotheses, illustrated on the diagram below, have pertained to the effects of the intestinal microflora on transit.[11,12,13,14,15,16]

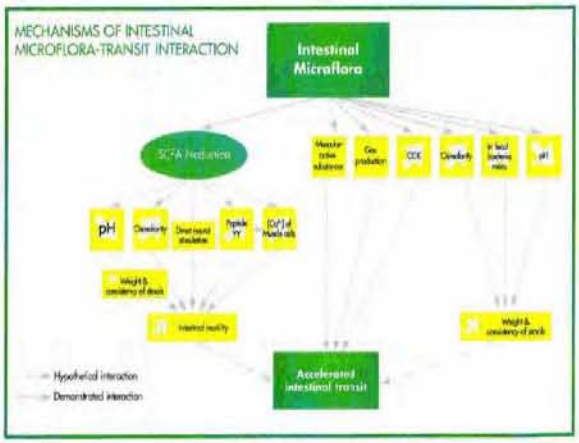


EXHIBIT G (continued)

Since certain strains of probiotics have been identified through their beneficial effect on the endogenous intestinal microflora, it was logical to assess their impact on transit. Bifidobacteria have thus been particularly and closely studied in man.[17] Their effects on transit have been clearly demonstrated through studies performed recently with ACTIVIA® by Dannon® and its specific strain: *Bifidobacterium animalis* DN-173 010.[18,19,20,21] Dannon's *Bifidobacterium animalis* DN-173 010 is an exclusive probiotic culture of food origin, which is found live and in large quantities in ACTIVIA®, and remains stable throughout the product shelf life.

Effects of ACTIVIA® and/or *Bifidobacterium animalis* DN-173 010 on transit time in healthy adults[18]

In a parallel, double-blind study including 72 healthy adult volunteers (mean age 30 years), the ingestion of a fermented milk (3x125 g/day) containing the strain *Bifidobacterium animalis* DN-173 010, for 11 days, significantly reduces total colonic transit time by 21% and sigmoid transit time by 39% compared to an identical fermented milk (3x125 g/day) in which bacteria were killed by heat treatment. The effect was more pronounced in women ($p<0.03$), particularly in those with a long baseline transit time compared to men ($p<0.05$). These beneficial effects were not found with heat-treated product, suggesting that both probiotic survival and metabolic activity are necessary.

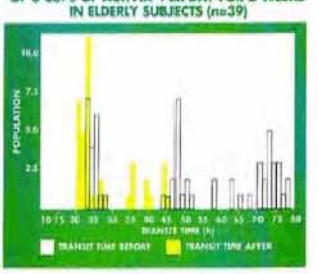
Action of ACTIVIA® on colonic transit time in women[19]

A double-blind, randomized, cross-over study including 36 healthy women (mean age 27 years) compared the efficacy of ACTIVIA® (3x125 g/day) with a fermented milk preparation containing no *Bifidobacterium animalis* DN-173 010 (3x125 g/day) during a consumption period of 10 days. Total colonic and sigmoid transit times were significantly shortened ($p<0.05$) with ACTIVIA® versus control (51.5 +/- 30.2 hours vs. 60.7 +/- 27.1; sigmoid: 21.6 +/- 14.9 hours vs. 26.8 +/- 14.2). In women with a total transit time of more than 40 hours, the sigmoid transit time and total transit time were significantly shorter following consumption of ACTIVIA® versus the baseline values recorded prior to consumption.

Effects of ACTIVIA® on total transit time in elderly subjects[18,21]

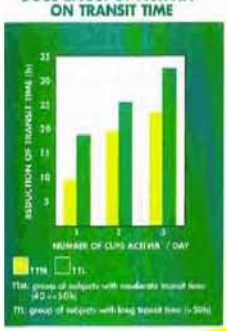
Two randomized studies investigated the efficacy of different doses of ACTIVIA® with *Bifidobacterium animalis* DN-173 010 on transit time by focusing on elderly subjects. The first study (total 100 subjects) showed that consumption of 2x125 g or 3x125 g of ACTIVIA® per day for two weeks significantly reduced intestinal transit time ($p<0.001$). A 10% reduction was found in the groups with a short transit time (less than 40 hours) and a 40% reduction was found in groups with a long transit time (greater than 40 hours). The results were greater in those elderly subjects who had 3x125 g of ACTIVIA® versus 2x125 g ($p<0.05$). Intestinal transit time is shortened in elderly subjects by consumption of two or three cups of ACTIVIA® for two weeks.

TRANSIT TIME BEFORE AND AFTER CONSUMPTION OF 3 CUPS OF ACTIVIA® PER DAY FOR 2 WEEKS IN ELDERLY SUBJECTS (n=39)



A second, large-scale, controlled study evaluated lower doses and the duration of the beneficial effects after discontinuing consumption of the product. The study included 200 elderly, healthy volunteers, aged 50–75 years, divided in two groups—100 with moderate transit time (40–50 hours) and 100 with a longer transit time (50–70 hours), who were randomized to receive either 1x125 g or 2x125 g of ACTIVIA® per day for 2 weeks. Consumption of one or two 125 g cups of ACTIVIA® significantly reduced intestinal transit time, both in subjects with moderate and long transit times ($p<0.05$). However, two servings per day were more effective than one serving per day ($p<0.05$). The action of ACTIVIA® persisted for at least two weeks after the end of consumption of one serving and for at least four weeks after the end of ingestion of two servings of ACTIVIA®.

DOSE-EFFECT OF ACTIVIA® ON TRANSIT TIME



In conclusion, these two studies demonstrate the efficacy of ACTIVIA® in reducing transit time in elderly subjects, particularly in those with long transit times. A dose-dependent effect was observed (from 1 to 3 cups).

DANONE
ACTIVIA

EXHIBIT G (continued)

Clinically proven to survive in the GI tract

ACTIVIA® contains *Bifidobacterium animalis* DN-173 010, which has been clinically proven to survive the passage through the gastrointestinal tract.

Various human studies have been performed to demonstrate the high survival of *Bifidobacterium animalis* DN-173 010 in the digestive system when consumed in a fermented dairy product.[22,23,24,25]

- *Bifidobacterium animalis* DN-173 010, incorporated in ACTIVIA,® survived successfully (10^5–10^6 cfu/g) for at least 90 minutes in the stomach, while another commercial strain was much less resistant. The shelf life of the product does not affect the survival capability of *Bifidobacterium animalis* DN-173 010.
- *Bifidobacterium animalis* DN-173 010, incorporated in ACTIVIA,® survived passage through the entire gastrointestinal tract and was recovered live and in large quantities in stools (>10^8 cfu/g). The amount of *Bifidobacterium animalis* DN-173 010 recovered was similar to the quantity initially ingested.

ACTIVIA® Benefits

- ACTIVIA® by Dannon® is clinically proven to naturally help regulate your digestive system in two weeks when consumed daily, as part of a healthy lifestyle and balanced diet.
- Daily consumption of ACTIVIA® helps with slow intestinal transit, particularly in women and eldery subjects. In subjects whose digestive system functions regularly, no marked change or risk of diarrhea was observed.
- The effect of ACTIVIA® is in part due to *Bifidobacterium animalis* DN-173 010, a unique probiotic culture, clinically proven to survive passage through the gastrointestinal tract.

How to recommend ACTIVIA® for your patients

- ACTIVIA® by Dannon® helps optimize the function of the gastrointestinal tract, helping to achieve a more regular intestinal transit, leading, in turn, to better daily well-being and a natural regulation of the digestive system.
- The scientifically demonstrated benefits allow us to recommend regular daily consumption of ACTIVIA® by Dannon® for everyone.
- ACTIVIA® is suitable for the entire family and can be included as part of a balanced diet.

Nutrition Facts
Serving Size 1 container (113g)

Amount Per Serving	
Calories 110	Calories from Fat 20
	% Daily Value*
Total Fat 2g	3%
Saturated Fat 1g	5%
Trans Fat 0g	
Cholesterol 5mg	2%
Sodium 75mg	3%
Potassium 220mg	6%
Total Carbohydrate 19g	6%
Dietary Fiber 0g	0%
Sugars 17g	
Protein 5g	10%
Vitamin A 0% • Vitamin C 0%	
Calcium 15% • Iron 0%	

Strawberry as dated 12/14/06

ACTIVIA® Product Information

- ACTIVIA® is available in 6 tasty flavors: vanilla, strawberry, mixed berry, prune, peach and blueberry.
- ACTIVIA® contains no artificial flavors or preservatives.
- ACTIVIA® is a probiotic-cultured, lowfat yogurt.
- ACTIVIA® is Kosher certified.
- Now available–ACTIVIA® Light, 70 calories per 4-oz cup.

Visit www.activia.com for stores and availability and to obtain a copy of our Scientific Summary. For more information on probiotics, visit www.dannonprobioticscenter.com

References

DANNON is a registered trademark and ACTIVIA is a trademark of the Dannon Company, Inc.

DANNON™ ACTIVIA

EXHIBIT G (continued)

Studies on *Bifidobacterium* DN-173 010 from Danone

Bifidobacterium animalis strain DN-173 010 shortens the colonic transit time in healthy women: a double-blind, randomized, controlled study

P. Marteau, E. Cuillerier, S. Méance, MF. Gerhardt, A. Myara, M. Bouvier, C. Bouley, F. Tondu, G. Bommelaer and JC. Grimaud
Aliment Pharmacol. Ther., 2002; 16: 587-593

Background: A previous study has suggested that *Bifidobacterium animalis* DN-173 010 shortens the colonic transit time in women. Aim: To confirm this effect and to determine whether modifications of the faecal bacterial mass and/or faecal secondary bile salts may be the explanation. Methods: A double-blind, cross-over study was performed. Thirty-six healthy women were studied in four consecutive 10-day periods. During periods 2 and 4, they ingested three 125 g cups per day of a fermented milk which was either a product containing *B. animalis* DN-173 010 or a control without bifidobacteria. Periods 1 and 3 were run-in and washout periods, respectively. The total and segmental colonic transit times were assessed using a pellet method. In 12 subjects, all stools were collected and analysed for pH, faecal weight, bacterial mass and bile acids. *Results*: The total and sigmoid transit times were significantly shorter during dosing with *B. animalis* compared to the control period. The other transit times, faecal weight, pH, bacterial mass and bile acids were not significantly affected. *Conclusions*: *B. animalis* DN-173 010 shortens the colonic transit time in healthy women. This effect is not explained by modifications of the faecal bacterial mass or secondary bile acids.

Effect of a fermented milk containing _Bifidobacterium animalis_ strain DN-173 010 on the health-related quality of life and symptoms in irritable bowel syndrome in adults in primary care: a multicentre, randomized, double-blind, controlled trial

D. Guyonnet, O. Chassany, P. Ducrotte, C. Picard, M. Mouret, C.-H. Mercier and C. Matuchansky
Aliment Pharmacol. Ther., 2007; 26: 475-486

Summary: Background: Health-related quality of life (HRQoL) has been rarely evaluated as a primary endpoint in the assessment of the effect of probiotics on the irritable bowel syndrome (IBS). Aim: To study the effects of fermented milk containing *Bifidobacterium animalis* DN-173 010 and yogurt strains on the IBS in a multicentre, double-blind, controlled trial. Methods: A total of 274 primary care adults with constipation-predominant IBS (Rome II) were randomized to consume for 6 weeks either the test fermented milk or a heat-treated yogurt (control). HRQoL and digestive symptoms were assessed after 3 and 6 weeks on an intention-to-treat population of 267 subjects. Results: The HRQoL discomfort score, the primary endpoint, improved ($p<0.001$) in both groups at weeks 3 and 6. The responder rate for the HRQoL discomfort score was higher (65.2 vs. 47.7%, $p<0.005$), as was the decrease in bloating score [0.56 ± (s.d.)1.01 vs. 0.31 ± 0.87, $p = 0.03$], at week 3 in the test vs. the control group. In those subjects with <3 stools/week, stool frequency increased ($p<0.001$) over 6 weeks in the test vs. control group. Conclusions: This study suggests a beneficial effect of a probiotic food on discomfort HRQoL score and bloating in constipation-predominant IBS, and on stool frequency in subjects with <3 stools/week.

Review article: Bifidobacteria as probiotic agents – physiological effects and clinical benefits

C. Picard, J. Fioramonti, A. Francois, T. Robinson, F. Neant and C. Matuchansky
Aliment Pharmacol. Ther., 2005; 22: 495–512

Summary: Bifidobacteria, naturally present in the dominant colonic microbiota, represent up to 25% of the cultivable faecal bacteria in adults and 80% in infants. As probiotic agents, bifidobacteria have been studied for their efficacy in the prevention and treatment of a broad spectrum of animal and/or human gastrointestinal disorders, such as colonic transit disorders, intestinal infections, and colonic adenomas and cancer. The aim of this review is to focus on the gastrointestinal effects of bifidobacteria as probiotic agents in animal models and man. The traditional use of bifidobacteria in fermented dairy products and the GRAS ('Generally Recognized As Safe') status of certain strains attest to their safety. Some strains, especially *Bifidobacterium animalis* strain DN-173 010 which has long been used in fermented dairy products, show high gastrointestinal survival capacity and exhibit probiotic properties in the colon. Bifidobacteria are able to prevent or alleviate infectious diarrhoea through their effects on the immune system and resistance to colonization by pathogens. There is some experimental evidence that certain bifidobacteria may actually protect the host from carcinogenic activity of intestinal flora. Bifidobacteria may exert protective intestinal actions through various mechanisms and represent promising advances in the fields of prophylaxis and therapy.

Survival of bifidobacteria ingested via fermented milk during their passage through the human small intestine: an in vivo study using intestinal perfusion

P. Pochart, P. Marteau, Y. Bouhnik, I. Goderel, P. Bourlioux and JC. Rambaud
Am. J. Clin. Nutr., 1992; 55: 78-80

Abstract: The ability of a strain of *Bifidobacterium* sp to survive passage through the upper gastrointestinal tract when ingested in fermented milk was investigated in six fasting healthy adults by using *in vivo* ileal perfusion. After ingestion of 10.8±0.5 log_{10} bifidobacteria in 400 g fermented milk, ileal flow of bifidobacteria increased significantly and reached a maximum of 8.8±0.2 log_{10} bifidobacteria/h 1.7±0.4 h after ingestion of fermented milk. The average number of bifidobacteria recovered from the terminal ileum during the 8 h after fermented-milk ingestion was 9.8±0.1 log_{10} and constituted 23.5±10.4% of the number ingested. These results indicate that in healthy adults *Bifidobacterium sp* survive transit through the gastrointestinal tract when ingested in fermented milk. Further studies are needed to investigate the behavior of these exogenous bacteria in the colonic lumen and to explore their effects on the physiology of the human gastrointestinal tract.

DANONE
RESEARCH
CENTRE DANIEL CARASSO

EXHIBIT G (continued)

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent The Dannon Company, Inc., is a Delaware corporation with its principal office or place of business at 100 Hillside Ave., White Plains, NY, 10603.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" means The Dannon Company, Inc., a corporation, its successors and assigns and their officers, and each of the above's agents, representatives, and employees.

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

3. "Adequate and well-controlled human clinical study" means a human clinical study conducted by persons qualified by training and experience to conduct such study. Such study shall be randomized, and, unless it can be demonstrated that blinding or placebo control cannot be effectively or ethically implemented given the nature of the intervention, shall be double-blind and placebo-controlled.

4. "Covered product" means: (a) any yogurt, including but not limited to, Activia yogurt; (b) any dairy drink; and (c) any food or drink not covered by the foregoing that contains a probiotic, including, but not limited to, DanActive.

5. "Essentially equivalent product" means a product that contains the identical ingredients, except for inactive ingredients (*e.g.*, inactive binders, flavors, preservatives, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (*e.g.*, orally, sublingually), as the covered product; provided that the covered product may contain additional ingredients or other differences in formulation to affect taste, texture, or nutritional value (so long as the other differences do

not change the form of the product or involve the ingredients from which the functional benefit is derived), if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount of additional ingredients, combination of additional ingredients, and any other differences in formulation are unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.

6. "Food" means as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

7. "Endorsement" means as defined in 16 C.F.R. § 255.0.

8. The term "including" in this Order means "without limitation."

9. The terms "and" and "or" in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that such product reduces the likelihood of getting a cold or the flu, unless the representation is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Activia yogurt, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that Activia yogurt relieves temporary irregularity or helps with slow intestinal transit time, unless the representation is non-misleading and conveys that eating three servings a day is required to obtain the benefit. *Provided, however*, that nothing in this Part II shall prohibit respondent from representing that such benefit can be achieved from eating less than three servings a day if such claim is non-misleading and respondent possesses and relies upon competent and reliable scientific evidence that substantiates that such representation is true. For purposes of this Part II, competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of Activia yogurt, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. Respondent shall have the burden of proving that a product satisfies the definition of essentially equivalent product.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product other than Activia yogurt, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name,

endorsement, depiction, or illustration, that such product relieves temporary irregularity or helps with slow intestinal transit time, unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Part III, competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of the covered product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. Respondent shall have the burden of proving that a product satisfies the definition of essentially equivalent product.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not make any representation, other than representations covered under Parts I through III of this order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the health benefits, performance, or efficacy of any covered product, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part IV, competent and reliable scientific evidence means tests, analyses, research, or studies that have been

conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, including, but not limited to, any misrepresentation that such product:

A. Is clinically proven to reduce the likelihood of getting a cold or flu; or

B. Is clinically proven to relieve temporary irregularity or help with slow intestinal transit time.

VI.

IT IS FURTHER ORDERED that nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VII.

IT IS FURTHER ORDERED that respondent The Dannon Company, Inc., and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

IT IS FURTHER ORDERED that respondent The Dannon Company, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent and its successors and assigns shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

IT IS FURTHER ORDERED that respondent The Dannon Company, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change

in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent and its successors and assigns learn less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent The Dannon Company, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent and its successors and assigns shall submit additional true and accurate written reports.

XI.

This order will terminate on January 31, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

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

This matter involves the advertising and promotion of DanActive, a probiotic dairy drink, and Activia, a probiotic yogurt. According to the FTC complaint, respondent represented, in various advertisements, that drinking DanActive reduces the likelihood of getting a cold or the flu. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act. The complaint also alleges that respondent represented that clinical studies prove that drinking DanActive reduces the likelihood of getting a cold or the flu. The complaint alleges that these claims are false and thus

violate the FTC Act.

With respect to Activia, the complaint alleges that respondent represented, in various advertisements, that eating one serving of Activia daily relieves temporary irregularity and helps with slow intestinal transit time. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act. The complaint also alleges that respondent represented that clinical studies prove that eating one serving of Activia daily relieves temporary irregularity and helps with slow intestinal transit time. The complaint alleges that these claims are false and thus violate the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. The order covers representations made in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce. The order defines a covered product as: (a) any yogurt, including but not limited to, Activia yogurt; (b) any dairy drink; and (c) any food or drink not covered by the foregoing that contains a probiotic, including, but not limited to, DanActive.

Part I of the consent order is designed to address the complaint allegations concerning respondent's allegedly unsubstantiated representations that drinking DanActive reduces the likelihood of getting a cold or the flu. Part I prohibits respondent from making representations that any covered product reduces the likelihood of getting a cold or the flu unless the representation is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration ("FDA") pursuant to the Nutrition Labeling and Education Act of 1990 ("NLEA"). Under this provision, therefore, respondent cannot claim that a covered product reduces the likelihood of getting a cold or the flu unless the FDA has issued a regulation authorizing the claim based on a finding that there is significant scientific agreement among experts qualified by scientific training and experience to evaluate such claims, considering the totality of publicly available scientific evidence. As noted in the Commission's Enforcement Policy

Statement on Food Advertising, "[t]he Commission regards the 'significant scientific agreement' standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim." Enforcement Policy Statement on Food Advertising (1994), available at http://www.ftc.gov/bcp/policystmt/ad-food.shtm. Thus, although the Enforcement Policy Statement does not say that the only way a food advertiser can adequately substantiate a disease risk-reduction claim is through FDA authorization, the consent order provision requiring FDA pre-approval before respondent makes a reduced cold or flu likelihood claim for its covered products in the future will facilitate compliance with and enforcement of the order and is reasonably related to the violations alleged.

Respondent may decide to make an advertising claim characterizing limited scientific evidence supporting the relationship between a covered product and a reduced likelihood of getting a cold or the flu. However, if the net impression of that advertising is that the covered product reduces the likelihood of getting a cold or the flu, and not merely that there is limited scientific evidence supporting the claim, the advertisement would be covered under Part I. The Commission notes that its experience and research show that it is very difficult to adequately qualify a disease risk-reduction claim in advertising to indicate that the science supporting the claimed effect is limited. In other words, reasonable consumers may interpret an advertisement to mean that the product will reduce the likelihood of getting a cold or the flu, even if respondent includes language indicating that the science supporting the effect is limited in some way. However, if respondent possesses reliable empirical testing demonstrating that the net impression of an advertisement making a qualified claim for a covered product does not convey that it will reduce the likelihood of getting a cold or the flu, then that claim would be covered under Part IV of the order.

Although Part I requires FDA approval before respondent can make claims that a covered product reduces the likelihood of getting a cold or the flu, the Commission does not intend Part I to limit respondent to using the precise language specified in an FDA-approved health claim. To the contrary, if the FDA has approved a claim that a covered product reduces the likelihood of getting a cold or the flu, respondent may use a variety of words and images to communicate that claim in its advertising. Conversely,

regardless of the particular words or images used, if the net impression of an advertisement is that a covered product reduces the likelihood of getting a cold or the flu, then for the ad to comply with the order, the FDA must have authorized a health claim based on significant scientific agreement that such product provides such a benefit.

Part II of the consent order prohibits respondent from making representations that eating one serving of Activia yogurt daily relieves temporary irregularity and helps with slow intestinal transit time unless the representation is non-misleading and it conveys that eating three servings a day is required to obtain the benefit. Part II further provides, however, that the order does not prohibit respondent from representing that the benefit can be achieved from eating less than three servings a day if such claim is non-misleading and respondent possesses and relies upon competent and reliable scientific evidence that substantiates that such representation is true.

For purposes of Part II, competent and reliable scientific evidence means at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. For purposes of the order, essentially equivalent product means a product that contains the identical ingredients, except for inactive ingredients (*e.g.*, inactive binders, flavors, preservatives, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (*e.g.*, orally, sublingually), as the covered product; provided that the covered product may contain additional ingredients or other differences in formulation to affect taste, texture, or nutritional value (so long as the other differences do not change the form of the product or involve the ingredients from which the functional benefit is derived), if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount of additional ingredients, combination of additional ingredients, and any other differences in formulation are unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.

Part III of the consent order prohibits respondent from making representations that any covered product other than Activia yogurt

relieves temporary irregularity and helps with slow intestinal transit time unless the representation is non-misleading and respondent possesses and relies upon competent and reliable scientific evidence that substantiates that such representation is true. For purposes of Part III, competent and reliable scientific evidence means at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true.

Part IV of the consent order prohibits respondent from making representations, other than representations covered under Parts I through III, about the health benefits, performance, or efficacy of any covered product, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of Part IV, competent and reliable scientific evidence means tests, analyses, research, studies, or other evidence that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results.

Part V of the consent order prohibits respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, including but not limited to but not limited to, any misrepresentation that a covered product is clinically proven (1) to reduce the likelihood of getting a cold or flu, or (2) to relieve temporary irregularity or help with slow intestinal transit time.

Part VI of the consent order provides that nothing in the order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the NLEA.

Parts VII, VIII, IX, and X of the consent order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XI provides that the order will terminate after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF

KEYSTONE HOLDINGS, LLC AND COMPAGNIE DE SAINT-GOBAIN, INC.

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

Docket No. C-4314; File No. 101 0175
Filed February 7, 2011 – Decision February 7, 2011

This consent order relates to allegations of anticompetitive effects resulting from Keystone Holdings LLC ("Keystone") proposed acquisition of certain Advanced Ceramics Business assets from Compagnie de Saint-Gobain ("Saint-Gobain") in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. According to the complaint, in the proposed acquisition, as originally structured, Keystone would have acquired Saint-Gobain's worldwide assets and businesses relating to the manufacture and sale of alumina wear tiles, including Saint-Gobain's North American alumina wear tile business in Latrobe, Pennsylvania. To resolve competitive concerns raised by the proposed acquisition, Keystone and Saint-Gobain re-structured the original transaction to exclude Saint-Gobain's alumina wear tile business in Latrobe. Under the order, Keystone is required for ten years to obtain prior approval from the Commission for the direct or indirect acquisition of Saint-Gobain's alumina wear tile business in Latrobe or certain other assets owned or controlled by Saint-Gobain relating to the alumina wear tile made in North America. The order requires Saint-Gobain for five years to provide advance written notice to the Commission prior to leasing or selling the Latrobe facility or selling substantially all of its interest in the Saint-Gobain alumina wear tile business. The order also requires Saint-Gobain to provide the Commission with advance written notice prior to closing the Latrobe facility, or ceasing production of alumina wear tiles at the facility.

Participants

For the *Commission*: *Melanie Hallas, Victoria Luxardo Jeffries, Victoria Lippincott, Angelike Andrinopoulos Mina, David Morris, Eric M. Sprague,* and *Arthur Strong.*

For the *Respondents*: *Robert Schlossberg* and *Bruce McCulloch, Freshfields Bruckhaus Deringer LLP;* and *Patricia Zeigler* and *Garret Rasmussen, Orrick, Herrington & Sutcliffe LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Keystone Holdings, LLC ("Keystone"), a limited liability company subject to the jurisdiction of the Commission, has made an offer to acquire the Advanced Ceramics Business assets of Respondent Compagnie de Saint-Gobain ("Saint-Gobain"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Keystone is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 16000 Table Mountain Parkway, Golden, Colorado.

2. Respondent Saint-Gobain is a corporation organized, existing, and doing business under, and by virtue of, the laws of France, with its office and principal place of business located at Courbevoie, France, Les Miroirs, 18 Avenue d'Alsace, 92096 La Defense Codex, France.

3. Respondents Keystone and Saint-Gobain are engaged in, among other things, the research, development, manufacture, marketing and sale of alumina wear tiles.

II. JURISDICTION

4. Respondents Keystone and Saint-Gobain are, and at all times relevant herein have been, engaged in commerce, as "commerce" is

defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are companies whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. On June 28, 2010, Keystone and Saint-Gobain announced the acquisition by Keystone of Saint-Gobain's Advanced Ceramics Business, including facilities in Europe, North America, South America, and Asia, for a purchase price of $245 million. The business acquired includes igniters, semiconductor components, precision balls, molten-metal filters, boron nitride, and ceramic specialties (hereinafter, "Notified Transaction").

6. As part of the Notified Transaction, Keystone proposes to acquire Saint-Gobain's assets and business in Latrobe, Pennsylvania, relating to the research, development, manufacture, marketing and sale of pre-engineered alumina wear tile and standard alumina wear tile in North America. Keystone also proposes to acquire a plant in Vinhedo, Brazil that furnishes standard alumina wear tiles to Latrobe that are marketed and sold worldwide by Saint-Gobain's Latrobe business.

IV. THE RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Notified Transaction are the research, development, manufacture, marketing and sale of: (a) pre-engineered alumina wear tile; and (b) standard alumina wear tile; or (c) alternatively, all alumina wear tile.

8. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Notified Transaction is North America.

V. THE STRUCTURE OF THE MARKETS

9. Respondents Keystone and Saint-Gobain are significant participants in the relevant markets, and the relevant markets are highly concentrated, as measured by the Herfindahl-Hirschman Index ("HHI"). The Notified Transaction would further increase concentration levels, resulting in Keystone becoming the largest supplier of alumina wear tile in the relevant geographic area. Keystone and Saint-Gobain are two of only three significant suppliers of pre-engineered alumina wear tile, and two of only four significant suppliers of standard alumina wear tile in the relevant geographic area.

VI. ENTRY CONDITIONS

10. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or defeat the anticompetitive effects of the Notified Transaction.

11. Entry into the relevant markets is costly, difficult, and unlikely because of, among other things, the time and cost required to construct an alumina wear tile manufacturing facility, develop and manufacture quality alumina wear tile products, and achieve customer acceptance. Because the size of the investment necessary to enter is substantial in relation to the size of the overall markets, and of the uncertainty that an entrant could secure the distribution necessary to make the investment profitable, it is unlikely a company could successfully enter the relevant markets.

VII. EFFECTS OF THE NOTIFIED TRANSACTION

12. The effects of the Notified Transaction, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Respondents Keystone and Saint-Gobain;

b. by increasing the likelihood that Respondent Keystone would unilaterally exercise market power in the relevant markets; and

c. by enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the relevant markets.

VIII. MODIFICATION OF THE NOTIFIED TRANSACTION

13. On or about December 2, 2010, Keystone and Saint-Gobain executed an amended purchase and sale agreement that, *inter alia*, removed from the Notified Transaction the assets and businesses of Saint-Gobain in Latrobe, Pennsylvania, relating to the research, development, manufacture, marketing and sale of standard alumina wear tile and pre-engineered alumina wear tile in North America. Pursuant to the amended purchase agreement, Keystone and Saint-Gobain also have contracted for the sale by Keystone to Saint-Gobain of standard alumina wear tile manufactured in Vinhedo, Brazil.

IX. VIOLATIONS CHARGED

14. The allegations contained in paragraphs 1-13 are repeated and re-alleged as though fully set forth here.

15. The Notified Transaction described in paragraph 5 would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of February, 2011, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Keystone Holdings, LLC, of the Advanced Ceramics Business of Respondent Compagnie de Saint-Gobain, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed

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

1. Respondent Keystone Holdings, LLC, is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 16000 Table Mountain Parkway, Golden, Colorado.

2. Respondent Compagnie de Saint-Gobain is a corporation organized, existing, and doing business under and by virtue of the laws of France, with its offices and principal place of business located at Courbevoie, France, Les Miroirs, 18 Avenue d'Alsace, 92096 La Defense Cedex, France.

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

ORDER

I.

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

DEFINITIONS OF PERSONS

A. "Commission" means the Federal Trade Commission.

B. "Saint-Gobain" or "Respondent Saint-Gobain" means Compagnie de Saint-Gobain, its directors, officers, employees, agents, representatives, predecessors,

successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Compagnie de Saint-Gobain, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

C. "Governmental Entity" means any federal, provincial, state, county, local, or other political subdivision of the United States or any other country, or any department or agency thereof.

D. "Keystone" or "Respondent Keystone" means Keystone Holdings, LLC, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries (including, but not limited to, CoorsTek, Inc.), divisions, groups and affiliates controlled by Keystone Holdings, LLC, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

E. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Governmental Entity, and any subsidiaries, divisions, groups or affiliates thereof.

GENERAL DEFINITIONS

F. "Acquisition" means the proposed acquisition of the Advanced Ceramics Business by Keystone from Saint-Gobain pursuant to the Purchase Agreement (June 25, 2010) by and between CoorsTek, Inc., on the one hand, and Saint-Gobain Performance Plastics Europe, S.A., Saint-Gobain Abrasives, Inc., Saint-Gobain do Brasil Produtos Industriais e para Construcoes Ltda., and Société Européenne des Produits Réfractaires, S.A., on the other hand, as amended by as amended by the

Supplement and Amendment No. 1 to the Purchase Agreement (December 2, 2010).

G. "Advanced Ceramics Business" means the assets and business of Saint-Gobain that Respondent Keystone proposes to acquire pursuant to the Purchase Agreement (June 25, 2010) and the Amended Purchase Agreement.

H. "Alumina Wear Tiles" or "AW Tiles" means sintered dense high-grade alumina ceramic tile that is used primarily, but not necessary solely, to line material-handling equipment to protect against abrasion and premature wear caused by the materials that pass through the equipment. AW Tile is comprised of tiles including, but not limited to, pre-engineered tile linings, iso-pressed monolithic shapes, and standard rectangular, pipe, tongue & groove and hex tiles.

I. "Amended Purchase Agreement" means the Supplement and Amendment No. 1 to the Purchase Agreement (December 2, 2010) between CoorsTek, Inc., and Saint-Gobain (as defined in the Purchase Agreement).

J. "Saint-Gobain AW Tile Business" means all of Respondent Saint-Gobain's right, title, and interest prior to the Acquisition in all tangible and intangible property of any kind relating to the research, development, marketing and sale anywhere in the world, of AW Tiles produced or manufactured in North America, including, but not limited to, the:

1. Latrobe Facility;

2. Saint-Gobain AW Tile Business Books and Records;

3. Saint-Gobain AW Tile Business Intellectual Property;

4. Saint-Gobain AW Tile Business Contracts;

5. Saint-Gobain AW Tile Business Inventories; and,

6. Complementary AW Tile Assets;

Provided, however, the Saint-Gobain AW Tile Business does not include:

1. The CoorsTek AW Tile Business; and,

2. The Advanced Ceramics Business.

K. "Saint-Gobain AW Tile Business Agreements" mean the Complementary AW Tile Intellectual Property License, the Complementary AW Tile Products Supply Agreement, and the Technical Services Agreement.

L. "Saint-Gobain AW Tile Business Books and Records" means all Books and Records relating to the research, development, marketing and sale anywhere in the world, of AW Tiles produced or manufactured in North America.

M. "Saint-Gobain AW Tile Business Contracts" means all contracts relating to the research, development, marketing and sale anywhere in the world, of AW Tiles produced or manufactured in North America.

N. "Saint-Gobain AW Tile Business Inventories" means:

1. All supplies and inventory of finished AW Tiles, and,

2. All supplies and inventory of AW Tiles in production, raw materials, and supplies held for use in the research, development, marketing and sale anywhere in the world, of AW Tiles produced or

manufactured in North America.

O. "Complementary AW Tile Products" means the "Products" as defined and addressed in the Complementary AW Tile Products Supply Agreement.

P. "Complementary AW Tile Assets" means:

1. A Complementary AW Tile Intellectual Property License; and,

2. A copy of all Books and Records relating to the research, development, marketing and sale anywhere in the world, of Complementary AW Tile Products;

provided, *however*, that Complementary AW Tile Assets do not include Books and Records relating to the marketing and sale of Complementary AW Tile Products to any Person who has not purchased any Complimentary AW Tile Products or AW Tiles from an employee of or agent for the Saint-Gobain AW Tile Business since January 1, 2008.

Q. "Complementary AW Tile Intellectual Property License" means Section 7.17 of the Purchase Agreement as amended by the Amended Purchase Agreement.

R. "Complementary AW Tile Products Supply Agreement" means Exhibit N to the Purchase Agreement as amended by the Amended Purchase Agreement.

S. "CoorsTek AW Tile Business" means the assets and business of Keystone relating to the research, development, production, manufacture, marketing, sale, and use of AW Tiles and related products anywhere in the world prior to the acquisition of Advanced Ceramics Business.

T. "Facility Assets" means:

1. All real property interests, including rights, title, and interests in and to owned or leased property, together with all easements, rights of way, buildings, improvements, and appurtenances;

2. All applicable federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, necessary for the operations of, and conduct of business at, such applicable facility, to the extent held by Respondent Saint-Gobain and with respect to which the transfer thereof is permitted by law; and

3. All fixtures, equipment, machinery, tools, vehicles, personal property, or tangible property of any kind located at such applicable facility that is owned or leased by Respondent Saint-Gobain, or that Respondent Saint-Gobain has the legal right to use, or to have the custody or control of, that is related to:

   a. The research, development, production, manufacture, marketing, and sale of AW Tiles; and

   b. Compliance by the Saint-Gobain AW Tile Business with any statute, ordinance, regulation, rule, or other legal requirement (including, but not limited to, environmental laws) of any Governmental Entity.

U. "Intellectual Property" means Patents, Know-how, and trade marks.

V. "Know-how" means know-how, trade secrets, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development and other similar information.

W. "Latrobe Facility" means all of Respondent Saint-Gobain's right, title, and interest in the Facility Assets:

1. Located at the real property in Latrobe, Pennsylvania, legally described in Exhibit A to this Decision and Order; and

2. Related to the research, development, marketing and sale anywhere in the world, of AW Tiles produced or manufactured in North America.

X. "Material Confidential Information" means any material non-public information relating to the Saint-Gobain AW Tile Business either prior to or after the Acquisition Date of Divestiture, including, but not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets, and:

1. Obtained by Respondent Keystone prior to the Acquisition Date; or,

2. Obtained by Respondent Keystone after the Acquisition Date, in the course of performing Respondent Keystone's obligations under any Saint-Gobain AW Tile Business Agreement;

Provided, however, that Material Confidential Information shall not include:

1. Information that is in the public domain when received by Respondent Keystone;

2. Information that is not in the public domain when received by Respondent Keystone and thereafter becomes public through no act or failure to act by Respondent Keystone;

3. Information that Respondent Keystone develops or obtains independently, without violating any applicable law or this Order; and

4. Information that becomes known to Respondent Keystone from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

Y. "Patents" means patents and/or all related patent applications, if any, and wherever located, and includes all reissues, divisions, continuations, continuations-in-part, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

Z. "Purchase Agreement" means the Purchase Agreement (June 25, 2010) by and between CoorsTek, Inc., on the one hand, and Saint-Gobain Performance Plastics Europe, S.A., Saint-Gobain Abrasives, Inc., Saint-Gobain do Brasil Produtos Industriais e para Construcoes Ltda., and Societe Europeenes des Produites Refractaires, S.E., on the other hand.

AA. "Technical Services Agreement" means Section 7.16 of the Purchase Agreement as amended by the Amended Purchase Agreement.

II.

IT IS FURTHER ORDERED that:

A. Respondent Keystone shall not acquire, directly or indirectly, without the prior approval of the Commission:

1. Any interest in the Saint-Gobain AW Tile Business;

2. Any interest in tangible or intangible assets owned or controlled by Respondent Saint-Gobain at the time of the Acquisition relating to the research, development, marketing and sale anywhere in the world, of AW Tiles produced or manufactured in North America;

provided, however Respondent Keystone and Respondent Saint-Gobain may in the ordinary course of business engage in the purchase and sale of AW Tiles from and to one another.

B. Respondent Keystone shall comply with all terms of all of the Saint-Gobain AW Tile Business Agreements, which agreements are incorporated into and made a part of this Order. Any breach by Respondent Keystone of any term of any of the Saint-Gobain AW Tile Business Agreements shall constitute a violation of this Order. Any modification of the Saint-Gobain AW Tile Business Agreements without the prior approval of the Commission shall constitute a failure to comply with this Order.

C. The purpose of the remedy provided by this Order and by the Saint-Gobain AW Tile Business Agreements is to preserve Respondent Saint-Gobain as an independent, viable and effective competitor in the relevant market in which the Saint-Gobain AW Tile Business was engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED THAT:

A. For a period of five (5) years from the date this Order becomes final, Respondent Saint-Gobain shall not,

directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

1. Lease or sell the Latrobe Facility, or sell, assign, or otherwise convey substantially all of its right, title, and interest in the Saint-Gobain AW Tile Business, to any Person other than a subsidiary or an affiliate of Respondent Saint-Gobain; or,

2. Close the Latrobe Facility, or cease operations or production of AW Tiles at the Latrobe Facility.

B. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (the "Waiting Period"). The Notification required by Paragraph III.A.1. to the Commission shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the Department of Justice, and notification is required only of Respondent Saint-Gobain and not of any other party to the transaction. Early termination of the Waiting Period in this Paragraph III.B. may be requested and, where appropriate, may be granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this Paragraph III.B. 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.

C. The prior notification required by Paragraph III.A.2.

shall be addressed to the Secretary of the Commission, shall affirmatively state that Respondent Saint-Gobain has provided the notice pursuant to this Paragraph III.A., and shall include:

1. The name, telephone number, email address, and street address of an officer of or agent for Respondent for Commission staff to contact to discuss the notified action; and,

2. A description in reasonable detail of the circumstances relevant to the contemplated closure of, or the cessation of operations or production of AW Tiles at, the Latrobe Facility.

Provided, however, that prior notification shall not be required by this Paragraph III.C. if Respondent Saint-Gobain in good faith closes the Latrobe Facility, or ceases operations or production of AW Tiles at the Latrobe Facility, for any period of six (6) months or less in furtherance or implementation of plans for maintenance, construction, capital projects, or expansion of capacity at the Latrobe Facility; and,

Provided further that Respondent may provide less than thirty (30) days prior notice, or no prior notice, if Respondent Saint-Gobain in good faith closes (or determines to close) the Latrobe Facility, or ceases (or determines to cease) operations or production of AW Tiles at the Latrobe Facility, due to a force majeure event, for reasons related to health and safety, in compliance with environmental regulations or laws, in response to a request by a Government Entity, related to a labor strike, or like causes, but in such circumstance Respondent Saint-Gobain shall provide the written notice described in this Paragraph III.C. as soon as practicable following its closure of (or determination to close), or cessation of (or determination to cease) operations or production at, the Latrobe Facility.

IV.

IT IS FURTHER ORDERED THAT:

A. Either before or after the Acquisition Date, Respondent Keystone shall:

1. Not provide, disclose, or otherwise make available any Material Confidential Information to any Person except as required or permitted by this Order; and

2. Not use any Material Confidential Information for any reason or purpose other than as required or permitted by this Order.

B. Respondent Keystone shall devise and implement measures to protect against the storage, distribution, and use of Material Confidential Information that is not permitted by this Order. These measures shall include, but not be limited to, restrictions placed on access by Persons to information available or stored on any of Respondent Keystone's computers or computer networks.

C. Notwithstanding Paragraph IV.A. of this Order, Respondent Keystone may use Material Confidential Information:

1. For the purpose of performing Respondent Keystone's obligations under this Order and the Saint-Gobain AW Tile Business Agreements;

2. For uses or applications in Respondent Keystone's businesses that do not compete with the Saint-Gobain AW Tile Business, if such use or application by Respondent Keystone is not competitively significant to the Saint-Gobain AW Tile Business, *provided, however,* that Respondent Saint-Gobain must consent to any use of competitively sensitive

information regarding the Saint-Gobain AW Tile Business;

3. To ensure compliance with legal and regulatory requirements;

4. To perform required auditing functions;

5. To provide accounting, information technology, and credit-underwriting services;

6. To provide legal services associated with actual or potential litigation and transactions;

7. To monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or,

8. As otherwise provided by this Order.

V.

IT IS FURTHER ORDERED THAT sixty (60) days from the date this Order becomes final, on the first anniversary of the date this Order becomes final, and thereafter annually on the anniversary of the date this Order becomes final until the earlier of the expiration of the last to expire of the AW Tile Business Agreements or the termination of this Order, Respondent Keystone shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Each report shall describe in reasonable detail the provision of all products and services under any AW Tile Business Agreement, and identify and describe any claims or disputes between Respondent Keystone and Respondent Saint-Gobain about whether either of them has complied fully with its obligations under any such agreement.

VI.

IT IS FURTHER ORDERED THAT: that Respondents

Keystone and Saint-Gobain shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Respondent Keystone or Respondent Saint Gobain;

B. Any proposed acquisition, merger or consolidation of Respondent Keystone or Respondent Saint-Gobain; or,

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

VII.

IT IS FURTHER ORDERED THAT for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent Keystone made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent Keystone shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 7, 2021.

By the Commission.

ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Keystone Holdings LLC ("Keystone") and Compagnie de Saint-Gobain ("Saint-Gobain"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects resulting from Keystone's proposed acquisition of certain Advanced Ceramics Business assets from Saint-Gobain ("proposed acquisition"). As originally structured, Keystone would have acquired Saint-Gobain's worldwide assets and businesses relating to the manufacture and sale of alumina wear tiles. To resolve the competitive concerns raised by the proposed acquisition, Keystone and Saint-Gobain have re-structured the original transaction to exclude Saint-Gobain's North American alumina wear tile business operated out of a facility in Latrobe, Pennsylvania.

Under the terms of the proposed Consent Agreement, Keystone is required for ten years to obtain prior approval from the Commission for the direct or indirect acquisition of Saint-Gobain's

alumina wear tile business in Latrobe or certain other assets owned or controlled by Saint-Gobain relating to the research, development, marketing, and sale anywhere in the world of alumina wear tile produced or manufactured in North America. The proposed Consent Agreement also requires that Saint-Gobain for five years provide advance written notice to the Commission prior to leasing or selling the Latrobe, Pennsylvania facility or selling, assigning, or otherwise conveying substantially all its interest in the Saint-Gobain alumina wear tile business. In addition, with limited exceptions, Saint-Gobain is obligated to provide advance written notice to the Commission prior to closing the Latrobe, Pennsylvania facility or ceasing operation or production of alumina wear tiles at the facility.

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

On June 28, 2010, Keystone and Saint-Gobain entered into a merger agreement under which Keystone proposed to acquire Saint-Gobain's Advanced Ceramics Business, including facilities in Europe, North America, South America, and Asia for a purchase price of $245 million. As originally structured, the assets acquired by Keystone would have included the Latrobe facility and other assets relating to the manufacture and sale of alumina wear tiles. On December 2, 2010, however, in an effort to resolve competitive concerns relating to the original transaction, Keystone and Saint-Gobain amended their agreement to exclude from the sale Saint-Gobain's North American alumina wear tile business.

The Commission's complaint alleges that the initial proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15. U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the manufacture and sale of standard and pre-

engineered alumina wear tile in North America. Although Saint-Gobain now proposes to retain its North American alumina wear tile business, a credible risk exists that the parties could re-negotiate the sale of Saint-Gobain's alumina wear tile business in the future, or that Saint-Gobain could sell the business upon terms that would reduce competition in the North American alumina wear tile markets. Therefore, the proposed Consent Agreement requires that Keystone obtain the Commission's prior approval in advance of any acquisition of Saint-Gobain's alumina wear tile business or related assets, and requires that Saint-Gobain provide written notice to the Commission prior to selling or ceasing its alumina wear tile business or selling or leasing its Latrobe, Pennsylvania facility. This remedy preserves competition in the North American markets for the manufacture and sale of alumina wear tile.

Parties

Keystone is the holding company of CoorsTek, Inc. ("CoorsTek"), which is a leading technical ceramics manufacturer, supplying ceramics based products for use in defense, medical, automotive, semiconductor, and power generation applications, among others. Keystone is headquartered in Golden, Colorado with facilities in North America, Europe and Asia. Keystone manufactures and sells alumina wear tile for use in high wear applications at its facilities in Golden, Colorado.

Saint-Gobain is a highly diversified, multinational company, headquartered in Courbevoie, France. The Advanced Ceramics Business includes ceramic components such as hot surface igniters, electro-ceramic parts for household appliances, ceramic balls for high-performance bearings, automobile water pump seals, special components for the semiconductor industry, agricultural spray nozzles, and other dense alumina components, such as alumina wear tile. Saint-Gobain manufactures and sells alumina wear tile out of its Latrobe, Pennsylvania facility. In 2009, Saint-Gobain's Advanced Ceramics Business achieved sales of 135 million euros.

The Products and Structure of the Alumina Wear Tile Markets

The Commission's complaint alleges that Keystone's acquisition of Saint-Gobain's North American alumina wear tile assets poses substantial antitrust concerns in both the pre-engineered and standard alumina wear tile markets, or alternatively, an all alumina wear tile market in North America. Alumina wear tile is used to line material-handling equipment to protect against abrasion and premature wear caused by the materials that pass through the equipment, extending the life of the equipment for years. Although other materials could be used as a wear solution these materials are not viable substitutes for alumina wear tile, as they do not have the unique price and wear attributes that are required in applications where alumina wear tile is commonly used.

The Commission's complaint alleges that the relevant markets within which to analyze the transaction are standard and pre-engineered alumina wear tile, or alternatively, all alumina wear tile. Standard alumina wear tile comes in a variety of predetermined sizes and shapes whereas pre-engineered alumina wear tile is custom made-to-order to fit complex shapes that standard tile sizes cannot accommodate.

The Commission's complaint alleges that the relevant geographic market in which to assess the impact of the proposed acquisition is North America. Successful participation in the market requires an established North American presence, most notably North American sales support and facilities from which to inventory and distribute alumina wear tile. Alumina wear tile companies that do not have an established presence in North America do not effectively compete for the business of U.S. alumina wear tile purchasers.

Keystone and Saint-Gobain are two of three significant suppliers of pre-engineered alumina wear tile and two of four significant suppliers of standard alumina wear tile in North America. In an all alumina wear tile market, Keystone and Saint-Gobain are two of four significant suppliers in North America. The acquisition would

increase concentration levels substantially in markets that already are highly concentrated.

Effects of the Acquisition

The Commission's complaint charges that the proposed acquisition would enhance the likelihood of collusion or coordinated interaction among the remaining firms in the market. Certain market conditions, including product homogeneity and the availability of detailed market information about customers and transactions are conducive to the firms reaching terms of coordination and detecting deviations from those terms.

The Commission's complaint also charges that Keystone's acquisition of Saint-Gobain's North American alumina wear tile assets would eliminate actual, direct, and substantial competition between CoorsTek and Saint-Gobain. By increasing CoorsTek's market share substantially, while at the same time eliminating the most significant competitor in the market, an acquisition of Saint-Gobain's North American alumina tile assets likely would allow CoorsTek to unilaterally charge higher prices for alumina wear tile.

The Commission's complaint alleges that significant impediments to entry, expansion or repositioning in the alumina wear tile markets make entry unlikely, untimely and likely unprofitable. The size of the investment and the time needed to enter the relevant markets relative to the size of the overall market is substantial. Entry is made more difficult due to reputational hurdles, and there is uncertainty that an entrant could secure the sales to make the investment profitable. As a result, new entry, expansion, or repositioning by other firms sufficient to achieve a significant market impact is unlikely to ameliorate the harms posed by the proposed transaction.

The Proposed Consent Agreement

The proposed Consent Agreement addresses the competitive risks of a future sale of Saint-Gobain's North American alumina tile business to Keystone or others. By imposing certain prior approval and prior notice conditions on Keystone and Saint-Gobain, the remedy serves to ensure that the assets of Saint-Gobain's North American alumina wear tile business will remain, and continue to compete, in the North American alumina wear tile markets.

Pursuant to the proposed Consent Agreement, for a period of ten years Keystone must obtain Commission approval prior to acquiring, directly or indirectly, Saint-Gobain's alumina wear tile assets. These assets primarily include the Latrobe facility, but also include assets of Saint-Gobain's alumina wear tile business or any interest in assets owned or controlled by Saint-Gobain relating to the research, development, marketing, and sale anywhere in the world of alumina wear tile produced and manufactured in North America.

Pursuant to the proposed Consent Agreement, for a period of five years Saint-Gobain must provide advance written notification to the Commission before selling all or substantially all of its North American alumina wear tile business to any person other than an affiliate. Saint-Gobain also must provide prior notice to the Commission before closing or ceasing operations at the Latrobe facility, subject to certain exceptions for maintenance, construction of improvements, and the like, and for involuntary closures due to force majeure, health and safety emergencies, and other such events.

As part of ensuring the continued viability of Saint-Gobain's alumina wear tile business, Keystone, pursuant to the proposed Consent Agreement, must comply with all terms of alumina wear tile business agreements between Keystone and Saint-Gobain. One of these agreements is a supply agreement for certain types of standard alumina tile produced at the Vinhedo, Brazil facility ("Vinhedo tile") that Keystone will acquire from Saint-Gobain. This supply agreement gives Saint-Gobain access to the alumina wear tile from the Vinhedo facility for a limited interim period, by which time

Saint-Gobain will be required to find another source for the Vinhedo tile or produce it internally.

Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the comments received, and decide whether to withdraw from the proposed Consent Agreement, modify it, or make it final. By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to inform and invite public comment on the proposed Consent Agreement, including the proposed remedy, and to aid the Commission in its determination of whether to make the proposed Consent Agreement final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement, nor to modify the terms of the proposed Consent Agreement in any way.

IN THE MATTER OF

GEMTRONICS, INC. AND WILLIAM H. ISELY

OPINION OF THE COMMISSION AND ORDER AFFIRMING THE INITIAL DECISION AND DENYING RESPONDENTS' APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES

Docket No. 9330
Decision, February 11, 2011

In this Opinion, the Commission affirms the Initial Decision denying the application filed by respondents Gemtronics, Inc. and William H. Isely ("respondents") for an award of attorneys' fees. The Administrative Law Judge dismissed the complaint after determining that insufficient evidence existed to support a finding of liability. The respondents subsequently filed a motion for award of attorneys' fees pursuant to the Equal Access to Justice Act (EAJA). The Administrative Law Judge denied respondents' motion and respondents appealed. In affirming the Administrative Law Judge's ruling, the Commission determined that Complaint Counsel had a "reasonable basis in law and fact" for bringing the complaint against respondents and an award pursuant to EAJA was, therefore, unwarranted.

Participants

For the *Commission*: *Barbara Bolton*.

For the *Respondents*: *William H. Isely*, pro se.

OPINION OF THE COMMISSION

By LEIBOWITZ, Chairman, for a Unanimous Commission:

Upon consideration of the record and the briefs submitted in connection with this matter,[1] the Commission denies Respondents' appeal and affirms the Chief Administrative Law Judge's Initial Decision on Respondents' Application for an Award of Attorney Fees and Other Expenses.

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[1] In addition to the parties' briefs, an *amicus curiae* brief supporting Respondents was submitted by S.M. Oliva.

I. BACKGROUND AND PROCEEDINGS BELOW

The Commission issued the Complaint in this matter on September 16, 2008 against Gemtronics, Inc. and William H. Isely ("Isely") (collectively, "Respondents"). The Complaint alleged that Respondents engaged in deceptive acts or practices, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 52, by disseminating, or causing the dissemination of, false advertisements for a purported herbal cancer cure, RAAX11, through an Internet website, www.agaricus.net. Complaint ¶¶ 3-5, 11. Respondents denied these allegations. In particular, Respondents asserted that they had no authority over or ability to control the content of www.agaricus.net, and that a Brazilian company, Takesun do Brasil, and its agents or other individuals not named in this action owned and exclusively controlled that website and caused the dissemination of the advertisements challenged in the Complaint. Answer ¶¶ 3, 5.

The parties conducted discovery, at the conclusion of which each side submitted a motion for summary decision under Rule 3.24 of the Commission Rules of Practice, 16 C.F.R. § 3.24. Chief Administrative Law Judge ("ALJ") D. Michael Chappell, who presided over the pretrial proceedings and the trial, denied each side's motion for summary decision because, upon consideration of the evidence submitted by the parties, he could "not conclude that there is no genuine dispute of fact as to any material issue or that either party is entitled to judgment as a matter of law." FPC Tr. at 6.[2]

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[2] References to the record are abbreviated as follows:

ID	Initial Decision (Sept. 16, 2009)
IDF	Initial Decision Finding of Fact (Sept. 16, 2009)
EAJA ID	Initial Decision on Respondents' Application for Attorney Fees (Apr. 27, 2010)
FPC Tr.	Transcript of Final Pre-trial Conference (June 24, 2009)
Tr.	Transcript of Testimony before the ALJ (June 24-25, 2009)
JX	Joint Exhibit
RAB	Respondents' Initial Appeal Brief

The final pre-trial conference was held on June 24, 2009, with trial commencing immediately thereafter. Following trial, Respondents and Complaint Counsel submitted post-trial briefs, proposed findings of fact and conclusions of law, and replies to each other's post-trial briefs and proposed findings. The ALJ heard closing arguments on July 30, 2009.

The ALJ issued his Initial Decision on September 16, 2009. The ALJ determined that there was insufficient evidence to hold Respondents liable for deceptive advertising of RAAX11. ID at 8. The ALJ found, among other things, that Complaint Counsel had failed to prove by a preponderance of the evidence that Respondents exercised control over the website www.agaricus.net or were otherwise responsible for disseminating the challenged advertisements on www.agaricus.net. *Id*. at 38-51[3]. Because the ALJ concluded that the facts as demonstrated at trial did not permit a finding of liability under the applicable case law, he dismissed the Complaint. ID at 51-56. Complaint Counsel did not appeal the Initial Decision, and it became the Decision of the Commission on November 9, 2009.

On December 2, 2009, Respondents submitted an application for attorney fees and other expenses under the Equal Access To Justice Act ("EAJA") and Commission Rules 3.81 through 3.83, 16 C.F.R. §§ 3.81-3.83[4]. On December 23, 2009, Respondents submitted a Petition to the Commission for Rulemaking on Maximum Rates for

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[3] Because the ALJ found that Complaint Counsel failed to prove that Respondents were responsible for dissemination of the advertisements on www.agaricus.net, he found it unnecessary to reach the question whether the challenged advertisements were false or misleading. ID at 8.

[4] Respondents submitted a supplement to their application on December 23, 2009, seeking attorney fees for a bill that had not yet issued at the time of their initial application.

Attorney Fees as Provided under Rule 3.81(g)[5]. On April 27, 2010, the ALJ issued his Initial Decision denying Respondents' application for attorney fees, finding that Complaint Counsel's position in the prior adjudicative proceeding was substantially justified[6]. The ALJ did not rule on the Petition for Rulemaking, which is a matter for the Commission, not the ALJ, to decide.

Respondents filed a timely appeal of the ALJ's decision denying their application for attorney fees. The decision of the ALJ is subject to *de novo* review by the Commission. *See* 16 C.F.R. § 3.54.

II. ANALYSIS

A. Standard for Award of Attorney Fees under EAJA

The Equal Access to Justice Act provides in pertinent part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party . . . , fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

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[5] Also, on December 23, Respondents notified the ALJ that they had terminated their counsel's representation. Since then, Respondents have proceeded *pro se*.

[6] In addition, on February 26, 2010, Respondents submitted a Motion to Sanction Complaint Counsel for allegedly improper actions in this action. The ALJ denied the motion, finding that neither the ALJ nor the Commission had the authority to assess such monetary sanctions. Respondents have not appealed the denial of their motion for sanctions.

5 U.S.C. § 504(a)(1)[7]. Section 504(c)(1) further directs that "each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses." 5 U.S.C. § 504(c)(1). Commission Rules 3.81 through 3.83, 16 C.F.R. §§ 3.81-3.83, implement the EAJA.

In addition to the requirement that an applicant for attorney fees be a prevailing party (which nobody disputes Respondents are), the criteria for eligibility include that the petitioning party be (1) an individual with a net worth of not more than $2 million, or (2) the sole owner of an unincorporated business, or any corporation or organization, with a net worth of not more than $7 million and not more than 500 employees. 5 U.S.C. § 504(b)(1)(B); 16 C.F.R. § 3.81(d)(2). Respondents submitted verified net worth exhibits demonstrating they satisfy these eligibility criteria. *See* EAJA ID at 6.

The critical question raised by this appeal is whether the position taken by Complaint Counsel in the prior adjudicative proceedings was "substantially justified." If it was, Respondents are not entitled to an award of attorney fees under the EAJA, notwithstanding the fact that they ultimately prevailed. "The EAJA is not" – after all – "a 'loser pays' statute." *Morgan v. Perry*, 142 F.3d 670, 685 (3d Cir. 1998). Nevertheless, "[t]he burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel." 16 C.F.R. § 3.81(e)(1)(i).

The Supreme Court has held that the government's position is "substantially justified" in the context of a petition for attorney fees under the EAJA "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v.*

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[7] This provision of the EAJA applies to administrative litigation such as the instant matter. Another provision of the EAJA applies to civil litigation arising from government action. *See* 28 U.S.C. § 2412.

Underwood, 487 U.S. 552, 566 n.2 (1988);[8] *see* 16 C.F.R. § 3.81(e)(1)(i) ("[C]omplaint counsel . . . may avoid an award by showing that its position had a reasonable basis in law and fact."). Stated another way, substantial justification exists when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," "if there is a genuine dispute," or "if reasonable people could differ as to the appropriateness of the contested action." *Pierce*, 487 U.S. at 565 (internal quotation marks and brackets omitted). We "cannot assume that the government's position was not substantially justified simply because the government lost on the merits." *Morgan*, 142 F.3d at 685; *accord SEC v. Fox*, 855 F.2d 247, 252 (5th Cir. 1988); *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988). Determination of this issue requires that we examine both Complaint Counsel's prelitigation and litigation positions. *Morgan*, 142 F.3d at 685; *Fox*, 855 F.2d at 252 ("[W]e must examine whether the agency had sufficient information to support a decision to prosecute, and whether the arguments at trial and in pleadings were reasonable in law and fact.").[9]

B. Support for Complaint Counsel's Position

Applying this standard, we must decide whether there was a "reasonable basis in law and fact" for Complaint Counsel's position that Respondents were responsible for making the challenged cancer-cure claims regarding RAAX11 on www.agaricus.net, in violation of Sections 5 and 12 of the FTC Act. The ALJ answered this question in the affirmative, because he found that "reasonable minds" might accept Complaint Counsel's evidence as adequate to

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[8] Although *Pierce* decided the meaning of "substantially justified" in 28 U.S.C. § 2412(d)(1)(A) (the part of the EAJA applicable in civil litigation), the language is identical to that in 5 U.S.C. § 504(a)(1) (the part of the EAJA applicable to attorney fees in administrative litigation). Courts have therefore relied on *Pierce* when evaluating the meaning of "substantially justified" in the context of administrative litigation. *See, e.g.*, *Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1233 (9th Cir. 1997); *First Nat'l Monetary Corp. v. CFTC*, 860 F.2d 654, 657 (6th Cir. 1988).

[9] *See* 5 U.S.C. § 504(b)(1)(E).

support a conclusion that Respondents participated in the dissemination of the advertisements on www.agaricus.net. EAJA ID at 10-11. The ALJ noted that he had denied both sides' motions for summary judgment in the prior adjudicative proceeding because there was a "genuine dispute" about the facts, and the existence of such a "genuine dispute" satisfies the "substantial justification" standard articulated in *Pierce*, 487 U.S. at 565. EAJA ID at 11-12.

We agree with the ALJ. Complaint Counsel presented evidence tying Respondents to the challenged advertisements on www.agaricus.net. This included evidence that: Isely formed a corporation in the name of "Gemtronics, Inc." in 2006, with its principal place of business at Isely's home address, and prior to that time did business under the unregistered trade name "Gemtronics," IDF 2, 13-14, 16-17; Isely also did business under the trade name Takesun USA (identifying it with products manufactured by Takesun do Brasil), IDF 20-21, 23-27; Isely was listed as the domain registrant and administrative, technical, and zone contact for Takesun do Brasil's website www.agaricus.net, IDF 154-55; Isely's name and telephone number were listed throughout www.agaricus.net, and the website directed U.S. consumers to call Isely for product information and ordering, IDF 93-94, 96, 100, 104-05, 108, 111-13, 119-21; two undercover purchases of RAAX11 made by an FTC investigator through www.agaricus.net were fulfilled by Isely, under the name Gemtronics, and a purchase confirmation webpage from the second order identified Gemtronics as the biller, IDF 124, 131, 143-45; and promotional literature that Isely included in one of the packages referred to cancer studies showing a "positive response" to "the RAAX11/Agaricus OPC Protocol,"[10] contained Isely's telephone number and e-mail address (under the name Gemtronics), and directed consumers to go to www.agaricus.net for more information and U.S. sales, IDF 147-48, 152. Reasonable people could certainly view this evidence as supporting a conclusion that Respondents sold RAAX11 through

[10] The other package sent by Isely also included a brochure entitled "RAAX11/Agaricus OPC Protocol," but it was largely illegible because the package was damaged in transit. EAJA ID at 26 n.4; JX 47.

www.agaricus.net and participated in the dissemination of cancer-cure claims regarding RAAX11 on that website.[11]

Although Respondents disputed the FTC's allegations and offered evidence that other persons or entities owned and controlled www.agaricus.net, that evidence did not negate Complaint Counsel's evidence indicating Respondents' apparent participation in the advertising and sale of RAAX11 on that website. For example, although a representative of the domain registration company testified that the owner of the account for www.agaricus.net was an individual named George Otto (also known as George Otto Kather) located in Brazil, he further testified that others could possess the username and password required to control the website's content. JX 4 at 14-16. Moreover, Respondents' evidence showing that Isely's name and contact information had been removed from the website and domain registration as of April 2008 (after the FTC contacted Isely) did not establish who owned or controlled the website prior to that time. *See* EAJA ID at 10 n.6. Indeed, as the ALJ observed, the fact that Respondents apparently were able to cause these changes to the content of and domain registration information for www.agaricus.net was a reasonable basis for concluding that Respondents exercised some control over that website. *Id.* at 11.

Furthermore, while Isely testified at his deposition that he fulfilled the FTC's undercover purchases made through www.agaricus.net only as a favor to George Otto, and that he did not sell RAAX11 through that website, he seemingly contradicted himself when he testified, later in the deposition, that if the purchases of RAAX11 through www.agaricus.net had been paid for by credit card (rather than using PayPal), he would have received

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[11] Indeed, when the Commission voted to issue the complaint, it found – based on this evidence – that there was "reason to believe" that Respondents had engaged in violations of the FTC Act. *See* 15 U.S.C. § 45(b) (providing that the Commission may issue a complaint "[w]henever the Commission shall have reason to believe that such a person . . . has been or is using any . . . unfair or deceptive act or practice in or affecting commerce").

those payments. JX 12 at 124. Reasonable people could come to different conclusions from this testimony about the extent of Respondents' participation in the challenged conduct. Had Complaint Counsel's interpretation of the evidence been borne out at trial, FTC precedent would have supported holding them liable under Sections 5 and 12 of the FTC Act, notwithstanding that other persons not named in the complaint might also have been liable in connection with the dissemination of the challenged advertisements.[12]

It is precisely because there was a "genuine dispute" about the facts that the ALJ denied the parties' motions for summary judgment. *Id*. at 11-12; FPC Tr. at 6. Given the commonality between that inquiry and the standard for substantial justification under the EAJA, *Pierce*, 487 U.S. at 565 (substantial justification exists if there is a "genuine dispute"), there is a presumption that a government case strong enough to survive a motion for summary judgment is substantially justified. *See, e.g., United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 381-82 (7th Cir. 2010); *FTC v. Magazine Solutions, LLC*, No. 7-692, 2010 U.S. Dist. LEXIS 108332 at *6 (W.D. Pa. Oct. 12, 2010). That presumption is not undermined here by the fact that the ALJ ultimately determined that the evidence adduced at trial did not support the inferences urged by Complaint Counsel. As the ALJ noted in his decision dismissing the complaint, this outcome depended largely on his assessment of Isely's credibility during his testimony at trial. ID at 38. *See Blaylock Elec.*, 121 F.3d at 1235-36 (affirming NLRB's determination that its counsel was substantially justified in pursuing the case through trial, where "the power of [respondent's] rebuttal

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[12] *See, e.g, In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 874-76 (1977), *aff'd and modified*, 608 F.2d 294 (7th Cir. 1979) (holding liable both the advertising agency that created deceptive advertisements and the retailer that distributed advertisements); *Standard Oil Co. v. FTC*, 577 F.2d 653, 659-60 (9th Cir. 1978) (affirming liability of advertising agency that actively participated in preparation of advertisement that it knew or should have known was deceptive); *Mueller v. United States*, 262 F.2d 443, 445-46 (5th Cir. 1958) (affirming liability where defendant's false advertisements were disseminated by others); *Schafe v. FTC*, 256 F.2d 661, 664 (6th Cir. 1956) (same).

case depended in substantial part on the ALJ's decision . . . whether to credit [the witness's] testimony"). Under these circumstances, we find that Complaint Counsel was substantially justified both in bringing this action against Respondents and in pursuing the case through trial.[13]

Respondents argue that the Commission acted unreasonably in bringing this action against them because it lacks jurisdiction over foreign websites, failed to enlist the assistance of Brazilian authorities to pursue perpetrators in that country under the authority of the U.S. SAFE WEB Act,[14] and generally failed to conduct a thorough investigation. None of these arguments has merit. The Commission unquestionably has jurisdiction under the FTC Act to bring an enforcement action targeting unfair or deceptive acts or practices that harm U.S. consumers – and here there is no dispute that the challenged claims regarding RAAX11 on www.agaricus.net were disseminated, and sales were made, to U.S. consumers[15]. The fact that the website may have been hosted in a foreign country does not deprive the Commission of jurisdiction. Moreover, although the

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[13] The record here distinguishes this case from the two cases principally relied on by Respondent. *See* RAB at 15-16, 19. Unlike *Hess Mechanical Corp. v. NLRB*, 112 F.3d 146 (4th Cir. 1997), in which the agency filed a complaint based on only "a single, uncorroborated affidavit and in the face of a wall of adverse evidence," *id.* at 150, the FTC's complaint was supported by evidence from numerous sources that pointed to Respondents as participants in the challenged conduct, and this evidence was not negated by Respondents' evidence implicating George Otto. And unlike *United States v. Hallmark Construction Co.*, 200 F.3d 1076 (7th Cir. 2000), in which the court faulted the ALJ for failing to evaluate the reasonableness of the government's decision to proceed with litigation in the face of conflicting evidence, we have considered this question (as did the ALJ) and find that Complaint Counsel was justified in proceeding with this action, notwithstanding the existence of certain conflicting evidence.

[14] Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers beyond Borders Act of 2006, Pub. L. No. 109-455, codified to the FTC Act, 15 U.S.C. §§ 41 *et seq*.

[15] Respondents rely on Section 5(a)(3), 15 U.S.C. § 45(a)(3), in support of their jurisdictional argument, but that provision does not apply to unfair or deceptive acts or practices.

U.S. SAFE WEB Act provides the Commission with enhanced tools for investigating cross-border fraud, nothing in the Act prescribes the manner in which investigations are to be conducted or obligates the Commission to investigate potential foreign defendants in lieu of domestic defendants or respondents.

Furthermore, we find no inconsistency between the ALJ's finding, in the prior adjudicative proceeding, that the investigation in this matter "could have [been] better," IDF 104, and our (and the ALJ's) conclusion that this action was substantially justified. Where, as here, ample evidence pointed to Respondents as parties responsible for the challenged conduct, the Commission was justified in bringing an action against them, notwithstanding that there may have been unresolved questions about certain aspects of the scheme, including other potential defendants. Although Complaint Counsel ultimately did not succeed in proving its case against Respondents, Complaint Counsel's position had a reasonable basis in both law and fact, making an award of attorney fees and costs under the EAJA unwarranted.

III. CONCLUSION

Accordingly, for the reasons stated above, we affirm the decision of the ALJ denying Respondents' application for attorney fees and other expenses. Because the application for attorney fees is denied, there is no need for us to address the merits of Respondents' petition for a rulemaking to increase the maximum rates for attorney fees, and that petition is also denied.

ORDER AFFIRMING THE INITIAL DECISION AND DENYING RESPONDENT'S APPLICATION FOR AN AWARD OF ATTORNEY FEES AND OTHER EXPENSES

The Commission has heard this matter upon the appeal of Respondents from the Initial Decision, and upon briefs in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has

determined to affirm the Initial Decision and deny Respondents' Application for an Award of Attorney Fees and Other Expenses. Accordingly,

IT IS ORDERED that the Initial Decision of the Administrative Law Judge be, and it hereby is, **AFFIRMED**; and

IT IS FURTHER ORDERED that Respondents' Application for an Award of Attorney Fees and Other Expenses be, and it hereby is, **DENIED**.

By the Commission.

IN THE MATTER OF

NONPROFIT MANAGEMENT LLC, D/B/A TESTED GREEN AND JEREMY RYAN CLAEYS

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

Docket No. C-4315; File No. 102 3064
Filed February 23, 2011 – Decision February 23, 2011

This consent order relates to allegations that Nonprofit Management LLC, doing business as Tested Green, and Jeremy Ryan Claeys ("Tested Green") in their advertising, marketing and selling of Tested Green environmental certifications represented that the products, services, and programs bearing the certification had been independently and objectively evaluated based on their environmental attributes, when, in fact, they had not. The complaint alleges that, by furnishing businesses with the certification and the tools to advertise it, respondents provided the means and instrumentalities for the commission of deceptive acts and practices, and thus committed a deceptive act in violation of Section 5 of the Federal Trade Commission Act. In addition, the complaint alleges that Tested Green deceived consumers by representing that endorsements by the National Green Business Association and the National Association of Government Contractors were independent, when, in fact, Tested Green owns and operates both organizations. The consent order prohibits Tested Green from misrepresenting the fact that they have, or a third party has, evaluated a product based on its environmental benefits; that respondents have the expertise to evaluate the environmental benefits of a product; the number of certifications they issue; and that a product is endorsed by an independent organization. The consent order also bars Tested Green, in connection with the marketing of any product or certification, from providing others with the means and instrumentalities to make any false or misleading statement.

Participants

For the Commission: *Elsie B. Kappler* and *James A. Kohm.*

For the Respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nonprofit Management LLC and Jeremy Ryan Claeys (collectively "Respondents") have violated provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nonprofit Management LLC, also doing business as Tested Green, is a Delaware limited liability corporation with a principal office at 1250 Connecticut Avenue, NW, Suite 200, Washington, DC 20036.

2. Respondent Jeremy Ryan Claeys, also doing business as Tested Green, is an officer and member of Nonprofit Management LLC. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of Nonprofit Management LLC. His principal office, doing business as Tested Green, is at 1250 Connecticut Avenue, NW, Suite 200, Washington, DC 20036.

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

4. From approximately February 2009 through April 2010, Respondents conducted business as "Tested Green." In this capacity, Respondents advertised, marketed, offered for sale, and sold the Tested Green Certification, depicted below:

5. Respondents advertised and sold the Tested Green Certification to the public throughout the United States via their website, www.testedgreen.com ("Tested Green website"), and via

emails that linked to the Tested Green website that Respondents repeatedly sent to approximately 30,000 persons.

6. Respondents claimed on their website that Tested Green was "endorsed by the National Green Business Association and the National Association of Government Contractors."

7. The National Green Business Association and National Association of Government Contractors are names for businesses owned and operated by Respondent Jeremy Claeys.

8. Respondents touted Tested Green on their website as "the nation's leading certification program for businesses that produce green products or use green processes in the manufacture of goods and services," stating that it "served over 45,000 certifications in the United States."

9. Respondents repeated this claim in the mass emails they sent during 2009, boasting that Tested Green was "the nation's leading certification for green businesses with over 45,000 certifications in the United States." In 2010, Respondents modified their mass emails to state that Tested Green was "the nation's leading certification for green businesses with over 65,000 certifications in the United States."

10. Respondents promised on the Tested Green website that the businesses that purchased Tested Green Certifications would have access to certain "promotional tools":

> Tested Green provides a simple way to certify your business as "green" and provides a package of advertising tools to show you have a verified green product, service or manufacturing process. Our unique certification gives you a branded verification website that you can customize for your business. Certification seals are available that automatically link to your custom site to verify your green status.

* * *

> Once you receive certification, several tools are available to promote your green certification. Tested Green maintains a certification verification page for every certified business. This customized page is yours to edit and promote to show you are a verified green business.

11. Tested Green offered two types of certifications: "Rapid Certify" and "Pro Certify," at an annual cost of $189.95 and $549.95, respectively.

12. According to the Tested Green website, to receive either certification:

> you will answer a series of questions about the green activities your business participates in. Those answers will appear on your certification page along with other business information.

13. In the case of the "Pro" Certification, Respondents represented that businesses were required to supply documentation and that "a site visit may be required to verify the green practices are legitimate and meet universal green standards."

14. No applicant for a Tested Green Certification was required to answer a series of questions about the green activities his business participates in, and no applicant for "Pro" Certification was required to submit documentation or subjected to a site visit as a condition of certification. All an applicant needed to do was to provide name and address information, and pay the indicated amounts via credit card.

15. Every one of the 129 persons that applied for Tested Green Certification and paid the designated amounts was given a Tested Green Certification.

16. Immediately upon certification, Respondents provided the 129 businesses with various tools to promote their Tested Green-

certified status, including access to the Tested Green logo via HTML code, and customized "certification verification" profiles for their businesses.

VIOLATIONS OF THE FTC ACT

COUNT I
MEANS AND INSTRUMENTALITIES

17. Respondents' Tested Green Certification represented expressly or by implication that the products, services, programs, or entities bearing such certification had been independently and objectively evaluated based on their environmental attributes or benefits.

18. In truth and in fact, the products, services, programs, and entities bearing the Tested Green certification had not been independently and objectively evaluated based on their environmental attributes or benefits.

19. By furnishing businesses with Tested Green Certifications, along with access to the HTML code for the Tested Green logo, and a "certification verification page" that such businesses could edit and use to promote their Tested Green certified status, Respondents provided businesses with the means and instrumentalities for the commission of deceptive acts and practices.

20. Therefore, Tested Green's practices, as described in Paragraphs 17-19, above, constitute deceptive acts and practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

COUNT II
DECEPTION IN USE OF ENDORSEMENTS

21. Through the means described in Paragraphs 4-6, above, Respondents represented, expressly or by implication, that the National Green Business Association and the National Association

of Government Contractors are independent from Respondents.

22. In truth and in fact, these organizations are not independent from Respondents, but are owned and operated by them.

23. Therefore, the representation in Paragraph 21 is false and misleading.

COUNT III
DECEPTION IN FAILURE TO DISCLOSE MATERIAL FACTS IN USE OF ENDORSEMENTS

24. Through the means described in Paragraphs 4-6, above, Respondents represented, expressly or by implication, that its alleged endorsers, the National Green Business Association and National Association of Government Contractors, are independent from Respondents.

25. Respondents failed to disclose, however, that they own and operate the National Green Business Association and National Association of Government Contractors.

26. The facts described in Paragraph 25 would have been material to consumers in their purchasing decisions.

27. Therefore, Respondents' failure to disclose these facts, in light of the representations made, constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission, on this twenty-third day of February, 2011, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order ("consent agreement"), an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Nonprofit Management LLC, also doing business as Tested Green, is a Delaware limited liability corporation with a principal office at 1250 Connecticut Avenue, NW, Suite 200, Washington, DC 20036.

2. Respondent Jeremy Ryan Claeys, also doing business as Tested Green, is an officer and member of Nonprofit Management LLC. Individually, or in concert with others, he formulates, directs, controls, or participates in

the policies, acts, or practices of Nonprofit Management LLC. His principal office, doing business as Tested Green, is at 1250 Connecticut Avenue, NW, Suite 200, Washington, DC 20036.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "Respondents" shall mean Nonprofit Management LLC, also doing business as Tested Green, its successors and assigns; and Jeremy Ryan Claeys, individually, also doing business as Tested Green, and as an officer and member of Nonprofit Management LLC.

2. "Certification" shall include any seal, logo, emblem, shield, or other insignia that expresses or implies approval or endorsement of any product, package, service, practice, or program, or any attribute thereof.

3. "Clearly and prominently" shall mean:

   A. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

   B. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the

required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

C. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication;

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

E. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

4. "Endorsement" means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser

and may be an individual, group, or institution.

5. "Environmental certification" shall mean any certification that expresses or implies that a product, package, service, practice, or program is environmentally friendly, environmentally superior, or environmentally preferable to other products, packages, services, practices, or programs; or expresses or implies other environmental attributes or benefits.

6. "Material connection" shall mean any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

7. "Tested Green Certification" shall refer to the certification issued by Respondents that is depicted below:

I.
MAKING MISREPRESENTATIONS

IT IS HEREBY ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with the labeling, advertising, marketing, promotion, offering for sale, sale, or distribution of any product, package, certification, service, practice, or program, are permanently restrained and enjoined from making or assisting others in making, expressly or by implication, orally or in writing, any misrepresentation, including misrepresenting:

A. the fact that, or degree to which, Respondents have, or a third party has, evaluated a product, package, service, practice, or program based on its environmental benefits or attributes;

B. that Respondents have, or a third party has, the appropriate expertise to evaluate the environmental benefits or attributes of a product, package, service, practice, or program;

C. the number of certifications issued by Respondents; or

D. that a product, package, certification, service, practice, or program is endorsed by an independent person or organization.

II.
MEANS AND INSTRUMENTALITIES

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with the labeling, advertising, marketing, promotion, offering for sale, sale, or distribution of any product, package, certification, service, practice, or program, are permanently restrained and enjoined from providing to others the means and instrumentalities to make, expressly or by implication, orally or in writing, any false or misleading statement.

III.
DISCLOSURE OF MATERIAL CONNECTION BETWEEN ENDORSER AND ENDORSED PERSON OR ENTITY

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees

and all persons or entities in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, in connection with the labeling, advertising, marketing, promotion, offering for sale, sale, or distribution of any product, package, certification, service, practice, or program, shall not make any representation, in any manner, expressly or by implication, about any user or endorser of such product, package, certification, service, practice, or program unless they disclose, clearly and prominently, a material connection, when one exists, between such user or endorser and the Respondents or any other individual or entity labeling, advertising, marketing, promoting, offering for sale, selling, or distributing such product, package, certification, service, practice, or program.

IV.

IT IS FURTHER ORDERED that Respondent Nonprofit Management LLC, and its successors and assigns, and Respondent Jeremy Ryan Claeys shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

A. All advertisements, labeling, packaging and promotional materials containing the representation;

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

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

D. All acknowledgments of receipt of this order, obtained pursuant to Part V.

V.

IT IS FURTHER ORDERED that Respondent Nonprofit Management LLC, and its successors and assigns, and Respondent Jeremy Ryan Claeys, shall deliver a copy of this order to all current and future principals, members, officers, directors, and managers; and all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondents shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001, *et seq*. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that Respondent Nonprofit Management LLC, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation or any business entity that the corporation directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however*, that, with respect to any proposed change about which the Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices

required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, *Re: FTC v. Nonprofit Management LLC and Jeremy Ryan Claeys*, FTC Docket No. C-4315. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if electronic versions of such notices are contemporaneously sent to the Commission at Debrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that Respondent Jeremy Ryan Claeys, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, *Re: FTC v. Nonprofit Management LLC and Jeremy Ryan Claeys*, FTC Docket No. C-4315. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if electronic versions of such notices are contemporaneously sent to the Commission at Debrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that Respondent Nonprofit Management LLC, and its successors and assigns, and Respondent Jeremy Ryan Claeys, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which Respondents have complied with this order. Within ten (10)

days of receipt of written notice from a representative of the Commission, Respondents shall submit additional true and accurate written reports.

IX.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an Agreement Containing Consent Order from Nonprofit Management LLC and Jeremy Ryan Claeys, also doing business as Tested Green ("respondents").

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

This matter involves the advertising, marketing, and sale of environmental certifications. From approximately February 2009 to April 2010, respondents marketed the Tested Green certification using their website, www.testedgreen.com, as well as mass e-mails linking to their website. The marketing claimed that Tested Green was the "nation's leading certification program with over 45,000 certifications in the United States." However, respondents never tested any of the companies to which they issued certifications, and certified anyone willing to pay a designated fee of either $189.95 for a "Rapid" certification, or $549.95 for a "Pro" certification. Immediately upon certifying companies, respondents provided them with HTML text for the Tested Green logo and a "certification verification page" that they could, in turn, use to advertise their Tested Green certified status. Respondents also claimed that Tested Green was endorsed by the National Green Business Association ("NGBA") and the National Association of Government Contractors ("NAGC"), two organizations which they own and operate.

The Commission alleges that the Tested Green certification constituted an express or implied representation that the products, services, programs, or entities bearing the certification had been independently and objectively evaluated based on their

environmental attributes or benefits, when, in fact, they had not. Additionally, by furnishing businesses with the certification and the tools to advertise it, respondents provided such businesses with the means and instrumentalities for the commission of deceptive acts and practices, and accordingly, themselves committed a deceptive act in violation of Section 5 of the FTC Act.

The Commission also alleges that by stating that the NGBA and the NAGC endorsed Tested Green, respondents represented expressly or impliedly that they were independent from these organizations, when, in fact, they own and operate NGBA and NAGC. Therefore, respondents' statement of endorsement by NGBA and NAGC was false and misleading, in violation of Section 5. Similarly, in light of respondents' express and implied representation that these organizations were independent, respondents' failure to disclose their relationship to NGBA and NAGC was deceptive, in violation of Section 5.

Part I of the proposed order prohibits respondents from misrepresenting: (1) the fact that, or degree to which, they have, or a third party has, evaluated a product, package, service, practice, or program based on its environmental benefits or attributes; (2) that respondents have, or a third party has, the appropriate expertise to evaluate the environmental benefits or attributes of a product, package, service, practice, or program; (3) the number of certifications issued by respondents; and (4) that a product, package, certification, service, practice, or program is endorsed by an independent person or organization.

Part II of the proposed order bars respondents, in connection with the labeling, advertising, marketing, promotion, offering for sale, sale, or distribution of any product, package, certification, service, practice, or program, from providing others with the means and instrumentalities to make, expressly or impliedly, any false or misleading statement.

Part III of the proposed order bars respondents from making any representation, expressly or by implication, about any user or

endorser of a product, package, certification, service, practice, or program, unless they clearly and prominently disclose a material connection with such user or endorser, where one exists.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires respondents to retain documents relating to their compliance with the order. Part V requires dissemination of the order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in respondent Nonprofit Management's corporate status. Part VII mandates that respondent Claeys notify the FTC of any changes in his business affiliations or employment. Part VIII mandates that respondents submit a report to the Commission detailing their compliance with the order. Part IX provides that the order expires after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF
TWITTER, INC.

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

Docket No. C-4316; File No. 092 3093
Filed March 2, 2011 – Decision March 2, 2011

This consent order relates to allegations that Twitter, Inc. ("Twitter"), a social networking website that enables users to send brief messages of 140 characters or less to others, falsely represented to consumers that it honored users' privacy choices and that used reasonable and appropriate safeguards to protect nonpublic user information from unauthorized access, in violation of Section 5 of the FTC Act. The consent order prohibits Twitter from misrepresenting the security, privacy, confidentiality, or integrity of any "nonpublic consumer information." The order requires Twitter to establish and maintain a comprehensive information security program that is designed to protect the security, privacy, confidentiality, and integrity of nonpublic consumer information. The consent order also requires Twitter to establish, and on a biennial basis thereafter for ten years, an assessment and report from a qualified, objective, independent third-party professional certifying that it has in place a security program that provides reasonable assurance that the security, privacy, confidentiality, and integrity of nonpublic consumer information is protected.

Participants

For the Commission: *Laura D. Berger, Cora Tung Han, Maneesha Mithal,* and *Christopher Olsen.*

For the Respondent: *Alexander MacGillivray, Twitter, Inc.; Lydia Parnes, Wilson Sonsini Goodrich & Rosati.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Twitter, Inc. ("Twitter" or "respondent"), a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Twitter is a privately-owned, Delaware corporation with its principal office or place of business at 795 Folsom St., Suite 600, San Francisco, CA 94103.

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 FTC Act.

RESPONDENT'S BUSINESS PRACTICES

3. Since approximately July 2006, Twitter has operated www.twitter.com, a social networking website that enables users to send "tweets" – brief updates of 140 characters or less – to their "followers" (*i.e.*, users who sign up to receive such updates) via email and phone text. Consumers who use Twitter can follow other individuals, as well as commercial, media, governmental, or nonprofit entities. Using Twitter, consumers may receive discount offers from companies, breaking news from media outlets, and public safety and emergency updates from federal and municipal authorities. In many instances, tweets invite users to click on links to other websites, including websites that consumers may use to obtain commercial products or services.

4. Twitter collects certain information from each user and makes it part of the user's public profile. Such information includes: a user name and profile image, lists of the other Twitter users whom the user follows and is followed by, and, at the user's option, a website address, location, time zone, and one-line narrative description or "bio." In addition, tweets appear in the user profile for both sender and recipient – and are public – except where users "protect" their tweets or send "direct messages," as described in Paragraph 6, below.

5. Twitter also collects certain information about its users that it does not make public. Such information includes: an email address, Internet Protocol ("IP") addresses, mobile carrier or mobile telephone number (for users who receive updates by phone), and the username for any Twitter account that a user has chosen to "block"

from exchanging tweets with the user. This nonpublic information (collectively, "nonpublic user information") cannot be viewed by other users or any other third parties, but – with the exception of IP addresses – can be viewed by the user who operates the account.

6. Twitter offers privacy settings through which a user may choose to designate tweets as nonpublic. For example, Twitter offers users the ability to send "direct messages" to a specified follower and states that "only author and recipient can view" such messages. Twitter also allows users to click a button labeled "Protect my tweets." If a user chooses this option, Twitter states that the user's tweets can be viewed only by the user's approved followers. Unless deleted, direct messages and protected tweets (collectively, "nonpublic tweets") are stored in the recipient's Twitter account.

7. From approximately July 2006 until July 2009, Twitter granted almost all of its employees the ability to exercise administrative control of the Twitter system, including the ability to: reset a user's account password, view a user's nonpublic tweets and other nonpublic user information, and send tweets on behalf of a user. Such employees have accessed these administrative controls using administrative credentials, composed of a user name and administrative password.

8. From approximately July 2006 until January 2009, Twitter's employees entered their administrative credentials into the same webpage where users logged into www.twitter.com (hereinafter, "public login webpage").

9. From approximately July 2006 until July 2008, Twitter did not provide a company email account. Instead, it instructed each employee to use a personal email account of the employee's choice for company business. During this time, company-related emails from Twitter employees in many instances displayed the employee's personal email address in the email header.

RESPONDENT'S STATEMENTS

10. Respondent has disseminated or caused to be disseminated statements to consumers on its website regarding its operation and control of the Twitter system, including, but not limited to:

a. from approximately May 2007 until November 2009, the following statement in Twitter's privacy policy regarding Twitter's protection of nonpublic user information:

> Twitter is very concerned about safeguarding the confidentiality of your personally identifiable information. We employ administrative, physical, and electronic measures designed to protect your information from unauthorized access. (*See* Exhibit 1).

b. since approximately November 17, 2008, the following statements on its website regarding the privacy of direct messages that users send via Twitter:

> **Help Resources/Getting Started/What is a direct message?**
> **What is a direct message? (DM)**
>
> **Private Twitter Messages**
>
> In addition to public updates . . . you can send followers private tweets, called direct messages, too . . .
>
> [direct messages] are not public; only author and recipient can view direct messages. (*See* Exhibit 2; emphases in original).

c. since at least November 6, 2008, the following statements on its website regarding the privacy of protected tweets that users send via Twitter:

Public vs protected accounts

. . .

Public or protected (private)?

When you sign up for Twitter, you have the option of keeping your account public (the default account setting) or protecting the account to keep your updates private . . . Protected accounts receive a follow request each time someone wants to follow them, and only approved followers are
able to see the profile page. If the idea of strangers reading your Twitter updates makes you feel a little weird, try protecting your profile at first. You can always change your mind later. . . .

Protecting your Twitter profile

Not everyone has to see your Twitter updates. Keep your Twitter updates private and approve your followers by protecting your profile . . . Protected account owners control who is able to follow them, and keep their updates away from the public eye . . . (*See* Exhibit 3; emphases in original).

RESPONDENT'S SECURITY PRACTICES

11. Contrary to the statements above, Twitter has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security to: prevent unauthorized access to nonpublic user information and honor the privacy choices exercised by its users in designating certain tweets as nonpublic. In particular, Twitter failed to prevent unauthorized administrative control of the Twitter system by, among other things, failing to:

a. establish or enforce policies sufficient to make administrative passwords hard to guess, including policies that: (1) prohibit the use of common dictionary words as administrative passwords; and (2) require that

such passwords be unique – *i.e.*, different from any password that the employee uses to access third-party programs, websites, and networks;

b. establish or enforce policies sufficient to prohibit storage of administrative passwords in plain text in personal email accounts;

c. suspend or disable administrative passwords after a reasonable number of unsuccessful login attempts;

d. provide an administrative login webpage that is made known only to authorized persons and is separate from the login webpage provided to other users;

e. enforce periodic changes of administrative passwords, such as by setting these passwords to expire every 90 days;

f. restrict each person's access to administrative controls according to the needs of that person's job; and

g. impose other reasonable restrictions on administrative access, such as by restricting access to specified IP addresses.

12. Between January and May 2009, intruders exploited the failures described above in order to obtain unauthorized administrative control of the Twitter system. Through this administrative control, the intruders were able to: (1) gain unauthorized access to nonpublic tweets and nonpublic user information, and (2) reset any user's password and send unauthorized tweets from any user account. In particular:

a. On approximately January 4, 2009, an intruder used an automated password guessing tool to derive an employee's administrative password, after submitting thousands of guesses into Twitter's public login

webpage. The password was a weak, lowercase, letter-only, common dictionary word. Using this password, the intruder could access nonpublic user information and nonpublic tweets for any Twitter user. In addition, the intruder could, and did, reset user passwords, some of which the intruder posted on a website. Thereafter, certain of these fraudulently-reset user passwords were obtained and used by other intruders to send unauthorized tweets from user accounts, including one tweet, purportedly from Barack Obama, that offered his more than 150,000 followers a chance to win $500 in free gasoline, in exchange for filling out a survey. Unauthorized tweets also were sent from eight (8) other accounts, including the Fox News account.

b. On approximately April 27, 2009, an intruder compromised an employee's personal email account, and was able to infer the employee's Twitter administrative password, based on two similar passwords, which had been stored in the account, in plain text, for at least six (6) months prior to the attack. Using this password, the intruder could access nonpublic user information and nonpublic tweets for any Twitter user. In addition, the intruder could, and did, reset at least one user's password.

VIOLATIONS OF THE FTC ACT

COUNT 1

13. As set forth in Paragraph 10, respondent has represented, expressly or by implication, that it uses reasonable and appropriate security measures to prevent unauthorized access to nonpublic user information.

14. In truth and in fact, as described in Paragraph 11, respondent did not use reasonable and appropriate security measures to prevent unauthorized access to nonpublic user information. Therefore, the

representation set forth in Paragraph 13 was, and is, false or misleading.

COUNT 2

15. As set forth in Paragraph 10, respondent has represented, expressly or by implication, that it uses reasonable and appropriate security measures to honor the privacy choices exercised by users.

16. In truth and in fact, as described in Paragraph 11, respondent did not use reasonable and appropriate security measures to honor the privacy choices exercised by users. Therefore, the representation set forth in Paragraph 15 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this second day of March, 2011, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*;

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

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

1. Respondent Twitter, Inc. ("Twitter") is a Delaware corporation with its principal office or place of business at 795 Folsom Street, Suite 600, San Francisco, CA 94103.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Twitter, its successors and assigns, officers, agents, representatives, and employees.

2. "Consumer" shall mean any person, including, but not limited to, any user of respondent's services, any employee of respondent, or any individual seeking to become an employee, where "employee" shall mean an agent, servant, salesperson, associate, independent contractor, or other person directly or indirectly under the control of respondent.

3. "Nonpublic consumer information" shall mean nonpublic, individually-identifiable information from or about an individual consumer, including, but not limited to, an individual consumer's: (a) email address; (b) Internet Protocol ("IP") address or other persistent identifier; (c) mobile telephone number; and (d) nonpublic communications made using respondent's microblogging platform. "Nonpublic consumer information" shall not include public communications made using respondent's microblogging platform.

4. "Administrative control of Twitter" shall mean the ability to access, modify, or operate any function of the Twitter system by using systems, features, or credentials

that were designed exclusively for use by authorized employees or agents of Twitter.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with the offering of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent maintains and protects the security, privacy, confidentiality, or integrity of any nonpublic consumer information, including, but not limited to, misrepresentations related to its security measures to: (a) prevent unauthorized access to nonpublic consumer information; or (b) honor the privacy choices exercised by users.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device, in connection with the offering of any product or service, in or affecting commerce, shall, no later than the date or service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, privacy, confidentiality, and integrity of nonpublic consumer information. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the nonpublic consumer information, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program.

B. the identification of reasonably-foreseeable, material risks, both internal and external, that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of nonpublic consumer information or in unauthorized administrative control of the Twitter system, and an assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, account takeovers, or other systems failures.

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.

D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding nonpublic consumer information such service providers receive from respondent or obtain on respondent's behalf, and the requirement, by contract, that such service providers implement and maintain appropriate safeguards; provided, however, that this subparagraph shall not apply to personal information about a consumer that respondent provides to a government agency or lawful information supplier when the agency or supplier already possesses the information and uses it only to retrieve, and supply to respondent, additional personal information about the consumer.

E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subparagraph C, any

material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

III.

IT IS FURTHER ORDERED that, in connection with its compliance with Paragraph II of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for ten (10) years after service of the order for the biennial Assessments. Each Assessment shall:

A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the nonpublic personal information collected from or about consumers;

C. explain how the safeguards that have been implemented meet or exceed the protections required by Paragraph II of this order; and

D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance to protect the security, privacy, confidentiality, and integrity of nonpublic consumer information and that the program has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

IV.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of:

A. for a period of three (3) years from the date of preparation or dissemination, whichever is later, all widely-disseminated statements, including, but not limited to, statements posted on respondent's website that describe the extent to which respondent maintains and protects the security, privacy, confidentiality, or integrity of any nonpublic consumer information, with all materials relied upon in making or disseminating such statements, except that respondent shall not be required to provide any such statements that are made using the Twitter microblogging platform;

B. for a period of six (6) months from the date received, all consumer complaints directed at respondent, or forwarded to respondent by a third party, that relate to respondent's activities as alleged in the draft complaint and any responses to such complaints;

C. for a period of two (2) years from the date received, copies of all subpoenas and other communications with law enforcement entities or personnel, if such communications raise issues that relate to respondent's compliance with the provisions of this order;

D. for a period of five (5) years from the date received, any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and

E. for a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, for the compliance period covered by such Assessment.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in either corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

VIII.

This order will terminate on March 2, 2031, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Twitter, Inc. ("Twitter").

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

Since approximately July 2006, Twitter has operated www.twitter.com, a social networking website that enables consumers who use Twitter ("users") to send "tweets" – brief

updates of 140 characters or less – to their "followers" (*i.e.*, users who sign up to receive such updates) via email and phone text. Consumers who use Twitter can follow other individuals, as well as commercial, media, governmental, or nonprofit entities. Twitter offers privacy settings through which a user may choose to designate tweets as nonpublic. In addition, Twitter collects certain information about its users that it does not make public ("nonpublic user information"). Such information includes: an email address, Internet Protocol ("IP") addresses, mobile telephone number (for users who receive updates by phone), and the username for any Twitter account that a user has chosen to "block" from exchanging tweets with the user. This nonpublic user information cannot be viewed by other users or any other third parties, but – with the exception of IP addresses – can be viewed after login by the account owner.

The Commission's complaint alleges that Twitter violated Section 5(a) of the FTC Act by falsely representing to consumers that it uses at least reasonable safeguards to protect user information from unauthorized access. The complaint further alleges that, through its statements regarding the privacy settings it offers to enable users to keep their tweets private, Twitter falsely represented that it maintains at least reasonable safeguards to honor the privacy choices exercised by users. Despite these representations, Twitter engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security to prevent unauthorized access to nonpublic user information and honor the privacy choices exercised by such users in designating certain tweets as nonpublic. Specifically, Twitter failed to prevent unauthorized administrative control of the Twitter system, which includes the ability to: reset a user's account password, view a user's nonpublic tweets and other nonpublic user information, and send tweets on behalf of a user. Among other things, Twitter failed to:

a. establish or enforce policies sufficient to make administrative passwords hard to guess, including policies that: (1) prohibit the use of common dictionary words as administrative passwords; or (2) require that such passwords be unique –

i.e., different from any password that the employee uses to access third-party programs, websites, and networks;

b. establish or enforce policies sufficient to prohibit storage of administrative passwords in plain text in personal email accounts;

c. suspend or disable administrative passwords after a reasonable number of unsuccessful login attempts;

d. provide an administrative login webpage that is made known only to authorized persons and is separate from the login webpage provided to other users;

e. enforce periodic changes of administrative passwords, such as by setting these passwords to expire every 90 days;

f. restrict each person's access to administrative controls according to the needs of that person's job; and

g. impose other reasonable restrictions on administrative access, such as by restricting access to specified IP addresses.

The complaint alleges that between January and May 2009, intruders exploited these failures on two occasions in order to obtain unauthorized administrative control of the Twitter system. Through this administrative control, the intruders were able to: (1) gain unauthorized access to nonpublic tweets and nonpublic user information, and (2) reset users' passwords and send unauthorized tweets from users' accounts.

The proposed order applies to "nonpublic consumer information" from or about an individual consumer. "Nonpublic consumer information" is defined broadly to mean nonpublic, individually-identifiable information from or about an individual consumer, including, but not limited to, an individual consumer's: (a) email address; (b) Internet Protocol ("IP") address or other persistent

identifier; (c) mobile telephone number; and (d) nonpublic communications made using Twitter's microblogging platform. The proposed order contains provisions designed to prevent Twitter from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Twitter from misrepresenting the security, privacy, confidentiality, or integrity of any "nonpublic consumer information."

Part II of the proposed order requires Twitter to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, privacy, confidentiality, and integrity of nonpublic consumer information. The security program must contain administrative, technical, and physical safeguards appropriate to Twitter's size and complexity, the nature and scope of its activities, and the sensitivity of the nonpublic consumer information. Specifically, the order requires Twitter to:

- designate an employee or employees to coordinate and be accountable for the information security program;

- identify reasonably-foreseeable, material risks, both internal and external, that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of nonpublic consumer information or in unauthorized administrative control of the Twitter system and assess the sufficiency of any safeguards in place to control these risks;

- design and implement reasonable safeguards to control the risks identified through risk assessment and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;

- develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding nonpublic consumer information they receive from respondent, and

require service providers by contract to implement and maintain appropriate safeguards; and

- evaluate and adjust its information security program in light of the results of the testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on the effectiveness of its information security program.

Part III of the proposed order requires that Twitter obtain within 180 days, and on a biennial basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, privacy, confidentiality, and integrity of nonpublic consumer information is protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. The proposed order requires Twitter to retain for a period of five (5) years from the date received, documents that contradict, qualify, or call into question its compliance with this order. Part IV further requires that Twitter retain all materials relied upon to prepare the third-party assessments for a period of three (3) years after the date that each assessment is prepared. In addition, Part IV requires that Twitter retain all "widely-disseminated statements" that describe the extent to which it maintains and protects the security, privacy, confidentiality, or integrity of any nonpublic consumer information, along with all materials relied upon in making or disseminating such statements, for a period of three (3) years after the date of preparation or dissemination, whichever is later. Part IV also requires Twitter to maintain for six (6) months from the date received all consumer complaints directed at Twitter or forwarded to Twitter from a third party that relate to the activities alleged in the proposed complaint. Finally, Part IV requires that Twitter maintain

for two (2) years from the date received copies of all subpoenas and communications with law enforcement, if such communications relate to Twitter's compliance with the order.

Part V requires dissemination of the order now and in the future to principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Twitter submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF

US SEARCH, INC. AND US SEARCH, LLC

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

Docket No. C-4317; File No. 102 3131
Filed March 14, 2011 – Decision March 14, 2011

This consent order addresses allegations that US Search, Inc. and US Search, LLC (collectively "US Search") engaged in deceptive acts or practices, in violation of Section 5 of the FTC Act, by misrepresenting that the purchase or use of its PrivacyLock service would prevent a consumer's name and address from appearing on US Search's website, in its advertisements, or in its search results. US Search, who operates an online data broker service, sells publicly available information about consumers to other consumers through its website, www.ussearch.com. This publicly available information includes a consumer's name, age, address, phone numbers, email addresses, aliases, maiden name, death records, address history, information about friends, associates, and relatives, marriage and divorce information, bankruptcies, tax liens, civil lawsuits, criminal records, and home values. The consent order includes injunctive relief that enjoins US Search from misrepresenting the effectiveness of its PrivacyLock service or any other service offered to consumers that will allow consumers to remove publicly available information from US Search's search results, websites, and advertisements. The order also requires US Search to refund any money consumers paid for the PrivacyLock service. Under the proposed order, US Search must credit consumers' credit and debit card accounts and notify consumers via email that such credits were made.

Participants

For the *Commission*: *Amanda Koulousias* and *Anthony Rodriguez*.

For the *Respondents*: *Becky Burr, WilmerHale.*

COMPLAINT

The Federal Trade Commission, having reason to believe that US Search, Inc., a corporation, and US Search, LLC, a limited liability

company, 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 US Search, Inc. is a Delaware corporation with its principal office or place of business at 600 Corporate Pointe, Culver City, California 90230.

2. Respondent US Search, LLC is a Delaware limited liability company with its principal office or place of business at 600 Corporate Pointe, Culver City, California 90230. US Search, LLC is a wholly owned subsidiary of US Search, Inc.

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

4. Respondents sell online search services to the public through an online data broker website, www.ussearch.com. For a fee, anyone can go on the website and search publicly available information on individuals by entering certain information about them, such as a name, phone number, or address. Respondents generate search results that may include information such as a consumer's name, age, address, phone numbers, aliases, maiden name, death record, address history, relatives, neighbors, marriage and divorce, associates/roommates, property, bankruptcies, tax liens, civil judgments, lawsuits, state criminal records, small claims and civil judgments, home value, email address, and publicly available online profiles. Respondents' "Reverse Lookup" service can return the name of an individual associated with a particular phone number or property address.

5. Since June 2009, respondents have offered a "PrivacyLock" service to allow consumers to block the appearance of their name and address in respondents' search results. Respondents charged $10 for their "PrivacyLock" service, with certain exceptions. If consumers checked a box indicating that they were victims of identity theft, victims of domestic violence, law enforcement officials, or public

and/or elected officials, and provided supporting documentation, respondents waived the $10 fee. Respondents stopped charging the fee on or about May 24, 2010.

6. During the time period that respondents offered and charged a fee for the "PrivacyLock" service, approximately 6,775 consumers requested the service, of whom 4,960 consumers paid the $10 fee.

7. The "PrivacyLock" service offered by respondents was advertised on respondents' privacy policy page on their website. The privacy policy stated: "If you want to remove your information from our site, please click here to learn how" (the words "click here" were a hyperlink that redirected consumers to the "PrivacyLock" page).

8. In connection with the sale of the "Privacy Lock" service, respondents made the following representation on their privacy policy page, as well as on the "PrivacyLock" page:

a. "US Search obtains most of the information for our products and services from partners who generally obtain it from public records. We do not maintain or control the public records, and we are unable to remove your name from any public records. We do however offer individuals the ability to lock their records on US Search in accordance with laws and US Search policy. Our PrivacyLock service will prevent your name and address from appearing on the (1) US Search Website, (2) US Search Advertisements (advertisements "powered by US Search"), and (3) US Search Reports. There is a service charge of $10.00 per request. Please allow up to 2 business days for your records to be locked. We guarantee that your record will be locked for a period of 1 year."

9. Additionally, in standard communications with consumers who inquired about the "PrivacyLock" service respondents represented the following:

a. "What do I get for my money?"

"When you enroll in the US Search PrivacyLock Service, you are taking a valuable step in securing your personal information. While many information providers either don't offer or don't honor privacy solutions, US Search quickly processes each request and provides verifiable results that can be backed by our 1 year promise."

b. "Why do I have to pay?"

"In addition to removing your information from the US Search website, your information will be suppressed from our affiliate and advertisers websites as well. Once again, this process is backed by our 1 year promise to remove any listings that may reappear at your request."

10. Through the means described in Paragraphs 8 and 9, respondents represented, directly or indirectly, expressly or by implication, that the purchase or use of respondents' "PrivacyLock" would prevent a consumer's name from appearing on respondents' website, in respondents' advertisements, and in respondents' search results.

11. In truth and in fact, in many instances respondents' "PrivacyLock" does not prevent the names of consumers from appearing on respondents' website, in respondents' advertisements, and in respondents' search results. The "PrivacyLock" does not block a consumer's information from appearing in the results of a "reverse search" on the consumer's phone number or address, or in a search of the consumer's address in real estate records. Further, the "PrivacyLock" does not block a consumer's name from showing up as an associate of someone else in a search for another person's name. When consumers change addresses, new records may be generated that are not be subject to the "PrivacyLock." When consumers have multiple records in existence (*e.g.*, John T. Smith and John Thomas Smith), the "PrivacyLock" may apply to only one

record. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission, this fourteenth day of March, 2011, has issued this complaint against respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violation of the Federal Trade Commission Act,15 U.S.C. § 45 *et seq*;

The Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than

jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1.a. Respondent US Search, Inc. is a Delaware corporation with its principal office or place of business at 600 Corporate Pointe, Culver City, California 90230.

1.b. Respondent US Search, LLC is a Delaware limited liability company with its principal office or place of business at 600 Corporate Pointe, Culver City, California 90230. US Search, LLC is a wholly owned subsidiary of US Search Inc.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, “respondents” shall mean US Search, Inc., a corporation, and US Search, LLC, a

limited liability company, their successors and assigns and their officers; and each of the above's agents, representatives, and employees.

2. "Clearly and prominently" shall mean that the required disclosures are unavoidable and of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear, and presented in understandable language and syntax.

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

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of "PrivacyLock" or any other service offered to consumers that will allow consumers to remove publicly available information from respondents' search results, websites, or advertisements, shall not misrepresent, in any manner, expressly or by implication, the effectiveness of such service.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of "PrivacyLock" or any other service offered to consumers that will allow consumers to remove publicly available information from respondents' search results, websites, or advertisements, shall not make any representation, in any manner, expressly or by implication, about the effectiveness of such service, unless they disclose, clearly and prominently, any material limitations regarding such service, including, but not limited to,

(1) any limitations on the duration of the removal; and (2) any circumstances under which information about the consumers will not be removed or will reappear.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, shall:

A. Upon issuance of this order, provide a full and complete refund to any consumer who requested "PrivacyLock" and was assessed a charge for such service, by crediting the credit or debit card used to pay for such service, and providing notice of the refund through an email message sent to affected consumers;

B. The email message shall also include contact information for respondents, including name, address and a toll-free telephone number, for consumers to use to contact respondents and receive a full and complete refund if, for any reason, respondents are unable to credit the consumer's credit or debit card; and

C. For a period of one (1) year after the date of issuance of this order, provide notice to consumers of the refund required by Section III.B. of this order. Such notice shall be clearly and prominently displayed on respondents' website www.ussearch.com; and

D. Within one year of the issuance of this order, respondents shall provide a full and complete accounting to the Commission of all refunds paid to consumers, including amounts paid, and the names and addresses (email and US mail) of consumers who received the refunds. Respondents shall also include in such an accounting all amounts that were not refunded to consumers, for whatever reason. Any amount not refunded to consumers

shall be deposited with the United States Treasury as disgorgement. No portion of this payment to the United States Treasury shall be deemed a payment of any fine, penalty, or punitive assessment.

IV.

IT IS FURTHER ORDERED that for a period of five (5) years after the last date of dissemination of any representation covered by this order, respondents US Search, Inc. and US Search, LLC, and their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. Complaints and refund requests (whether received directly or indirectly, such as through a third party) and any responses to those complaints or requests;

C. All records and documents necessary to demonstrate full compliance with each provision of this order, including but not limited to, copies of acknowledgments of receipt of this order required by Section V. and all reports submitted to the FTC pursuant to Section VII.

V.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of issuance of this order, respondents US Search, Inc. and US Search, LLC, and their successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers who engage in conduct related to the subject matter of the order, and any business entity resulting from any change in structure set forth in Section VI. For current personnel, delivery shall be within five (5) days of service of this order. For new

personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Section VI, delivery shall be at least ten (10) days prior to the change in structure. Respondents must secure a signed and dated statement acknowledging receipt of the order within thirty (30) days of delivery from all persons receiving a copy of the order pursuant to this section.

VI.

IT IS FURTHER ORDERED that, respondents US Search, Inc. and US Search, LLC, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation or business entity that may affect compliance obligations arising under this order, including but not limited to: incorporation or other organization; a dissolution, assignment, sale, merger, or other action; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business name or address. *Provided, however*, that, with respect to any proposed change in the corporation or business entity about which a respondent learns less than thirty (30) days prior to the date such action is to take place, such respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. US Search, Inc. and US Search, LLC. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at Debrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that respondents US Search, Inc. and US Search, LLC, and their successors and assigns, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

VIII.

This order will terminate on March 14, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement with US Search, Inc., and US Search, LLC (collectively "US Search").

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

US Search operates an online data broker service and sells publicly available information about consumers to other consumers through its website, www.ussearch.com. This publicly available information includes name, age, address, phone numbers, email addresses, aliases, maiden name, death records, address history, information about friends, associates, and relatives, marriage and divorce information, bankruptcies, tax liens, civil lawsuits, criminal records, and home values. In conjunction with this service, since June 2009, US Search has offered and sold a PrivacyLock service, which purportedly allows consumers to "lock their records" on the US Search website and prevent their names from appearing on US Search's website, in US Search's advertisements, and in US Search's

search results. Until recently, US Search charged most consumers a $10 fee to place a PrivacyLock, and almost 5,000 consumers paid to have their information removed from the US Search site.

The complaint alleges that, in truth and in fact, the PrivacyLock service did not prevent consumers' information from appearing on the US Search website in many instances. The complaint alleges that US Search has engaged in deceptive acts or practices, in violation of Section 5 of the FTC Act, by misrepresenting that the purchase or use of its PrivacyLock service will prevent a consumer's name and address from appearing on US Search's website, US Search's advertisements, and in US Search's search results.

The proposed consent order includes injunctive relief that enjoins US Search from misrepresenting the effectiveness of its PrivacyLock service or any other service offered to consumers that will allow consumers to remove publicly available information from US Search's search results, websites, and advertisements. Also included in the order are redress provisions that require US Search to refund any money consumers paid for the PrivacyLock service. Under the proposed order, US Search would be required to credit consumers' credit and debit card accounts and notify consumers via email that such credits were made.

Part I of the proposed order prohibits US Search from misrepresenting, in any manner, the effectiveness of its "PrivacyLock" service or any other service offered to consumers that will allow consumers to remove publicly available information from US Search's search results, websites, or advertisements.

Part II of the proposed order prohibits US Search from making any representations concerning the effectiveness its "PrivacyLock" service or any other similar service offered to consumers that will allow consumers to remove publicly available information from US Search's search results, websites, or advertisements, unless US Search discloses, clearly and prominently, any material limitations regarding such service, including but not limited to (1) any limitations

on the duration of the removal; and (2) any circumstances under which information about the consumers will not be removed or will reappear.

Part III of the proposed order requires US Search to provide full refunds to any consumer who requested "PrivacyLock" and was assessed a charge for such service, by crediting the consumer's credit or debit card used to purchase the service. US Search must also provide notice of the refund through an email message sent to affected consumers. The message must include an address and a toll-free number for consumers to use to contact US Search regarding the refund. US Search must display a notice about its refund program clearly and prominently on its website for a period of one year. Any amounts not refunded to consumers must be deposited with the U.S. Treasury as disgorgement. The proposed order further requires US Search, within one year of issuance of this order, to provide the Commission with an accounting of all refunds paid to consumers, as well as any amounts that were deposited with the U.S. Treasury as disgorgement.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV of the proposed order requires US Search to retain for a period of five (5) years from the last date of dissemination of any representation covered by the order all advertisements and promotional materials containing the representation; complaints and refund requests, and any responses to such requests; and all records and documents necessary to demonstrate full compliance with each provision of the proposed order.

Part V of the proposed order requires dissemination of the order now and in the future to principals, officers, directors, and managers having responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that US Search submit an initial compliance report to the FTC and make available to the FTC subsequent reports. Part

VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

CONCURRING STATEMENT OF COMMISSIONER BRILL

The respondent in this matter, US Search, Inc., is an online commercial information broker that gathers and sells information about individuals obtained from public records. The Commission's action announced today alleges that US Search deceived consumers when it failed to honor its promise to remove profiles of consumers who paid $10 to opt out of the company's databases. The resolution of this matter requires US Search to provide full refunds to every consumer who paid to opt out of the databases. I support the resolution of this case based on its particular facts.

This case raises a number of troubling issues. As noted in our recent draft report, "Protecting Privacy in an Era of Rapid Change," information brokers collect data from a wide variety of online and offline sources, including traditional public sources such as court files, property records, and telephone books[1]. While this sort of

1 Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (2010) (preliminary FTC staff report), *available at* http://www.ftc.gov/os/2010/12/101201privacyreport.pdf.

publicly available information has been gathered, processed, and sold by private parties since time immemorial, the marketplace for consumer information has been radically transformed in recent years. Until recently, it was not particularly cost effective for data brokers to trudge down to every tax assessor, county clerk, and courthouse to gather paper data, and then piece it together by hand in order to come up with a consumer profile. The advent of the Internet and high-speed data transfers has dramatically increased data brokers' ability to gather public information from just about any source imaginable. Data brokers can now use sophisticated computer algorithms to piece together countless bits of discrete public data – sometimes combined with nonpublic information – into a composite consumer profile that many would find unsettling in its comprehensiveness. Understandably, many consumers want to have the choice to opt out of such data gathering, processing, and use, at least for certain purposes, such as marketing.

More importantly, focusing only on the consumer's opt out options misses more problematic issues that should be addressed. The collection, processing, and use of information by data brokers can have as great an impact on consumers as data gathered through Internet tracking. Industry and policymakers have demonstrated their awareness of the issues surrounding Internet tracking, and a willingness to address them. It is encouraging to see the self-regulatory proposals concerning online tracking that industry has developed since the Commission released the staff's draft privacy report[2]. It also is encouraging to see the current legislative efforts to

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[2] Over the past few months there has been a great deal of discussion by industry, consumer groups, technologists, and policy makers about how to address collection and use of data through consumers' online interactions, both with first party websites and third party advertisers. Some of the solutions that are being discussed include browser modifications that will allow consumers to indicate their choices about data collection and use by websites they visit. *See* Press Release, Microsoft, Providing Windows Customers with More Choice and Control of Their Privacy Online with Internet Explorer 9 (Dec. 7, 2010) *available at* http://www.microsoft.com/presspass/features/2010/dec10/12-07 ie9privacyqa.mspx; Google Public Policy Blog, Keep your opt-outs (Jan. 24, 2011) *available at* http://googlepublicpolicy.blogspot.com/2011/01/keep-your-

address some of these same online tracking issues[3].

Unlike the recent self-regulatory efforts with respect to online tracking, there has been little effort by industry, since release of the draft staff report, to address the issues surrounding more traditional information brokers. I urge industry to work with technologists, consumer advocates, legislators and other policy makers to address the important issues relating to the collection, processing, and use of information by data brokers.

Among the issues that industry should consider are providing consumers with (1) meaningful notice, as described in the draft staff report, about information brokers' practices, and (2) a reasonable means to access and correct consumers' information held by information brokers. In addition, industry should consider whether, and under what circumstances, consumers should be given a reasonable mechanism to opt out of these databases.

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opt-outs.html; and Mozilla Blog, Mozilla Firefox 4 Beta, now including "Do Not Track" capabilities (Feb. 8, 2011) *available at* http://blog.mozilla.com/blog/2011/02/08/mozilla-firefox-4-beta-now-including-do-not-track-capabilities/. Others use universal icons that will allow consumers to describe their choices about online data collection and use. *See* Press Release, Interactive Advertising Bureau Press Release, Major Marketing Media Trade Groups Launch Program to Give Consumers Enhanced Control over Collection and Use of Web Viewing Data for Online Behavioral Advertising (Oct. 4, 2010), *available at* http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-100410; Tony Romm and Kim Hart, *Political Intel: FTC Chairman on Self-Regulatory Ad Effort*, POLITICO Forums (Oct. 11, 2010), *available at* http://dyn.politico.com/members/forums/thread.cfm?catid=24&subcatid=78&threadid=4611665.

3 *See* H.R. 654, 112th Cong. (2011).

IN THE MATTER OF

NBTY, INC., NATURESMART LLC, AND REXALL SUNDOWN, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5(A) AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4318; File No. 102 3080
Filed March 22, 2011 – Decision March 22, 2011

This consent order relates to the advertising and promotion of the Disney/Marvel line of children's multivitamin and mineral dietary supplements ("Vitamin Products"). According to the complaint, NBTY, Inc., NatureSmart LLC, and Rexall (collectively "Respondents") misrepresented the amount of Omega-3 fatty acids contained in the Vitamin Products in their advertisements. The complaint also alleges that Respondents falsely represented that a daily serving of the Vitamin Products promoted healthy brain and eye development in children over two years of age. The consent order requires Respondents to pay $2,100,000 in consumer redress and prohibits Respondents from misrepresenting any ingredients or the amount of its ingredients. The order further prohibits Respondents from making any false or misleading representations in advertising about the health benefits, performance, or efficacy of any product, or from making representations regarding any products without competent and reliable scientific evidence.

Participants

For the *Commission*: *Devin Domond, Heather Hippsley,* and *Andrew Wone*.

For the *Respondents*: *John Fledler, Hyman, Phelps & McNamara, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that NBTY, Inc., NatureSmart LLC, and Rexall Sundown, Inc. (collectively "respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent NBTY, Inc. ("NBTY") is a Delaware corporation with its principal place of business at 2100 Smithtown Ave., Ronkonkoma, New York 11779.

2. Respondent NatureSmart LLC ("NatureSmart") is a Colorado limited liability company with its principal place of business at 2100 Smithtown Ave., Ronkonkoma, New York 11779. Respondent NatureSmart is a wholly owned subsidiary of NBTY.

3. Respondent Rexall Sundown, Inc. ("Rexall Sundown"), also doing business as Sundown, Inc., is a Florida corporation with its principal place of business at 2100 Smithtown Ave., Ronkonkoma, New York 11779. Respondent Rexall Sundown is an indirectly wholly owned subsidiary of NBTY.

4. Respondent NBTY has manufactured and, together with Respondent NatureSmart, has advertised, marketed, distributed, or sold, throughout the United States, a children's multivitamin and mineral chewable tablet product called Disney Princess Complete and the following children's multivitamin and mineral gummy products: 1) Disney Princess Gummies; 2) Disney Pixar Cars Gummies; 3) Disney Winnie the Pooh Gummies; 4) Disney Tigger & Pooh Gummies; 5) Disney Pixar Finding Nemo Gummies; 6) Disney Pixar Wall-E Gummies; and 7) Disney Pixar Toy Story Gummies (the gummy vitamin products, collectively referred to as the "Disney Gummies"). According to the package directions for these products, they are intended for adults and children two years of age and older.

5. Respondent NBTY has manufactured and, together with Respondent Rexall Sundown, has advertised, marketed, distributed, or sold, throughout the United States, a children's multivitamin and mineral chewable tablet product called Marvel Heroes Complete and a children's multivitamin and mineral gummy product called Marvel Heroes Gummies. According to the package directions for these products, they are intended for adults and children two years of age and older.

6. Respondents have marketed the Disney Gummies and Marvel Heroes Gummies (collectively, the "Disney and Marvel Gummies") at a wide range of major retail stores, including, but not limited to, CVS Pharmacy, Wal-Mart, Target, Walgreens, Kroger, Kmart, Meijer, and Rite Aid. They have also marketed these products through online vendors, such as www.drugstore.com.

7. Respondents have marketed Disney Princess Complete and Marvel Heroes Complete tablets (collectively, the "Disney and Marvel Complete Tablets") through various online vendors, such as www.drugstore.com.

8. The Disney and Marvel Gummies and the Disney and Marvel Complete Tablets (collectively, the "NBTY Products") are either "foods" or "drugs" as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

9. Retail prices for the NBTY Products range from approximately $4.00 to $8.00 for a sixty-count bottle.

10. The acts and practices of respondents, as alleged herein, have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

11. Respondents have disseminated, or caused to be disseminated, advertisements for the NBTY Products, including, but not limited to, the attached Exhibits A through C. These advertisements contain the following statements and depictions, among others:

a. **Print Advertisements:** Text "with DHA*" in white font within a red starburst-shaped graphic appears above images of packages for various products. The asterisk refers to the following statement, which is situated at the bottom of these advertisements:

DHA is naturally found in the brain and the eyes. 100 mg promotes healthy brain and eye

development. One serving provides 100 mcg of DHA.

(*See, e.g.*, Exhibit A.)

b. **Product Packages and Labels for the Disney and Marvel Gummies:** On the front panel is the text "with DHA*" in colored font within a graphic that corresponds to the theme of the children's vitamin, such as a pink crystal heart for Disney Princess Gummies, an orange starfish for Disney Pixar Nemo Gummies, and a white spider web situated in front of an image of the Marvel Spider-Man super hero for Marvel Heroes Gummies. The asterisk refers to the following statement, which is displayed on the side panel of these packages:

*DHA is naturally found in the brain and the eyes. 100 mg promotes healthy brain and eye development.** One serving provides 100 mcg of DHA.

(Exhibit B.)

c. **Product Packages and Labels for the Disney and Marvel Complete Tablets:** On the front panel is the text "Plus DHA 100 mcg*" in colored font within a graphic that corresponds to the theme of the children's vitamin, specifically, a pink crystal heart for Disney Princess Complete and a white spider web situated in front of an image of the Marvel Spider-Man super hero for Marvel Heroes Complete. The asterisk refers to the following statement, which is displayed on the side panel of these packages:

*DHA is naturally found in the brain and the eyes. 100 mg promotes healthy brain and eye development.** One tablet provides 100 mcg of DHA.

(Exhibit C.)

12. A daily serving (1 tablet) of the Disney and Marvel Complete Tablets for children ages four years and older and a daily serving (2 gummies) of the Disney and Marvel Gummies contain 0.1 mg (100 mcg) of DHA (docosahexaenoic acid, a polyunsaturated Omega-3 fatty acid), which equals one thousandth of the 100 mg amount referred to in product advertising and packaging as promoting health benefits. The Disney and Marvel Complete Tablets contain 0.05 mg (50 mcg) of DHA per daily serving (½ tablet) for children two to four years of age, which equals five ten-thousandths of the 100 mg amount referred to in product advertising and packaging as promoting health benefits.

13. Through the means described in Paragraphs 11 and 12, respondents NBTY and NatureSmart have represented, expressly or by implication, that the Disney Gummies and Disney Princess Complete contain a significant amount of DHA. For example, they have represented, expressly or by implication, that these products contain an amount of DHA that is comparable to 100 mg of DHA.

14. Through the means described in Paragraphs 11 and 12, respondents NBTY and Rexall Sundown have represented, expressly or by implication, that Marvel Heroes Gummies and Marvel Heroes Complete contain a significant amount of DHA. For example, they have represented, expressly or by implication, that these products contain an amount of DHA that is comparable to 100 mg of DHA.

15. In truth and in fact, the NBTY Products contained neither a significant amount of DHA nor an amount comparable to 100 mg of DHA. Therefore, the representations set forth in Paragraphs 13 and 14 were false or misleading.

16. Through the means described in Paragraphs 11 and 12, respondents NBTY and NatureSmart have represented, expressly or by implication, that the DHA provided by a daily serving of Disney Princess Complete or the Disney Gummies promotes healthy brain and eye development in children two years of age and older.

17. Through the means described in Paragraphs 11 and 12, respondents NBTY and Rexall Sundown have represented, expressly or by implication, that the DHA provided by a daily serving of Marvel Heroes Complete or Marvel Heroes Gummies promotes healthy brain and eye development in children two years of age and older.

18. Through the means described in Paragraphs 11 and 12, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraphs 16 and 17 at the time the representations were made.

19. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraphs 16 and 17 at the time the representations were made. Therefore, the representation set forth in Paragraph 18 was false or misleading.

20. 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 Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this twenty-second day of March, 2011, has issued this complaint against respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent NBTY, Inc. is a Delaware corporation with its principal place of business located at 2100 Smithtown Ave., Ronkonkoma, New York 11779.

2. Respondent NatureSmart LLC is a Colorado limited

liability company with its principal place of business at 2100 Smithtown Ave., Ronkonkoma, New York 11779.

3. Respondent Rexall Sundown, Inc., also doing business as Sundown, Inc., is a Florida corporation with its principal place of business at 2100 Smithtown Ave., Ronkonkoma, New York 11779.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" means NBTY, Inc., NatureSmart LLC, and Rexall Sundown, Inc., also doing business as Sundown, Inc., and their successors and assigns, and their officers, and each of the above's agents, servants, representatives, and employees.

2. The "NBTY Products" means, collectively, the children's multivitamin and mineral chewable tablet products manufactured, promoted, advertised, distributed, and sold by respondents under the names Disney Princess Complete and Marvel Heroes Complete and the following children's multivitamin and mineral gummy products: Disney Princess Gummies; Disney Pixar Cars Gummies; Disney Winnie the Pooh Gummies; Disney Tigger & Pooh Gummies; Disney Pixar Finding Nemo Gummies; Disney Pixar Wall-E Gummies; Disney Pixar Toy Story Gummies; and Marvel Heroes Gummies.

3. "Commerce" means as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. "Product" means any good that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under any brand name of respondents, their successors and assigns, or under the brand name of any third party. "Product" also means any product sold or distributed to the public by third parties under any brand name of respondents, or under private labeling agreements with respondents, their successors and assigns. "Product" shall include, but not be limited to, the NBTY Products.

5. "Food" and "drug" mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

6. "DHA" means docosahexaenoic acid, a polyunsaturated Omega-3 fatty acid.

7. The term "including" in this order means "including without limitation."

8. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Product, in or affecting commerce, shall not misrepresent, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that such Product contains a specific ingredient or a specific numerical amount of any ingredient.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Product, in or affecting commerce, shall not make, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation about the health benefits, performance, or efficacy of any Product, including, but not limited to, representations that DHA or any other substantially similar ingredient in such Product promotes brain or eye health, unless the representation is non-misleading, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

III.

IT IS FURTHER ORDERED that nothing in this order shall prohibit respondents from making any representation for:

A. Any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and

B. Any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

IV.

IT IS FURTHER ORDERED that within five (5) days from the date of service of this order, respondents, jointly and severally, shall pay to the Commission by electronic funds transfer the sum of two million, one hundred thousand dollars ($2,100,000) in accordance with instructions provided by the Commission.

A. In the event of default on any obligation to make payment under this order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for ten (10) calendar days beyond the date that payment is due, the entire amount shall immediately become due and payable. Respondents shall be jointly and severally liable for all payments required by this Subpart and any interest on such payments.

B. All funds paid to the Commission pursuant to this order shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including, but not limited to, consumer redress, including restitution, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers (which shall be the first priority for dispersing the funds set forth above) is wholly or partially impracticable or funds remain after the redress to consumers is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to respondents' practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited in the United

States Treasury as disgorgement. Respondents shall have no right to challenge the Commission's choice of remedies under this Part. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under this Part herein shall be deemed a payment of any fine, penalty, or punitive assessment.

C. Respondents relinquish all dominion, control, and title to the funds paid pursuant to this Part to the fullest extent permitted by law. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise. In the event of bankruptcy of any respondent, respondents acknowledge that the funds paid are not part of the debtor's estate, nor does the estate have any claim or interest therein.

D. Respondents agree that the facts as alleged in the complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment under this Part, including, but not limited to, a nondischargeability complaint in any bankruptcy case.

E. Proceedings instituted under this Part are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this order.

V.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having more than a *de minimis* responsibility with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that each respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing or filing of a bankruptcy petition; or a change in the corporate

name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, each respondent, and its successors and assigns, shall notify the Commission as soon as is practicable after obtaining such knowledge. For the purposes of this order, respondents shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier or U.S. Postal Express Mail all reports and notifications to the Commission that are required by this order to:

Associate Director for Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
RE: *In the Matter of NBTY, et al.,* FTC File No. 102 3080

Provided that, in lieu of overnight courier, respondents may send such reports or notifications by first-class mail, but only if respondents contemporaneously send an electronic version of such report or notification to the Commission at DEBrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, each shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents shall submit additional true and accurate written reports.

IX.

This order will terminate on March 22, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an

accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from NBTY, Inc., NatureSmart LLC, and Rexall Sundown, Inc. (collectively, "Respondents").

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

This matter involves the advertising and promotion of the following products in Respondents' Disney/Marvel line of children's multivitamin and mineral dietary supplements: 1) Disney Princess Complete; 2) Disney Princess Gummies; 3) Disney Pixar Cars Gummies; 4) Disney Winnie the Pooh Gummies; 5) Disney Tigger & Pooh Gummies; 6) Disney Pixar Finding Nemo Gummies; 7) Disney Pixar Wall-E Gummies; 8) Disney Pixar Toy Story Gummies; 9) Marvel Heroes Complete; and 10) Marvel Heroes Gummies (collectively, the "NBTY Products").

According to the FTC complaint, Respondents represented, in advertisements, that the NBTY Products contained a significant amount of DHA (docosahexaenoic acid, a polyunsaturated Omega-3 fatty acid) or an amount comparable to 100 mg of DHA. The complaint alleges that this claim is false or misleading because, in fact, a daily serving of the NBTY products only contained either 0.1 mg of DHA (which is one thousandth of 100 mg) or 0.05 mg of DHA (which is five ten-thousandths of 100 mg).

The Commission also charges that Respondents represented that the DHA provided by a daily serving of the NBTY Products promoted healthy brain and eye development in children two years of age and older. The FTC alleges that this claim is false or misleading because Respondents failed to have evidence to substantiate it.

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Respondents from

misrepresenting that any product contains a specific ingredient or specific numerical amount of any ingredient.

Part II of the proposed order prohibits Respondents from making any representations in advertising for any product about the health benefits, performance, or efficacy of the product, unless the representation is true and non-misleading. In addition, Respondents must possess competent and reliable scientific evidence sufficient in quality and quantity, when considered in light of the entire body of relevant and reliable scientific evidence, to support such claims as true.

Part III of the proposed order states that the order does not prohibit Respondents from making representations for any drug that are permitted in labeling for that drug under any tentative or final standard promulgated by the FDA, or under any new drug application approved by the FDA. This part of the proposed order also states that the order does not prohibit Respondents from making representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part IV of the proposed order requires Respondents to pay two million, one hundred thousand dollars ($2,100,000) to the Commission to be used for equitable relief, including restitution, consumer redress, and any attendant expenses for the administration of such equitable relief.

Parts V through VIII of the proposed order require Respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF

ALAN B. MILLER, UNIVERSAL HEALTH SERVICES, INC., AND PSYCHIATRIC SOLUTIONS, INC.

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

Docket No. C-4309; File No. 101 0142
Filed November 15, 2010 – Decision April 19, 2011

This consent order addresses allegations that the proposed $2 billion acquisition by Universal Health Services of Psychiatric Solutions, Inc. would substantially lessen competition in the markets for acute inpatient psychiatric care in the State of Delaware; the Las Vegas, Nevada metropolitan statistical area; and the Commonwealth of Puerto Rico. The consent order requires UHS to divest several acute inpatient psychiatric care facilities, as well as related outpatient clinics, contracts, commercial trade names, and real property in each of the relevant markets, within six months to a Commission-approved buyer. Pending the transfer of these assets, both UHS and PSI are required to maintain the competitive viability of the assets and protect the confidentiality of any sensitive business information.

Participants

For the *Commission*: *Ken Field, Janelle Filson, Naomi Licker,* and *Andrea Zach*.

For the *Respondents*: *Katherine B. Forrest* and *Peter T. Barbur, Cravath, Swaine & Moore LLP*; *Kenneth S. Prince* and *Lisl J. Dunlop, Shearman & Sterling LLP*.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Universal Health Services, Inc. ("UHS"),

a corporation controlled by Alan B. Miller and subject to the jurisdiction of the Commission, has agreed to acquire Respondent Psychiatric Solutions, Inc. ("PSI"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, PO Box 51448, King of Prussia, PA 19406-0958.

2. Respondent UHS is controlled by Respondent Alan B. Miller and is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 367 South Gulph Road, PO Box 61588, King of Prussia, PA 19406-0958. UHS is, among other things, engaged in the sale and provision of acute inpatient psychiatric services.

3. UHS owns or operates 25 general acute care hospitals and 102 behavioral health facilities located in 32 states, Washington, D.C., and Puerto Rico. UHS's revenues from all operations totaled approximately $5.2 billion in 2009. UHS's 102 behavioral health facilities generated approximately $1.3 billion in revenue (25% of total revenues) from nearly 8,000 licensed beds and over 2 million patient days.

4. Respondent PSI operates 94 inpatient behavioral health facilities in 32 states, Puerto Rico, and the U.S. Virgin Islands. The company also manages behavioral health programs for 109 general acute care hospitals owned by third parties. PSI's revenue for the twelve months ending December 31, 2009 was approximately $1.8

billion**.** Behavioral health facilities and residential treatment centers generated 93% of PSI's 2009 revenues; the contract management business accounted for the remaining 7%.

II. JURISDICTION

5. Respondent Alan B. Miller is and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

6. Respondent UHS is and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

7. Respondent PSI is and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

8. Pursuant to an Agreement and Plan of Merger dated May 16, 2010, UHS proposes to purchase all of the outstanding voting securities of PSI ("the Acquisition").

9. The Acquisition would combine two of the largest providers of acute inpatient psychiatric services in three geographic markets: the Las Vegas, Nevada Metropolitan Statistical Area; the State of Delaware; and the Commonwealth of Puerto Rico. Respondents UHS and PSI both own and operate psychiatric facilities in these areas and compete and promote their businesses based on name recognition, reputation, location, price, range of available services, quality of service, associated product offerings, and the appearance of facilities.

IV. THE RELEVANT PRODUCT MARKET

10. The relevant line of commerce in which to analyze the Acquisition is the provision and sale of acute inpatient psychiatric services, meaning inpatient psychiatric services for the diagnosis, treatment, and care of patients deemed, due to an acute psychiatric condition, to be a threat to themselves or others or unable to perform basic life functions.

V. THE RELEVANT GEOGRAPHIC MARKETS

11. The relevant geographic markets in which to assess the competitive effects of the Acquisition are: the Las Vegas, Nevada, Metropolitan Statistical Area; the State of Delaware; and the Commonwealth of Puerto Rico.

VI. CONCENTRATION

12. Each of the three affected local markets for the provision and sale of acute inpatient psychiatric services already is highly concentrated, and the Acquisition will substantially increase concentration in each market as measured by the Herfindahl-Hirschman Index ("HHI").

13. The combined market share of UHS and PSI – based on bed counts, analysis of discharge data, and other information obtained by the Commission – is 60 percent or more in each of the relevant geographic markets.

14. Post-acquisition, UHS would have a market share of about 66 percent based on beds in the Las Vegas market for acute inpatient psychiatric services. The Acquisition would increase the HHI by 2610 points, from 2782 to 4942, leaving only two meaningful competitors to UHS and eliminating substantial and close competition between the Respondents.

15. UHS would have a post-merger market share of approximately 60 percent based on beds in the market for acute inpatient psychiatric services in the State of Delaware. The Acquisition would increase the HHI by 1428 points, from 2488 to 3916, and reduce from three to two the number of meaningful competitors in the State of Delaware.

16. In the Commonwealth of Puerto Rico, UHS would control at least 62 percent of the acute inpatient psychiatric beds post-Acquisition. The Acquisition would increase the HHI by 1641 points, from 2275 to 3916, and combine the two largest providers of acute inpatient psychiatric services in Puerto Rico.

VII. ENTRY CONDITIONS

17. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or deter the likely anticompetitive effects of the Acquisition. Significant entry barriers include the time and cost associated with constructing or expanding an acute care psychiatric services facility, as well as the need to satisfy regulatory and licensing requirements that govern such services.

VIII. EFFECTS OF THE ACQUISITION

18. The Acquisition, if consummated, may substantially lessen competition for acute inpatient psychiatric services in the three geographic markets, identified in Paragraph 9, in the following ways, among others:

a. by eliminating direct and substantial competition between UHS and PSI;

b. by increasing the likelihood that Respondent UHS will unilaterally exercise market power; or

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

IX. VIOLATIONS CHARGED

19. The agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this fifteenth day of November, 2010, issues its Complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Psychiatric Solutions, Inc. ("PSI"), by Universal Health Services, Inc. ("UHS"), an entity controlled by Alan B. Miller, hereinafter referred to as Respondents, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.

2. Respondent Universal Health Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.

3. Respondent Psychiatric Solutions, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 6640 Carothers Parkway, Suite 500, Franklin, TN 37067.

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

ORDER

I.

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

A. "UHS" means Universal Health Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by UHS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, UHS includes PSI.

B. "Alan B. Miller" means Alan B. Miller, a natural person, and all partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Alan B. Miller, and the respective partners, directors, officers, employees, agents, attorneys, representatives, successors, and assigns of each.

C. "PSI" means Psychiatric Solutions, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by PSI, and

the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" means Alan B. Miller, UHS, and PSI, collectively or individually.

E. "Acquisition" means the proposed acquisition described in and contemplated by the Agreement and Plan of Merger by and among UHS and PSI dated as of May 16, 2010.

F. "Acute Inpatient Psychiatric Services" means the provision of inpatient psychiatric services for the diagnosis, treatment and care of patients deemed, due to an acute psychiatric condition, to be a threat to themselves or others or unable to perform basic life functions.

G. "Business Records" means all information, documents and records, including all electronic records wherever stored, including without limitation, client and customer lists, patient and payor information, referral sources, research and development reports, production reports, service and warranty records, equipment logs, operating guides and manuals, financial and accounting documents, creative materials, advertising materials, promotional materials, studies, reports, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salaries and benefits information, and, subject to legal requirements, copies of all personnel files.

H. "Closing Date" means the date on which Respondents consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey to a Commission-

approved Acquirer one or more of the Divestiture Businesses.

I. "Commission" means the Federal Trade Commission.

J. "Commission-approved Acquirer" means the Person or Persons approved by the Commission to acquire Divestiture Assets pursuant to this Order.

K. "Confidential Business Information" means information not in the public domain that is primarily related to or primarily used in connection with the Divestiture Business, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, payor and provider communications, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.

L. "Delaware Divestiture Assets" means all Divestiture Assets primarily used in connection with or primarily relating to MeadowWood Behavioral Health.

M. "Direct Cost" means cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide Transitional Services. "Direct Cost" to a Commission-approved Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

N. "Divestiture Agreement" means any agreement(s) between Respondents and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer), and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Divestiture Assets that have been approved by the Commission to accomplish the requirements of this Order.

O. "Divestiture Assets" means all of Respondents' rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with the Divestiture Business, including, without limitation, the following:

1. all real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. all Tangible Personal Property, including, without limitation, any Tangible Personal Property removed and not replaced from the Divestiture Assets, if such property was used by the Divestiture Assets on or after the date Respondents execute the Consent Agreement;

3. all rights under any and all contracts and agreements (e.g. leases, service agreements such as dietary and housekeeping services, supply agreements, procurement contracts) including but not limited to contracts and agreements with physicians, other health care providers, unions, third party payors, HMOs, customers, suppliers, sales representatives,

distributors, agents, personal property lessors, personal property lessees, licensors, licensees, cosigners, and consignees;

4. all rights and title in and to use the name of each of the hospitals on a permanent and exclusive basis (even as to Respondents);

    1. all Intellectual Property;

    2. all intangible rights and property other than Intellectual Property, including, going concern value, goodwill, internet, telephone, telecopy and telephone numbers, domain names, listings and web sites;

    3. all approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;

    4. all inventories, stores, and supplies;

    5. all accounts receivable;

    6. all rights under warranties and guarantees, express or implied;

    7. all books, records, and files (electronic and hard copy); and

    8. all Business Records;

provided, however, that the Divestiture Assets shall not include Respondents' rights, title, and interest to or in property and assets, tangible or intangible, that are not primarily related to or primarily used in connection with the Divestiture Businesses;

provided, however, at the option of the Commission-approved Acquirer, that the Divestiture Assets need not include any property or assets that the Commission-approved Acquirer determines it does not need, if the Commission approves the Divestiture Agreement without such property or assets; and

provided, however, that Respondents may retain a copy of all books, records, files and Business Records to the extent necessary to comply with applicable law, regulations and other legal requirements.

P. "Divestiture Business" means the operation of a Psychiatric Hospital Facility and includes but is not limited to the provision of Acute Care Psychiatric Services, whether provided or performed at the facility or in a different location within the Relevant Areas, and also includes all other services, businesses, and operations primarily related to the Las Vegas Divestiture Assets, the Delaware Divestiture Assets, and the Puerto Rico Divestiture Assets.

Q. "Hold Separate Order" means the Order to Hold Separate and Maintain Assets issued by the Commission in this matter.

R. "Hospital San Juan Capestrano" means the Psychiatric Hospital Facility owned by UHS located at Carretera Estatal 877, Km. 1.6, Camino Las Lomas, Rio Piedras, PR 00926; and the following: PHP Hospital San Juan Capestrano, Carretera Estatal 877, Km. 1.6, Camino Las

Lomas, Rio Piedras, PR 00926; Clinica del Norte Hatillo, Carretera #2, Km. 81.7 Bo., Carrizales, Edif. Galeria del Norte 3rd Floor, Hatillo, PR 00659; Condado Integrated Healthcare System, Calle Washington #30 Suite #3, San Juan, PR 00907; Manati Integrated Healthcare System, Carretera 149, Km. 7.5, Expresso Manati-Ciales, Manti, PR 00674; Clinica del Oeste Mayaguez, Office Park Building Suite 104, Hostos Ave., Mayaguez, PR 00680; Clinica del Este Caguas, Ave. Jose Mercado Esq. Ruiz Belvis, Edif. Gatsby, Piso 2, Caguas, PR 00725; Clinica del Este Humacao, Carretera 128 Font Martelo Esq. Ramon Gomez, Telephone Co. Old Building, Humacao, PR 00791; Clinica de Servicios Ambulatorios Ponce, 2000 Calle Flamboyanes, Coto Laurel, PR 00780-1320; Clinica de Servicios Ambulatorios Carolina, Iturregui Plaza Shopping Center Suite #17, 1135 Ave. 65 Infanteria, Rio Piedras, PR 00924; Clinica de Ninos y Adolescentes, Urb. Munoz Rivera, #9 Call Acuarela, Guaynabo, PR 00966; Clinica de Servicios Ambulatorios Bayamon, Calle 2, #146, Hermanas Davila 5ta Ext., Bayamon, PR 00959.

S. "Intellectual Property" means, without limitation:

1. all patents, patent applications, and inventions and discoveries that may be patentable;

2. all know-how, trade secrets, software, technical information, data, registrations, applications for governmental approvals, inventions, processes, best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality control practices and information, research and test procedures and information, and safety, environmental and health practices and information;

3. all confidential or proprietary information, commercial information, management systems, business processes and practices, customer lists, customer information, customer records and files, customer communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing materials, customer support materials, advertising and promotional materials; and

4. all rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

T. "Las Vegas Divestiture Assets" means all Divestiture Assets primarily used in connection with or primarily relating to Montevista Hospital and Red Rock Behavioral Health Hospital.

U. "MeadowWood Behavioral Health" means the Psychiatric Hospital Facility owned by PSI, located at 575 South DuPont Highway, New Castle, DE 19720.

V. "Montevista Hospital" means the Psychiatric Hospital Facility owned by PSI, located at 5900 West Rochelle Avenue, Las Vegas, NV 89103.

W. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity or governmental body.

X. "Prospective Acquirer" means a Person that Respondents intend to submit to the Commission for its prior approval pursuant to Paragraphs II.A, III.A., or IV.A. of this Order.

Y. "Psychiatric Hospital" means a health care facility, licensed or certified as a psychiatric hospital (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.

Z. "Psychiatric Hospital Facility" means a Psychiatric Hospital or a Psychiatric Unit.

AA. "Psychiatric Unit" means a department, unit, or other organizational subdivision of a hospital, licensed or certified as a provider of inpatient psychiatric care (except for a facility limited by its license or certificate to residential treatment or other long-term care), that provides Acute Inpatient Psychiatric Services.

BB. "Puerto Rico Divestiture Assets" means all Divestiture Assets primarily used in connection with or primarily relating to Hospital San Juan Capestrano.

CC. "Red Rock Behavioral Health Hospital" means the Psychiatric Hospital Facility owned by PSI located at 5975 W. Twain Avenue, Las Vegas, NV 89103.

DD. "Relevant Area" means each of

0. the State of Delaware;

0. Las Vegas, NV, MSA; and

0. the Commonwealth of Puerto Rico.

A. "Relevant Employees" means any and all full-time employees, part-time employees, contract employees, or independent contractors whose duties, at any time during the ninety (90) days preceding the Acquisition or at any

time after the Acquisition, related or relate primarily to the Divestiture Business.

B. "Tangible Personal Property" means all machinery, equipment, tools, fixtures, vehicles, furniture, inventories, computer hardware, and all other items of tangible personal property of every kind owned or leased by Respondents, wherever located, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

C. "Third Parties" means Persons other than Respondents or Commission-approved Acquirers.

D. "Transitional Administrative Services" means administrative assistance with respect to the operation of a Psychiatric Hospital Facility or the provision of Acute Inpatient Psychiatric Services, including but not limited to assistance relating to billing, accounting, governmental regulation, human resources management, information systems, managed care contracting, and purchasing, as well as providing assistance in acquiring, obtaining access, and customizing all software used in the provision of such services.

E. "Transitional Clinical Services" means clinical assistance and support services with respect to the operation of a Psychiatric Hospital Facility or the provision of Acute Inpatient Psychiatric Services.

F. "Transitional Services" means Transitional Administrative Services and Transitional Clinical Services.

II.

IT IS FURTHER ORDERED that:

A. No later than six (6) months after the date this Order becomes final, Respondents shall divest the Delaware Divestiture Assets, absolutely and in good faith and at no minimum price, as an on-going business, only to a single acquirer that receives the prior approval of the Commission, and only in a manner (including an executed Divestiture Agreement) that receives the prior approval of the Commission.

B. Respondents shall cooperate with the Commission-approved Acquirer to ensure that the Delaware Divestiture Assets are transferred to the Commission-approved Acquirer as a financially and competitively viable Psychiatric Hospital operating as an ongoing business providing Acute Inpatient Psychiatric Services, including but not limited to providing assistance necessary to transfer to the Commission-approved Acquirer all governmental approvals needed to operate the Delaware Divestiture Assets.

C. Prior to the Closing Date, Respondents shall:

1. secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Delaware Divestiture Assets and/or to grant any license(s) to a Commission-approved Acquirer to permit the Commission-approved Acquirer to operate the Delaware Divestiture Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties; and

2. take all actions necessary to ensure that the Delaware Divestiture Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Delaware Divestiture Assets to the Commission-approved Acquirer.

D. The purpose of the divestiture is to ensure the continuation of the Delaware Divestiture Assets as an ongoing, viable Psychiatric Hospital Facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. No later than six (6) months after the date this Order becomes final, Respondents shall divest the Las Vegas Divestiture Assets, absolutely and in good faith and at no minimum price, as an on-going business, only to a single acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

B. Respondents shall cooperate with the Commission-approved Acquirer to ensure that the Las Vegas Divestiture Assets are transferred to the Commission-approved Acquirer as financially and competitively viable Psychiatric Hospitals operating as ongoing businesses providing Acute Inpatient Psychiatric Services, including but not limited to providing assistance necessary to transfer to the Commission-approved Acquirer all governmental approvals needed to operate the Las Vegas Divestiture Assets.

C. Prior to the Closing Date, Respondents shall:

1. secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Las Vegas Divestiture Assets and/or to grant any license(s) to a Commission-approved Acquirer to permit the Commission-approved Acquirer to operate the Las Vegas Divestiture Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties; and

2. take all actions necessary to ensure that the Las Vegas Divestiture Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Las Vegas Divestiture Assets to the Commission-approved Acquirer.

D. The purpose of the divestiture is to ensure the continuation of the Las Vegas Divestiture Assets as ongoing, viable Psychiatric Hospital Facilities and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

A. No later than nine (9) months after the date this Order becomes final, Respondents shall divest the Puerto Rico Divestiture Assets, absolutely and in good faith and at no minimum price, as an on-going business, only to a single acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

B. Respondents shall cooperate with the Commission-approved Acquirer to ensure that the Puerto Rico

Divestiture Assets are transferred to the Commission-approved Acquirer as a financially and competitively viable Psychiatric Hospital operating as an ongoing business providing Acute Inpatient Psychiatric Services, including but not limited to providing assistance necessary to transfer to the Commission-approved Acquirer all governmental approvals needed to operate the Puerto Rico Divestiture Assets.

C. Prior to the Closing Date, Respondents shall:

1. secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Puerto Rico Divestiture Assets and/or to grant any license(s) to a Commission-approved Acquirer to permit the Commission-approved Acquirer to operate the Puerto Rico Divestiture Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that such Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties; and

2. take all actions necessary to ensure that the Puerto Rico Divestiture Assets meet federal, state, local, and municipal requirements necessary to allow the transfer of the Puerto Rico Divestiture Assets to the Commission-approved Acquirer.

D. The purpose of the divestiture is to ensure the continuation of the Puerto Rico Divestiture Assets as an ongoing, viable Psychiatric Hospital Facility and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall not use, solicit, or access, directly or indirectly, any Confidential Business Information, and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to or with any Person other than:

0. as necessary to comply with the requirements of this Order or the Hold Separate Order;

2. subject to an appropriate confidentiality agreement, a Person that has shown an interest in acquiring one or more of the Divestiture Businesses and that UHS has reason to believe may be qualified to acquire one or more of the Divestiture Businesses;

3. a Prospective Acquirer or Commission-approved Acquirer, or other Persons specifically authorized by such Prospective Acquirer or Commission-approved Acquirer to receive such information, regarding a particular Divestiture Business;

4. pursuant to a Divestiture Agreement;

5. to enforce the terms of a Divestiture Agreement or prosecute or defend against any dispute or legal proceeding; or

6. to comply with applicable law, regulations and other legal requirements.

A. No later than five (5) days after the Acquisition, Respondents shall provide written notification of the

restrictions, prohibitions and requirements of this Paragraph V. – with Paragraph III.B of the Hold Separate Order being hereby superseded – to all of Respondents' employees, agents, and representatives of any Psychiatric Hospital facility or related outpatient centers, clinics, and offices in the Relevant Areas or, even if located outside the Relevant Areas, all other of Respondents' employees, agents, and representatives who had or have responsibilities in or relating to any Psychiatric Hospital Facility or related outpatient centers, clinics, and offices in the Relevant Areas or who had or have access to or possession, custody or control of any Confidential Business Information. Respondents may provide such notification by e-mail with return receipt requested or similar transmission, and shall keep a file of any receipts or acknowledgments for one (1) year after the respective Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such notifications at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

B. Respondents shall:

0. no later than fourteen (14) days after the Acquisition – with Paragraph III.C.1. of the Hold Separate Order being hereby superseded – obtain, as a condition of continued employment post-divestiture, from each of Respondents' employees, agents, and representatives of any Psychiatric Hospital Facility or related outpatient centers, clinics, and offices in the Relevant

Areas or, even if located outside the Relevant Areas, from each of Respondents' employees, agents, and representatives who had, since completion of the Acquisition, or have responsibilities in or relating to any Psychiatric Hospital Facility or related outpatient centers, clinics, and offices in the Relevant Areas and who had, since completion of the Acquisition, or have access to or possession, custody or control of any Confidential Business Information an executed confidentiality agreement that complies with the restrictions, prohibitions and requirements of this Order and the Hold Separate Order; and

0. no later than thirty (30) days after the Acquisition, institute procedures and requirements and take such actions as are necessary to ensure that Respondents' personnel comply with the restrictions, prohibitions and requirements of this Paragraph V., including all actions that Respondents would take to protect their own trade secrets and confidential information.

VI.

IT IS FURTHER ORDERED that Respondents shall:

A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:

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

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

0. the base salary or current wages;

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

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

0. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

0. at the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.

A. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;

B. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer;

C. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete

or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective 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;

D. Provide all Relevant Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by Respondents;

E. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees to terminate his or her employment with the Commission-approved Acquirer; *provided, however,* that Respondents may:

1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

2. hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further, however,* that this Paragraph shall not prohibit Respondents from

making offers of employment to or employing any Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Commission-approved Acquirer.

VII.

IT IS FURTHER ORDERED that, at the request of a Commission-approved Acquirer, for a period not to exceed twelve (12) months, or as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

A. Respondents shall provide Transitional Services to the Commission-approved Acquirer sufficient to enable the Commission-approved Acquirer to operate Psychiatric Hospital Facilities and to provide Acute Inpatient Psychiatric Services in substantially the same manner that Respondents have operated such facilities and provided such services at the Psychiatric Hospital Facilities to be divested; and

B. Respondents shall provide the Transitional Services required by this Paragraph at substantially the same level and quality as such services are provided by Respondents in connection with its operation of the Psychiatric Hospital Facilities to be divested.

Provided, however, that Respondents shall not (i) require the Commission-approved Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation to provide Transitional

Services because of a material breach by the Commission-approved Acquirer of any agreement to provide such assistance except if Respondents are unable to provide such services due to such material breach.

VIII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations imposed by Paragraphs II., III., or IV. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the required Divestiture Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VIII.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 Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons

for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

0. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

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

    a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

    b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraphs II., III., or IV. of this Order, or believes that such obligations can be

achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the period only two (2) times.

c. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VIII. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

d. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such

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

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

f. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the

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

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

h. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

i. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

C. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee, issue such additional orders or directions as may be necessary or

appropriate to accomplish the divestitures required by this Order.

D. The Divestiture Trustee appointed pursuant to this Paragraph VIII. may be the same person appointed as Hold Separate Trustee pursuant to the relevant provisions of the Hold Separate Order.

IX.

IT IS FURTHER ORDERED that:

A. No Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements.

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

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

D. Respondents shall not modify or amend any material term of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Closing Date, without the prior approval of the Commission. Notwithstanding any paragraph, section, or

other provision of any Divestiture Agreement, for a period of five (5) years after the respective Closing Date, any modification of the relevant Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission of the modification no later than five (5) days following execution of the documents containing the modification, such notice to include the specific language of the modification, the need for the modification, and a description of the effect, if any, on Respondents' obligations under the Order; and, if the Commission rejects the modification, Respondents shall rescind it.

X.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Order becomes final, Respondents shall not, without providing advance written notification to the Commission in the manner described in this Paragraph, directly or indirectly:

0. Acquire any stock, share capital, equity, or other interest in any Person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in or is engaged in providing Acute Inpatient Psychiatric Services in any of the Relevant Areas; or

0. Enter into any agreement or other arrangement to manage or otherwise control a Third Party Psychiatric Facility which during the twelve (12) months immediately preceding such agreement or arrangement, was engaged or is engaged in providing Acute Inpatient Psychiatric Services in any of the Relevant Areas.

Nothing herein shall be construed to require advance written notification if Respondents seek to open a new Psychiatric Hospital Facility or expand existing Acute Inpatient Psychiatric Services at one of Respondents' Psychiatric Hospital Facilities in any of the Relevant Areas.

A. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. *Provided further, however,* that prior notification shall not be required by

this Paragraph for Respondents' continued ownership, management, or operation of the assets required to be divested (i) pursuant to Paragraphs II., III., or IV. of this Order pending such divestiture; and (ii) pursuant to the Divestiture Agreement.

XI.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after this Order becomes final, and every sixty (60) days thereafter until Respondents have complied with their obligations in Paragraphs II., III., or IV. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II., III., and IV. of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II., III., and IV. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communication to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture.

B. One (1) year after this Order becomes final, annually for the next nine (9) years on the anniversary of that date, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

XII.

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

A. Any proposed dissolution of such Respondent;

B. Any proposed acquisition, merger, or consolidation of such Respondent; and

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

XIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to their principal United States offices, registered office of their United States subsidiaries, or headquarters addresses, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

XIV.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date this Order becomes final.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Psychiatric Solutions, Inc. ("PSI"), by Universal Health Services, Inc. ("UHS"), an entity controlled by Alan B. Miller, hereinafter referred to as Respondents, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by

Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Alan B. Miller is a natural person with his offices and principal place of business located at 367 South Gulph Road, PO Box 51448, King of Prussia, PA 19406-0958.

2. Respondent Universal Health Services, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 367 South Gulph Road, PO Box 61558, King of Prussia, PA 19406-0958.

3. Respondent Psychiatric Solutions, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 6640 Carothers Parkway, Suite 500, Franklin, TN 37067.

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

ORDER

I.

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Acquisition Date" means the date on which Respondent Universal Health Services, Inc., directly or indirectly, acquires a controlling interest in Respondent Psychiatric Solutions, Inc.

B. "Decision and Order" means

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

0. the Final Decision and Order issued by the Commission following issuance and service of a final Decision and Order by the Commission.

A. "Hold Separate Business" means the Delaware Divestiture Assets, the Las Vegas Divestiture Assets, and the Puerto Rico Divestiture Assets.

B. "Hold Separate Employees" means all full-time employees, part-time, employees, contract employees, and independent contractors, whose duties, at any time during the ninety (90) days preceding the Acquisition or any time after the Acquisition related or relates primarily

to at least one of the Divestiture Businesses, a complete list of whom has been submitted to and approved by the Hold Separate Trustee and each respective Manager, in consultation with the Commission staff, no later than three (3) days after the Acquisition.

C. "Hold Separate Order" means this Order to Hold Separate and Maintain Assets.

D. "Hold Separate Period" means the period during which the Hold Separate Order is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph VIII. of this Hold Separate Order.

E. "Hold Separate Trustee" means the Person appointed pursuant to Paragraph II. of this Hold Separate Order.

F. "Manager" means the Person or Persons appointed pursuant to Paragraph II. of this Hold Separate Order.

G. "Orders" means the Decision and Order and this Hold Separate Order.

H. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity or governmental body.

I. "Support Service Employees" means the persons listed on Confidential Appendix A of the Hold Separate Order; at any time during the Hold Separate Period, Respondents may, in consultation with the Hold Separate Trustee, modify the list of Support Service Employees on Confidential Appendix A.

J. "Support Services" means assistance with respect to the operation of the Hold Separate Business, including, but not limited to, (i) human resources and administrative

services such as payroll processing and employee benefits; (ii) financial accounting services; (iii) reimbursement department support (i.e., Medicare cost reports); (iv) tax-related support; (v) treasury support; (vi) insurance support; (vii) clinical information systems support; (viii) information technology software and support services; (ix) participation in group purchasing arrangements; (x) online training programs; (xi) legal services; and (xii) federal and state regulatory compliance support.

II.

IT IS FURTHER ORDERED that during the Hold Separate Period:

A. Respondents shall:

0. Hold the Hold Separate Business separate, apart, and independent of Respondents' other businesses and assets as required by this Hold Separate Order and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business; and

0. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, the Managers, or the Hold Separate Trustee, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to ensure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and all applicable laws.

A. Respondents shall take all actions necessary to maintain and ensure the continued maintenance of the viability,

marketability and competitiveness of the Hold Separate Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, and shall not sell, transfer, encumber or otherwise impair the Hold Separate Business (except as required by the Decision and Order).

B. Respondents shall hold the Hold Separate Business separate, apart, and independent of its other operations on the following terms and conditions:

0. At any time after Respondents sign the Consent Agreement, the Commission may appoint Robert H. Osburn as Hold Separate Trustee to monitor the operations of the Hold Separate Business and ensure that Respondents comply with their obligations as required by this Hold Separate Order and the Decision and Order:

   a. The Commission shall select the Hold Separate Trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) business days after notice by the staff of the Commission to Respondents of the identity of any proposed Hold Separate Trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

   b. The Hold Separate Trustee shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Manager or Managers; maintaining the independence of the Hold Separate Business; and

monitoring Respondents' compliance with their obligations pursuant to the Hold Separate Order, including, without limitation, maintaining the viability, marketability and competitiveness of the Hold Separate Business pending divestiture.

c. No later than three (3) days after appointment of the Hold Separate Trustee, Respondents shall execute an agreement that, subject to the prior approval of the Commission, transfers to and confers upon the Hold Separate Trustee all rights, powers, and authority necessary to permit the Hold Separate Trustee to perform his or her duties and responsibilities pursuant to this Hold Separate Order, in a manner consistent with the purposes of the Orders, and shall require that the Hold Separate Trustee shall act in a fiduciary capacity for the benefit of the Commission.

d. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Trustee may reasonably request and shall cooperate with the Hold Separate Trustee.

e. Respondents shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondents' compliance with this Hold

Separate Order, the Consent Agreement or the Decision and Order or otherwise to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order.

f. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.

g. The Commission may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Trustee's duties.

h. Respondents may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however,* that such agreement shall not restrict the Hold Separate Trustee from providing any information to the Commission.

i. The Hold Separate Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.

j. Respondents shall indemnify the Hold Separate Trustee 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 Hold Separate 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 liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Hold Separate Trustee.

k. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the Hold Separate Business is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

l. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this Hold Separate Order.

m. The Hold Separate Trustee shall serve until the day after the last of the Closing Dates; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

0. No later than five (5) days after the Acquisition Date, Respondents shall appoint a Manager or Managers, approved by the Hold Separate Trustee in consultation with Commission staff, from among the current employees of the Hold Separate Business to manage and maintain the operations of the Hold Separate Business in the regular and ordinary course of business and in accordance with past practice:

   a. Each Manager shall report directly and exclusively to the Hold Separate Trustee and shall manage the Hold Separate Business independently of the management of Respondents and their other businesses. No Manager shall be involved, in any way, in the operations of the other businesses of Respondents during the term of this Hold Separate Order.

   b. Each Manager shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Manager's duties and responsibilities. Nothing contained herein shall preclude any of the Managers from contacting or communicating directly with the staff of the Commission either at the request of the staff of the Commission or in the discretion of the Manager.

c. No later than three (3) days after appointment of a Manager, Respondents shall enter into a management agreement with that Manager that, subject to the prior approval of the Hold Separate Trustee, in consultation with the Commission staff, transfers all rights, powers, and authority necessary to permit that Manager to perform his or her duties and responsibilities pursuant to this Hold Separate Order, in a manner consistent with the purposes of the Orders.

d. No Manager shall make material changes in the ongoing operations of the Hold Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.

e. Each Manager shall have the authority, in consultation with the Hold Separate Trustee, to remove Hold Separate Employees and replace them with others of similar experience or skills. If any Hold Separate Employee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Manager, in consultation with the Hold Separate Trustee, may request Respondents to, and Respondents shall, appoint a substitute Person, which Person the Manager shall have the right to approve.

f. In addition to Hold Separate Employees, each Manager may, in consultation with the Hold Separate Trustee, employ such Persons as are reasonably necessary to assist the Manager in managing the Hold Separate Business.

g. Respondent shall provide each Manager with reasonable financial incentives to undertake this

position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the Hold Separate Business's viability, marketability and competitiveness until the Closing Date, and as may otherwise be necessary to achieve the purposes of these Orders.

h. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove a Manager for cause. Within three (3) days of such removal, Respondents shall appoint a replacement Manager on the same terms and conditions as provided in this Hold Separate Order. In the event that a Manager voluntarily ceases to act as a Manager, then Respondents shall appoint a substitute Manager within three (3) days on the same terms and conditions as provided in this Hold Separate Order.

i. Each Manager shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.

j. Respondents shall indemnify each 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 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 liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Manager.

0. The Hold Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Hold Separate Business. To the extent that such employees leave or have left the Hold Separate Business prior to the Closing Date of the respective Divestiture Assets, the Manager, in consultation with the Hold Separate Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.

0. Respondents shall provide the Hold Separate Business with sufficient financial and other resources as are appropriate in the judgment of the Hold Separate Trustee:

   a. to operate the Hold Separate Business at least as it is currently operated (including efforts to generate new business) consistent with the practices of the Hold Separate Business in place prior to the Acquisition Date;

   b. to perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and with current plans;

   c. to carry on during the Hold Separate Period such capital projects and physical plant improvements as are already under way for which all necessary

regulatory and legal approvals have been obtained, including but not limited to existing or planned renovation, remodeling, and expansion projects; and

d. to maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however,* that, consistent with the purposes of the Decision and Order and in consultation with the Hold Separate Trustee, the Manager may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

0. In connection with Support Services not included within the Hold Separate Business:

a. Respondents shall continue to provide, or offer to provide, the same Support Services to the Hold Separate Business as are being provided to the Hold Separate Business by Respondents as of the date the Consent Agreement is signed by Respondents;

b. For Support Services that Respondents provided to the Hold Separate Business as of the date the Consent Agreement is signed by Respondents, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services as of the date the Consent Agreement is signed by Respondents;

c. For any other Support Services that Respondents may provide to the Hold Separate Business, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services;

d. Support Service Employees must retain and maintain all Confidential Business Information of the Hold Separate Business on a confidential basis, and, except as is permitted by the Orders, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves the management or operation of any of Respondents' businesses or activities other than the Hold Separate Business. As required by II.C.6., below, Support Service Employees shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Hold Separate Business, except as permitted by the Orders; and

e. Not withstanding the above, the Hold Separate Business shall have, at the option of the Manager and in consultation with the Hold Separate Trustee, the ability to acquire Support Services from Third Parties.

0. Respondents shall cause the Hold Separate Trustee, each Manager, and each of Respondents' employees (excluding those employed in the Hold Separate Business) having access to Confidential Business Information of or pertaining to the Hold Separate Business to submit to the Commission a signed statement that the individual will maintain the

confidentiality required by the terms and conditions of this Hold Separate Order. These individuals must retain and maintain all Confidential Business Information of or pertaining to the Hold Separate Business on a confidential basis and, except as is permitted by this Hold Separate Order or the Decision and Order, such Persons shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other Person whose employment involves the management or operations of any of Respondents' businesses or activities other than the Hold Separate Business.

0. Except for the Managers and Hold Separate Employees, and except to the extent provided in this Hold Separate Order, Respondents shall not permit any other of its employees, officers, or directors to be involved in the operations of the Hold Separate Business.

0. Respondents' employees (excluding the Hold Separate Employees and Support Service Employees) shall not receive, or have access to, or use or continue to use any Confidential Business Information except:

   a. as required by law; and

   b. to the extent that necessary information is exchanged:

      (1) in the course of consummating the Acquisition;

(2) in negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence;

(3) in complying with or as permitted by this Hold Separate Order or the Decision and Order;

(4) in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Hold Separate Business and the integrity of the financial controls of the Hold Separate Business;

(5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Hold Separate Business; or

(6) in obtaining legal advice.

Nor shall any Manager or any Hold Separate Employees receive or have access to, or use or continue to use, any confidential business information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply

with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

0. Respondents and the Hold Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.

10. No later than ten (10) days after the Acquisition Date, Respondents shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate Order.

11. No later than ten (10) days after the Acquisition Date, Respondents shall circulate to Hold Separate Employees, and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business, a notice of this Hold Separate Order and the Consent Agreement, in a form approved by the Hold Separate Trustee in consultation with Commission staff.

A. Respondents shall provide each Hold Separate Employee with reasonable financial incentives to continue in his or

her position consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Assets pending divestiture. Such incentives shall include a continuation of all employee benefits, including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the viability, marketability and competitiveness of the Divestiture Assets until the applicable Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.

B. The purpose of this Hold Separate Order is to: (1) preserve the assets and businesses within the Hold Separate Business as viable, competitive, and ongoing businesses independent of Respondents until the divestitures required by the Decision and Order are achieved; (2) assure that no Confidential Business Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order and the Decision and Order; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) maintain the full economic viability, marketability and competitiveness of the Divestiture Assets, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall not use, solicit, or access, directly or indirectly, any Confidential Business Information, and

shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such Confidential Business Information, directly or indirectly, to or with any Person other than:

0. as necessary to comply with the requirements of these Orders;

0. subject to an appropriate confidentiality agreement, a Person that has shown an interest in acquiring one or more of the Divestiture Businesses and that UHS has reason to believe may be qualified to acquire one or more of the Divestiture Businesses;

0. a Prospective Acquirer or Commission-approved Acquirer, or other Persons specifically authorized by such Prospective Acquirer or Commission-approved Acquirer to receive such information, regarding a particular Divestiture Business;

0. pursuant to a Divestiture Agreement;

0. to enforce the terms of a Divestiture Agreement or prosecute or defend against any dispute or legal proceeding; or

0. to comply with applicable law, regulations and other legal requirements.

A. No later than five (5) days after the Acquisition, Respondents shall provide written notification of the restrictions, prohibitions and requirements of this Paragraph III. and Paragraph V. of the Decision and Order to all of Respondents' employees, agents, and representatives located in the Relevant Areas or, even if located outside the Relevant Areas, to Respondents' employees, agents, and representatives who had or have

responsibilities in or relating to the Relevant Areas or who had or have access to or possession, custody or control of any Confidential Business Information. Respondents may provide such notification by e-mail with return receipt requested or similar transmission, and must keep a file of any receipts or acknowledgments for one (1) year after the respective Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such notifications at Respondents' corporate headquarters and shall provide an officer's certification to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

B. Respondents shall:

0. no later than fourteen (14) days after the Acquisition, obtain, as a condition of continued employment post-divestiture, from each of Respondents' employees, agents, and representatives located in the Relevant Areas or, even if located outside the Relevant Areas, from each of Respondents' employees, agents, and representatives who had or have responsibilities in or relating to the Relevant Areas or who had or have access to or possession, custody or control of any Confidential Business Information an executed confidentiality agreement that complies with the restrictions, prohibitions and requirements of these Orders; and

0. no later than thirty (30) days after the Acquisition, institute procedures and requirements and take such actions as are necessary to ensure that Respondents'

personnel comply with the restrictions, prohibitions and requirements of this Paragraph III., including all actions that Respondents would take to protect their own trade secrets and confidential information.

IV.

IT IS FURTHER ORDERED that Respondents shall:

A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Relevant Employee, as and to the extent permitted by law:

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

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

3. the base salary or current wages;

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

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

6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. at the Prospective Acquirer's option, copies of all employee benefit plans and summary plan

descriptions (if any) applicable to the Relevant Employee.

B. Within a reasonable time after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees;

C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Prospective Acquirer;

D. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however,* that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

E. Provide all Relevant Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee

benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by Respondents;

F. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees to terminate his or her employment with the Commission-approved Acquirer; *provided, however,* that Respondents may:

1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

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

V.

IT IS FURTHER ORDERED that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondents

shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

VI.

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

A. Any proposed dissolution of such Respondent;

B. Any proposed acquisition, merger, or consolidation of such Respondent; and

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

VII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the applicable Respondent made to its principal United States offices, registered office of its United States subsidiary, or headquarters address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and

documents in the possession or under the control of such Respondent related to compliance with this Hold Separate Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Hold Separate Order.

VIII.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. the day after the last of the divestitures required by the Decision and Order is completed; *provided, however*, that when the Divestiture Assets that are included within the Hold Separate Business are divested pursuant to the applicable paragraphs in the Decision and Order, those Divestiture Assets shall cease to be covered by this Hold Separate Order.

By the Commission.

CONFIDENTIAL APPENDIX A

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

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Alan B. Miller and Universal Health Services, Inc. (collectively, "UHS") and Psychiatric Solutions, Inc. ("PSI"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from UHS's acquisition of PSI. Under the terms of the proposed Consent Agreement, UHS is required to divest four psychiatric facilities and eleven affiliated clinics operating in three local acute inpatient psychiatric care markets to acquirers who receive the approval of the Commission. The proposed Consent Agreement also requires UHS to divest all related assets and real property necessary to ensure that the buyer(s) of the divested facilities will be able to quickly and fully replicate the competition that would have otherwise been eliminated by the acquisition. Finally, UHS and PSI have agreed to an Order to Hold Separate and Maintain Assets ("Hold Separate Order") that requires UHS to maintain and hold separate the facilities to be divested pending their final divestiture pursuant to the Consent Agreement.

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

On May 16, 2010, UHS and PSI entered into a merger agreement under which UHS proposes to acquire all of the outstanding voting securities of PSI for approximately $2.0 billion in cash, and to assume approximately $1.1 billion of PSI debt. The Commission's complaint

alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by removing an actual, direct, and substantial competitor from three local markets for acute inpatient psychiatric care. The proposed Consent Agreement would remedy the alleged violations by requiring complete divestitures in each of the three markets. These divestitures will replace the competition that otherwise would be lost in these markets as a result of the proposed acquisition.

The Parties

UHS, headquartered in King of Prussia, Pennsylvania, owns or operates 25 general acute care hospitals and 102 behavioral health facilities located in 32 states, Washington, D.C., and Puerto Rico. It is one of the nation's largest hospital management companies, with 2009 revenues totaling approximately $5.2 billion. In 2009, UHS's 102 behavioral health facilities generated approximately $1.3 billion in revenue (25% of total revenues) from nearly 8,000 licensed beds and over 2 million patient days.

PSI, headquartered in Franklin, Tennessee, operates 94 inpatient behavioral health facilities in 32 states, Puerto Rico, and the U.S. Virgin Islands. The 11,000 licensed beds at these facilities accounted for 2.8 million patient days in 2009. The company also manages the behavioral health programs for 109 general acute care hospitals owned by third parties. PSI's revenue for the twelve months ending December 31, 2009 was approximately $1.8 billion. Behavioral health facilities and residential treatment centers generated 93% of 2009 revenues and the contract management business accounted for the remaining 7%.

Acute Inpatient Psychiatric Services

UHS's proposed acquisition of PSI poses substantial antitrust concerns in the relevant product market of acute inpatient psychiatric

services. Acute inpatient psychiatric services are those provided for the diagnosis, treatment, and care of patients deemed to be a threat to themselves or others or unable to perform basic life functions, due to an acute psychiatric condition.

The three acute inpatient psychiatric services markets are local in nature. Analysis of patient flow data and evidence gathered from market participants indicate that patients and their families prefer to find care close to home in order to facilitate visits or participation in family therapy. Also, emergency responders typically transport patients in acute psychiatric distress to the nearest emergency room for treatment or placement. The three acute inpatient psychiatric services markets affected by the proposed acquisition are: the State of Delaware; the Las Vegas, Nevada metropolitan statistical area; and the Commonwealth of Puerto Rico.

The proposed acquisition would dramatically increase market concentration in each of the relevant acute inpatient psychiatric markets. The markets already range from moderately to highly concentrated prior to the acquisition. In each market, the proposed acquisition would significantly increase market concentration and eliminate substantial, direct competition between two significant acute inpatient psychiatric care providers. Under the 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, an acquisition is presumed to enhance market power or facilitate its exercise if it increases the Herfindahl-Hirschman Index ("HHI") by more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. The proposed acquisition far exceeds these thresholds: the post-acquisition HHIs range from 3916 to 4942, and HHI levels would increase by 1428 to 2610 points above pre-acquisition levels. The proposed acquisition also would result in UHS controlling approximately 60 percent or more of the acute inpatient psychiatric beds in each of the affected markets.

The presumption of anticompetitive harm created by the steep increases in market concentration is further supported by evidence of

the intense rivalry between UHS- and PSI-owned facilities that would be eliminated by the proposed acquisition. In each of the local markets, consumers have benefitted from the head-to-head competition in the form of lower health care costs, higher quality of care, and improved service offerings. Left unremedied, the proposed acquisition likely would cause anticompetitive harm by enabling UHS to profit by unilaterally raising the reimbursement rates negotiated with commercial health plans. These costs are ultimately passed on to consumers in the form of higher premiums, co-pays, and other out-of-pocket costs. The loss of competition also reduces UHS's incentive to improve quality and provide better service.

New entry is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition. Among other entry barriers, regulatory requirements pose substantial barriers to entrants attempting to establish new psychiatric facilities or to expand their offerings in the relevant markets. In particular, Delaware and Puerto Rico require Certificates of Need in order to enter or significantly expand the number of beds provided in the market. The availability of suitable land, local zoning regulations, and Medicare and Medicaid certifications also impact significantly the ability of firms to enter or expand. As a result, new entry sufficient to achieve a significant market impact is unlikely to occur in a timely manner in these markets.

The Proposed Consent Agreement

The proposed Consent Agreement wholly remedies the anticompetitive effects of the acquisition by requiring the divestiture of all of the PSI or UHS assets to a Commission-approved buyer (or buyers) within six months of the date the Consent Agreement becomes final in Delaware and Las Vegas, and within nine months in Puerto Rico. Specifically, the proposed Consent Agreement requires the divestiture of four facilities that provide acute inpatient psychiatric care, as well as related outpatient clinics, contracts, commercial trade names, and real property, in the three geographic markets. *See* Appendix A for a complete list of the divestiture assets.

Each psychiatric facility and its associated clinics to be divested in Delaware and Puerto Rico is a stand-alone business, and includes all of the assets necessary for a Commission-approved buyer to independently and effectively operate each facility. The two facilities in Las Vegas are closely related and complementary businesses and were jointly managed within PSI; as such, the two facilities together constitute a stand-alone business, and include all of the assets necessary for a Commission-approved buyer to independently and effectively operate the business.

The proposed Consent Agreement contains several provisions designed to ensure that the divestitures are successful. First, the Commission will evaluate the suitability of possible purchasers of the divested assets to ensure that the competitive environment that would have existed but for the transaction is replicated by the required divestitures. If UHS fails to divest the assets within the required time period to a Commission-approved buyer, the Consent Agreement permits the Commission to appoint a trustee to divest the assets. Second, UHS is required to provide transitional services to the Commission-approved buyer. These services will facilitate a smooth transition of the assets to the acquirer, and ensure continued and uninterrupted operation of the assets during the transition. Third, the Consent Agreement requires UHS to remove any contractual impediments that may deter the current managers of the facilities to be divested from accepting offers of employment from any Commission-approved acquirer and to obtain all consents necessary to transfer the required assets. Finally, to ensure that the Commission will have an opportunity to review any future attempt by UHS to acquire any acute inpatient psychiatric services provider in any of the three geographic markets at issue, the proposed Consent Agreement contains a ten-year prior notice provision.

The Hold Separate Order requires the parties to maintain the viability of the divestiture assets as competitive operations until each facility is transferred to a Commission-approved buyer. Specifically, the parties must maintain the confidentiality of sensitive business information, and take all actions necessary to prevent the destruction

or wasting of the divestiture assets. After UHS acquires PSI, the Hold Separate Order requires that UHS separately hold and maintain the divestiture assets and appoint a Hold Separate Manager to operate these assets pending their divestiture.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.

IN THE MATTER OF
ORECK CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5(A) AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4321; File No. 102 3033
Filed May 19, 2011 – Decision May 19, 2011

This consent order relates to Oreck Corporation's ("Oreck") advertising, marketing, and sale of its Oreck Halo vacuum cleaner and Oreck ProShield Plus portable air cleaner. The complaint alleges that Oreck misrepresented that its Oreck Halo and Oreck ProShield Plus (1) substantially reduces the risk of or prevents the flu; (2) substantially reduces the risk of or prevents other illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, diarrhea, upset stomachs, asthma, and allergy symptoms; and (3) will eliminate all or virtually all common germs and allergens found on the floors in users' homes. The consent order prohibits Oreck from making misleading representations that the Oreck Halo or any other vacuum cleaner (1) reduces the risk of or prevents the flu; (2) reduces the risk of or prevents illnesses or ailments caused by bacteria, viruses, molds, or allergens, such as the common cold, diarrhea, upset stomachs, asthma and allergy symptoms; (3) will eliminate all or virtually all germs, bacteria, dust mites, molds, viruses or allergens from a user's floor; and (4) will eliminate any percent or numerical quantity of germs, bacteria, dust mites, molds, viruses or allergens from a user's floor. The consent order also requires Oreck to pay $750,000 in consumer redress.

Participants

For the *Commission*: *Matthew D. Gold* and *Kerry O'Brien*.

For the *Respondent*: *John G. Arena, Oreck Corporation; Michael L. Sibarium, Pillsbury Winthrop Shaw Pittman LLP;* and *Brian D. Fergemann, Winston & Strawn LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Oreck Corporation, a corporation ("respondent"), has violated the

provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Oreck Corporation is a Delaware corporation with its principal office or place of business at 565 Marriott Drive, Suite 300, Nashville, Tennessee 37214.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including the Oreck Halo vacuum cleaner and the Oreck ProShield Plus portable air cleaner. Respondent offers these products direct to consumers by telephone and through numerous websites, including www.oreck.com, www.healthier-home.com, www.oreckhalo.com, and www.oreckpureair.com, as well as through company-owned and franchised retail stores and third-party retail outlets. The Oreck Halo and the Oreck ProShield Plus are "devices," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. The Oreck Halo is an upright vacuum cleaner that has a built-in light chamber and a HEPA filter bag. The light chamber generates ultraviolet light in the C spectrum onto floor surfaces while vacuuming. Respondent promotes the Oreck Halo as effective, through normal use, in killing virtually all bacteria, viruses, germs, mold, and allergens that exist on carpets and other floor surfaces.

5. The Oreck Proshield Plus is a portable room air cleaner. Containing an electrostatic precipitator, the Oreck Proshield Plus uses a process called electrostatic attraction to trap airborne particles. Respondent promotes the Oreck ProShield Plus as effective, through normal use, in killing virtually all bacteria, viruses, germs, mold, and allergens that exist in the air of an average-sized household room.

6. Respondent has disseminated or has caused to be

disseminated advertisements for the Oreck Halo and Oreck ProShield Plus, including but not necessarily limited to the attached Exhibits A through N. These advertisements contain the following statements and depictions:

A. http://www.oreck.com/flu-fighters/index.cfm, accessed 12/9/09 (Exhibit A)

"The new Oreck ProShield™ Plus Air Purifier with Helios Shield™ captures and destroys many airborne viruses like the flu.
You can do something about the air in your home. Twice every hour, the new Oreck ProShield Plus cleans and re-circulates the air in a 12' x 1 8' room. In in-home testing, the ProShield helped deliver up to a 99% reduction in particles down to .1 microns.* . . . ."

"The Oreck Halo® kills many germs on your floor while you vacuum.
Now you and your family can enjoy a healthier clean. This is the only vacuum in the world that uses powerful UV-C light to kill many of the germs that could be living on your floors. UV-C technology is not new. It's used to sanitize hospital operating rooms and to purify drinking water. . . ."

B. Oreck Halo and ProShield Plus Print Advertisement (Exhibit B)

"Introducing the Oreck Flu Fighters.

Help stop the flu on virtually any surface and in the air in your home.

Captures Viruses

The NEW Oreck ProShield™ Plus Air Purifier with Helios Shield™ can capture and destroy many airborne viruses like the flu.

You can do something about the air in your home. Twice every hour, the new Oreck ProShield Plus cleans and re-circulates the air in a 12' x 1 8' room. In in-home testing, the ProShield helped deliver up to a 99% reduction in airborne particles down to .1 microns.*

. . . .

Now you and your family can enjoy a healthier clean. This is the only vacuum in the world that uses powerful UV-C light to kill many of the germs that could be living on your floors. UV-C technology is not new. It's used to sanitize hospital operating rooms and to purify drinking water supplies. See for yourself just how effective it is and what a fantastic job it does on all types of floor surfaces.* . . . ."

[The advertisement contains the following statement in small print: "*Results may vary. Extent of killing on surfaces depends on microorganism exposure time. The Oreck Halo vacuum cleaner is not intended for use in the

cure, mitigation, treatment or prevention of any disease or medical condition, including asthma or allergies."]

C. Oreck Halo 30-minute Infomercial (Exhibit C, transcript, and Exhibit D, DVD containing ad)

[Announcer]: "Your floors look clean but are they really...even if it looks clean there can be germs, mold, bacteria, viruses, dust mite and flea eggs living right under your feet. Tracked in on your shoes or carried in by your pet. Did you know that you can find over 100,000 dust mites on one square yard of carpet and dust mites have been linked to indoor allergies and asthma. Plus there can be up to 2,500 bacteria, a common cause of infections on just one square inch of tile. But it gets worse! You could find up to 200,000 bacteria on just one square inch of carpet."

. . . .

[Announcer]: "Ordinary vacuums pick up dirt, but may leave germs behind and harsh chemicals like bleach can ruin carpet. But now you can kill and reduce many germs and bacteria on all your floors, while you vacuum. Introducing the revolutionary Oreck Halo-the only germ-killing UVC vacuum!"

[The advertisement depicts a woman quickly vacuuming up all simulated germs. On the screen, the following statement appears in small white print superimposed at the bottom of the screen for a few seconds: "Simulation only. Results may vary. Extent of killing on surfaces depends on microorganism exposure time. The Oreck Halo vacuum cleaner is not intended for use in the cure, mitigation, treatment or prevention of any disease or medical condition, including asthma or allergies."]

. . . .

[Announcer]: "The light chamber in the Oreck Halo has killed up to 99.9% of bacteria exposed to its light in one second or less."

[The advertisement depicts a woman vacuuming up all simulated germs. On screen, the statements appear: "Killed up to 99.9% of bacteria in laboratory testing." and "One second or less."]

. . . .

[Andrea Jackson]: "The Oreck Halo light chamber has been tested and shown to kill up to 99.9% of certain common germs, plus dangerous pathogens like E. Coli and MRSA. Best of all, the many germs it kills can then be vacuumed up without a trace, thanks to superior vacuum technology that could only come from Oreck."

[The advertisement depicts a man quickly vacuuming up all simulated germs. On screen, the following statement appears: "Reduced up to 99.9% of common germs in laboratory testing." The advertisement also contains the following statement in small white print superimposed at the bottom of the screen: "Simulation only. Results may vary. Extent of killing on surfaces depends on microorganism exposure time. The Oreck Halo vacuum cleaner is not intended for use in the cure, mitigation, treatment or prevention of any disease or medical condition, including asthma or allergies. Do not attempt to look into Oreck Halo light. See Owner's Manual for safety and other instructions."]

. . . .

[Announcer]: "In laboratory testing the Halo light

chamber can kill flu virus and e.coli bacteria in as little as .33 seconds. There is no extra work and no extra cleaning."

[The advertisement depicts a man in lab coat vacuuming, followed by the following chart:

The advertisement then calls out from the chart the times relating to the flu virus and e. coli bacteria.]

. . . .

[Stan Kikkert]: "I'm Stan Kikkert. In carpets, we can commonly find staphylococcus. Basically we did a simple experiment. I applied staphylococcus to the surface of various carpet samples. Some of those samples were vacuumed two passes from the Oreck Halo vac. Some received four passes, some received six passes. In addition, I did this experiment in parallel with a conventional vacuum, one that did not have an ultra-violet light. After performing the vacuuming, I swabbed the carpets, and transferred those swabs onto some auger Petri dishes. What we saw was a conventional vacuum is not effective at removing microorganisms from the carpet. The Oreck Halo vac was successful at removing bacteria from the surface of

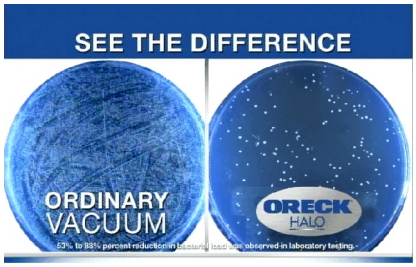
carpet samples. That reduction was approximately 80%, with each set of two passes."

[On-screen depiction]

[On screen in above depiction in small white print at the bottom of the screen: "53% to 88% percent reduction in bacterial load was observed in laboratory testing."]

[Stan Kikkert]: "We see that repeated use of the Oreck Halo vac, you get a repeated reduction in the amount of bacteria that's present on the surface of the carpet samples."

[On-screen depiction]



[On screen in above depiction in small white print at the bottom of the screen: "53% to 88% percent reduction in bacterial load was observed in laboratory testing."]

. . . .

[Dr. Charles Gerba]: "To assess the effectiveness of the Oreck Halo, we looked at the numbers of bacteria in five different households. And I want to show you the results, because they're rather dramatic. Let me start with the Rosser home, where you can see the number of bacteria on the baby's carpeting before and after the use of the Oreck Halo-over a 90% reduction."

[On-screen depiction]

[On screen in above depiction in small white print at the bottom of the screen: "Results may vary. Extent of killing on surfaces depends on microorganism exposure time. Bacteria colonies were incubated for comparison based on colony growth. Results may not represent actual bacteria levels present prior to incubation."]

[Consumer endorser]: "Now I know firsthand! I mean the results are right in front of my face. It makes such a difference. That's just amazing."

[Dr. Charles Gerba]: "Well, let's take a look at the results from the Harber's kitchen tile floor. This is before and after. You can see the effectiveness of the Oreck Halo - here over 90% reduction."

[Woman's voice; close-up of two simulated Petri dishes-before and after-"Harber Family" heading]: "I can't

believe how much the Oreck Halo eliminated, and how, just by using the Halo for the thirty days. . . I just couldn't be happier with the results."

[Dr. Charles Gerba]: "Let's move on to the Squier household. You can see the large numbers of bacteria here, and in this case we reduced the number of bacteria by more than 99.9%."

[Consumer endorser]: "The bacteria was almost gone, so I know that if I continued to use the Oreck Halo, it's gonna remove more bacteria each time it's being used."

[Dr. Charles Gerba]: "Let's move on to the Coble home-the hardwood bedroom floors, you can see more than a 90% reduction."

[Consumer endorser]: "Couldn't even express the night and day results."

. . . .

D. Oreck Halo 60-second Television Commercial (Exhibit E, transcript, and Exhibit F, DVD containing ad)

[Announcer]: "Chances are allergens and illness triggers are in your home...living right under your feet. Dirt and debris you can see and germs, bacteria and dust mites that you can't see. So how do you get from here...

[Depiction of simulated germs, bacteria and dust mite eggs deep below the surface of a carpet]

to here?"

[Depiction of woman quickly vacuuming up all simulated mold, bacteria, germs and viruses]

[On screen in above depiction in small white print at the bottom of the screen: "Simulation only. Results may vary. Extent of killing on surfaces depends on microorganism exposure time. Not intended to cure, treat or prevent any disease or medical condition. Do not attempt to look into Oreck Halo light. See Owner's Manual for safety and other instructions."]

[Announcer]: "With the incredible germ killing vacuum so revolutionary it could only be an Oreck.

. . . .

The secret is the patented Halo Light chamber that creates a powerful germicidal wavelength of UV-C light that can kill and reduce up to 99.9% of germs and bacteria helping you give your floors a healthier clean."

[The advertisement depicts the Oreck Halo's UV-C light killing germs. On the screen, the following statement appears in small white print superimposed at the bottom of the screen

for a few seconds: "Results may vary. Extent of killing on surfaces depends on microorganism exposure time. The Oreck Halo vacuum cleaner is not intended to cure, treat or prevent any disease or medical condition, including asthma or allergies."]

[Announcer]: ". . . . and learn how the Oreck Halo can help you give your home a healthier clean."

[The advertisement depicts the Oreck Halo eliminating all germs below the vacuum]

E. Oreck Halo Print Advertisement (Exhibit G)

"Goodbye bacteria, viruses, mold, and germs. Hello barefoot clean!

Introducing the powerful new Oreck Halo.™ The only UV-C germ-killing vacuum.

There is a lot more that could be living in your home than just your family and pets. Dust-mites, fleas and their eggs, mold, bacteria, germs, and microorganisms that cause flu, diarrhea and upset stomachs could be living there, too. Now there's an amazingly powerful new vacuum that was designed to help protect your family from many of those microscopic, uninvited guests. It's the new Oreck Halo with exclusive germ-killing UV-C Technology.

Technology proven in hospitals. The new Oreck Halo can kill many bacteria, viruses, dust mite eggs, and even mold on any floor surface.* That's due to its powerful UV-C light. This is the same light used to disinfect hospital operating rooms and purify drinking water. You get a healthier clean.

. . . ."

[Small print at bottom of ad: "Results may vary. Extent of killing on surfaces depends on exposure time. Instant killing is considered exposure times of one second or less. The Oreck Halo vacuum cleaner is not intended for use in the cure, mitigation, treatment, or prevention of any disease or medical condition, including asthma or allergies. Bag filters 99.95% of all particles captured down to 0.3 microns."]

F. Oreck Halo Print Advertisement (Exhibit H)

"Make sure your child is the only thing crawling on your floors.

Millions of germs, viruses and bacteria could be living on **your** floor and can trigger asthma and allergy attacks, colds, and flu.

. . . .

When the light is on, germs are gone.

. . . ."

G. Oreck Halo Print Advertisement (Exhibit I)

"The Oreck Halo helps you fight the flu.

Now you can enjoy a healthier clean, thanks to the Oreck Halo.

This is the only vacuum in the world that uses powerful UV-C light to kill many of the germs that could be living on your floors, such as the flu. UV-C technology is not new. It's used to sanitize hospital operating rooms and to purify drinking water. Plus the Oreck Halo is hypo-allergenic. It traps 99.9% of particulates down to 0.3 microns.

. . . ."

H. Oreck ProShield Plus 30-minute Infomercial (Exhibit J, transcript, and Exhibit K, DVD containing ad)

[David Oreck]: "Here are a couple of questions. Do you want to protect your family from exposure to colds and flu this season in your home? Do you have pets? Do you ever use aerosol cleaners? Does anyone in your family have allergies or asthma? Now, if you answered 'yes' to any of these questions, that's where my new Pro Shield Plus Air Purifier comes in."

[On-screen depiction of woman sneezing]

. . . .

[Announcer]: "Our country is facing what some are calling the worst flu season in years. Now more than ever we should

be aware of the airborne germs and viruses that could be in our home."

. . . .

[Host]: "Well, now you can fight back with this, the new Oreck ProShield Plus, the air purifier that circulates the air to capture and kill many of the potentially harmful things that may be in it. I know how harmful they can be because my health was severely affected for several years by indoor air pollution. So when the folks at Oreck asked me to host this show I told them I wanted to see proof that the ProShield Plus worked in real homes for real families, and not just in a laboratory. Their response? No problem."

. . . .

[Tony Frassrand]: "Well, our independent air quality specialist did an initial test in the Vaccher's home and found that they had an incredibly high number of particles in their air. We then turned on the Oreck ProShield Plus that was placed it in the center of the living room, and the ProShield Plus got to work cleaning the air. Our independent air quality specialist retested the air over a short period of time to see how the Oreck ProShield Plus performed. What'd you find?"

[Indoor Air Quality Specialist]: "Well what I found was that we had a 98% reduction."

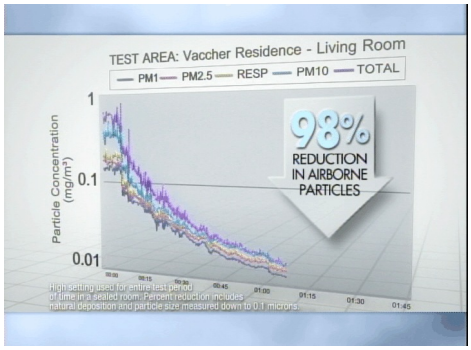
[Tony Frassrand]: "98% reduction."

[Consumer endorsers]: "Wow!"

. . . .

[Tony Frassrand]: "Remember, before the ProShield Plus,

the Vaccher family was battling an extremely high number of particulates in their air. In fact, the air in their home was more polluted than the air outside. But, the ProShield Plus helped remove 98% of those harmful particles out of the air. Well, if it can happen here in the Vaccher home then it can surely happen for you too."



[On screen in above depiction in small white print at the bottom of the screen: "High setting used for entire test period of time in a sealed room. Percent reduction includes natural deposition and particle size measured down to 0.1 microns."]

. . . .

[Announcer]: "And here's a special announcement. Our country is facing what some are calling the worst flu season in years. With the existing flu pandemic on the rise, now more than ever we should be aware of airborne germs and viruses that can be in our homes."

[On screen in above depiction in small white print at the bottom of the screen: "The Oreck ProShield Air Purifier is not intended for use in the cure, mitigation, treatment, or prevention of any disease or medical condition, including asthma or allergies."]

[Announcer]: "That's why when you order now, David Oreck will give you $50.00 off his new Oreck ProShield Plus. That's how committed Oreck is to the well being of your family and it's a smart way to help reduce your chance of exposure to colds and flu in your home."

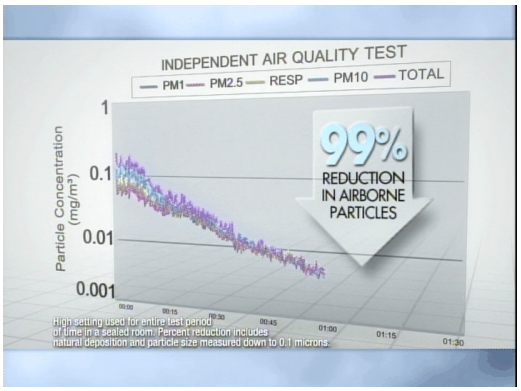
. . . .

[Host]: "Few things are more beautiful than flowers in bloom. Unfortunately, that can also mean pollen is in the air.

And for some of us, that can mean more than just an occasional sneeze. No wonder so many families with allergy and asthma sufferers love the ProShield Plus."

. . . .

[David Oreck]: "In fact, independent testing proved the ProShield Plus helped produce an astounding 99% reduction in airborne particles in a room in an actual home. And it can do the same in your home."



[On screen in above depiction in small white print at the bottom of the screen: "High setting used for entire test period of time in a sealed room. Percent reduction includes natural deposition and particle size measured down to 0.1 microns."]

. . ."

I. Oreck ProShield Plus 120-second Television Commercial (Exhibit L, transcript, and Exhibit M, DVD containing ad)

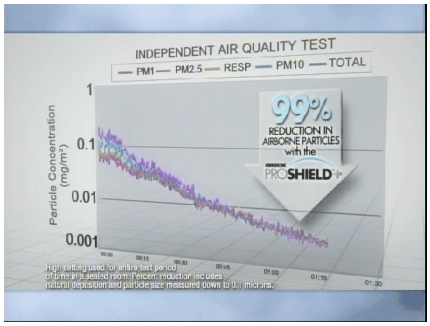
[Announcer]: "Attention. The federal government warns we could be in for the worst flu season in decades. So how are you going to fight back the millions of microorganisms that

could be riding on the airborne dust in your home?"

[Announcer]: "And those dust particles could carry things like germs, cold and flu viruses, bacteria, mold and allergens. And could be spreading illnesses like the influenza virus and when your front door closes you and your family are sealed in with that pollution."

[The advertisement depicts simulated particles floating in a typical livingroom]

[Announcer]: "Now, you can fight back with the new Oreck ProShield Plus Air Purifier. The new ProShield Plus features two air-purification innovations only available from Oreck. Powerful fans circulate the air through the ProShield Plus and Oreck's patented Truman Cell electrostatically charges many dust particles, allergens, germs and viruses pulling them out of the air like a magnet. And for odors, Oreck's brand new Helios Shield uses ultraviolet light to smash the molecular structure of gases and odors. In fact, in-home testing shows that the new ProShield Plus helped deliver up to a 99% reduction in airborne particles down to .1 microns."



[On-screen depiction of graph showing 99% reduction in airborne particles]

[On screen in above depiction in small white print at the bottom of the screen: "High setting used for entire test period of time in a sealed room. Percentage reduction includes natural deposition and particle size measured down to 0.1 microns."]

[Announcer]: ". . . . Try it risk free for 30 days. Keep it and enjoy the freedom of NO payment and NO interest for 1 year. Call now and fight the flu in your home air, with the new Oreck ProShield Plus air purifier."

J. Oreck proshield plus print advertisement provided to franchisees (exhibit n)

Introducing the New Oreck ProShield™+ Air Purifier. In-home testing shows the ProShield helped deliver up to 99% reduction in airborne particles down to .1 microns†.

Can capture and destroy many airborne allergens and viruses like the flu!


BACTERIA


VIRUSES


POLLEN

[The advertisement contains the following statement in small print: "High setting used for entire test period of time in a sealed room. Percent reduction includes natural deposition

and particle size measured down to .1 micron."]

7. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that:

A. The Oreck Halo substantially reduces the risk of or prevents the flu;

B. The Oreck Halo substantially reduces the risk of or prevents other illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, diarrhea, upset stomachs, asthma, and allergy symptoms;

C. The Oreck Halo will eliminate all or virtually all common germs and allergens found on the floors in users' homes;

D. The Oreck Halo's UV-C light is effective against germs, bacteria, dust mites, mold and viruses embedded in carpets;

E. The Oreck ProShield Plus substantially reduces the risk of or prevents the flu;

F. The Oreck ProShield Plus substantially reduces the risk of or prevents other illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, asthma, and allergy symptoms; and

G. The Oreck ProShield Plus will eliminate all or virtually all airborne particles from a typical household room under normal living conditions.

8. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made.

9. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. Through the means described in Paragraph 6, respondent has represented, expressly or by implication, that:

A. Scientific tests prove that users of the Oreck Halo will eliminate or virtually eliminate many common germs and allergens found on the floors in their homes; and

B. Scientific tests prove that the Oreck ProShield Plus will eliminate or virtually eliminate many common viruses, germs and allergens from a typical household room under normal living conditions.

11. In truth and in fact:

A. Scientific tests do not prove that users of the Oreck Halo will eliminate or virtually eliminate many common germs and allergens found on the floors in their homes; and

B. Scientific tests do not prove that the Oreck ProShield Plus will eliminate or virtually eliminate many common viruses, germs and allergens from a typical household room under normal living conditions.

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

12. Respondent has provided advertisements to its franchised stores for use in their marketing and sale of the Oreck Halo and the Oreck ProShield, including but not necessarily limited to the attached Exhibits B, F, G, H, and N.

13. Through the means described in Paragraph 12, respondent has provided means and instrumentalities to distributors of respondent's products in furtherance of the deceptive and misleading acts or practices alleged in Paragraphs 6 through 11.

14. The acts and practices of respondent 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 Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this nineteenth day of May, 2011, has issued this complaint against respondent.

By the Commission.

EXHIBIT A


Introducing the Oreck Flu Fighters
HELP REDUCE THE FLU!
Oreck
Facebook

EXHIBIT A (continued)

EXHIBIT B


INTRODUCING THE ORECK FLU FIGHTERS.
Help stop the flu on virtually any surface and in the air in your home.
CAPTURES VIRUSES
KILLS VIRUSES
The patented Oreck Halo germ-killing UV-C Light.
The NEW Oreck ProShield™ Plus Air Purifier with Helios Shield™ can capture and destroy many airborne viruses like the flu.
The Oreck Halo® can kill many germs on your floor while you vacuum.
Get FREE gifts just for trying the ProShield™ Plus.
Get FREE gifts just for trying the Oreck Halo®
$150 VALUE
$125 VALUE
Plus FREE shipping.
Plus FREE shipping.
Try these flu fighters risk-free for 30 days.
Call: 1-800-487-9794 Code: D5732 Or visit: oreck.com/novcd
NO INTEREST, NO PAYMENTS FOR ONE FULL YEAR!

EXHIBIT C

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

Oreck Halo Infomercial – Offer 2
Bags only, No Interest No Payments for 1 full year

ANNC: The following is a paid presentation for the new Oreck Halo germ-killing vacuum. Brought to you by Oreck Direct, LLC.

Oreck Halo Transcript Segment 1

VO: The following is a paid presentation for the new Oreck Halo germ killing vacuum. Brought to you by Oreck Direct LLC.

VO: Your floors look clean but are they really...even if it looks clean there can be germs, mold, bacteria, viruses, dust mite and flea eggs living right under your feet. Tracked in on your shoes or carried in by your pet. Did you know that you can find over 100,000 dust mites on one square yard of carpet and dust mites have been linked to indoor allergies and asthma. Plus there can be up to 2,500 bacteria, a common cause of infections on just one square inch of tile. But it gets worse! You could find up to 200,000 bacteria on just one square inch of carpet.

Older woman, plaid sweater: I thought once I vacuumed, I had gotten all the germs, never realizing what was actually living on my floor and rug.

VO: Ordinary vacuums pick up dirt, but may leave germs behind and harsh chemicals like bleach can ruin carpet.
VO: But now you can kill and reduce many germs and bacteria on all your floors, while you vacuum. Introducing the revolutionary Oreck Halo—the only germ-killing UVC vacuum!

Woman, blonde, green shirt: When I was using my regular vacuum to clean my floors at home, I thought I was doing a pretty good job, but boy, when I got the Oreck Halo, it totally changed my mind.

DO: Hello, I'm David Oreck. You know, the filth of the street is on your feet. And every day it can get tracked into the place we all presume is safe—our home. Now that filth is loaded with germs and bacteria that can make your entire family sick. Go beyond clean, to a healthier clean with the Oreck Halo—my remarkable germ-killing machine. Which also happens to be one of the best vacuums I've ever made.

Woman, dark hair, mint green shirt: The vacuum itself is fantastic! It's a great vacuum, and then to have that ultraviolet light, that is killing bacteria and E. Coli, and it sucked up everything so everything looks clean and it is clean.

African-American woman, pink shirt: I like having the peace of mind, knowing that when my son is playing on the floor with his little toys, that I've done everything that I can possibly do to reduce the amount of bacteria and germs that are on the carpet.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

VO: The light chamber in the Oreck Halo has killed up to 99.9% of bacteria exposed to its light in one second or less.

DO: When the light is on, the germs are gone! The patented Halo light chamber lets you kill many of the germs that could be living on your floor in your home. And most importantly, it helps protect your family. Well, here's one family that knows the value of a healthier home: Ken and Carrie Garcia. You know, eight years ago they received a wonderful blessing, but also, a serious challenge.

Carrie Garcia: We really had a need to keep our house as clean as possible.

Ken Garcia: Our triplets were born prematurely, and weighed about 2 ½ pounds when they were born.

Carrie Garcia: When we were getting ready to bring our boys home from the hospital, the doctor suggested to us that we should consider ripping up our carpets, because all of the dust mites, bacteria, germs, and mold that could be living there.

Ken Garcia: I worked in the water treatment industry and we've been using the power of ultra-violet light for decades to kill germs and bacteria in water, making it safe for people to drink.

Carrie Garcia: When Ken was telling me about how UV-C light works, I thought, wow, wouldn't that be great if we could put that on the bottom of the vacuum.

Ken Garcia: It took research, and work, and engineering to optimize the ultra-violet light on the bottom of the vacuum, so that the magnification from that ultra-violet light could kill some of the common germs, mold and bacteria on your floors while you were vacuuming.

Carrie Garcia: It just makes sense. If you're already vacuuming, why not get the benefit of the UV-C light?

Ken Garcia: We wanted to share our invention with families everywhere. So we took it to David Oreck because of his commitment to quality products that help create healthier homes.

Andrea Jackson: Hey there! I'm Andrea Jackson. You know, nothing beats having a healthier and cleaner home. Thanks to the Garcia family's ingenuity and care, the Oreck Halo gives you an easy and reliable way to safely remove many of the germs that could be living on the floors of your home. The Oreck Halo light chamber has been tested and shown to kill up to 99.9% of certain common germs, plus dangerous pathogens like E. Coli and MRSA. Best of all, the many germs it kills can then be vacuumed up without a trace, thanks to superior vacuum technology that could only come from Oreck.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

VO: Imagine a revolutionary vacuum that goes way beyond where vacuums have been before. One that is capable of picking up sand, dust, pet hair in virtually one pass with the ability to kill many germs that could be living on your floors in a flash. That's what you get with the powerful new Oreck Halo. The secret is the patented UVC Light chamber that is built right into the bottom of the vacuum. This exclusive chamber contains a powerful UVC light, specially engineered reflector array, and quartz glass lens that magnifies and focuses a germicidal wave-length of light onto your floors as you vacuum. In laboratory testing the Halo light chamber can kill flu virus and e.coli bacteria in as little as .33 seconds. There is no extra work and no extra cleaning. And the Halo is the high quality vacuum you've come to expect form Oreck. Featuring not one but two high powered motors that independently drive the brush-roll and create incredible suction. Putting 117 miles per hour of air flow at floor level to deliver debris directly to the specially designed HEPA 13 filter bag, with Sani-seal tab, that captures up to 99.9% of everything vacuumed up for clean and easy removal. Say goodbye to mess. Say goodbye to many bacteria, viruses, and germs. Say hello to barefoot clean! With the revolutionary new Oreck Halo.

Andrea: The Oreck Halo offers amazing 2-in-1 cleaning power in just one easy step. Check this out—I just turn it on, then I turn on the Halo UV-C light, and just like that, I'm not only picking up dirt and debris, I'm also killing many of the germs, bacteria and mold that the naked eye can't see living on the floor. In fact, tests have shown that just two passes of the Oreck Halo can reduce bacterial-load on your floors by up to 80%.

Stan Kikkert: I'm Stan Kikkert. In carpets, we can commonly find staphylococcus. Basically we did a simple experiment. I applied staphylococcus to the surface of various carpet samples. Some of those samples were vacuumed two passes from the Oreck Halo vac. Some received four passes, some received six passes. In addition, I did this experiment in parallel with a conventional vacuum, one that did not have an ultra-violet light. After performing the vacuuming, I swabbed the carpets, and transferred those swabs onto some auger Petri dishes. What we saw was a conventional vacuum is not effective at removing microorganisms from the carpet. The Oreck Halo vac was successful at removing bacteria from the surface of carpet samples. That reduction was approximately 80%, with each set of two passes. We see that repeated use of the Oreck Halo vac, you get a repeated reduction in the amount of bacteria that's present on the surface of the carpet samples.

Woman, curly blonde hair, dark green shirt: Knowing that Dr. Kikkert proved that just two passe of the Oreck Halo Vacuum over your carpet could reduce Staph by 80% that is really awesome and it's a big relief to know that all that stuff is out of your carpet.

Woman, blonde, dark pink shirt: I know that when I'm done vacuuming, that it's clean.

Older woman, plaid sweater: I love the Oreck Halo! I just know that when I'm doing it, I'm not wasting my time. I'm sucking up that dog hair and any germs that they may bring into the house. I feel that this is a new generation—put the bleach away and use the Oreck Halo.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

CTA – Offer 2

David: Go beyond clean to a healthier clean…with the Oreck Halo. My remarkable germ-killing machine which also happens to be one of the best vacuums I've ever made.

ANNC: Now you can kill and reduce bacteria and viruses.

Diminish dust mite and flea eggs that can trigger allergies and asthma.

All while picking up tough dirt, debris and pet hair with the revolutionary Oreck Halo, the first Germ Killing UV-C Vacuum.

Call right now for No interest and No Payments for 1 full year. Now, you to can take advantage of the Oreck Halo's 2 in 1 cleaning power and as a special bonus we'll send you a years supply of Hepa 13 Filter Bags absolutely free.

Harsh chemicals like bleach could kill germs and bacteria – but they can also ruin carpet. The Oreck Halo is safe on every floor in your home; go from carpet, to tile, to hardwood…cleaning and killing many germs as you go.

ANNC: The secret is the patented Oreck Halo light chamber built right into the bottom of the vacuum. It creates a powerful germicidal wavelength of UV-C light, capable of disrupting the DNA of microorganisms present on your floors.

ANNC: Laboratory testing showed that it killed up to 99.9% of FLU virus and E-coli bacteria in less than one second, leaving your floors a healthier clean.

ANNC: This incredible germ killing power combines with legendary Oreck vacuum power, featuring over 350,000 brush strokes a minute and incredible suction from not 1 but 2 high-powered motors. Delivering 117 miles per hour of air flow at floor level, the Oreck Halo sucks up dirt and debris directly into the specially designed HEPA 13 filter bag with sani-seal tab.

Capturing 99.9% of everything vacuumed up for clean and easy removal. That means no more bag-less messes which can spread dust and allergens back into the air!

TESTIMONIAL: "its not only just getting the dust or the dog hair, its getting the germs, its killing things that I cant see."

TESTIMONIAL: "It makes me feel good, I feel like I'm taking care of my family."

ANNC: The Oreck Halo comes complete with a variety of on board attachments for all of your above-the-floor cleaning needs. And the UV-C light is backed by a five year warranty.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

ANNC: Call now for no interest and no payments for one full year and FREE SHIPPING. You'll also receive a years supply of HEPA 13 filter bags, and three tune-ups at any of the 450 Oreck stores nationwide. That's a total value of 185 dollars, yours free.

David: For over 40 years I've made it my mission to make your home cleaner and healthier. Try my Oreck Halo for 30 days, risk free in your own home. If you don't love it, you don't keep it. Just send it back and I'll even pay for return shipping no questions asked. You've got nothing to lose call me now.

ANNC. So Call now for this amazing 2 in 1 cleaning power and go way beyond ordinary clean to Oreck Halo Healthier Clean.

Oreck Halo Transcript Segment 2

Andrea: So, what do you think the germiest places in your home are? Well, we had several surfaces swabbed for germs in several regular homes, and then sent them to Dr. Charles Gerba, a renowned microbiologist. He transferred the samples to Petri dishes with a nutrient, so that any germs and bacteria that were present would be revealed.

Dr Gerba: Well you might be wondering what's the germiest area in your home, and most people are really surprised. We find like the toilet seat, it's actually one of the cleaner areas in the home. In contrast, take a look at the hardwood floors—here we see even more bacteria. The kitchen floor tile is one of the germier areas in the house. Finally, let's take a look at the carpeting here. This is actually carpeting that has been vacuumed. The regular vacuum cleaner will not kill germs that's why the Oreck Halo with UV light technology is a really good idea. You clean that dirt that you can see, but you're also killing those germs that you can't really see. It does two things at one time without extra work for your family. You're gonna vacuum the floor and you're gonna kill germs potentially that could make you ill.

Andrea: Dr. Gerba found over 200,000 bacteria on a single square inch of carpeting. Now you may be thinking, my home's not that bad. Well, we sent a team in the field to swab everyday homes just like yours.

Rich Hollenberg: Hi, I'm Rich. Today my team and I are going around to homes using these swabs to test their floors inside and see if there just might be some germs and bacteria living on them.

Woman, blonde, light pink shirt: My gut instinct would say that my floors are pretty clean.

Woman, dark blonde hair, blue shirt: But I'm afraid to see what kind of germs it might have on it.

Woman, blonde, pink shirt, holding toddler: Yeah, I was always kind of wondering what was on those floors, whenever we have the kids running around all the time.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

Rich Hollenberg: All I do is swab the floors in your house, for germs that might be on your floor. Then these swabs go back in the bag and we're gonna send them off to the University of Arizona, where Dr. Gerba is. He's a noted microbiologist, and he's an expert in the field for finding germs and bacteria.

Woman, blonde, light pink shirt: Ok, sounds good.
Rich: We have the reports back for you and unfortunately they are not to favorable....they're not very pretty...the news is not very good. In fact it's a little scary and instead of me telling you , Dr. Gerba has some results to report back to you.

Dr. Gerba: Dalton family—we did find some fecal bacteria on the living room rug and the kitchen floor.

Rich: I just wanted to show you that this is what 30,000 E. Coli looks like.

Woman, brown hair: That's disgusting.

Man, brown hair: Yeah, that's bad.

Dr. Gerba: Squier family, we found E. Coli on your TV room rug, and your kitchen tile.

Rich: That's what 240,000 E. Coli looks like. There was also staphylococcus.

Dr. Gerba: The Rosser family, we did find E. Coli on your kitchen tile floor.

Rich: And what's worse, this is what we found in your baby's room, on their carpet. That's thousands and thousands of germs.
Woman, blonde, blue shirt: I thought I was cleaning the floors, and I think that's the scary part.

Dr. Gerba: In the Harber family here, we found E. Coli on the downstairs rug.

Woman, blonde, brown shirt: Really?! Oh my gosh, that's just...that's scary!

Dr. Gerba: In the Coble family, we actually found fecal bacteria on the hardwood bedroom floors, living room rug, and we also found MRSA.

Man, silver hair, blue shirt: The MRSA's very alarming.

Rich: Well guys, we do have something that we think can help. The Oreck Halo vacuum cleaner actually has a patented light chamber, and it's been tested and shown to kill and reduce common germs. So, what I could do for you is leave the Oreck Halo vacuum here, keep it for thirty days,

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

I'll come back in a month with my team, we'll re-swab your floors. And hopefully, we'll be able to come back with some better news for you the second time around. Sound good?

Woman, brown hair, red shirt: Yeah, that sounds great.

Man, blue shirt, brown hair: Sounds great.

Woman, long brown hair, dark pink shirt: That'd be great, yes.

Man, silver hair, blue shirt: Excellent.

Woman, blonde, dark pink shirt: That'd be awesome.

Andrea: So how do you kill germs, bacteria, mold and viruses? Well, you might use powerful chemicals like these on your kitchen counter tops, but most of these, especially things like bleach, you don't want to put those on your carpet and your hardwood floors. This is why the Oreck Halo is so unique and exciting. It uses zero chemicals, thanks to the patented Oreck Halo light chamber, This exclusive chamber contains a powerful UVC light, specially engineered reflector array, and quartz glass lens that magnifies and focuses a germicidal wave-length of light onto your floors as you vacuum. In laboratory testing the Halo light chamber has killed up to 99.9% of flu virus and E. coli bacteria in one second or less. An incredible effective solution, no additional work, just vacuum like you normally do, and when the light is on, the germs are gone. There is nothing out there that works quite like the Oreck Halo. Isn't it time your floors see the light?

Rich: I'm Rich, back at the Dalton's house. It's been 30 days since we were here, and I'm back with the new results. If you remember, this is what 30,000 E. Coli looked like. Now, after using the Oreck Halo vacuum after thirty days, this is what your kitchen floor area looked like that we tested.

Woman, brown hair, pink shirt: Wow!

Man, brown hair, green shirt: That's huge.

Rich: Now you can see what a big difference it is. Pretty good results right?

Woman, brown hair, pink shirt: Yeah! That's awesome. The house feels cleaner.

Rich: And now here are the new results on your kitchen floor.

Man, silver hair, beige shirt: Wow!

Rich: That's a 96.1% reduction.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

Woman, blonde, orange shirt: Oh my gosh!

Rich: That's a 95% reduction in E. Coli.

Woman, blonde hair, green shirt: That's a big change. To think that all we have to do now is vacuum the floors and it makes such a difference. That's just amazing!

Rich: Do you see anything in that dish?

Woman, blonde hair, pink shirt: No.

Rich: There was no staphylococcus found after using the Oreck Halo.

Woman, blonde hair, pink shirt: That's great.

Rich: Now your eyes aren't deceiving you—there is nothing on that Petri dish. It completely eliminated the MRSA.

Man, silver hair, beige shirt: Unbelievable!

Woman, blonde hair, orange shirt: I can't believe how much better it looks!

Rich: That's a 96.1% reduction. Well, you have a decision to make now. You could keep your old vacuum, or, you can trade out your old vacuum and I'll leave the Oreck Halo vacuum for you to keep. Sound like a good deal?

Woman, brown hair, pink shirt: Deal.

Man, brown hair, green shirt: Deal.

Woman, blonde hair, pink shirt: Oh, I'm definitely gonna trade it out. If this is the results I get, definitely.

Woman, blonde hair, orange shirt: That isn't any decision because I'm gonna keep the Halo.

Woman, long brown hair, yellow shirt: That's like the only thing that we've done that's really effective.

Man, silver hair, beige shirt: That's a no-brainer.

DO: What is it worth to you to help your child avoid germs and bacteria? What is it worth knowing you're helping to make a healthier home? Isn't that the most important thing? Now, you've got nothing to lose but the germs! So try my new Oreck Halo today, see the difference it makes.

Complaint

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

African-American woman, pink shirt: It sucks up the finest dirt along with the big chunks. Having two children there is often lots of chunks around our house. (laugh) So it does you know gobble up all that stuff but it also kills the bacteria.

Woman, blonde, green shirt: I think the Oreck Halo is a vacuum and a germ killing machine all in one nice neat package.

CTA – Offer 2

David: Go beyond clean to a healthier clean…with the Oreck Halo. My remarkable germ-killing machine which also happens to be one of the best vacuums I've ever made.

ANNC: Now you can kill and reduce bacteria and viruses.

Diminish dust mite and flea eggs that can trigger allergies and asthma.

All while picking up tough dirt, debris and pet hair with the revolutionary Oreck Halo, the first Germ Killing UV-C Vacuum.

Call right now for No interest and No Payments for 1 full year. Now, you to can take advantage of the Oreck Halo's 2 in 1 cleaning power and as a special bonus we'll send you a years supply of Hepa 13 Filter Bags absolutely free.

Harsh chemicals like bleach could kill germs and bacteria – but they can also ruin carpet. The Oreck Halo is safe on every floor in your home; go from carpet, to tile, to hardwood…cleaning and killing many germs as you go.

ANNC: The secret is the patented Oreck Halo light chamber built right into the bottom of the vacuum. It creates a powerful germicidal wavelength of UV-C light, capable of disrupting the DNA of microorganisms present on your floors.

ANNC: Laboratory testing showed that it killed up to 99.9% of FLU virus and E-coli bacteria in less than one second, leaving your floors a healthier clean.

ANNC: This incredible germ killing power combines with legendary Oreck vacuum power, featuring over 350,000 brush strokes a minute and incredible suction from not 1 but 2 high-powered motors. Delivering 117 miles per hour of air flow at floor level, the Oreck Halo sucks up dirt and debris directly into the specially designed HEPA 13 filter bag with sani-seal tab.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

Capturing 99.9% of everything vacuumed up for clean and easy removal. That means no more bag-less messes which can spread dust and allergens back into the air!

TESTIMONIAL: "Its not only just getting the dust or the dog hair, its getting the germs, its killing things that I cant see."

TESTIMONIAL: "It makes me feel good, I feel like I'm taking care of my family."

ANNC: The Oreck Halo comes complete with a variety of on board attachments for all of your above-the-floor cleaning needs. And the UV-C light is backed by a five year warranty.

ANNC: Call now for no interest and no payments for one full year and FREE SHIPPING. You'll also receive a years supply of HEPA 13 filter bags, and three tune-ups at any of the 450 Oreck stores nationwide. That's a total value of 185 dollars, yours free.

David: For over 40 years I've made it my mission to make your home cleaner and healthier. Try my Oreck Halo for 30 days, risk free in your own home. If you don't love it, you don't keep it. Just send it back and I'll even pay for return shipping no questions asked. You've got nothing to lose call me now.

ANNC. So Call now for this amazing 2 in 1 cleaning power and go way beyond ordinary clean to Oreck Halo Healthier Clean.

Oreck Halo Transcript Segment 3

Woman, curly brown hair, green shirt: The Oreck Halo has actually become like my new best friend. Especially when I use the ultraviolet light on the carpeted areas that we have, knowing what it's doing for us, It's exciting!

Woman, short brown hair, mint green shirt: In life, there's a lot that you can't control. I like knowing that I can control the environment in my house. I can make it cleaner, I can make it safer for my entire family. It's a good feeling.

Woman, curly blonde hair, green shirt: I really love my Oreck Halo. It saves me so much time. Because nobody likes to clean, but if you can do it faster, and you can do it better, and you can kill germs at the same time—it's awesome!

Andrea Jackson: All those people have plenty of reasons to feel great about using the Oreck Halo. In one easy step, the patented Oreck Halo light chamber kills many germs in a flash with every pass of the vacuum. Listen to this to see just what I mean.

Ken Garcia: The ultra-violet light that's used in this vacuum is the same ultra-violet light that's been used for decades in water treatment plants; so that it purifies the water, making it safe and

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

healthy for people to drink everyday. So we took that same idea, that same concept and applied it into a vacuum cleaner. This optimized light chamber magnifies the ultra-violet light, so that exposure can kill some of the common germs, mold and bacteria found living on floor surfaces. Oreck was a great place to take this technology because of their long-standing commitment to innovative products that really make a difference in people's homes.

DO: For over forty years. I've made it my mission to make your home cleaner and healthier. But there can be invisible hazards on our floors that can make us sick, might keep us from going to work or going to school. My Oreck Halo is unlike any vacuum I've ever produced. Sure, it features the terrific vacuum power you'd expect from any one of the Oreck vacuums, but it's also a germ-killing machine. Try my new Oreck Halo today, and see the difference it makes!

Andrea Jackson: Your ordinary vacuum may pick up some of the germs living on your floors, well, that's if you're lucky. Even then, the germs it might pick up could still be alive inside your vacuum bag or canister. So, when you go to empty that bag or canister, you simply move germs from one part of the house to another. But the Oreck Halo kills many of the germs before they ever reach the Hepa vacuum bag. They are D.O.A., dead on arrival. So to prove it, we've set up a demonstration. Here we have a bagless vacuum, and here we have the Oreck Halo. Now, in front of each vacuum is a pile of debris. In each pile, we mixed in material that responds to special black lights—showing us just how effectively each of these vacuums secures its contents. First, let's empty the bagless vacuum. Watch how the glowing particles disperse into the air, and that dirt and filth can go right back into your house. Just look at my hand. What if this was germs and bacteria? Now, look at the Oreck Halo. The outside of the scientifically advanced Hepa 13 filter bag is free of glowing particles. And with the Sani-seal tab, we just take the bag out, and it automatically seals. That means nearly nothing has escaped—because what goes in the bag, stays in the bag. See? My hands are clean.

Dr. Gerba: To assess the effectiveness of the Oreck Halo, we looked at the numbers of bacteria in five different households. And I want to show you the results, because they're rather dramatic. Lemme start with the Rosser home, where you can see the number of bacteria on the baby's carpeting before and after the use of the Oreck Halo—over a 90% reduction.

Woman, blonde hair, green shirt: Now I know firsthand! I mean the results are right in front of my face. It makes such a difference. That's just amazing.

Dr. Gerba: Well, let's take a look at the results from the Harber's kitchen tile floor. This is before and after. You can see the effectiveness of the Oreck Halo - here over 90% reduction.

Woman's voice; close-up of two simulated Petri dishes—before and after—"Harber Family" heading: I can't believe how much the Oreck Halo eliminated, and how, just by using the Halo for the thirty days... I just couldn't be happier with the results.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer Z

Dr. Gerba: Let's move on to the Squier household. You can see the large numbers of bacteria here, and in this case we reduced the number of bacteria by more than 99.9%.

Woman, blonde hair, dark pink shirt: The bacteria was almost gone, so I know that if I continued to use the Oreck Halo, it's gonna remove more bacteria each time it's being used.

Dr. Gerba: Let's move on to the Coble home—the hardwood bedroom floors, you can see more than a 90% reduction.
Man, silver hair, beige shirt: Couldn't even express the night and day results.

Dr. Gerba: We also found MRSA, but it was completely eliminated after the use of the Oreck Halo. Finally, taking a look at the Dalton household—before the use of the Oreck Halo; after the use of the Oreck Halo.

Woman, dark hair, mint green shirt: I had no idea what was living in my carpet or on my floor. I thought it was completely disgusting that there was E. Coli in my kitchen and in my rugs that my kids lay on and roll around in. To know that I'm reducing it and killing it, I mean, it makes me feel a lot better.

Dr. Gerba: We found substantial numbers of bacteria on all the floor surfaces. However, after thirty days of the Oreck Halo UV light technology, we found no E. Coli, we found no staphoreous, and we found no MRSA. So to me that's a step, an advance, in technology, where you could accomplish two things at one time.

Andrea Jackson: The Oreck Halo gives you peace of mind knowing you're reducing the harmful germs and bacteria on every floor in your home, each time you vacuum. The Oreck Halo can truly make a difference and give your family a refreshing, clean living environment. And few things are as important as a healthier home. So, what are you waiting for? Get your Oreck Halo today, and discover the healthier difference between what looks like it might be clean and Oreck Halo healthier clean.

CTA – Offer 1

David: Go beyond clean to a healthier clean…with the Oreck Halo. My remarkable germ-killing machine which also happens to be one of the best vacuums I've ever made.

ANNC: Now you can kill and reduce bacteria and viruses.

Diminish dust mite and flea eggs that can trigger allergies and asthma.

All while picking up tough dirt, debris and pet hair with the revolutionary Oreck Halo, the first Germ Killing UV-C Vacuum.

EXHIBIT C (continued)

Project Oreck Re-edit
Client Oreck
Date 04/21/09
Oreck Halo Infomercial – Re-edit
Offer 2

TESTIMONIAL: "Its not only just getting the dust or the dog hair, its getting the germs, its killing things that I cant see."

TESTIMONIAL: "It makes me feel good, I feel like I'm taking care of my family."

ANNC: The Oreck Halo comes complete with a variety of on board attachments for all of your above-the-floor cleaning needs. And the UV-C light is backed by a five year warranty.

ANNC: Call now for no interest and no payments for one full year and FREE SHIPPING. You'll also receive a years supply of HEPA 13 filter bags, and three tune-ups at any of the 450 Oreck stores nationwide. That's a total value of 185 dollars, yours free.

David: For over 40 years I've made it my mission to make your home cleaner and healthier. Try my Oreck Halo for 30 days, risk free in your own home. If you don't love it, you don't keep it. Just send it back and I'll even pay for return shipping no questions asked. You've got nothing to lose call me now.

ANNC. So Call now for this amazing 2 in 1 cleaning power and go way beyond ordinary clean to Oreck Halo Healthier Clean.

ANNC: The preceding was a paid presentation for the new Oreck Halo germ-killing vacuum. Brought to you by Oreck Direct, LLC.

EXHIBIT D

DVD of Oreck Halo Commercial

Complaint

EXHIBIT E

Project Oreck Halo
Client: Oreck
:60 Lead Gen Spot
Date 06/16/09
Revision 3

****Triggers Lead Gen**

ANNC: Chances are allergens and illness triggers, are in your home...living right under your feet. Dirt and debris you can see and germs, bacteria and dust mites that you can't see.

So how do you get from here

To here?

With the incredible germ killing vacuum so revolutionary it could only be an Oreck.

Call now for a FREE no obligation DVD about the Oreck Halo the world's first germ killing vacuum. The secret is the patented Oreck Halo Light chamber that creates a powerful germicidal wavelength of UV-C light that can kill and reduce up to 99.9% of germs and bacteria helping you give your floors a healthier clean. [Need comprehensive footnote.]

The Oreck Halo has 2 high powered motors that pick up tough dirt, debris and pet hair like only an Oreck can. And, the revolutionary germ killing power kills germs while you vacuum.

For floors that not only look clean but truly are clean... and its only available from Oreck!

Call now for a FREE no obligation DVD and learn all about the amazing Oreck Halo and how it can help you create a healthier clean home for you and your family.

EXHIBIT F

DVD of Oreck Halo 60-Second TV Commercial

EXHIBIT G


Goodbye bacteria, viruses, mold, and germs. Hello barefoot clean!
Introducing the powerful new Oreck Halo.™ The only UV-C germ-killing vacuum.
There is a lot more that could be living in your home than just your family and pets. Dustmites, fleas and their eggs, mold, bacteria, germs, and microorganisms that cause flu, diarrhea and upset stomachs could be living there, too. Now there's an amazingly powerful new vacuum that was designed to help protect your family from many of those microscopic, uninvited guests. It's the new Oreck Halo with exclusive germ-killing UV-C Technology.
Technology proven in hospitals. The new Oreck Halo can kill many bacteria, viruses, dust mite eggs, and even mold on any floor surface! That's due to its powerful UV-C light. This is the same kind of light used to disinfect hospital operating rooms and purify drinking water. You get a healthier clean.
2009 WINNER! Oreck Award Best Product Award.
It's more than a vacuum. When you clean your home with the new Oreck Halo, you get the added benefit of being able to clean your toughest messes in virtually one pass and the ability to kill many germs in a flash. We call it Protection Beyond Clean.® You owe it to yourself to try this powerful, germ-killing, hypo-allergenic, durable, easy-to-use, vacuum risk-free for 30 days.
Call: 1-800-364-1156 Code: DR258 Or visit: OreckHaloClean.com/tsi3
Get a FREE 1-Year Supply of Filter Bags! A $24.95 value.
Try it FREE for 30 days in your own home and PAY NOTHING FOR A YEAR!
Get FREE Shipping! A $39.95 value.

EXHIBIT H


Make sure your child is the only thing crawling on your floors.
> Millions of germs, viruses and bacteria could be living on your floor and can trigger asthma and allergy attacks, colds, and flu.
> Get an Oreck Halo Healthier Home. Try the NEW germ-killing Oreck Halo vacuum with a 30 day Risk Free Guarantee. Available only at your local Oreck Store.
NEW
GERM KILLING UV-C LIGHT
ORECK HALO
Viruses
Dust Mite Eggs
Flea Eggs
Bacteria
Mold
WHEN THE LIGHT IS ON, GERMS ARE GONE.
Location Name 411 Location Street Town, St XXXXX
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Location Name 411 Location Street Town, St XXXXX
Location Name 411 Location Street Town, St XXXXX
Location Name 411 Location Street Town, St XXXXX
ORECK clean home center

Complaint

EXHIBIT I

Complaint

EXHIBIT J

ORECK
PROSHIELD+
with
HELIOS SHIELD & TRUMAN CELL® TECHNOLOGY

FINAL SHOW SCRIPT
ISCI #2813-01

Script to Screen
Direct Thinking for Direct Response

EXHIBIT J (continued)

Oreck Direct, LLC *"Oreck ProShield Plus"*

VISUALS:	AUDIO:
OPENING DISCLAIMER	ANNCR 1: The following is a paid presentation for the new Oreck ProShield Plus Air Purifier, the breakthrough in improving indoor air quality from one of America's most trusted names in cleaning.
CUT TO DAVID ORECK	DAVID ORECK: You have everything in your home from smoke detectors, to safety locks on the door, to antibacterial soap to protect your family. But what can you do to help protect them from the air that they're breathing?
01:00:35;00	DAVID ORECK: Here are a couple of questions. DAVID ORECK: Do you want to protect your family from exposure to colds and flu this season in your home. Do you have pets? Do you ever use aerosol cleaners? Does anyone in your family have allergies or asthma? Now, if you answered 'yes' to any of these questions, that's where my new Pro Shield Plus Air Purifier comes in. DAVID ORECK: Hi, I'm David Oreck. Today, we are going to use this little device to show you the incredible number of potentially dangerous particulates that could be in the air in your home. Let me show you … DAVID ORECK: A special light is going to help me reveal what you can't see. Now hit the lights! There! Now you can see the thousands of particles that you could be in your air. Particles could be affecting your health. Well, stick around I'm going to show you how to get rid of them.
01:01:19;14	ANNCR 1: Our country is facing what some are calling the worst flu season in

EXHIBIT J (continued)

	years. Now more than ever we should be aware of the airborne germs and viruses that could be in our home.
01:01:28;10	ANNCR 1: Coming up, see what we found when TV's House Detective along with an Independent Air Quality Specialist test the air in the home of two different families. The results before and after using the new Oreck ProShield Plus surprised everyone.
CUT TO IN-HOME TESTIMONIALS	GIRL: That's incredible! MOM: I can't believe that! DAD: That's exciting!
01:01:46;03	ANNCR 2: And see how one schoolteacher is helping her students fight exposure to colds and viruses… In this classroom, the only thing they plan on taking home this flu season is homework.
01:01:54;07	ANNCR 1: You'll also meet the star of a popular home improvement show, who battled her own air quality issues.
01:02:00;13	ANNCR 2: And you'll hear from the many people with allergy and asthma symptoms that use the new ProShield Plus to help make a difference in the air they breathe.
CUT TO TESTIMONIALS	SAL: It's clean! It's fresh! LORI: It's really changed our lives. DANNY: You could feel the difference in the air. NOCELLA FAMILY: It's phenomenal. We love it.
01:02:14;05	ANNCR 1: Those are actual reactions from the many people who've experienced the new Oreck ProShield Plus, the portable proactive way to help clean the air in your

EXHIBIT J (continued)

	home, from America's #1 seller of air purifiers.
01:02:35;06	ANNCR 2: Did you know that as you move through your home, you're actually kicking up dust into the air? And those dust particles can carry things like germs, cold and flu viruses, bacteria, mold and allergens. And could be spreading illnesses ,like the influenza virus.
01:02:39;08	ANNCR 1: That's why you need the powerful performance of Oreck's exclusive 'capture and kill' filtration system. Powerful fans circulate the air through Oreck's patented Truman cell. It electrostatically charges many dust particles, allergens, germs and viruses, pulling them out of the air like a magnet. ANNCR 1: And for odors, Oreck's newest innovation, the Helios Shield uses the power of concentrated ultraviolet light to break down and neutralize odors and volatile organic compounds.
CUT TO TESTIMONIALS	NOCELLA FAMILY: The food odors, the dog odors, that's gone. CATHERINE: You walk into the house and it smells cleaner.
01:03:12;04	ANNCR 1: Circulate, capture and kill! That's the ProShield advantage!
01:03:16;05	ANNCR 2: And The space saving design of the new ProShield Plus allows it to work in either the upright or the low-profile position.
01:03:22;14	ANNCR 1: And best of all, when you order the new ProShield Plus you'll also get this handy remote control. Now with a simple push of a button, you can control the ProShield Plus from anywhere in the room.

EXHIBIT J (continued)

Oreck Direct, LLC	*"Oreck ProShield Plus"*
01:03:32;01	ANNCR 2: Contemporary styling…
01:03:33;06	ANNCR 1: Advanced engineering…
01:03:35;04	ANNCR 2: Compact design. Complete portability…
01:03:38;12	ANNCR 1: It's the new Oreck ProShield Plus Air Purifier!
CUT TO DAVID ORECK	DAVID ORECK: Just how much of a difference can my ProShield Plus make in your home? Now my friend, Tanya, is about to show you. Tanya is a host of a popular home improvement show and she's a daughter of a homebuilder. Now she herself has experienced firsthand how air quality can affect your health. So that's why she wanted to join me to share with you all the benefits of my new ProShield Plus.
CUT TO TANYA MEMME	TANYA: Every time you close your front door, you're sealing yourself in with airborne bacteria, dust, germs, and allergens. TANYA: Well, now you can fight back with this, the new Oreck ProShield Plus, the air purifier that circulates the air to capture and kill many of the potentially harmful things that may be in it. I know how harmful they can be because my health was severely affected for several years by indoor air pollution. So when the folks at Oreck asked me to host this show I told them I wanted to see proof that the ProShield Plus worked in real homes for real families, and not just in a laboratory. Their response? No problem. TANYA: So they sent out Tony Frassrand, who you may recognize from one of his many home improvement shows. Tony was joined with an independent testing firm. Their goal: to show families the level of

EXHIBIT J (continued)

	particles in their air and how quickly the ProShield Plus can reduce them.
CUT TO TONY FRASSRAND	TONY: Well I'm out here in front of the home of the Vaccher family. And inside right now, our independent air quality specialist, Sarah Coley is getting ready to test the air quality. Now the Vaccher's are like a lot of families out there with three kids living at home and two dogs, you know that that back and front door is opening and closing all day long. And if you've got the allergies that Patty Vaccher suffers from, that can be a problem.
	TONY: What is it about your home that makes you think that you've got air quality issues?
	PATTY: Well we have a couple of dogs running around and…
	TONY: I see…
	PATTY: Lots of hair flying all over, and allergies and stuffy nose and watery eyes.
	TONY: I imagine it smells like dog in here?
	KID: Yeah.
01:05:42;00	TONY: Well our independent air quality specialist did an initial test in the Vaccher's home and found that they had an incredibly high number of particles in their air.
	TONY: We then turned on the Oreck ProShield Plus that was placed it in the center of the living room, and the ProShield Plus got to work cleaning the air. Our independent air quality specialist retested the air over a short period of time to see how the Oreck ProShield Plus performed.

EXHIBIT J (continued)

	TONY: What'd you find?
	SARA: Well what I found was that we had a 98% reduction.
	TONY: 98% reduction…
	KID and PATTY: Wow!
	TONY: What do you think about that?
	KID: Wow! That's amazing! Incredible!
	PATTY: I think that sounds like it'll make my house so much more clean
	KID: The dogs, you can't smell them anymore.
01:06:19;11	TONY: Remember, before the ProShield Plus, the Vaccher family was battling an extremely high number of particulates in their air. In fact, the air in their home was more polluted than the air outside. But, the ProShield Plus helped remove 98% of those harmful particles out of the air.
	TONY: Well, if it can happen here in the Vaccher home then it can surely happen for you too.
CUT TO LONG TERM TESTIMONIAL	WHITE FAMILY: We are an Oreck Family… we have the Oreck Vacuum and then now of course we have the Oreck ProShield Plus. What impresses me most about the Oreck ProShield Plus is the Helios Shield, especially for odors in the house, especially having a new baby, dirty diapers, and also having dogs. It, it really does help with that.
CUT TO TANYA MEMME	TANYA: And while it cleans your air, it's also saving you money. The Helios Shield and Truman Cell never need to be replaced and the ProShield Plus can use as little electricity as a 25-watt bulb. Other air

EXHIBIT J (continued)

	purifiers rely on HEPA filters just like these. They have to be replaced; they can cost you hundreds of dollars and their filters that can eventually end up in a landfill. TANYA: But with Oreck's ProShield Plus 'capture and kill' filtration system you don't use expensive HEPA filters. You just remove the Truman Cell, let it soak in some warm soapy water, rinse it out…Oh, look at all the nasty stuff it pulled out of the air. And when you are finished let it dry and then put it back in. TANYA: You know David Oreck has spent a lifetime creating products to help give your home a healthier clean. Now his new ProShield Plus Air Purifier can help give the air a healthier clean, too!
CUT TO DAVID ORECK	DAVID ORECK: The EPA says indoor air may be five times more polluted than the air out in the street.
01:08:03;14	DAVID ORECK: And if you have weather-tight doors and windows, pets, use aerosol cleaners or smoke, you could be adding to the problem. DAVID ORECK: That's where my new Pro Shield Plus Air Purifier comes in.
01:08:14;12	DAVID ORECK: Independent Air Quality Tests proved that my new Oreck ProShield Plus could help reduce the amount of harmful airborne particles in your home by up to 99%. DAVID ORECK: Imagine, if the air you're breathing right now was 99% cleaner and healthier. It might make it easier to avoid exposure to colds and flu's this season in your home.

EXHIBIT J (continued)

Oreck Direct, LLC *"Oreck ProShield Plus"*

CUT TO TESTIMONIALS	CATHERINE: You really feel a difference, you can smell a difference. NOCELLA FAMILY: When you walk in your home you smell that the air is clean. CHRISTIE: I feel really good about having clean air for my family.
CTA #1 01:08:41;09	CTA #1 ANNCR 2: Millions of harmful airborne microorganisms could be riding on the dust in your home, Those dust particles can carry harmful things like germs, cold and flu viruses, bacteria, mold and other allergens that could be in the air you're breathing right now! ANNCR 2: And when your front door closes, you and your family are sealed in with that pollution.
01:00:01;03	ANNCR 1: Now, you can fight back with the new Oreck ProShield Plus Air Purifier. The new ProShield Plus features two air purification innovations only available from Oreck, that can capture particles down to .1 microns. ANNCR 1: Powerful fans circulate the air through the ProShield Plus. And Oreck's patented Truman Cell electrostatically charges many dust particles, allergens, germs and viruses, pulling them out of the air like a magnet. ANNCR 1: And for odors, Oreck's brand new Helios Shield uses ultraviolet light to smash the molecular structure of gases, including tobacco smoke, cooking and pet odors, and even the harmful components of aerosols and cleaning products
01:09:40;11	ANNCR 2: This one-of-a-kind capture and kill filtration is guaranteed for life. There

EXHIBIT J (continued)

Oreck Direct, LLC *"Oreck ProShield Plus"*

	are no expensive Hepa filters that have to be replaced, saving you hundreds of dollars over the lifetime of your air purifier.
01:09:54;02	ANNCR 1: The space saving design of the ProShield Plus allows it to work in either the upright or the low-profile position. ANNCR 1: And best of all, you'll also get this handy remote control.
CUT TO DAVID ORECK	DAVID ORECK: I want you to use my new ProShield Plus in your home for 30 days. There is no obligation. You have absolutely nothing to lose! You know we're America's #1 seller of air purifiers, and I'm convinced this is the best one we have ever built!
01:10:21;02	ANNCR 2: Order now and David Oreck will send you his amazing cordless refrigerator air purifier. A $50 value yours FREE.
01:10:28;14	ANNCR 1: And if you're one of the first 500 to order, you'll also get the incredible Speed Sweep cordless electric vacuum. It's both a powerful hand vacuum and floor vacuum—a $100 value, yours FREE.
01:10:40;13	ANNCR 2: Both gifts are yours to keep even if you decide to return the air purifier. That's how sure David is you'll love his ProShield Plus.
CUT TO DAVID ORECK	DAVID ORECK: And shipping and handling is on me! In fact, if you don't sleep better, awake more refreshed, breathe more easily, dust your home less and simply enjoy the benefits of fresh, crisp, clean air just send it back. I'll even pay return shipping. So what are you waiting for? This is the ultimate risk-free offer. Call me now.
01:11:11;13	ANNCR 1: And heres a special

EXHIBIT J (continued)

announcement.

ANNCR 1: Our country is facing what some are calling the worst flu season in years. With the existing flu pandemic on the rise, now more than ever we should be aware of airborne germs and viruses that can be in our homes.

01:11:27;00

ANNCR 2: That's why when you order now, David Oreck will give you $50.00 off his new Oreck ProShield Plus. That's how committed Oreck is to the well being of your family and it's a smart way to help reduce your chance of exposure to colds and flu in your home.

01:11:41;14

ANNCR 1: The new ProShield Plus is backed by a 3-year overall warranty, and is supported by nearly 450 Oreck Clean Home Centers across North America.

CUT TO DAVID ORECK INTERVIEW

DAVID ORECK: I feel good knowing that there's millions of people all over the world actually using Oreck products and it's contributing to their well-being.

DAVID ORECK: That makes me feel good!

01:12:02;10

ANNCR 1: Call Now and experience the Oreck Clean Air Advantage for 30 days risk free. Decide to keep it and it's yours with no payments and no interest for one year.

01:12:11;10

ANNCR 2: And find out how you can get a second ProShield Plus Air Purifier for half price.

01:12:16;12

ANNCR 1:You won't want to pass up this exclusive Oreck offer. So don't wait. Call now!

LOCAL ANNOUNCER: Call 1-800-XXX-XXXX or log onto _____. Call now,

EXHIBIT J (continued)

	1-800-XXX-XXXX.
SECOND SEGMENT	**SECOND SEGMENT**
CUT TO DAVID ORECK	DAVID ORECK: You know, people come up to me all the time and ask if my air purifier is really cleaning the air out of this chamber. Well, 'seeing is believing'. So I took my new ProShield Plus to a busy shopping mall so everyone could see its incredible air cleaning power for themselves.
MAN-ON-THE-STREET TESTIMONIALS	Person1: That's a lot of smoke.
	Group: Wow!
	Person2: Wow!
	Person3: Oh man, look at that!
	Person4: Where did it go!
	Person5: Wow!
	Person6: Oh my God!
	Person7: It worked so quickly. I mean I pushed the button I know how long it took. (Snaps fingers) Just like that.
	Person10: Yeah…
	Person11: That's amazing!
	Person12: And there's nothing under the table, and it's…it just disappeared.
	Person14: It's almost like unbelievable to watch that happen…
	Person15: But we just saw it.
	Person16: I know.
	Person19: I have a lot of allergies so that

EXHIBIT J (continued)

	would be really good for someone like me. Person21: I have an Oreck vacuum cleaner and I love it! Person22: I trust David Oreck. 'Seeing is believing.' Person24: If they can do that with that little box, imagine what it would do for our entire home, it would, it would be great! Person27: This, I think it's a very good idea that I ought to just go ahead and get one. Person28: We should get one of these. Person29: Yeah, where do we get one? Person30: I'll just take this one with me.
CUT TO TANYA MEMME	TANYA: Few things are more beautiful than flowers in bloom. Unfortunately, that can also mean pollen is in the air. And for some of us, that can mean more than just an occasional sneeze. TANYA: No wonder so many families with allergy and asthma sufferers love the ProShield Plus.
CUT TO TESTIMONIALS	CHRISTIE: When we got the ProShield Plus air purifier, I had no idea the difference it would make. but I can't imagine not having one now. DENA: I never thought about getting an air purifier and then when I did get one it's such a difference. I mean you don't realize you need it until you-you get one. SAL: I've tried it, it works for me, I'm excited about it and so I'm telling everybody I know about the ProShield Plus.

EXHIBIT J (continued)

CUT TO FIONA LINCKE/SCHOOL TEACHER TESTIMONIAL	FIONA: We'll I'm an educator and I've been teaching for ten years. FIONA: I am working in a school that's very dusty and um I needed something to clear the air. And with the Oreck ProShield Plus, it just makes it more pleasant, and the-the kids love it. And you know something that's really amazing to me though is when I clean it to see all the dust and grime and dirt that comes off of it that's what my students would have been breathing in. FIONA: I would highly recommend the Oreck ProShield Plus and it does make life more comfortable. It really does.
CUT TO TANYA MEMME	TANYA: Every year the flu causes high rates of absenteeism from school and work, costing our economy billions of dollars. That's why it just makes sense to do all you can to help protect your family from exposure to it. The Oreck ProShield Plus is an important step to help you filter many of these types of risks from your indoor air. TANYA: Now check this out, at the other end of this chamber is the Oreck ProShield Plus and at this end I'm going to release some smoke. Now the smoke represents the particulates in the air that you can't see, the viruses, the molds, things that are so unhealthy for you and your family. Now watch how quickly the ProShield Plus draws in the smoke, captures it, cleans it, refreshes it and releases cleaner, fresher air back into your home.
01:15:26;12	TANYA: Powerful fans circulate the air through Oreck's patented Truman cell. It electrostatically charges many dust particles, allergens, germs and viruses, pulling them out of the air like a magnet.

EXHIBIT J (continued)

Oreck Direct, LLC *"Oreck ProShield Plus"*

	TANYA: And for odors, Oreck's newest innovation, the Helios Shield uses the power of concentrated ultraviolet light to break down and neutralize odors and volatile organic compounds.
	TANYA: As David Oreck says, "You have to move the air to clean the air," and that's exactly what it's doing.
CTA #2 CUT TO DAVID ORECK	**CTA #2** DAVID ORECK: Here are a couple of questions that can help you decide if it's really worth your while to try my new Oreck ProShield Plus Air Purifier.
01:16:02;00 (reprise)	DAVID ORECK: Do you want to protect your family from exposure to colds and flu this season in your home. Does your home have weather-tight doors and windows? Do you have pets? Do you ever use aerosol cleaners? Does the air quality in your community every get an elevated rating? Does anyone in your family have allergies or asthma? Do you ever have trouble sleeping? Does anyone in your home smoke?
	DAVID ORECK: Now, if you answered 'yes' to any of these questions, you owe it yourself to experience the Oreck Clean Air Advantage risk-free for 30 days.
01:16:35;01	DAVID ORECK: Watch closely and I'll show you how powerful my new ProShield Plus is. This glass chamber represents the size of an average room.
	DAVID ORECK: We have an Oreck ProShield Plus inside the chamber. We're going to fill the room full of smoke. That smoke represents the unseen dust, viruses, bacteria and allergens that could be in your air.
	DAVID ORECK: Now, let me turn on my

EXHIBIT J (continued)

	new Oreck ProShield Plus and watch how it removes the smoke particles and recycles the air over and over again. And in less than hour the smoke is gone and the air is cleaner.
	DAVID ORECK: In fact, independent testing proved the ProShield Plus helped produce an astounding 99% reduction in airborne particles in a room in an actual home.
	DAVID ORECK: And it can do the same in your home.
	DAVID ORECK: Smell and breathe the difference that I believe my ProShield Plus can make and once you do, I know you'll want to make it a permanent part of your home.
	DAVID ORECK: Order now and I'll send you two free gifts, my refrigerator air purifier and my new Speed Sweep cordless electric vacuum.
	DAVID ORECK: That's $150 value in free gifts, and I'll pay shipping and handling as well. If you're not happy with my ProShield Plus send it back, I'll even pay return shipping, and you can keep both free gifts as a thanks just for trying it.
01:17:55;01	ANNCR 1: And here's a special announcement.
	ANNCR 1: Our country is facing what some are calling the worst flu season in years. With the existing flu pandemic on the rise, now more than ever we should be aware of airborne germs and viruses that can be in our homes.
01:18:10;11	ANNCR 2: That's why when you order now, David Oreck will give you $50.00 off

EXHIBIT J (continued)

	his new Oreck ProShield Plus. That's how committed Oreck is to the well being of your family and it's a smart way to help reduce your chance of exposure to colds and flu in your home.
01:18:25;02	ANNCR 1: The new Oreck ProShield Plus can work in the either the upright or low profile position, and it comes with handy remote control. Call now and get no payments, and no interest for one year. ANNCR 2: And find out how you can get a second ProShield Plus Air Purifier for half price. Call now! LOCAL ANNOUNCER: Call 1-800-XXX-XXXX or log onto _____. Call now, 1-800-XXX-XXXX.
THIRD SEGMENT CUT TO TANYA MEMME	**THIRD SEGMENT** TANYA: Who doesn't love puppies? But whether you're a dog or cat person, you know that pet hair and dander can make you sneeze or trigger allergies. That's why every pet lover should have an Oreck ProShield Plus in the house. TANYA: Making having a great pet like this guy enjoyable for everyone in the family. Right, little sweetie?
CUT TO TESTIMONIALS	CHRISTIE: I've always had kind of a scratchy throat and you know I wake up in the morning and I sneeze. Now that I've had the ProShield Plus in my house, I feel a lot better. SAL: I found out after a few years that I was allergic to my own cats and I wasn't going to get rid of my cats so I had to look at my options. So I thought well let me try an air purifier, let me try the Oreck ProShield Plus, and it's been working out great.

EXHIBIT J (continued)

CUT TO TANYA MEMME	TANYA: Many scented sprays, candles, and plug-in type air fresheners like these don't really remove odors. They just cover up one odor with another. You see, some household products can contain VOCs—volatile organic compounds. According to the EPA, VOCs can be highly toxic and cause headaches, eye and sinus irritation, or just leave you feeling tired and listless.
01:19:56;08	TANYA: That's why the new Oreck ProShield Plus has an exclusive Capture and Kill filtration system. Its brand new Helios Shield uses concentrated ultraviolet light along with an advanced odor filter to neutralize volatile organic compounds and break down odors TANYA: To prove just how powerful the new ProShield Plus really is, we put it to the ultimate test inside an environment full of nasty smelling VOC's …
CUT TO NAIL/HAIR SALON TESTIMONIAL	CUSTOMER: Right when you walk in to any salon, you always smell like that acrylic smell, or you can smell hair spray… CUSTOMER: I could smell the perm solutions. I could smell the hair tint… STYLIST 1: Toxins, dust, and all the junk that we're breathing in all the time. SALON OWNER: Well since we've gotten that Oreck ProShield Plus The minute you walk into the salon everything smells fresh and clean. STYLIST 2: Knowing that I'm breathing in fresher air, it's clean and its safe, that gives me peace of mind working here every day. CUSTOMER: the air is just so much fresher and cleaner.

EXHIBIT J (continued)

CUSTOMER: It makes it much more enjoyable for me to sit here and get my hair done,

STYLIST: I can see and feel a big difference. It's amazing that such a small piece of equipment can cover the whole entire salon.

SALON OWNER: people started coming up to us and asking us, what are you guys doing in here, there's, the air, its fresher, its cleaner, its crisper. There's not that odor of the salon anymore. So, I told them we bought one of the Oreck air purifiers.

INTERVIEWER: And what'd they say?

MALE HAIRDRESSER: They wanted to know where they could get one? And I said, you're not taking mine.

CUT TO TONY FRASSRAND

TONY: This is the Wilkey home. Looks rather inviting, right? Well, the allergy suffers inside will tell you that sometimes the home is a hostile environment.

TONY: Now right now, we've got independent air quality specialist, Sara Coley inside getting ready to test the air quality. So we can let the Wilkeys know, what they are up against, especially up there in their son's bedroom, which is kind of a trouble spot for them.

TONY: What we're going to do is measure the number of particulates, things like dust, and pollen, and other allergens that maybe floating in the air. Then I'm going to show you how the Oreck ProShield Plus can help reduce those allergy triggers. Lets go see what Sara's up to.

TONY: Are we pretty much doing the same thing here that we did back at the Vaccher's living room?

EXHIBIT J (continued)

SARA: Yes Tony, we're looking for the same types of common indoor particles.

01:21:58;04

TONY: These little particles are things that Rob maybe breathing in at night when he sleeps.

DAD: For us, it's all about Rob. He's got the allergies, uh we got to stay away from the dust and the dander and the doctors have told us try to keep it as clean as we can, taken as many proactive measures as we could to try and set it up for him.

MOM: We just tried to keep the pollen count down as much as we can in that room.

01:22:19;05

TONY: Well our Independent Air Quality Specialist did an initial test in 9-year old Rob's bedroom and found that even though his parents kept the house super clean, there were still a high number of particles in the air that could be the reason his allergies flared up so often. We then turned on the Oreck ProShield Plus and let it clean the air. After only a short period of time, our Independent Air Quality Specialist came back and retested the air to see how the ProShield Plus performed.

TONY: Sarah what'd you find?

SARA: Well Tony, we saw a 99% reduction in the number of particles in the air!

TONY: Wow!

DAD: Cool

MOM: 99%?

SARA: It was really dramatic.

EXHIBIT J (continued)

	MOM: That's a little, I can't believe that, I mean I dust that place every other day and I vacuum it almost daily and I can't believe there was a 99% reduction.
	DAD: Part of me thinks, like how could that possibly be, but the numbers are there. That's exciting, it's terrific
	MOM: It's a little unsetting that, you know, I clean and clean and clean, and yet 99%. Well it talks about the things that you don't see.
01:23:17;04	TONY: Remember, before the ProShield Plus, Rob was exposed to a high number of particles in the air. But the ProShield Plus was successful in helping to remove 99% of those harmful particles out of the air.
CUT TO DAVID ORECK	DAVID ORECK: This Truman cell was just removed from a ProShield Air Purifier. Now normally you would clean this off in your kitchen sink but I'm doing it here. And to show you how it traps many of the allergens, viruses, and bacteria in the air. You can actually see the dirt pulled from the air when you clean it Now just look at that, would you drink water with this nasty stuff in it? Of course not so why breathe it in? Well now you can reduce allergens and pollutants and breathe cleaner fresher air with my new ProShield Plus Air Purifier.
01:24:14;02	DAVID ORECK: Folks, we've shown you that the airborne dust in your home could be carrying harmful microorgasisms like germs, cold and flu viruses, bacteria, mold and other allergens that can make you sick.
	DAVID ORECK: The bottom line is,

EXHIBIT J (continued)

Oreck Direct, LLC *"Oreck ProShield Plus"*

	you've got to move the air to clean the air. And my new whisper-quiet Oreck does it!
01:24:34;12	DAVID ORECK: Just like it did for the many people who use the new Oreck ProShield Plus and love it!
CUT TO TESTIMONIALS	DENA: I love the ProShield Plus.
	SAL: I love it, use it and I really recommend it.
	CATHERINE: the Oreck ProShield Plus is- is nice looking. It's sleek, it's contemporary,
	SANDY: I love it!
	STEPHANIE: The Oreck ProShield Plus, yes, I like it. I love it actually. I think it's really great. It's definitely made a difference for me.
CTA #3 01:24:56;11	**CTA #3** ANNCR 1: The new ProShield Plus features two air purification innovations only available from Oreck, that can capture particles down to .1 microns.
	ANNCR 1: Powerful fans circulate the air through the ProShield Plus. And Oreck's patented Trunan Cell electrostatically charges many dust particles, allergens, germs and viruses, pulling them out of the air like a magnet.
	ANNCR 1: And for odors, Oreck's brand new Helios Shield uses ultraviolet light to smash the molecular structure of gases, including tobacco smoke, cooking and pet odors, and even the harmful components of aerosols and cleaning products
01:25:30;05	ANNCR 2: This one-of-a-kind capture and kill filtration system never needs to be replaced. You just rinse it clean, let dry and

EXHIBIT J (continued)

	it's back on the job. Plus it's guaranteed for life. And there are no expensive Hepa filters that have to be replaced, saving you hundreds of dollars over the lifetime of your air purifier.
01:25:46;10	ANNCR 1: The space saving design of the ProShield Plus allows it to work in either the upright or the low-profile position. And best of all, when you order the new ProShield Plus, you'll also get this handy remote control. Now with a simple push of a button, you can control the ProShield Plus from anywhere in the room.
CUT TO DAVID ORECK	DAVID ORECK: You know we're America's #1 seller of air purifiers, and I'm convinced this is the best one we have ever built!
01:26:10;08	ANNCR 2: Order now and David Oreck will send you his amazing cordless refrigerator air purifier. A $50 value yours FREE.
01:26:17;14	ANNCR 1: And if you're one of the first 500 to order, you'll also get the incredible Speed Sweep cordless electric vacuum. It's both a powerful hand vacuum and floor vacuum—a $100 value yours FREE.
CUT TO DAVID ORECK	DAVID ORECK: And shipping and handling is on me! In fact, if you don't sleep better, awake more refreshed, breath more easily, dust your home less and simply enjoy the benefits of fresh, crisp, clean air just send it back. I'll even pay return shipping.
01:26:48;00	DAVID ORECK: And you can keep the free gifts just for trying my new ProShield Plus. So what are you waiting for? This is the ultimate risk-free offer. Call me now.
01:26:58;14	ANNCR 1: And here's a special announcement

EXHIBIT J (continued)

	ANNCR 1: Our country is facing what some are calling the worst flu season in years. With the existing flu pandemic on the rise, now more than ever we should be aware of airborne germs and viruses that can be in our homes.
01:27:12;14	ANNCR 2: That's why when you order now, David Oreck will give you $50.00 off his new Oreck ProShield Plus.
	ANNCR 2: That's how committed Oreck is to the well being of your family and it's smart way to help reduce your chance of exposure to colds and flu in your home.
01:27:28;06	ANNCR 1: The new ProShield Plus is backed by a 3-year overall warranty, and is supported by nearly 450 Oreck Clean Home Centers across North Americia.
CUT TO DAVID ORECK INTERVIEW	DAVID ORECK: We're an American company. We stand behind what we sell. I believe you ask anybody who bought an Oreck product I think you'll find that they say 'those are good folks'.
01:27:46;09	ANNCR 1: Call Now and experience the Oreck Clean Air Advantage for 30 days risk free. Decide to keep it and it's yours with no payments and no interest for one year.
CUT TO TESTIMONIAL	KEROL: When I opened the box and took it out. It's already ready to go, which is great. I didn't have to assemble anything. I just plugged it in.
01:28:01;01	ANNCR 2: Call now to find out how you can get a second ProShield Plus Air Purifier for half price.
01:28:07;03	ANNCR 1: You won't want to pass up this exclusive Oreck offer. So don't wait. Call now!

EXHIBIT J (continued)

Oreck Direct, LLC *"Oreck ProShield Plus"*

	LOCAL ANNOUNCER: Call 1-800-XXX-XXXX or log onto _____. Call now, 1-800-XXX-XXXX.
CLOSING DISCLAIMER	ANNCR 1: The preceding was a paid presentation for the new Oreck ProShield Plus Air Purifier.

EXHIBIT K

DVD of Oreck ProShield Plus Infomercial

EXHIBIT L

ORECK
PROSHIELD+
with
HELIOS SHIELD & TRUMAN CELL TECHNOLOGY

:120 DRTV Spot
2813M-01
Condensed Premiums

FINAL SPOT SCRIPT:
October 1st, 2009

Script to Screen
Direct Thinking for Direct Response

EXHIBIT L (continued)

VISUALS:	AUDIO:
	ANNCR (Male): Attention. The federal government warns we could be in for the worst flu season in decades. So how are you going to fight back the millions of microorganisms that could be riding on the airborne dust in your home? ANNCR (Female): And those dust particles could carry things like germs, cold and flu viruses, bacteria, mold and allergens. And could be spreading illnesses like the influenza virus and when your front door closes you and your family are sealed in with that pollution.
	ANNCR (Male): Now, you can fight back with the new Oreck ProShield Plus Air Purifier. The new ProShield Plus features two air-purification innovations only available from Oreck. ANNCR (Male): Powerful fans circulate the air through the ProShield Plus and Oreck's patented Truman Cell electrostatically charges many dust particles, allergens, germs and viruses pulling them out of the air like a magnet. And for odors, Oreck's brand new Helios Shield uses ultraviolet light to smash the molecular structure of gases and odors. ANNCR (Male): In fact, in home testing shows that the new ProShield Plus helped deliver up to a 99% reduction in airborne particles down to .1 microns.
CUT TO TESTIMONIALS.	NOCELLA FAMILY: The food odors, the dog odors, that's gone. CHRISTIE: I feel really good about having pure air for my family.

EXHIBIT L (continued)

	ANNCR (Female): David Oreck is so committed to the well being of your family that he'll ship his new ProShield Plus to you for FREE.
CUT TO DAVID ORECK	DO: I want you to use my new ProShield Plus in your home for 30 days. There is no obligation. You have absolutely nothing to lose! DO: Order now, and I'll send you two free gifts. My Refrigerator Air Purifier and my new Speed Sweep Cordless Electric Vacuum.
	ANNCR (Male): That's $150 in free gifts that are yours to keep even if you decide to return the air purifier. That's how sure David is you'll love his new ProShield Plus.
	ANNCR (Female): The ProShield Plus can work in either the upright or low profile position…
	ANNCR (Female): …and it comes with a remote control.
	ANNCR (Male): Try it risk free for 30 days. Keep it and enjoy the freedom of NO payment and NO interest for 1 year. Call now and fight the flu in your home air, with the new Oreck ProShield Plus air purifier.

EXHIBIT M (continued)

DVD of Oreck ProShield Plus 120-Second TV Commercial

EXHIBIT N


WANT A NEW WAY TO HELP BATTLE THE FLU?
Introducing the NEW Oreck ProShield™+ Air Purifier. In-home testing shows the ProShield helped deliver up to a 99% reduction in airborne particles down to .1 microns‡
• Healthier: Patented Truman Cell™ captures and destroys many viruses, germs and allergens down to 0.1 micron.
• Smarter: Silence Technology™ is amazingly quiet and uses as little energy as an ordinary lightbulb.
• Reliable: Helios Shield™ uses UV light to remove many odors from the air.
Because nothing could be more important than the air you breathe.
$00 OFF
Offer expires XX/XX/09
Can capture and destroy many airborne allergens and viruses like the flu‡
BACTERIA
VIRUSES
POLLEN
COME IN TODAY FOR A CLEAN AIR DEMO AND SAVE.
THE NEW ORECK XL LITTLE HERO JIFFY VAC
10% OFF the NEW Oreck Steam-It
Oreck Clean Home Center 123 Main Street, Anytown. (000) 000-0000
ORECK clean home center

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Oreck Corporation is a Delaware corporation with its principal office or place of business at 565 Marriott Drive, Suite 300, Nashville, Tennessee 37214.

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

ORDER

DEFINITIONS

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

1. "Competent and reliable scientific evidence" shall mean tests, analyses, research or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "respondent" shall mean Oreck Corporation, a corporation, its successors and assigns and its officers, agents, representatives, and employees.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Oreck Halo or any other vacuum cleaner, in or affecting commerce, shall not make, or assist others in making, any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration:

A. that such product reduces the risk of or prevents the flu;

B. that such product reduces the risk of or prevents illnesses or ailments caused by bacteria, viruses, molds, or

allergens, such as the common cold, diarrhea, upset stomachs, asthma and allergy symptoms;

C. that such product will eliminate all or virtually all germs, bacteria, dust mites, molds, viruses or allergens from a user's floor;

D. about the ability of such product to eliminate any percent or numerical quantity of germs, bacteria, dust mites, molds, viruses or allergens from a user's floor; and

E. that ultraviolet light is effective against germs, bacteria, dust mites, molds, viruses or allergens embedded in carpets;

unless the representation is non-misleading and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Oreck ProShield Plus or any other air cleaning product, in or affecting commerce, shall not make, or assist others in making, any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration:

A. that such product reduces the risk of or prevents the flu;

B. that such product reduces the risk of or prevents illnesses or ailments caused by bacteria, viruses, molds, or allergens, such as the common cold, asthma and allergy symptoms;

C. that such product will eliminate all or virtually all indoor airborne particles under normal living conditions; and

D. about the ability of such product to eliminate any percent or numerical quantity of indoor air contaminants under normal living conditions;

unless the representation is non-misleading and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not make, or assist others in making, any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, other than representations covered under Parts I and II of this order, about the absolute or comparative health benefits of such product, unless the representation is non-misleading, and, at the time of making such representation, the respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when

considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, or assist others in misrepresenting, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

V.

IT IS FURTHER ORDERED that respondent shall, within thirty (30) days after the date of entry of this order, provide to the Commission a searchable electronic file containing the name and contact information of all consumers who purchased the Oreck Halo or the Oreck ProShield Plus from January 1, 2009 through August 31, 2010, to the extent it has such information in its possession or control, including information available upon request from franchisees or others. Such file: (1) shall include each consumer's name and address, the product(s) purchased, the total amount of moneys paid less any amount credited for returns or refunds, the date(s) of purchase, and, if available, the consumer's telephone number and email address; (2) shall be updated through the National Change of Address database; and (3) shall be accompanied by a sworn affidavit attesting to its accuracy.

VI.

IT IS FURTHER ORDERED that respondent shall pay to the Federal Trade Commission the sum of seven hundred fifty thousand

dollars ($750,000). This payment shall be made in the following manner:

A. The payment shall be made by wire transfer made payable to the Federal Trade Commission, the payment to be made no later than five (5) days after the date that this order becomes final.

B. In the event of default on any obligation to make payment under this order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for ten (10) calendar days beyond the date that payment is due, the entire amount shall immediately become due and payable.

C. All funds paid to the Commission pursuant to this order shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including, but not limited to, consumer redress, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress to consumers is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to respondent's practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited in the United States Treasury as disgorgement. Respondent shall have no right to challenge the Commission's choice of remedies under this Part. Respondent shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

D. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise.

E. Respondent agrees that the facts as alleged in the complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this order, including but not limited to a nondischargeability complaint in any bankruptcy case. Respondent further agrees that the facts alleged in the complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S. C. § 523(a)(2)(A), and that this order shall have collateral estoppel effect for such purposes.

F. In accordance with 31 U.S.C. § 7701, respondent is hereby required, unless it has done so already, to furnish to the Commission its taxpayer identifying number, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of respondent's relationship with the government.

G. Proceedings instituted under this Part are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this order.

VII.

IT IS FURTHER ORDERED that respondent Oreck Corporation and its successors and assigns shall send as soon as

practicable, but in no event later than thirty (30) days after entry of this order, by first-class mail, postage prepaid and return receipt requested, an exact copy of the notice attached hereto as Attachment A, showing the date of mailing, to all of respondent's franchisees. The notice required by this paragraph shall include a copy of this order, but shall not include any other document or enclosures and shall be sent to the principal place of business of each entity.

VIII.

IT IS FURTHER ORDERED that respondent Oreck Corporation and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

IT IS FURTHER ORDERED that respondent Oreck Corporation and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed

and dated statement acknowledging receipt of the order. Respondent Oreck Corporation and its successors and assigns shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

IT IS FURTHER ORDERED that respondent Oreck Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line: In the Matter of Oreck Corporation, FTC File Number 102-3033. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at Debrief@ftc.gov.

XI.

IT IS FURTHER ORDERED that respondent Oreck Corporation and its successors and assigns shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

XII.

This order will terminate on May 19, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A

[ON ORECK CORPORATION LETTERHEAD]

IMPORTANT NOTICE ABOUT GOVERNMENT ACTION

[insert addressee name]
[insert addressee address]

Dear Oreck franchisee:

In a recent lawsuit, the Federal Trade Commission (FTC) alleged that Oreck Corporation made misleading representations in its advertising and marketing of the Oreck Halo vacuum cleaner and the Oreck ProShield Plus portable air cleaner. Among other things, the FTC alleged that Oreck deceptively claimed that these products substantially reduce the risk of or prevent the flu and other illnesses or ailments. In addition, the FTC alleged that Oreck made several other deceptive claims regarding the products' health benefits and effectiveness in removing germs and allergens from the floor and air.

Oreck resolved this matter with the FTC by a settlement in which it did not agree to any wrongdoing. Oreck has agreed to send this notification to you as part of its settlement with the FTC.

Oreck hereby requests that you immediately stop using all advertising and marketing materials previously provided to you by Oreck relating to the Oreck Halo vacuum cleaner and the Oreck ProShield Plus portable air cleaner. Under separate cover, Oreck will provide you with instructions regarding future advertising and marketing for these products.

For further information about this matter, go to www.ftc.gov and search for "Oreck."

Very truly yours,

John Arena
Vice President, General Counsel and Secretary
Oreck Corporation

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an Agreement Containing Consent Order from Oreck Corporation ("respondent"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter involves the advertising, marketing, and sale of the Oreck Halo vacuum cleaner and the Oreck ProShield Plus portable air cleaner. Oreck has marketed these products directly to consumers through numerous websites, as well as through company-owned and franchised retail stores and third-party retail outlets.

The Oreck Halo is an upright vacuum cleaner that has a built-in light chamber and a HEPA filter bag. The light chamber generates ultraviolet light in the C spectrum onto floor surfaces while vacuuming. According to the FTC complaint, Oreck has promoted the Oreck Halo as effective, through normal use, in killing virtually all bacteria, viruses, germs, mold and allergens that exist on carpets and other floor surfaces.

Specifically, the FTC complaint alleges that respondent represented, in various advertisements, that the Oreck Halo: (1) substantially reduces the risk of or prevents the flu; (2) substantially reduces the risk of or prevents other illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, diarrhea, upset stomachs, asthma, and allergy symptoms; and (3) will eliminate all or virtually all common germs and allergens found on the floors in users' homes. The complaint also alleges that Oreck claimed that the Oreck Halo's UV-C light is effective against germs, bacteria,

dust mites, mold and viruses embedded in carpets. The complaint alleges that all of these claims are unsubstantiated and thus violate the FTC Act.

The FTC complaint also alleges that Oreck represented, in various advertisements, that the Oreck ProShield Plus portable air cleaner: (1) substantially reduces the risk of or prevents the flu; (2) substantially reduces the risk of or prevents other illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, asthma, and allergy symptoms; and (3) will eliminate all or virtually all airborne particles from a typical household room under normal living conditions. The complaint alleges that all of these claims are unsubstantiated and thus violate the FTC Act.

The complaint further alleges that Oreck claimed that scientific tests prove that users of the Oreck Halo will eliminate or virtually eliminate many common germs and allergens found on the floors in their homes; and that scientific tests prove that the Oreck ProShield Plus will eliminate or virtually eliminate many common viruses, germs and allergens from a typical household room under normal living conditions. According to the complaint, these claims are false and thus violate the FTC Act.

Finally, the complaint alleges that Oreck provided advertisements to its franchised stores for use in their marketing and sale of the Oreck Halo and the Oreck ProShield. According to the complaint, Oreck thereby provided means and instrumentalities to distributors of its products in furtherance of the deceptive and misleading acts or practices alleged in the complaint.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I of the proposed order addresses the allegedly unsubstantiated claims regarding the Oreck Halo. Part I covers any representation that the Oreck Halo or any other vacuum cleaner: (1) reduces the risk of or prevents the flu; (2) reduces the risk of or prevents illnesses or ailments caused by bacteria, viruses,

molds, or allergens, such as the common cold, diarrhea, upset stomachs, asthma and allergy symptoms; (3) will eliminate all or virtually all germs, bacteria, dust mites, molds, viruses or allergens from a user's floor; and (4) will eliminate any percent or numerical quantity of germs, bacteria, dust mites, molds, viruses or allergens from a user's floor. Part I also applies to representations that ultraviolet light is effective against germs, bacteria, dust mites, molds, viruses or allergens embedded in carpets. Part I prohibits Oreck from making any of the above representations unless the representation is non-misleading and, at the time of making such representation, Oreck possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. The proposed order defines "competent and reliable scientific evidence" as "tests, analyses, research or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results."

Part II of the proposed order addresses the allegedly unsubstantiated claims regarding the Oreck ProShield Plus. Part II covers any representation that the Oreck ProShield Plus or any other air cleaner: (1) reduces the risk of or prevents the flu; (2) reduces the risk of or prevents illnesses or ailments caused by bacteria, viruses, molds, or allergens, such as the common cold, asthma and allergy symptoms; (3) will eliminate all or virtually all indoor airborne particles under normal living conditions; and (4) will eliminate any percent or numerical quantity of indoor air contaminants under normal living conditions. Part II prohibits Oreck from making any of the above representations unless the representation is non-misleading and, at the time of making such representation, Oreck possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

Part III of the proposed order prohibits respondent from making representations, other than representations covered under Parts I or II, about the absolute or comparative health benefits of any product, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

Part IV of the proposed order addresses the allegedly false claims that scientific tests prove that the Oreck Halo or ProShield Plus eliminate or virtually eliminate many common germs, viruses or allergens from the user's floor or air. Part IV prohibits respondent, when advertising any product, from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part VI of the proposed order requires the payment of $750,000 intended for redress to consumers. To facilitate the payment of redress, Part V of the proposed order requires Oreck to provide to the Commission a searchable electronic file containing the name and contact information of all consumers who purchased the Oreck Halo or the Oreck ProShield Plus from January 1, 2009 through August 31, 2010.

Part VII of the proposed order requires Oreck to send a letter to all of its franchisees requesting that they immediately stop using all advertising and marketing materials previously provided to them by Oreck. The required letter is appended to the proposed order as Attachment A.

Parts VIII, IX, X and XI of the proposed order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in

corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XII provides that the order will terminate after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF

LEGACY LEARNING SYSTEMS, INC. AND LESTER GABRIEL SMITH

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

Docket No. C-4323; File No. 102 3055
Filed June 1, 2011 – Decision June 1, 2011

This consent order relates to the advertising of instructional courses via an online affiliate marketing program by respondents Legacy Learning System and Lester Gabriel Smith ("Respondents"). The complaint alleges that Respondents promoted their instructional courses through affiliates that received financial compensation for providing positive endorsements of Respondents' courses in articles, blog posts, or other online editorial copy. However, Respondents failed to implement a reasonable monitoring program to ensure that these postings clearly and prominently disclosed the compensated nature of the affiliates' relationship. The complaint alleges that Respondents violated Section 5 of the FTC Act by disseminating or causing to be disseminated reviews of their instructional courses that misrepresented that they were those of independent, ordinary consumers. The complaint further alleges that Respondents violated Section 5 by failing to disclose, or disclose adequately, that the affiliates receive financial compensation from the sale of Respondents' products. The consent order requires Respondents to pay $250,000 in monetary relief. The consent order further prohibits Respondents from misrepresenting the status of any user or endorser of a product or service in connection with the advertising of any product or service and establishes certain disclosure requirements regarding the relationship between promoters and users or endorsers of a product or service.

Participants

For the *Commission*: *Victor DeFrancis* and *Stacey Ferguson*.

For the *Respondents*: *J. Carson Stone, III, J. Carson Stone, III, P.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Legacy Learning Systems, Inc., a corporation, and Lester Gabriel Smith, an officer and director of the corporation ("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. Legacy Learning Systems, Inc. ("Legacy") is a Tennessee corporation with its principal office or place of business at 624 Grassmere Park, Suite 16, Nashville, TN 37211.

2. Respondent Lester Gabriel Smith is Legacy's CEO and owns 100% of the company. At all times relevant to this complaint, Smith, individually or in concert with others, formulated, directed, controlled, or participated in the acts or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.

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

4. Respondents manufacture, advertise, market, promote, offer to sell, sell, and distribute instructional courses containing DVDs and written materials throughout the United States through their website www.learnandmaster.com.

5. Respondents advertise their instructional courses on the Internet through a variety of techniques, including an affiliate program created in 2006, the Legacy Learning Systems Affiliate Program (the "Program"). After respondents admit affiliates into their Program, those affiliates generate commissions, ranging from 20% to 45% of the cost of each instructional course sold, by directing Internet purchasers to Legacy's website at www.learnandmaster.com.

6. Respondents have recruited "Review Ad" affiliates for the Program, who promote Legacy's instructional courses through positive endorsements in articles, blog posts, or other online editorial copy that contain hyperlinks to Legacy's website in close

proximity to the endorsements. Respondents' Review Ad affiliates often post such endorsements using statements that give readers the impression the endorsements have been submitted by ordinary consumers.

7. Through the Program, respondents have disseminated or have caused to be disseminated advertisements for their instructional videos, including, but not necessarily limited to, those attached as Exhibit A. These advertisements contain the following statements:

www.bestguitarsoftware.com:

Features: ★★★★★ (5 Stars out of 5 stars)

The undisputed No. 1 training product for someone wanting to learn how to play the guitar.

www.learnandmasterlessons.com:

Read my Independent Review and Discover the Truth of Learn & Master Guitar Now!

Rank: #1 . . .

Simply the best beginner course available, Learn and Master Guitar is well structured, well paced, and contains an appropriate level of music theory and techniques to develop your musicianship.

www.reviewmspy.com:

Learn and Master Guitar. 4.9/5 Stars

The best home study DVD course for guitar I have ever seen.

www.guitarlessoninsider.com:

> Learn and Master Guitar is by far the **most comprehensive guide out there** to help you learn to play the guitar . . . This truly is **the most you can get for your money** as far as a guitar course where you are able to learn at your own pace.

www.reviewsnest.com:

> Reviews Nest
> The Independent Reviews Site
>
> **What we think:**
>
> **Putting it simply: Learn and Master Guitar emerged from our test as the King of "learn guitar at home" courses.**

8. Through advertisements including, but not limited to, those set forth in Paragraph 7, a small number of respondents' Review Ad affiliates have generated substantial revenues for Legacy. In fact, twenty-five of Legacy's Review Ad affiliates are responsible for at least $5 million in sales of Legacy's instructional courses.

9. Since at least December 1, 2009, respondents' contracts have stated that their Review Ad affiliates should "comply with the FTC guidelines on disclosures." However, respondents have failed to implement a reasonable monitoring program to ensure that their Review Ad affiliates clearly and prominently disclose their relationship to Legacy. In fact, many of respondents' Review Ad affiliates, including but not limited to those described in Paragraph 8, have endorsed Legacy's instructional courses without any disclosure of their relationship to Legacy, or with disclosures accessible only through inconspicuous hyperlinks located at the bottom of the home pages of Review Ad affiliates' web sites.

10. Through the means described in Paragraphs 5-9, respondents have represented, directly or indirectly, expressly or by implication, that reviews of their instructional videos were independent reviews reflecting the opinions of ordinary consumers.

11. In truth and in fact, the reviews for those instructional videos were not independent reviews reflecting the opinions of ordinary consumers. Legacy's affiliates created these reviews in furtherance of Legacy's Program to promote the sales of Legacy's instructional videos. Therefore, the representation set forth in Paragraph 10 was, and is, false and misleading.

12. Through the means described in Paragraphs 5-9, respondents have represented, directly or indirectly, expressly or by implication, that reviews for Legacy's instructional videos represented endorsements from persons who had used or reviewed those instructional videos. Respondents failed to disclose, or disclose adequately, that the endorser receives financial compensation from the sale of Legacy's products. This fact would be material to consumers in their purchasing decision regarding the instructional videos. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

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

THEREFORE, the Federal Trade Commission this first day of June, 2011, has issued this Complaint against respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq*.; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Legacy Learning Systems, Inc. is a Tennessee corporation with its principal office or place

of business at 624 Grassmere Park, Suite 16, Nashville, TN 37211.

Respondent Lester Gabriel Smith is an officer and director of the corporate respondent, with his principal office or place of business at 624 Grassmere Park, Suite 16, Nashville, TN 37211.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Legacy Learning Systems, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees; and Lester Gabriel Smith, individually, and as an officer and director of Legacy.

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

3. "Affiliate Program" shall mean any arrangement whereby any person, through hyperlinks on the World Wide Web, hyperlinks in commercial email messages, or any other Internet-based mechanism, provides respondents with, or refers to respondents, potential or actual customers.

4. "Affiliate" shall mean any person or entity who participates in an Affiliate Program.

5. "Material connection" shall mean any relationship that

materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

6. "Endorsement" shall mean as defined in the Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0.

7. "Clearly and prominently" shall mean:

A. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

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

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

D. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and

presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and

E. In all instances, the required disclosures are presented in an understandable language and syntax, and in the same language as the predominant language that is used in the communication, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

8. The term "including" in this order shall mean "without limitation."

9. The terms "and" and "or" in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the status of any user or endorser of a product or service, including, but not limited to, misrepresenting that the user or endorser is an independent user or ordinary consumer of the product or service.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution

of any product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about any user or endorser of such product or service unless they disclose, clearly and prominently, a material connection, when one exists, between such user and endorser and the respondents or any other individual or entity manufacturing, advertising, labeling, promoting, offering for sale, selling, or distributing such product or service.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall take steps sufficient to ensure compliance with Parts I and II of this order. Such steps shall include, at a minimum:

A. Establishing, implementing, and thereafter maintaining a system to monitor and review their Affiliates' representations and disclosures to ensure compliance with Parts I and II of this order. The system shall be implemented as follows:

1. No later than thirty (30) days after the date of service of this order, and, on a semi-annual basis thereafter, respondents shall determine those Affiliates that generate the most sales for respondents. For respondents' top fifty (50) revenue-generating Affiliates, respondents shall monitor and review each of their web sites on at least a monthly basis at times not disclosed in advance to their Affiliates and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted;

2. For the remainder of respondents' Affiliates, respondents shall monitor and review the web sites of a random sample of fifty (50) on at least a monthly basis at times not disclosed in advance to their Affiliates and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted;

B. Immediately terminating from any Affiliate Program and ceasing payment to any Affiliate who respondents reasonably conclude:

1. has misrepresented, in any manner, the status of such Affiliate, including, but not limited to, the misrepresentation that such Affiliate is an independent user or ordinary consumer; or

2. has failed to disclose, clearly and prominently, a material connection, when one exists, between such Affiliate and the respondents; and

C. Creating, and thereafter, maintaining, reports sufficient to show the results of the monthly monitoring required by subpart A of this Part of the order.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, to ensure compliance with Parts I and II of this order, shall, for (i) any prospective Affiliate, prior to acceptance into any Affiliate Program or (ii) any current Affiliate, no later than ten (10) days after the date of service of this order:

A. Provide each such person a copy of this order;

B. Obtain from each such person a signed and dated statement acknowledging receipt of this order and expressly agreeing to comply with this order; and

C. Provide written notice that engaging in acts or practices prohibited by this order will result in immediate termination of any Affiliate Program account and forfeiture of all monies earned or owed. Any electronic signature that respondents obtain pursuant to this Part shall comply with the signature requirements of the Electronic Signatures in Global and National Commerce Act ("E-Sign Act"), 15 U.S.C. § 7001 et seq.

V.

IT IS FURTHER ORDERED that respondents shall pay to the Federal Trade Commission the sum of Two Hundred and Fifty Thousand Dollars ($250,000). This payment shall be made in the following manner:

A. The payment shall be made by wire transfer made payable to the Federal Trade Commission, the payment to be made no later than fifteen (15) days after the date that this order becomes final; *provided* that all respondents are primarily liable, jointly and severally, for the payment amount, including any default payment amount if the payment is in default, unless and until payment is made in full.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961(a), from the date of default to the date of payment, shall immediately become due and payable to the Commission.

Respondents agree that, in such event, the facts as alleged in the complaint shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this order, including, but not limited to, a nondischargeability complaint in any subsequent bankruptcy proceeding.

C. All funds paid pursuant to this Part, together with any accrued interest, shall be used by the Commission in its sole discretion to provide such relief as it determines to be reasonably related to respondents' practices alleged in the complaint, and to pay any attendant costs of administration. Such relief may include, but shall not be limited to, the recision of contracts, payment of damages, and/or public notification respecting such unfair or deceptive acts or practices as alleged in the Complaint. If the Commission determines, in its sole discretion, that such relief is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

D. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any respondent, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

VI.

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make

available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondents, that:

A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any endorsement made by respondents, and any responses to those complaints or inquiries;

B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, terms of this order, and all reports submitted to the Commission pursuant to this order;

C. Contradict, qualify, or call into question respondents' compliance with this order; and

D. All acknowledgments of receipt of this order obtained pursuant to Parts IV.B and VII.

VII.

IT IS FURTHER ORDERED that respondent Legacy, its successors and assigns, and respondent Smith shall deliver a copy of this order to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each person a signed and dated statement acknowledging receipt of this order. For current personnel, delivery shall be within ten (10) days of the date of service of this order. For new personnel, delivery shall occur prior to their first assuming their responsibilities.

VIII.

IT IS FURTHER ORDERED that respondent Legacy, its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or related entity that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Legacy Learning Systems, Inc., *et al.*, File No. 102-3055. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IX.

IT IS FURTHER ORDERED that respondent Smith, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include Smith's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal

Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line Legacy Learning Systems, Inc., *et al.*, File No. 102-3055. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

X.

IT IS FURTHER ORDERED that respondent Legacy, its successors and assigns, and respondent Smith shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

XI.

This order will terminate on June 1, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Legacy Learning Systems, Inc. and Lester Gabriel Smith, an officer and director of the corporation ("respondents").

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

The practices challenged in this case relate to the advertising of respondents' instructional courses via an online affiliate marketing program. According to the Commission's complaint, many of respondents' affiliates promoted respondents' instructional courses

through positive endorsements in articles, blog posts, or other online editorial copy that contained hyperlinks to respondents' website in close proximity to the endorsements. For each sale of an instructional course to a consumer directed to respondents' website by an affiliate, respondents paid the affiliate a commission of 20 to 45 percent of the purchase price. The affiliates often posted endorsements about respondents' instructional courses using statements that gave readers the impression the endorsements had been submitted by ordinary consumers or independent reviewers. Respondents failed to implement a reasonable monitoring program to ensure that these postings clearly and prominently disclosed the compensated nature of the affiliates' relationship to respondents.

The Commission's complaint alleges that respondents violated Section 5 of the FTC Act by disseminating or causing to be disseminated reviews of their instructional courses that misrepresented that they were those of independent, ordinary consumers. The complaint further alleges that respondents violated Section 5 by failing to disclose, or disclose adequately, that the affiliates receive financial compensation from the sale of respondents' products.

Part I of the proposed order prohibits respondents, in connection with the advertising of any product or service, from misrepresenting the status of any user or endorser of a product or service, including, but not limited to, misrepresenting that the user or endorser is an independent user or ordinary consumer of the product or service.

Part II prohibits respondents from making any representation about any user or endorser of a product or service unless they disclose, clearly and prominently, a material connection, when one exists, between the user or endorser of the product or service and any other party involved in promoting that product or service. The proposed order defines "material connection" as any relationship that materially affects the weight or credibility of any endorsement and would not be reasonably expected by consumers.

Part III requires respondents to take immediate steps to ensure compliance with Parts I and II of the order, including maintaining a system to review and monitor their affiliate representations and disclosures. The proposed order requires respondents to determine, on a semi-annual basis, their top fifty (50) revenue-generating affiliates, and then monitor, on a monthly basis, the web sites of those affiliates and the web sites of a random sample of fifty (50) of their remaining affiliates. Part III also requires respondents to terminate any affiliate who engages in conduct inconsistent with Parts I and II of the order and to maintain reports regarding compliance with Part III of the order.

Part IV requires respondents to serve copies of the order to prospective affiliates prior to their entry into respondents' affiliate program, and to current affiliates within ten days of the date of service of the order.

Part V requires respondents to pay to the Commission a sum of $250,000. This payment may be used in the Commission's sole discretion to provide appropriate relief, which may include, but is not limited to, the recision of contracts, payment of damages, and/or public notification respecting the unfair or deceptive acts or practices alleged in the complaint. If the Commission determines that such relief is wholly or partially impracticable, any or all such funds shall be paid to the United States Treasury.

Parts VI through X of the proposed order require respondents to: keep copies of relevant consumer complaints and inquiries, documents demonstrating order compliance, and any documents relating to any representation covered by this order; provide copies of the order to certain of their personnel; notify the Commission of changes in corporate structure that might affect compliance obligations under the order; notify the Commission of changes in corporate business or employment as to respondent Lester Gabriel Smith individually; and file compliance reports with the Commission. Part XI provides that the order will terminate after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF

HIKMA PHARMACEUTICALS PLC

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

Docket No. C-4320; File No. 111 0051
Filed April 25, 2011 – Decision June 6, 2011

This consent order relates to the proposed acquisition by Hikma Pharmaceuticals ("Hikma") of Baxter Healthcare Corporation, Inc.'s generic injectable pharmaceutical business. The complaint alleges that the proposed acquisition would substantially lessen competition in the U.S. markets for generic injectable phenytoin and generic injectable promethazine. In order to replace the competition that would otherwise be eliminated by the proposed acquisition, the consent order requires Hikma to divest all of its rights and assets relating to its generic injectable phenytoin and generic injectable promethazine products to X-Gen Pharmaceuticals, Inc. or another Commission-approved acquirer. The consent order further requires Hikma to maintain the competitive viability of these assets until they are divested.

Participants

For the *Commission*: *Jennifer Lee, Mark Silvia, David Von Nirschl,* and *Kari A. Wallace*.

For the *Respondent*: *John D. Carroll, Brian R. Meiners,* and *Kevin R. Sullivan, King & Spalding LLP*; *Michael Sennett* and *Pamela L. Taylor, Jones Day.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that the Respondent Hikma Pharmaceuticals PLC ("Hikma"), a company subject to the jurisdiction of the Commission, has entered into an agreement to

acquire from Baxter Healthcare Corporation, Inc. ("Baxter"), a company subject to the jurisdiction of the Commission, certain assets that comprise Baxter's generic injectable pharmaceutical products business, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Hikma is a corporation organized, existing, and doing business under and by virtue of the laws of England and Wales, with its headquarters located at 13 Hanover Square, London W1S 1HW, United Kingdom and the address of its United States subsidiary, West-Ward Pharmaceutical Corp., located at 465 Industrial Way West, Eatontown, New Jersey 07724-2209. Hikma is engaged in the research, development, manufacture, and sale of human pharmaceutical products.

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

II. THE ACQUIRED COMPANY

3. Baxter is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters located at One Baxter Parkway, Deerfield, Illinois 60015-4633. Baxter, among other things, is engaged in the research, development, manufacture, and sale of human pharmaceutical products in the United States.

III. THE PROPOSED ACQUISITION

4. Pursuant to an Asset Purchase Agreement ("Acquisition Agreement") dated October 29, 2010, Hikma proposes to acquire Baxter's generic injectable pharmaceutical business for approximately $111.5 million (the "Acquisition").

IV. THE RELEVANT MARKETS

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

a. generic injectable phenytoin; and

b. generic injectable promethazine.

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

V. THE STRUCTURE OF THE MARKETS

7. Generic injectable phenytoin is an anti-convulsant drug used to control seizures and prevent the incidence of seizures during and after surgery. The $1.5 million market for generic injectable phenytoin is highly concentrated; only Hikma, Baxter, and Hospira, Inc. ("Hospira") sell the drug in the United States. Hikma is the market leader with a 44 percent share. Baxter accounts for an additional 38 percent, while Hospira has a share of 18 percent.

8. Generic injectable promethazine is used, among other things, to relieve allergies and allergic reactions, to prevent and control motion sickness, nausea, vomiting, and dizziness, and to help patients sleep and control pain and anxiety during and after surgery. The $17 million market for generic injectable promethazine is highly

concentrated, with only Baxter, Hikma, and Hospira currently manufacturing and selling the product for the U.S. market. Baxter and Hikma are the market leaders and Hospira's product has limited competitive significance.

VI. ENTRY CONDITIONS

9. Entry into the relevant markets described in Paragraphs 5 and 6 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because the combination of drug development times and U.S. Food and Drug Administration approval requirements take at least two years. In addition, entry is not likely because the relevant markets are relatively small, limiting sales opportunities for any potential new entrant.

VII. EFFECTS OF THE ACQUISITION

10. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Hikma and Baxter in the markets for generic injectable phenytoin and generic injectable promethazine, thereby: (1) increasing the likelihood that Hikma will be able to unilaterally exercise market power in these markets; (2) increasing the likelihood and degree of coordinated interaction between or among the remaining competitors; and (3) increasing the likelihood that customers would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fifth day of April, 2011, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Hikma Pharmaceuticals PLC ("Hikma") of certain assets relating to the business of generic injectable pharmaceutical products of Baxter Healthcare Corporation ("Baxter"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such

Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Hikma is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its headquarters address at 13 Hanover Square, London W1S 1HW, United Kingdom and the address of its United States subsidiary, Westward Pharmaceutical Corp., located at 465 Industrial Way West, Eatontown, New Jersey 07724-2209.

2. Baxter is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at One Baxter Parkway, Deerfield, Illinois 60015-4633.

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

ORDER

I.

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

A. "Hikma" or "Respondent" means Hikma Pharmaceuticals PLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hikma (including, but not limited to, West-ward Pharmaceutical Corporation and Hikma (Maple) Limited), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Baxter" means Baxter Healthcare Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Baxter (including, but not limited to, Baxter International, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the

requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

E. "Acquisition" means the acquisition contemplated by the "Asset Purchase Agreement" by and among West-ward Pharmaceutical Corporation, Hikma (Maple) Limited, and Baxter, dated as of October 29, 2010.

F. "Acquisition Date" means the date the Respondent closes on the Acquisition pursuant to the Asset Purchase Agreement, by and among West-ward Pharmaceutical Corporation, Hikma (Maple) Limited and Baxter, dated as of October 29, 2010.

G. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

H. "Application(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary

for the preparation thereof, and all correspondence between Respondent and the FDA related thereto. The term "Application" also includes an "Investigational New Drug Application" ("IND") for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondent and the FDA related thereto.

I. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

J. "Clinical Trial(s)" means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of Generic Injectable Products.

K. "Closing Date" means, as to each Generic Injectable Product, the date on which Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Generic Injectable Product to an Acquirer pursuant to this Order.

L. "Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Generic Injectable Product(s);

provided, however, that the restrictions contained in this Order regarding the Respondent's use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following:

a. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondent;

b. information related to the Generic Injectable Products that Baxter can demonstrate it obtained without the assistance of Respondent prior to the Acquisition;

c. information that is required by Law to be publicly disclosed;

d. information relating to the Respondent's general business strategies or practices relating to research, Development, manufacture, marketing, or sales of Products that does not discuss with particularity the Generic Injectable Products;

e. information specifically excluded from the Generic Injectable Product Assets;

f. all intellectual property licensed to the Acquirer on a non-exclusive basis; and

g. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

M. "Contract Manufacture" means:

1. to manufacture a Generic Injectable Product or ingredient or component thereof, or

2. to provide any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Generic Injectable Product,

by Respondent or Baxter to an Acquirer.

N. "Contract Manufacture Product(s)" means any Generic Injectable Product, or ingredient or component thereof, for which any part of the manufacturing process is performed by the Respondent prior to the Closing Date at a facility that is not subject to divestiture pursuant to this Order.

O. "Development" means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

P. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the

relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of Respondent's employees' labor shall not exceed the average hourly wage rate for such employee;

provided, however, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Generic Injectable Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Generic Injectable Product.

Q. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

R. "Domain Name" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration. "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

S. "Drug Master Files" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

T. "Generic Injectable Product(s)" means the following: all Products in Development, manufactured, marketed or sold by Respondent Hikma pursuant to the following ANDAs:

1. Phenytoin, in 2mL vials and 10 mL vials with a dosage strength of 50mg/mL pursuant to ANDA No. A040573;

2. Promethazine, in 1mL ampoules with dosage strengths of 25mg/mL or 50mg/mL pursuant to ANDA No. A040737; and

3. any supplements, amendments, or revisions thereto;

provided, however, that for the purposes of the Contract Manufacture provisions of this Order, the term "Generic Injectable Products" shall include all presentations of any Retained Product that, as of the Acquisition Date, are being, or will be, manufactured, marketed or sold by the Respondent for sale within the United States that contain the same active pharmaceutical ingredients in the dosage strengths and presentations specified above.

U. "Generic Injectable Product Assets" means all of the Respondent's rights, title and interest in and to all assets related to the Respondent's business within the Geographic Territory related to each of the respective Generic Injectable Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each such Product, including, without limitation, the following:

1. all Product Intellectual Property related to any such Generic Injectable Product;

2. all Product Approvals related to any such Generic Injectable Product;

3. all Product Manufacturing Technology related to any such Generic Injectable Product;

4. all Product Marketing Materials related to any such Generic Injectable Product;

5. all Website(s) related exclusively to any such Generic Injectable Product;

6. a list of all of the NDC Numbers related to any such Generic Injectable Product, and rights, to the extent permitted by Law:

    a. to require Respondent to discontinue the use of those NDC Numbers in the sale or marketing of the Generic Injectable Products *except* for returns, rebates, allowances, and adjustments for Generic Injectable Products sold prior to the Acquisition Date and *except* as may be required by applicable Law;

    b. to prohibit Respondent from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s);

    c. to seek to change any cross-referencing by a customer of those NDC Numbers with the Retained Product(s) (including the right to receive notification from Respondent of any such cross-referencing that is discovered by Respondent);

    d. to seek cross-referencing from a customer of those NDC Numbers with the Acquirer's NDC Numbers related to the Generic Injectable Product;

    e. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of Generic Injectable Products *except* for returns, rebates, allowances, and

adjustments for Generic Injectable Products sold prior to the Acquisition Date and *except* as may be required by applicable Law; and

f. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such NDC numbers by Respondent prior to such notification(s) being disseminated to the customer(s);

7. all rights to all of Respondent's Applications related to any such Generic Injectable Product;

8. Right of Reference or Use to the Drug Master Files related to the above-described Applications including, but not limited to, the pharmacology and toxicology data contained in all Application(s);

9. all Product Development Reports related to any such Generic Injectable Product;

10. at the Acquirer's option, all Product Assumed Contracts related to any such Generic Injectable Product (copies to be provided to the Acquirer on or before the Closing Date);

11. all strategic safety programs submitted to the FDA related to any such Generic Injectable Product that are designed to decrease product risk by using one or more interventions or tools beyond the package insert;

12. all patient registries related to any such Generic Injectable Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to

facilitate the investigation of adverse effects related to any such Generic Injectable Product;

13. a list of all customers and targeted customers for such Generic Injectable Product and a listing of the net sales (in either units or dollars) of such Generic Injectable Products to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of such Generic Injectable Products on behalf of the High Volume Account and his or her business contact information;

14. at the Acquirer's option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to any such Generic Injectable Product;

15. copies of all unfilled customer purchase orders for such Generic Injectable Product as of the Closing Date, to be provided to the Acquirer not later than five (5) days after the Closing Date;

16. at the Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for such Generic Injectable Product; and

17. all of the Respondent's books, records, and files directly related to the foregoing or to any such Generic Injectable Product;

provided, however, that "Generic Injectable Product Assets" shall not include: (1) documents relating to Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of generic pharmaceutical Products, where such documents do not discuss with particularity the Generic Injectable Products; (2) shall not include administrative, financial, and accounting records; (3) quality control records that are determined by the Interim Monitor or the Acquirer not to be material to the manufacture of the Generic Injectable Product; and (4) any real estate and the buildings and other permanent structures located on such real estate;

provided further, *however*, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to a Generic Injectable Product and to other Products or businesses of the Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to any such Generic Injectable Product; or (2) for which the Respondent has a legal obligation to retain the original copies, the Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondent shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent provides the Acquirer with the above-described information without requiring Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

V. "Generic Injectable Product Core Employee(s)" means the Product Research and Development Employees and the Product Manufacturing Employees related to each Generic Injectable Product.

W. "Generic Injectable Product License" means all of the following related to the Generic Injectable Products:

1. a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property and all Product Manufacturing Technology related to general manufacturing know-how:

   a. to research and Develop the Generic Injectable Products for marketing, distribution or sale within the United States of America;

   b. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the Generic Injectable Products within the United States of America;

   c. to import or export the Generic Injectable Products to or from the United States of America to the extent related to the marketing, distribution or sale of the Generic Injectable Products in the United States of America; and

   d. to have the Generic Injectable Products made anywhere in the World for distribution or sale within, or import into the United States of America;

provided further, however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party to the Respondent, the scope of the rights granted hereunder shall only be required to be equal to

the scope of the rights granted by the Third Party to the Respondent.

X. "Generic Injectable Product Releasee(s)" means the Acquirer for the assets related to a particular Generic Injectable Product or any Person controlled by or under common control with such Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Acquirer, or of such Acquirer-affiliated entities.

Y. "Geographic Territory" shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.

Z. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

AA. "High Volume Account(s)" means any retailer, wholesaler or distributor whose annual or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Generic Injectable Product in the United States of America from the Respondent was, or is projected to be among the top twenty highest of such purchase amounts by the Respondent's U.S. customers on any of the following dates: (1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (2) the end of the last quarter that immediately preceded the Acquisition Date; (3) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (4) the end of the last quarter following the Acquisition or the Closing Date.

BB. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

CC. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

DD. "Manufacturing Designee" means any Person other than Respondent or Baxter that has been designated by an Acquirer to manufacture a Generic Injectable Product for that Acquirer.

EE. "NDC Numbers" means the National Drug Code numbers, including both the labeler code assigned by the FDA and the additional numbers assigned by an Application holder as a product code for a specific Product.

FF. "Order Date" means the date on which this Decision and Order becomes final and effective.

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

HH. "Patent(s)" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related

to any Product of or owned by Respondent as of the Closing Date (*except* where this Order specifies a different time).

II. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.

JJ. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient.

KK. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application.

LL. "Product Assumed Contracts" means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to the Generic Injectable Product(s) and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the Generic Injectable Product(s) from the Respondent unless

such contract applies generally to the Respondent's sales of Products to that Third Party;

2. pursuant to which Respondent purchases the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of the Generic Injectable Product(s);

3. relating to any Clinical Trials involving the Generic Injectable Product(s);

4. with universities or other research institutions for the use of the Generic Injectable Product(s) in scientific research;

5. relating to the particularized marketing of the Generic Injectable Product(s) or educational matters relating solely to the Generic Injectable Product(s);

6. pursuant to which a Third Party manufactures or packages the Generic Injectable Product(s) on behalf of Respondent;

7. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Generic Injectable Product(s) to Respondent;

8. pursuant to which a Third Party is licensed by Respondent to use the Product Manufacturing Technology;

9. constituting confidentiality agreements involving the Generic Injectable Product(s);

10. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the Generic Injectable Product(s);

11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Generic Injectable Products to Respondent including, but not limited to, consultation arrangements; and/or

12. pursuant to which any Third Party collaborates with Respondent in the performance of research, Development, marketing, distribution or selling of the Generic Injectable Product or the Generic Injectable Product business;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondent shall assign the Acquirer all such rights under the contract or agreement as are related to the Generic Injectable Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

MM. "Product Copyrights" means rights to all original works of authorship of any kind directly related to the Generic Injectable Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of the Generic Injectable Product or of any materials used in the research, Development, manufacture, marketing or sale of the Generic Injectable Product, including all copyrights in raw data relating to

Clinical Trials of the Generic Injectable Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, the Generic Injectable Product sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees who accept employment with the Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Generic Injectable Product or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA.

NN. "Product Development Reports" means:

1. Pharmacokinetic study reports related to the specified Generic Injectable Product;

2. Bioavailability study reports (including reference listed drug information) related to the specified Generic Injectable Product;

3. Bioequivalence study reports (including reference listed drug information) related to the specified Generic Injectable Product;

4. all correspondence to the Respondent from the FDA and from the Respondent to the FDA relating to the Application(s) submitted by, on behalf of, or acquired by, the Respondent related to the specified Generic Injectable Product;

5. annual and periodic reports related to the above-described Application(s), including any safety update reports;

6. FDA approved Product labeling related to the specified Generic Injectable Product;

7. currently used product package inserts (including historical change of controls summaries) related to the specified Generic Injectable Product;

8. FDA approved patient circulars and information related to the specified Generic Injectable Product;

9. adverse event/serious adverse event summaries related to the specified Generic Injectable Product;

10. summary of Product complaints from physicians related to the specified Generic Injectable Product;

11. summary of Product complaints from customers related to the specified Generic Injectable Product; and

12. Product recall reports filed with the FDA related to the specified Generic Injectable Product.

OO. "Product Employee Information" means the following, for each Generic Injectable Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Generic Injectable Product Core Employee (including former employees who were employed by Respondent within ninety (90) days of the execution date of any Remedial Agreement);

2. with respect to each such employee, the following information:

   a. the date of hire and effective service date;

   b. job title or position held;

   c. a specific description of the employee's responsibilities related to the relevant Generic Injectable Product; *provided, however*, in lieu of this description, Respondent may provide the employee's most recent performance appraisal;

   d. the base salary or current wages;

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

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

   g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

PP. "Product Intellectual Property" means all of the following related to a Generic Injectable Product (other than Product Licensed Intellectual Property):

1. Patents;

2. Product Copyrights;

3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and

4. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof and to bring suit against a Third Party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

provided, however, "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Hikma" or "West-ward", or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondent or the related corporate logos thereof, or general registered images or symbols by which Hikma or West-ward can be identified or defined.

QQ. "Product Licensed Intellectual Property" means the following:

1. Patents that are related to a Generic Injectable Product that Respondent can demonstrate have been routinely used, prior to the Acquisition Date, for a Retained Product(s) that:

   a. has been marketed or sold on an extensive basis by a Respondent within the two-year period immediately preceding the Acquisition; or

   b. for which, prior to the announcement of the Acquisition, there was an approved marketing plan to market or sell such a Retained Product on an extensive basis by a Respondent; and

2. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the Geographic Territory to limit the use or disclosure thereof, that are related to a Generic Injectable Product and that Respondent can demonstrate have been routinely used, prior to the Acquisition Date, for a Retained Product(s) that:

   a. has been marketed or sold on an extensive basis by the Respondent within the two-year period immediately preceding the Acquisition; or

   b. for which, prior to the announcement of the Acquisition, there was an approved marketing plan to market or sell such a Retained Product on an extensive basis by a Respondent;

provided, however, that, in cases where the aggregate retail sales of a Retained Product(s) in dollars within the two-year period immediately preceding the Acquisition collectively are less than the aggregate retail sales in

dollars within the same period of the Generic Injectable Product collectively being divested to a particular Acquirer, the above-described intellectual property shall be considered, at the such Acquirer's option, to be Product Intellectual Property and, thereby, subject to assignment to such Acquirer;

provided further, however, that in such cases, Respondent may take a license back from such Acquirer for such intellectual property for use in connection with the Retained Products and such a license to Respondent may be perpetual, fully paid-up and royalty-free license(s) with rights to sublicense.

RR. "Product Manufacturing Employees" means all salaried employees of Respondent who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the specified Generic Injectable Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

SS. "Product Manufacturing Technology" means:

1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Generic Injectable Product, including, but not limited to, the following: all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical

data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

2. all active pharmaceutical ingredients related to the Generic Injectable Product; and,

3. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture the Generic Injectable Product.

TT. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of a Generic Injectable Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to the Generic Injectable Product; *provided, however*, that for any generic Product, "Product Marketing Materials" excludes final pricing and formulas that determine the final pricing of each of the Generic Injectable Products and/or

Retained Products to customers and competitively sensitive information that is exclusively related to the Retained Products.

UU. "Product Research and Development Employees" means all salaried employees of Respondent who directly have participated in the research, Development, or regulatory approval process, or clinical studies of the specified Generic Injectable Product (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

VV. "Product Trade Dress" means the current trade dress of the Generic Injectable Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

WW. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the specified Product(s).

XX. "Proposed Acquirer" means a Person proposed by Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondent pursuant to this Order.

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

1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent related to a Generic Injectable Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

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

4. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of

Respondent related to a Generic Injectable Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

ZZ. "Retained Product" means any Product(s) other than a Generic Injectable Product.

AAA. "Right of Reference or Use" means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application, including the ability to make available the underlying raw data from the investigation for FDA audit.

BBB. "Supply Cost" means a cost not to exceed the manufacturer's average direct per unit cost in United States dollars of manufacturing the Generic Injectable Product for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Generic Injectable Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Generic Injectable Product.

CCC. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*,

a. designating employees knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Generic Injectable Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

b. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Generic Injectable Product that are acceptable to the Acquirer;

c. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and

d. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:

(1) manufacture the specified Generic Injectable Product in the quality and quantities achieved by the Respondent, or the manufacturer and/or developer of such Generic Injectable Product;

(2) obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell the specified Generic Injectable Product in

commercial quantities and to meet all Agency-approved specifications for such Generic Injectable Product; and

(3) receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Generic Injectable Product.

DDD. "Third Party(ies)" means any non-governmental Person other than the following: Respondent; Baxter; or, the Acquirer for the Generic Injectable Product Assets.

EEE. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondent; *provided, however,* "Website" shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Generic Injectable Products.

FFF. "X-Gen" means X-Gen Pharmaceuticals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its headquarters address at 300 Daniel Zenker Drive, Horseheads, NY 14845-1014.

GGG. "X-Gen Generic Injectable Product Divestiture Agreements" means all of the following agreements:

1. "Asset Purchase Agreement" by and among X-Gen Pharmaceuticals, Inc., West-ward Pharmaceutical Corp. and Hikma Farmacêutica, S.A., dated as of

March 28, 2011, and all amendments, exhibits, attachments, agreements, and schedules thereto;

2. "Manufacturing Agreement" between X-Gen Pharmaceuticals, Inc. and Hikma Farmacêutica, S.A., dated as of March 28, 2011, and all amendments, exhibits, attachments, agreements, and schedules thereto; and

3. Letter Agreement to X-Gen Pharmaceuticals, Inc. from Hikma Farmacêutica, S.A., dated as of March 29, 2011, and all amendments, exhibits, attachments, agreements, and schedules thereto;

related to the Generic Injectable Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The X-Gen Generic Injectable Product Divestiture Agreements are attached to this Order and contained in non-public Appendix II.A.

II.

IT IS FURTHER ORDERED that:

A. Not later than the earlier of: (1) ten (10) days after the Acquisition Date or (2) ten (10) days after the Order Date, Respondent shall divest the Generic Injectable Product Assets and grant the Generic Injectable Product License, absolutely and in good faith, to X-Gen pursuant to, and in accordance with, the X-Gen Generic Injectable Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of X-Gen or to reduce any obligations of Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement related

to the Generic Injectable Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the Generic Injectable Product Assets and granted the Generic Injectable Product License to X-Gen prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that X-Gen is not an acceptable purchaser of the Generic Injectable Product Assets, then Respondent shall immediately rescind the transaction with X-Gen, in whole or in part, as directed by the Commission, and shall divest the Generic Injectable Product Assets and grant the Generic Injectable Product License within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive(s) the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further that if Respondent has divested the Generic Injectable Product Assets and granted the Generic Injectable Product License to X-Gen prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Generic Injectable Product Assets or grant of the Generic Injectable Product License, as applicable, to X-Gen (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date, Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the Generic Injectable Product Assets and grant the Generic Injectable Product License to the Acquirer, and to permit the Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Generic Injectable Products;

provided, however, Respondent may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

C. Respondent shall provide, or cause to be provided to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Product Manufacturing Technology (including all related intellectual property) related to the Generic Injectable Products; and

2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed by Respondent related to the specified Generic Injectable Products.

Respondent shall obtain any consents from Third Parties required to comply with this provision.

D. Respondent shall:

1. upon reasonable written notice and request from an Acquirer to Respondent, Contract Manufacture and deliver to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at

Respondent's Supply Cost, for a period of time sufficient to allow the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondent and Baxter and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in the specified Respondent's Application(s) for the respective Generic Injectable Product from Persons other than the Respondent;

2. make representations and warranties to the Acquirer(s) that the Contract Manufacture Product(s) supplied by the Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving Respondent prompt written notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement shall be consistent with the obligations assumed by Respondent under this Order;

   provided, however, that Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with Respondent's responsibilities to supply the ingredients and/or

components in the manner required by this Order; *provided further* that this obligation shall not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondent to the Acquirer;

provided further that in each instance where: (1) an agreement to divest relevant assets or supply Contract Manufacture Products is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Generic Injectable Product, each such agreement may contain limits on Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to the Acquirer pursuant to such Remedial Agreement by Respondent to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of Products for Respondent's own use or sale;

4. make representations and warranties to the Acquirer(s) that Respondent shall hold harmless and indemnify the Acquirer(s) for any liabilities or loss of profits resulting from the failure by Respondent to deliver the Contract Manufacture Products in a timely manner as required by the Remedial Agreement(s) unless Respondent can demonstrate that its failure was entirely beyond the control of Respondent and in no part the result of negligence or willful misconduct by Respondent;

provided, however, that in each instance where: (1) an agreement to divest relevant assets is specifically

referenced and attached to this Order or to supply Contract Manufacture Products, and (2) such agreement becomes a Remedial Agreement for a Generic Injectable Product, each such agreement may contain limits on Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture between Respondent and an Acquirer, upon written request of such Acquirer or the Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;

6. during the term of any agreement to Contract Manufacture between Respondent and an Acquirer, maintain manufacturing facilities necessary to manufacture each of the relevant Contract Manufacture Products in finished form, *i.e.*, suitable for sale to the ultimate consumer/patient; and

7. during the term of any agreement to Contract Manufacture between Respondent and an Acquirer, provide consultation with knowledgeable employees of Respondent and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling such Acquirer (or the Manufacturing Designee of such Acquirer) to obtain all Product Approvals to manufacture the Generic Injectable Products in the same quality achieved by, or on behalf of, the Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent and Baxter and sufficient to satisfy management of the Acquirer that

its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Generic Injectable Products;

The foregoing provisions, II.D.1. - 7., shall remain in effect with respect to each Generic Injectable Product until the earliest of: (1) the date each Acquirer (or the Manufacturing Designee(s) of such Acquirer), respectively, is approved by the FDA to manufacture such Generic Injectable Product and able to manufacture such Generic Injectable Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Baxter; (2) the date the Acquirer of a particular Generic Injectable Product notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture such Generic Injectable Product; (3) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Generic Injectable Product has abandoned its efforts to manufacture such Generic Injectable Product, or (4) the date four (4) years from the Closing Date.

E. Respondent shall:

1. submit to each Acquirer, at Respondent's expense, all Confidential Business Information related to the Generic Injectable Products;

2. deliver such Confidential Business Information to such Acquirer:

   a. in good faith;

b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Generic Injectable Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Generic Injectable Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. Respondent's obligations to the Acquirer of the particular Generic Injectable Product under the terms of any Remedial Agreement related to any such Generic Injectable Product; or

   c. applicable Law;

5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons specifically

authorized by such Acquirer to receive such information; and

6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Generic Injectable Products to the employees associated with business related to those Retained Products that contain the same active pharmaceutical ingredient as the Generic Injectable Products.

F. Respondent shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of such Acquirer to acquire or use the Product Manufacturing Technology (including all related intellectual property) related to the Generic Injectable Products acquired by such Acquirer from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.

G. Not later than ten (10) days after the Closing Date, Respondent shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.F. that allows the Third Party to provide the relevant Product Manufacturing Technology to the Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to such Acquirer.

H. Respondent shall:

1. for each Generic Injectable Product, for a period of six (6) months from the Closing Date or upon the hiring of twenty (20) Generic Injectable Product Core

Employees by the Acquirer or its Manufacturing Designee, whichever occurs earlier, provide such Acquirer with the opportunity to enter into employment contracts with the Generic Injectable Product Core Employees related to the Generic Injectable Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the "Generic Injectable Product Core Employee Access Period(s)"; and

2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondent to provide the Product Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Generic Injectable Product Core Employees. Failure by Respondent to provide the Product Employee Information for any Generic Injectable Product Core Employee within the time provided herein shall extend the Generic Injectable Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;

3. during the Generic Injectable Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer or its Manufacturing Designee of the Generic Injectable Product Core Employees, and remove any impediments within the control of Respondent that may deter these employees from accepting employment with such Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Generic Injectable Product or other contracts with Respondent that would affect the ability or incentive

of those individuals to be employed by such Acquirer or its Manufacturing Designee. In addition, Respondent shall not make any counteroffer to such a Generic Injectable Product Core Employee who has received a written offer of employment from such Acquirer or its Manufacturing Designee;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.I.3. shall not prohibit Respondent from continuing to employ any Generic Injectable Product Core Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to such employee;

4. until the Closing Date, provide all Generic Injectable Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Generic Injectable Product consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Generic Injectable Product and to ensure successful execution of the pre-Acquisition plans for such Generic Injectable Product. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent until the Closing Date(s) for the divestiture of the assets related to the Generic Injectable Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph II.H. does not require nor shall be construed to require Respondent to terminate the employment of any employee or to prevent Respondent from continuing to employ the

Generic Injectable Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not:

   a. directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Generic Injectable Product ("Generic Injectable Product Employee") to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or

   b. hire any Generic Injectable Product Employee;

   provided, however, Respondent may hire any former Generic Injectable Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with Respondent, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

   provided further, *however*, that Respondent may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Generic Injectable Product Employees; or (2) hire a Generic Injectable Product Employee who contacts Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from Respondent.

I. Respondent shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each Generic

Injectable Product Core Employee retained by Respondent, the direct supervisor(s) of any such employee, and any other employee retained by Respondent and designated by the Interim Monitor (if applicable) sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Generic Injectable Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

J. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Generic Injectable Products by Respondent's personnel to all of Respondent's employees who:

1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of any of the Generic Injectable Products;

2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active pharmaceutical ingredient as the Generic Injectable Products; and/or

3. may have Confidential Business Information related to the Generic Injectable Products.

Respondent shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondent shall provide a copy of such

notification to the Acquirer. Respondent shall maintain complete records of all such notifications at Respondent's registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

K. Until Respondent completes the divestiture required by Paragraphs II.A. and fully provides, or causes to be provided, the related Product Manufacturing Technology to the Acquirer,

1. Respondent shall take such actions as are necessary to:

   a. maintain the full economic viability and marketability of the businesses associated with each Generic Injectable Product;

   b. minimize any risk of loss of competitive potential for such business;

   c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Generic Injectable Product;

   d. ensure the Generic Injectable Product Assets are provided to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with each Generic Injectable Product;

e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and

2. Respondent shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Generic Injectable Product.

L. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Generic Injectable Product Releasee(s) of that Acquirer for the research, Development, manufacture, use, import, export, distribution, or sale of the Generic Injectable Product(s) acquired by that Acquirer under the following:

1. any Patent owned or licensed by Respondent as of the day after the Acquisition Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Acquisition Date) that claims a method of making, using, or administering, or a composition of matter, relating to the Generic Injectable Product(s) acquired by that Acquirer, or that claims a device relating to the use thereof;

2. any Patents owned or licensed by Respondent at any time after the Acquisition Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Acquisition Date) that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Generic Injectable Product(s) acquired by that Acquirer;

if such suit would have the potential to interfere with such Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Generic Injectable Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of a particular Generic Injectable Product. Respondent shall also covenant to such Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue such Acquirer or the related Generic Injectable Product Releasee(s) under such Patents, if the suit would have the potential to interfere with that Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Generic Injectable Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of a particular Generic Injectable Product.

M. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Generic Injectable Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Generic Injectable Product acquired by that Acquirer; or (2) the use, import, export, supply,

distribution, or sale of such Generic Injectable Product within the Geographic Territory.

N. For any patent infringement suit in which the Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as the Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Generic Injectable Product(s) acquired by that Acquirer; or (2) the use, import, export, supply, distribution, or sale of such Generic Injectable Product(s), Respondent shall:

1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent in connection with obtaining resolution of any pending patent litigation involving such Generic Injectable Product;

2. waive conflicts of interest, if any, to allow the Respondent's outside legal counsel to represent the relevant Acquirer in any ongoing patent litigation involving such Generic Injectable Product; and

3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondent's outside counsel relating to such Generic Injectable Product.

O. Respondent shall not, in the Geographic Territory:

1. use the Product Trademarks contained in the Product Intellectual Property or any mark confusingly similar

to such Product Trademarks, as a trademark, trade name, or service mark;

2. attempt to register such Product Trademarks;

3. attempt to register any mark confusingly similar to such Product Trademarks;

4. challenge or interfere with the relevant Acquirer's use and registration of such Product Trademarks; or

5. challenge or interfere with the relevant Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

provided however, that this paragraph shall not preclude Respondent from continuing to use all trademarks, tradenames, or service marks that have been in use in commerce on a Retained Product at any time prior to the Acquisition Date.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed,

in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

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

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

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

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

3. The Interim Monitor shall serve until the date of completion by Respondent of the divestiture of all Generic Injectable Product Assets and the transfer and delivery of the related Product Manufacturing

Technology in a manner that fully satisfies the requirements of this Order and until the earliest of:

a. with respect to each Generic Injectable Product, the date the Acquirer (or its Manufacturing Designee(s)) is approved by the FDA to manufacture such Generic Injectable Product and able to manufacture such Generic Injectable Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Baxter;

b. with respect to each Generic Injectable Product, the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture such Generic Injectable Product; or

c. with respect to each Generic Injectable Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Generic Injectable Product;

provided, however, that, with respect to each Generic Injectable Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date;

provided further, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books,

documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Order.

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

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

7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and

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

provided, however, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VIII.B., and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Generic Injectable Product and obtaining the ability to manufacture each Generic Injectable Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Baxter.

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

E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission

materials and information received in connection with the performance of the Interim Monitor's duties.

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

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

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

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Generic Injectable Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude

the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

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

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

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

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted,

licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is

submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in

significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing

any information to the Commission.

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

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

V.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondent shall assure that Respondent's counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. To assure Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Generic Injectable Products or the assets

and businesses associated with those Generic Injectable Products;

provided, *however*, that Respondent may disclose such information as necessary for the purposes set forth in this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however,* that pursuant to this Paragraph V, Respondent shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if such Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VI.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondent shall include in each Remedial Agreement related to each of the Generic Injectable Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligations to the Acquirer pursuant to this Order.

D. Respondent shall also include in each Remedial Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to

secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Generic Injectable Product and to have any such manufacture to be independent of Respondent and Baxter, all as soon as reasonably practicable.

E. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Generic Injectable Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

F. Respondent shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

VII.

IT IS FURTHER ORDERED that the purpose of the divestiture of the Generic Injectable Product Assets and the transfer and delivery of the related Product Manufacturing Technology and the related obligations imposed on the Respondent by this Order is:

A. to ensure the continued use of such assets in the research, Development, and manufacture of each of the Generic Injectable Products and for the purposes of the business associated with each Generic Injectable Product within the Geographic Territory;

B. to provide for the future use of such assets for the distribution, sale and marketing of each of the Generic Injectable Products in the Geographic Territory;

C. to create a viable and effective competitor, that is independent of the Respondent and Baxter:

1. in the research, Development, and manufacture of each of the Generic Injectable Products for the purposes of the business associated with each Generic Injectable Product within the Geographic Territory; and

2. the distribution, sale and marketing of the each of the Generic Injectable Products in the Geographic Territory; and

D. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

VIII.

IT IS FURTHER ORDERED that:

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

B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent has fully complied with the following: Paragraphs II.A , II.B., II.C., II.E.1.-3., II.G., II.H.1.-4., II.J., and II.K., Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including a full description of all substantive contacts or

negotiations related to the divestiture of the relevant assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

IX.

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

A. any proposed dissolution of a Respondent;

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

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

X.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

XI.

IT IS FURTHER ORDERED that this Order shall terminate on June 6, 2021.

By the Commission.

NON-PUBLIC APPENDIX II.A.
X-GEN GENERIC INJECTABLE PRODUCT DIVESTITURE AGREEMENTS

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

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Hikma Pharmaceuticals PLC ("Hikma") of certain assets relating to the business of generic injectable pharmaceutical products of Baxter Healthcare Corporation ("Baxter"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Hikma is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its headquarters address at 13 Hanover Square, London W1S 1HW, United Kingdom and the address of its United States subsidiary, West-Ward Pharmaceutical Corporation, located at 465 Industrial Way West, Eatontown, New Jersey 07724-2209.

2. Baxter is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at One Baxter Parkway, Deerfield, Illinois 60015-4633.

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

ORDER

I.

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

A. "Hikma" or "Respondent" means Hikma Pharmaceuticals PLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Hikma (including, but not limited to, West-Ward Pharmaceutical Corporation and Hikma (Maple) Limited), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Baxter" means Baxter Healthcare Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Baxter (including, but not limited to, Baxter International, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Decision and Order" means the:

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

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

E. "Divestiture Assets" means the Generic Injectable Product Assets, as defined in the Decision and Order.

F. "Divestiture Product Business(es)" means the business of the Respondent within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products, including the research, Development, manufacture, distribution, marketing, and sale of each Divestiture Product and the assets related to such business, including, without limitation, the Divestiture Assets.

G. "Divestiture Product Core Employees" means the Generic Injectable Product Core Employees, as defined in the Decision and Order.

H. "Divestiture Products" means the Generic Injectable Products, as defined in the Decision and Order

I. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.

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

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective:

A. Until Respondent fully transfers and delivers each of the respective Divestiture Assets to an Acquirer, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Businesses except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair such Divestiture Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the related Divestiture Product Businesses.

B. Until Respondent fully transfers and delivers each of the respective Divestiture Assets to an Acquirer, Respondent shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including

regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products at the related High Volume Accounts;

5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including without limitation, the Divestiture Assets;

6. providing each of the respective Divestiture Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of such Divestiture Product Business; and

7. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such business by Respondent as of the date the Consent Agreement was signed by Respondent.

C. Until Respondent fully transfers and delivers the Divestiture Assets to the Acquirer, Respondent shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.

D. Until the Closing Date for the Divestiture Assets, Respondent shall provide all the related Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the relevant Divestiture Products consistent with past practices and as may be

necessary to preserve the marketability, viability and competitiveness of such Divestiture Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent until the Closing Date for the divestiture of the Divestiture Assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Divestiture Product's competitiveness.

E. Respondent shall:

1. for each Divestiture Product, for a period of six (6) months from the Closing Date or upon the hiring of twenty (20) Divestiture Product Core Employees by the Acquirer, whichever occurs earlier, provide the Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s)";

2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondent to provide the Product Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee

Access Period(s) with respect to that employee in an amount equal to the delay;

3. during the Divestiture Product Employee Access Period, not interfere with the hiring or employing by the Acquirer of Divestiture Product Core Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondent shall not make any counteroffer to a Divestiture Product Core Employee who receives a written offer of employment from the Acquirer;

   provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.E.3. shall not prohibit Respondent from continuing to employ any Divestiture Product Core Employee under the terms of such employee's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such employee.

F. Pending divestiture of the Divestiture Assets, Respondent shall:

1. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Divestiture Products other than as necessary to comply with the following:

   a. the requirements of this Order;

b. Respondent's obligations to the Acquirer of the particular Generic Injectable Product under the terms of any Remedial Agreement related to such Generic Injectable Product; or

c. applicable Law;

2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons specifically authorized by such Acquirer to receive such information;

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Generic Injectable Products to the employees associated with business related to those Retained Products that contain the same active pharmaceutical ingredient as the Generic Injectable Products; and

4. institute procedures and requirements to ensure that the above-described employees:

a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and

b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.

G. Not later than thirty (30) days from the earlier of the Closing Date or the date that this Order to Maintain Assets becomes final and effective, Respondent shall provide to all of Respondent's employees and other

personnel who may have access to Confidential Business Information related to the Divestiture Products notification of the restrictions on the use of such information by Respondent's personnel. Respondent shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondent shall provide a copy of such notification to the Acquirer. Respondent shall maintain complete records of all such agreements at Respondent's registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

H. Respondent shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's employees and other personnel.

I. Respondent shall adhere to and abide by the Remedial Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondent to the Acquirer under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.

J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Orders and the Remedial Agreements.

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

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers

necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

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

3. The Interim Monitor shall serve until the date of completion by Respondent of the divestiture of all Generic Injectable Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of the Decision and Order and until the earliest of:

    a. with respect to each Generic Injectable Product, the date the Acquirer (or its Designee(s)) is approved by the FDA to manufacture such Generic Injectable Product and able to manufacture such Generic Injectable Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and

Baxter;

b. with respect to each Generic Injectable Product, the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture such Generic Injectable Product; or

c. with respect to each Generic Injectable Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Generic Injectable Product;

provided, however, that, with respect to each Generic Injectable Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date;

provided, further, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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

shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Order.

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

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

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

the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order;

provided, however, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VIII.B. of the Decision and Order, and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward obtaining FDA approval to manufacture each Generic Injectable Product and obtaining the ability to manufacture each Generic Injectable Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Baxter.

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

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

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

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

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

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final and effective, and every thirty (30) days thereafter until Respondent has fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A. of the related Decision and Order in this matter, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to Paragraph VIII of the Decision and Order.

V.

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

A. any proposed dissolution of a Respondent;

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

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

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to any Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The later of:

1. The day after the divestiture of all of the Divestiture Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or

2. the day after the day the related Decision and Order becomes final and effective.

By the Commission.

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Hikma Pharmaceuticals PLC ("Hikma") that is designed to remedy the anticompetitive effects of Hikma's acquisition of certain assets from Baxter Healthcare Corporation, Inc. ("Baxter"). Under the terms of the proposed

Consent Agreement, Hikma would be required to divest to X-Gen Pharmaceuticals, Inc. ("X-Gen") all of Hikma's rights and assets relating to its generic injectable phenytoin and generic injectable promethazine products.

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

Pursuant to an Asset Purchase Agreement dated October 29, 2010, Hikma proposes to acquire Baxter's generic injectable pharmaceutical business in a transaction valued at approximately $111.5 million ("Proposed Acquisition"). The assets to be sold include chronic pain, anti-infective, and anti-emetic products, along with Baxter's Cherry Hill, New Jersey manufacturing facility and Memphis, Tennessee warehouse and distribution center. The Commission's Complaint alleges that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. markets for generic injectable phenytoin and generic injectable promethazine. The proposed Consent Agreement will remedy the alleged violations by replacing the competition that would otherwise be eliminated by the acquisition.

The Products and Structure of the Markets

The Proposed Acquisition would reduce the number of generic suppliers in each of the relevant markets. The number of generic injectable suppliers has a direct and substantial effect on pricing.

Phenytoin is an anti-convulsant drug used to control seizures and prevent them during or after surgery. In 2009, sales of injectable phenytoin totaled $1.5 million. The branded version of injectable phenytoin is no longer sold in the United States. The market for generic injectable phenytoin is highly concentrated; currently only Hikma, Baxter, and Hospira, Inc. ("Hospira") sell the product in the United States. The acquisition of Baxter's injectable business by Hikma would therefore reduce the number of suppliers of injectable phenytoin from three to two.

Generic injectable promethazine is used to relieve or prevent some types of allergies or allergic reactions, to prevent and control motion sickness, nausea, vomiting, and dizziness, and to help people go to sleep and control their pain or anxiety before or after surgery. Sales of generic injectable promethazine totaled $17 million in 2009. The market for generic injectable promethazine is highly concentrated. Only three companies currently sell generic injectable promethazine in the United States: Hikma, Baxter, and Hospira. Hospira's competitive significance in this market is limited because it only offers a premium-priced pre-filled syringe, while Hikma and Baxter offer lower priced ampules and vials that appeal to a broader range of customers. A fourth company has approval to sell generic injectable promethazine in the United States and has historically offered the product, but it is not currently manufacturing the product and its re-entry date is currently unknown. Thus, the acquisition would result in a market with only one low-cost competitor.

Entry

Entry into the markets for the manufacture and sale of generic injectable phenytoin and generic injectable promethazine would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Entry would not take place in a timely manner because the combination of generic drug development times and regulatory requirements, including Food and Drug Administration approval, takes at least two years. In addition to the regulatory hurdles facing

a potential entrant, manufacturing difficulties in producing generic injectable products, combined with the small size of the markets in question, makes additional entry unlikely to occur.

Effects

The Proposed Acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for the manufacture and sale of generic injectable phenytoin and generic injectable promethazine. In generic injectable pharmaceuticals markets, price generally decreases as the second, third, or fourth competitors enter. Thus, reducing the number of competitors to two and one in each market, respectively, would cause anticompetitive harm to consumers in these U.S. markets by increasing the likelihood that consumers would pay higher prices.

The Consent Agreement

The proposed Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in the relevant markets by requiring Hikma to divest certain rights and assets related to generic injectable phenytoin and generic injectable promethazine to a Commission-approved acquirer no later than ten days after the acquisition. The acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating a possible purchaser of divested assets is to maintain the competitive environment that existed prior to the acquisition.

The proposed Consent Agreement remedies the competitive concerns the acquisition raises by requiring Hikma to divest its generic injectable phenytoin and generic injectable promethazine products to X-Gen, which will purchase all rights currently held by Hikma. X-Gen is a New York-based generic injectable pharmaceutical company with 40 active products and an active product development pipeline. With its experience in generic

injectable markets and strong ties to manufacturing partners, X-Gen is expected to replicate the competition that would otherwise be lost with the Proposed Acquisition.

If the Commission determines that X-Gen is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, the parties must unwind the sale to X-Gen and divest the phenytoin and promethazine product lines, within six months of the date the Order becomes final, to a Commission-approved acquirer. The Commission may appoint a trustee to divest the products if Hikma fails to divest the products as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestitures are successful. The Order requires Hikma to take all action to maintain the economic viability, marketability, and competitiveness of the products until such time as they are transferred to a Commission-approved acquirer. In addition, the parties must supply X-Gen with phenytoin and promethazine pursuant to a supply agreement while Hikma transfers the manufacturing technology to X-Gen or a third-party manufacturer of X-Gen's choice.

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

IN THE MATTER OF
CHITIKA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4324; File No. 102 3087
Filed June 7, 2011 – Decision June 7, 2011

This consent order addresses the use by Chitika, Inc. ("Chitika") of "cookies" in its online advertising to track consumers' online activities in order to serve them targeted advertisements based upon their individual web browsing activity. The complaint alleges that Chitika violated Section 5 of the FTC Act by making false and misleading statements in its privacy policy that consumers could opt out of targeted advertising for an extended period when, in fact, the opt-out expired within 10 days. The consent order prohibits Chitika from misrepresenting (1) the extent of its data collection about consumers and (2) the extent to which consumers are able to control the collection, use, or sharing of their data. The consent order also requires Chitika to increase its opt-out period from 10 days to 10 years and to take a number of steps to improve the transparency of, and consumers' ability to control, its collection of consumer data for online behavioral advertising.

Participants

For the *Commission*: *Peder Magee* and *Tracy Shapiro.*

For the *Respondent*: *Faith Kasparian* and *Shannon Zollo, Morse Barnes-Brown & Pendleton.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Chitika, Inc. has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Chitika, Inc. ("Chitika" or "respondent") is a Delaware corporation with its principal office or place of business at 1800 West Park Drive, Westborough, Massachusetts, 01581.

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

RESPONDENT'S BUSINESS PRACTICES

3. Respondent is in the business of online behavioral advertising, which is the practice of tracking a consumer's online activities in order to deliver advertising targeted to the individual consumer's interests. Specifically, respondent tracks the searches a consumer has conducted, the web pages visited, and the content viewed in order to deliver or "serve" advertising targeted to the individual consumer's interests.

4. Respondent offers an online behavioral advertising service that it markets as "Chitika Ads for Online Advertising." As part of this service, respondent acts as an intermediary between website publishers ("publishers") and advertisers that wish to have their advertisements placed on websites. Respondent purchases advertising space on publishers' websites and contracts with advertisers to place their advertisements on the websites. Respondent refers to the network of publishers from which it purchases advertising space as the "Chitika network."

5. When a consumer visits a website within the Chitika network, respondent sets a new cookie or automatically receives a cookie it has previously set in the consumer's browser (the "Chitika tracking cookie"). Cookies are small text files that are commonly used to store information about a consumer's online activities, including information such as the content or advertisements that a consumer views or the pages a consumer visits within a particular website. Respondent facilitates the setting or receiving of Chitika tracking cookies by providing code to publishers that redirects a consumer's browser to respondent's server with an instruction to

request a new cookie or send a cookie previously set by respondent. The communication between the browser and respondent's server occurs almost instantaneously in the background and is not visible to the consumer, unless the consumer uses sophisticated web diagnostics tools.

6. The Chitika tracking cookie contains a unique identification number that allows respondent to recognize the particular consumer or computer and correlate it to online activity. When respondent sets a new Chitika tracking cookie or receives a previously-set Chitika tracking cookie, respondent adds information about the consumer's web browsing activities to the cookie, including, in some instances, the consumer's search terms. Respondent uses this cookie to serve advertisements to the consumer that are targeted to his or her interests.

7. As long as a consumer visits a website in the Chitika network from the same web browser on the same computer at least once a year, the consumer will indefinitely retain the Chitika tracking cookie in his browser.

8. Respondent stores data contained in Chitika tracking cookies in log files on its servers for up to two years.

RESPONDENT'S STATEMENTS & OPT-OUT

9. From at least May 2008 to the present, respondent disseminated or caused to be disseminated a privacy policy on respondent's website, including, but not limited to, the following statements regarding respondent's collection and use of consumer information:

> When users visit a page in the Chitika network, one or more cookies - a small file containing a string of characters - are set to the computer that uniquely identifies the users (sic) browser.
> Chitika uses cookies to improve the quality of the targeting service by storing anonymous activity data

> and tracking user trends, such as how people search and browse. Users can reset their browsers to refuse all cookies or to indicate when a cookie is being sent.
> . . .
> Chitika encourages and promotes business practices that protect and honor the privacy of users.
> You can opt-out of receiving Chitika cookies by using the button below.

10. Directly following the above statement is a button labeled "Opt-Out," with an adjacent statement that "You are currently not opted out." (Exhibit A) When a consumer clicks the "Opt-Out" button, the message adjacent to the button changes to, "You are currently opted out." (Exhibit B)

11. When a consumer selects respondent's opt-out, respondent sets an "opt-out cookie" in the consumer's browser. When the consumer subsequently visits a website in the Chitika network, the consumer's browser automatically sends the opt-out cookie to respondent's servers. When respondent receives the opt-out cookie, it does not set any additional cookies in the consumer's browser. It also does not add any information to a previously-set Chitika tracking cookie or use the data from the cookie to target advertisements to the consumer.

12. From at least May 2008 to February 28, 2010, respondent delivered opt-out cookies that it set to expire after 10 days. Consequently, 10 days after consumers selected respondent's opt-out, the opt-out cookies automatically expired and disappeared from consumers' browsers. When consumers then visited websites in the Chitika network, respondent: (1) set new Chitika tracking cookies in consumers' browsers that did not have a Chitika tracking cookie; or (2) automatically received Chitika tracking cookies that it set before consumers selected the opt-out. In both instances, respondent added information to the Chitika tracking cookies in order to track consumers' online activities and serve targeted advertisements to them. Respondent did not inform consumers that the opt-out cookie would expire after 10 days.

13. As of March 1, 2010, after being contacted by FTC staff, respondent modified the expiration date of its opt-out cookies, so that any future opt-out cookies it delivers will expire after 10 years. Respondent's modification of its opt-out cookies does not affect any opt-out cookies delivered before March 1, 2010.

VIOLATION OF THE FTC ACT

14. Through the means described in Paragraphs 9 and 10, respondent represents, expressly or by implication, that when consumers opt out of targeted advertising by Chitika, such opt-out will last for a reasonable period of time.

15. In truth and in fact, when consumers opted out of targeted advertising by Chitika, such opt-out did not last for a reasonable period of time. Therefore, the representations set forth in Paragraphs 9 and 10 were false or misleading.

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

THEREFORE, the Federal Trade Commission this seventh day of June, 2011, has issued this complaint against respondent.

By the Commission.

EXHIBIT A

Chitika, Inc. Privacy Policy

Chitika

Publishers Advertisers About Us Blog Support Research Links Login

Chitika Privacy Policy

Chitika does not collect any personally identifying user-level information.
Chitika's contextual targeting services solely rely on cookie-level tracking containing no personally identifying information.
When users visit a page in the Chitika network, one or more cookies - a small file containing a string of characters - are set to the computer that uniquely identifies the users browser.
Chitika uses cookies to improve the quality of the targeting service by storing anonymous activity data and tracking user trends, such as how people search and browse. Users can reset their browsers to refuse all cookies or to indicate when a cookie is being sent.
Chitika will not collect or use any user-level personally identifiable information without prior consent from its clients.
Chitika encourages and promotes business practices that protect and honor the privacy of users.
You can opt-out of receiving Chitika cookies by using the button below.

You are currently not opted out

Opt Out

If your status has switched after selecting Opt-Out, your browser may be set to block Chitika Cookies. Please allow Chitika Cookies and try again.

Note: This opt-out applies to a specific browser rather than a specific user. Therefore you will have to opt-out separately from each computer or browser that you use.

Publishers | Advertisers | Account Login | Chitika Blog | Chitika Research

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EXHIBIT B

Chitika, Inc. Privacy Policy

Chitika

Publishers Advertisers About Us Blog Support Research Labs Login

Chitika Privacy Policy

Chitika does not collect any personally identifying user-level information.
Chitika's contextual targeting services solely rely on cookie-level tracking containing no personally identifying information.
When users visit a page in the Chitika network, one or more cookies - a small file containing a string of characters - are set to the computer that uniquely identifies the users browser.
Chitika uses cookies to improve the quality of the targeting service by storing anonymous activity data and tracking user trends, such as how people search and browse. Users can reset their browsers to refuse all cookies or to indicate when a cookie is being sent.
Chitika will not collect or use any user-level personally identifiable information without prior consent from its clients.
Chitika encourages and promotes business practices that protect and honor the privacy of users.
You can opt-out of receiving Chitika cookies by using the button below.

You are currently opted out

Opt-In

If your state has not changed after selecting Opt-Out, your browser may be set to block Chitika Cookies. Please update Chitika Cookies and try again.

Note: This opt-out applies to a specific browser rather than a specific user. Therefore you will have to opt-out separately from each computer or browser that you use.

Publishers | Advertisers | Account Login | Chitika Blog | Chitika Research

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DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*;

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent Chitika, Inc. ("Chitika") is a Delaware corporation with its principal office or place of business at 1800 West Park Drive, Westborough, Massachusetts, 01581.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Chitika, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

2. "Clear(ly) and prominent(ly)" shall mean:

   A. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer or mobile device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

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

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

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

D. In all instances, the required disclosures: (1) are presented in an understandable language and syntax; and (2) include nothing contrary to, inconsistent with, or in mitigation of any other statements or disclosures provided by respondent.

3. "Commerce" shall be defined as it is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Computer" or "device" shall mean any desktop or laptop computer, handheld device, telephone, or other product or device through which a consumer can access the Internet.

5. "Collection of data" or "collecting data" shall mean the practice of receiving any information or data from a computer or device, whether transmitted by a web browser or otherwise, and retaining that information, whether on the user's computer or on a server. "Data collected" shall mean any information or data received from a computer or device, whether transmitted by a web browser or otherwise, and retained, whether on the user's computer or respondent's server(s).

6. "Chitika user" shall mean any consumer, computer, or device that respondent has uniquely identified.

7. "Online behavioral advertising" shall mean the practice of tracking a consumer's online activities in order to deliver advertising targeted to the individual consumer's interests.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, website, third party, or other means, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication: (A) the extent to which consumers may exercise control over the collection, use, disclosure, or sharing of data collected from or about them, their computers or devices, or their online activities, or (B) the extent to which data from or about a particular consumer, computer, or device is collected, used, disclosed, or shared.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, website, third party, or other means, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service on websites other than respondent's, in or affecting commerce, shall:

A. Within thirty (30) days after the date of service of the order, place a clear and prominent notice, including a hyperlink, on the homepage(s) of its website(s), which states, "We collect information about your activities on certain websites to send you targeted advertisements. To opt out of Chitika's targeted ads, click here." When selected, the hyperlink shall directly take consumers to the mechanism required by Part II.C. of the order;

B. Within thirty (30) days after the date of service of the order, for a duration of twelve (12) months, include immediately after the notice required by Part II.A. of the order, the following statement: "If you opted out of our targeted ads before March 1, 2010, the opt-out has

expired and you must opt out again to avoid targeted ads.";

C. Within thirty (30) days after the date of service of the order, provide a mechanism, separate and apart from any preferences or controls offered by consumers' browsers, to enable Chitika users to prevent respondent from collecting data that can be associated with a Chitika user or a Chitika user's computer or device, or that contains any unique identifier, including Chitika user ID or Internet Protocol (IP) address; from redirecting Chitika users' browsers to third parties that collect data, absent a click or other affirmative action by such Chitika user; and from associating any previously collected data with any Chitika user's computer or device. This mechanism shall require no more than one additional click for consumers to exercise their choice(s), and shall remain in effect for a minimum time period of five (5) years, unless the consumer deletes his or her cookies or takes deliberate action to disable the mechanism. Within close proximity to the mechanism, respondent shall clearly and prominently disclose to consumers: (1) that Chitika collects information about consumers' activities on certain websites in order to deliver targeted advertisements; (2) that by opting out, Chitika will not collect this information for the purpose of delivering targeted advertisements; (3) the current status of their choice (i.e., "opted in" or "opted out" of collection); and (4) that their choice is specific to the browser they are using, and they need to implement the mechanism again if they use a different browser; and

D. Within ninety (90) days after the date of service of the order, within any advertisement that respondent serves as part of online behavioral advertising, include a hyperlink that directly takes consumers to the mechanism required by Part II.C. of this order. The hyperlink text shall clearly

and prominently state: "Opt out?" While a consumer's cursor, or functional equivalent, hovers over the hyperlink, a box shall be visible in close proximity to the hyperlink, which clearly and prominently states, "Opt out of Chitika's targeted ads."

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, third party, or other entity, shall not use, disclose, sell, rent, lease, or transfer any information that can be associated with a Chitika user or a Chitika user's computer or device that respondent obtained prior to March 1, 2010. Within sixty (60) days after the date of service of the order, respondent shall permanently delete or destroy: (1) all such information stored in Chitika users' cookies; and (2) all IP addresses and unique identifiers, including any Chitika user identification numbers, in log files on respondent's server(s) and in backup tapes, and shall provide a written statement to the Commission, sworn under penalty of perjury, confirming that all such information has been deleted or destroyed. *Provided that,* if respondent is prohibited from deleting or destroying such information by law, regulation, or court order, respondent shall provide a written statement to the Commission, sworn under penalty of perjury, identifying any information that has not been deleted or destroyed and the specific law, regulation, or court order that prohibits respondent from deleting or destroying such information. Unless otherwise directed by a representative of the Commission, all statements required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. Chitika. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

IV.

IT IS FURTHER ORDERED that respondent shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance with the terms and provisions of this order, including, but not limited to:

A. For a period of five (5) years, any documents, whether prepared by or on behalf of respondent, that:

1. Comprise or relate to complaints or inquiries, whether received directly or indirectly, concerning: (a) any data collection by respondent; (b) the use, disclosure or sharing of such data; or (c) any mechanism to limit or prevent such collection of data or the use, disclosure, or sharing of data collected, as well as any responses to those complaints or inquiries;

2. Are necessary to demonstrate full compliance with each provision of this order, including, but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, or terms of this order, and all reports submitted to the Commission pursuant to this order; or

3. Contradict, qualify, or call into question respondent's compliance with this order; and

B. For a period of five (5) years after the last public dissemination thereof, all advertisements, terms of use, end-user license agreements, frequently asked questions, privacy policies, and similar documents relating to: (a) any data collection by respondent; (b) the use, disclosure or sharing of such data; or (c) any mechanism to limit or

prevent such collection of data or use, disclosure, or sharing of data collected, as well as any responses to those complaints or inquiries.

V.

IT IS FURTHER ORDERED that Chitika, Inc., and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

.

IT IS FURTHER ORDERED that Chitika, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the entity that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the entity name or address. *Provided, however*, that with respect to any proposed change in the entity about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. Chitika. *Provided, however,* that, in lieu of overnight courier, notices

may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that Chitika, Inc., and its successors and assigns, within sixty (60) days after service of the order, and at such other times as the Federal Trade Commission may require, shall file with the Commission a true and accurate report, in writing, setting forth the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, Chitika, Inc. shall submit additional true and accurate written reports.

VIII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part of this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on

appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Chitika, Inc. ("Chitika").

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

Chitika is a network advertiser that engages in online behavioral advertising, the practice of tracking consumers' activities online in order to serve them targeted advertisements based upon their individual web browsing activity. Chitika offers an online behavioral advertising service in which it acts as an intermediary between website publishers and advertisers that wish to have their advertisements placed on websites. Chitika tracks the searches a consumer has conducted, the websites visited, and the content viewed in order to serve advertising targeted to the individual

consumer's interests. When a consumer visits a website within Chitika's network of website publishers, Chitika sets a new cookie or automatically receives a cookie it has previously set in the consumer's browser (the "Chitika tracking cookie"). Chitika uses cookies to serve advertisements to consumers that are targeted to their interests.

The Commission alleges that representations Chitika made in its privacy policy regarding consumers' ability to opt out of receiving tracking cookies were false or misleading. Chitika's privacy policy stated that consumers could opt out of receiving Chitika cookies. For those consumers who elected to opt out, Chitika set an "opt-out cookie" in the consumer's browser so that no additional cookies would be set in the consumer's browser, no additional information would be added to a previously set Chitika tracking cookie, and the data previously placed in the cookie would no longer be used to target advertisements to the consumer. From at least May 2008 to February 28, 2010, however, Chitika delivered opt-out cookies that were set to expire after ten (10) days. Accordingly, the complaint alleges that Chitika deceived consumers and violated Section 5 of the FTC Act by making an unqualified claim that consumers could opt out of targeted advertising when the opt out expired in ten (10) days.

Part I of the proposed order prohibits Chitika from misrepresenting (1) the extent of its data collection about consumers and (2) the extent to which consumers are able to control the collection, use, or sharing of their data.

Part II of the proposed order requires Chitika to take a number of steps to improve the transparency of, and consumers' ability to control, its collection of consumer data for online behavioral advertising. First, within thirty (30) days after service of the proposed order, Chitika must place a clear and prominent notice with a hyperlink on the homepage of its website that states: "We collect information about your activities on certain websites to send you targeted advertisements. To opt out of Chitika's targeted ads, click here." The mechanism that Chitika provides to allow

consumers to prevent Chitika from collecting information about them must remain in effect for a minimum of five (5) years. Within close proximity to the mechanism, Chitika must disclose: (1) that Chitika collects information about consumers' activities on certain websites to deliver targeted ads; (2) that by opting out, Chitika will not collect this information to deliver such ads; (3) consumers' current choice status (*i.e.*, whether opted in or opted out of tracking); and (4) that consumers' choice is specific to the browser they are using (*i.e.*, if they switch browsers or devices, they will have to opt out again).

Part II of the proposed order includes two additional provisions. First, for a period of one (1) year, near the notice and hyperlink discussed above, Chitika's homepage must state that: "If you opted out of our targeted ads before March 1, 2010, the opt-out has expired and you must opt out again to avoid targeted ads."

The final provision in Part II requires that within any behaviorally targeted advertisement that Chitika serves, it must include a hyperlink that takes consumers directly to the required choice mechanism. The hyperlink text must state: "Opt out?" When a consumer's cursor, or equivalent, is placed over the hyperlink, a box shall be visible that clearly and prominently states, "Opt out of Chitika's targeted ads."

Part III of the proposed order restricts Chitika's use of any data that it collected from consumers prior to March 1, 2010, the date on which Chitika extended the expiration date of its opt-out cookies from ten (10) days to ten (10) years. Specifically, the proposed order prevents Chitika from using, selling, or transferring "any information that can be associated with a Chitika user or a Chitika user's computer or device" that the company obtained prior to March 1, 2010. In addition to restricting the use of this data, within sixty (60) days after the service of the order, Chitika must delete any such information stored in Chitika users' cookies and any information retained in Chitika's files that would allow the information to be associated with a particular consumer or that consumer's computer or device.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Chitika to retain documents relating to its compliance with the order. Part V requires dissemination of the order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Chitika submit a report to the Commission detailing its compliance with the order. Part VIII provides that the order expires after twenty (20) years, with certain exceptions.

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

IN THE MATTER OF
CERIDIAN CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4325; File No. 102 3160
Filed June 8, 2011 – Decision June 8, 2011

This consent order addresses Ceridian Corporation's ("Ceridian") web-based payroll processing service for small business customers, known as "Powerpay." The complaint alleges that Ceridian violated Section 5 of the FTC Act by failing to provide reasonable and appropriate security for the sensitive personal information it collected and maintained. As a result of these failures, hackers executed an SQL injection attack on the Powerpay website and web application and exported the information of at least 27,673 individuals, including bank account numbers, Social Security Numbers, and dates of birth. The consent order prohibits Ceridian from misrepresenting the privacy, confidentiality, or integrity of personal information it collects from or about consumers. The consent order also requires Ceridian to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of such information about consumers, employees, and those seeking to become employees.

Participants

For the *Commission*: *Tiffany George* and *Jamie Hine.*

For the *Respondent*: *David Zetoony* and *Megan Gajewski, Bryan Cave LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Ceridian Corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Ceridian Corporation ("Ceridian") is a Delaware corporation with its principal office or place of business at 3311 East Old Shakopee Road, Minneapolis, Minnesota 55425.

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.

3. Respondent is a service provider that, among other things, provides payroll processing, payroll-related tax filing, benefits administration, and other human resource services to business customers.

4. Among other things, respondent operates Powerpay, a web-based payroll processing service in the United States under the name "Powerpay." Respondent's small business customers enter their employees' personal information on to the Powerpay website, which they use as a repository to collect, track, and store employee payroll data and to automate payroll processing for their employees.

5. When customers enter their employees' personal information on to the Powerpay website, the information is sent to computers on respondent's computer network for the purpose of computing payroll amounts and processing payroll checks and direct deposits. This personal information can consist of sensitive information about employees, including, in some instances, name, address, email address, telephone number, Social Security number, date of birth, and direct deposit account number (hereinafter "personal information").

6. Since at least September 2008, respondent has disseminated or caused to be disseminated statements on the Ceridian website, including, but not limited to, the following statement regarding the privacy and confidentiality of the personal information they collect:

> Worry-free Safety & Reliability . . . When managing employee health and payroll data, security is paramount with Ceridian. Our comprehensive

> security program is designed in accordance with ISO 27000 series standards, industry best practices and federal, state and local regulatory requirements.

7. In addition, respondent has disseminated or caused to be disseminated statements in its contracts with customers, including, but not limited to, the following statements regarding the security measures it takes to protect the personal information entrusted to its business customers:

> Confidentiality and Privacy: [Ceridian] shall use the same degree of care as it uses to protect its own confidential information of like nature, but no less than a reasonable degree of care, to maintain in confidence the confidential information of the [customer].

8. Until at least December 2009, respondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information it collected and maintained. Among other things, respondent: (1) stored personal information in clear, readable text; (2) created unnecessary risks to personal information by storing it indefinitely on its network without a business need; (3) did not adequately assess the vulnerability of its web applications and network to commonly known or reasonably foreseeable attacks, such as "Structured Query Language" ("SQL") injection attacks; (4) did not implement readily available, free or low-cost defenses to such attacks; and (5) failed to employ reasonable measures to detect and prevent unauthorized access to personal information.

9. In December 2009, hackers exploited the failures set forth in Paragraph 8 by using a SQL injection attack on the Powerpay website and web application. Through this attack, the hackers found personal information stored in Powerpay on respondent's network and exported the information of at least 27,673 individuals, including, in some instances, bank account numbers, Social Security Numbers, and dates of birth, over the internet to outside computers.

10. Through the means described in Paragraphs 6 and 7, respondent represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect personal information against unauthorized access.

11. In truth and in fact, respondent did not implement reasonable and appropriate measures to protect personal information against unauthorized access. Therefore, the representations set forth in Paragraphs 6 and 7 were, and are, false or misleading.

12. As set forth in Paragraph 8, respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to personal information. Respondent's practices caused, or are likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

13. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this eighth day of June, 2011, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

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

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

1. Respondent Ceridian Corporation is a Delaware corporation with its principal office or place of business at 3311 East Old Shakopee Road, Minneapolis, Minnesota 55425.

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

ORDER

DEFINITIONS

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

1. "Personally identifiable information" or "personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other state-issued identification number; (g) a financial institution account number; (h) credit or debit card information, including card number, expiration date, and security code; (i) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; or (j) any information that is combined with any of (a) through (i) above. For the purpose of this provision, a "consumer" shall mean any person, including, but not limited to, any user of respondent's services; any employee of respondent, or any individual seeking to become an employee, where "employee" shall mean an agent, servant, salesperson, associate, independent contractor, or other person directly or indirectly under the control of respondent.

2. Unless otherwise specified, "respondent" shall mean

Ceridian and its subsidiaries, divisions, successors and assigns, except that no provision of this Order shall apply to any foreign entity, to the extent that its conduct does not fall within the Commission's jurisdiction.

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

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent maintains and protects the privacy, confidentiality, or integrity of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program;

B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to, (1) employee training and management, (2) information systems, including network and software design, information processing, storage, transmission, and disposal, and (3) prevention, detection, and response to attacks, intrusions, or other systems failure;

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent and requiring service providers by contract to implement and maintain appropriate safeguards; and

E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

III.

IT IS FURTHER ORDERED that, in connection with its compliance with Part II of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession; *provided, however,* that this Part shall not apply to Comdata Network Inc. or Ceridian Stored Value Solutions, Inc. to the extent that they do not advertise, market, promote, offer for sale, or sell any product or service relating to payroll, taxes, or human resources. *Provided further* that this Part shall not apply to payment cards provided to employers by Comdata Network Inc. that are not linked to accounts maintained by individual employees. Professionals qualified to prepare such Assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred eighty (180) days after service of the order for the initial Assessment; and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;

C. explain how the safeguards that have been implemented

meet or exceed the protections required by Part II of this order; and

D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request. Unless otherwise directed by a representative of the Commission, the initial Assessment, and any subsequent Assessments requested, shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the matter of Ceridian Corporation*, FTC File No.1023160. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

IV.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of:

A. for a period of three (3) years after the date of preparation of each Assessment required under Part III of

this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts II and III of this order, for the compliance period covered by such Assessment;

B. unless covered by IV.A, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all other documents relating to compliance with this order, including but not limited to:

1. all advertisements and promotional materials containing any representations covered by this order, as well as all materials used or relied upon in making or disseminating the representation; and

2. any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current subsidiaries and personnel within thirty (30) days after service of this order, and to such future subsidiaries and personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the matter of Ceridian Corporation*, FTC File No.1023160. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that respondent within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

VIII.

This order will terminate on June 8, 2031, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to Ceridian Corporation.

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

The Commission's complaint alleges that Ceridian is a service provider that, among other things, provides payroll processing, payroll-related tax filing, benefits administration, and other human resource services to business customers. The company operates a web-based payroll processing service for small business customers in the United States under the name "Powerpay." Ceridian's customers enter their employees' personal information on the Powerpay website, which they use to automate payroll processing for their employees.

The complaint alleges that when customers enter their employees' personal information on the Powerpay website, the information is sent to computers on Ceridian's computer network for the purpose of computing payroll amounts and processing payroll checks and direct deposits. This personal information, in some instances, consists of name, address, email address, telephone number, Social Security number, date of birth, and direct deposit account number. Such information – particularly Social Security numbers, which do not expire – can be used to facilitate identity theft, including existing and new account fraud, among other things. In addition, direct deposit account information can be used to facilitate theft.

The complaint alleges that Ceridian engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information it collected and maintained. Among other things, Ceridian: (1) stored personal information in clear, readable text; (2) created unnecessary risks to personal information by storing it indefinitely on its network without a business need; (3) did not adequately assess the vulnerability of its web applications and network to commonly known or reasonably foreseeable attacks, such as "Structured Query Language" ("SQL") injection attacks; (4) did not implement readily available, free or low-cost defenses to such attacks; and (5) failed to employ reasonable measures to detect and prevent unauthorized access to personal information. These practices are fundamental security failures. Each has been challenged in prior FTC data security cases, and each could have been remedied using well-known, readily available, and free or low-cost data security measures. In particular, SQL injection has been a well-known vulnerability for nearly a decade and is one of the most basic network vulnerabilities to address.

The complaint alleges that as a result of these failures, hackers executed an SQL injection attack on the Powerpay website and web application. Through this attack, the hackers found personal information stored in Powerpay on Ceridian's network and exported the information of at least 27,673 individuals, including, in some instances, bank account numbers, Social Security Numbers, and dates of birth, over the internet to outside computers. Given the sensitive nature of the personal information exposed, the company's failure to provide reasonable and appropriate security for this information is likely to cause consumers substantial injury as described above. That substantial injury is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. The complaint alleges that Ceridian's failure to employ reasonable and appropriate measures to prevent unauthorized access to sensitive personal information is an unfair act or practice, and that the company misrepresented that it had implemented such measures, in violation of Section 5 of the Federal Trade Commission Act.

Analysis to Aid Public Comment

The proposed order applies to personal information that Ceridian entities within the Commission's jurisdiction collect from or about consumers and employees. It contains provisions designed to prevent Ceridian from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the privacy, confidentiality, or integrity of personal information collected from or about consumers. Part II of the proposed order requires Ceridian to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of such information (whether in paper or electronic format) about consumers, employees, and those seeking to become employees. The security program must contain administrative, technical, and physical safeguards appropriate to Ceridian's size and complexity, the nature and scope of its activities, and the sensitivity of the information collected from or about consumers and employees. Specifically, the proposed order requires Ceridian to:

- designate an employee or employees to coordinate and be accountable for the information security program;

- identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks;

- design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;

- develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal

information they receive from Ceridian, and require service providers by contract to implement and maintain appropriate safeguards; and

- evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on its information security program.

Part III of the proposed order requires Ceridian to obtain within the first one hundred eighty (180) days after service of the order, and on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer, employee, and job applicant information has been protected. Two Ceridian subsidiaries, Ceridian Stored Value Solutions, Inc. and Comdata Network Inc., are excluded from this requirement to the extent that they do not advertise, market, promote, offer for sale, or sell any product or service relating to payroll, taxes, or human resources. Part III does not apply to payment cards provided to employers by Comdata Network Inc. that are not linked to accounts maintained by individual employees.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Ceridian to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, Ceridian must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to all current and future subsidiaries,

current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Ceridian submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

LOOKOUT SERVICES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4326; File No. 102 3076
Filed June 15, 2011 – Decision June 15, 2011

This consent order addresses a security breach by Lookout Services, Inc. ("Lookout"), in which an employee gained unauthorized access to sensitive personal information, including Social Security numbers, of more than 37,000 consumers. Lookout provides a web-based computer product, known as I-9 Solution, that uses an employee's sensitive personal information, including Social Security number, date of birth, address, and passport number, to verify that employee's eligibility to work in the United States. The complaint alleges that Lookout misrepresented that it had implemented reasonable and appropriate security measures to protect the sensitive personal information it collected and maintained. This misrepresentation, combined with Lookout's failure to implement such measures, constituted an unfair act or practice in violation of Section 5 of the FTC Act. The consent order prohibits Lookout from misrepresenting the privacy, confidentiality, or integrity of the personal information it collects from or about consumers. The consent order further requires Lookout to establish and maintain a comprehensive information security program. The consent order requires that Lookout retain an independent third party professional to assess this program on a biennial basis for the next 20 years.

Participants

For the *Commission*: *Kristin Krause Cohen* and *Kandi Parsons.*

For the *Respondent*: *Rufus Oliver, Baker Botts L.L.P.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Lookout Services, Inc. ("respondent" or "Lookout") has violated the

provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Lookout is a Texas corporation, with its principal office or place of business at 5909 West Loop South, Suite 300, Bellaire, Texas 77401.

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 FTC Act, 15 U.S.C. § 44.

3. At all relevant times, Lookout has been in the business of selling a web-based computer product known as the I-9 Solution. This product is designed to help employers comply with their obligations under federal law to complete and maintain a U.S. Citizenship and Immigration Services Form I-9 about each employee in order to verify that the employee is eligible to work in the United States.

4. The I-9 Solution routinely collects and stores information from or about its customers' employees, including, but not limited to, names; addresses; dates of birth; Social Security numbers; passport numbers; alien registration numbers; driver's license numbers; and military identification numbers. This highly sensitive information is maintained in Lookout's database (the "I-9 database"). The misuse of such information – particularly Social Security numbers – can facilitate identity theft and related consumer harms.

5. Since at least April 2009, Lookout has disseminated or caused to be disseminated statements in its marketing materials, including, but not limited to, the following statement regarding the security of data it maintains:

> *Secure Your Data*
> Although the data is entered via the web, your data will be encoded and transmitted over secured lines to Lookout Services

> server. This FTP interface will protect your data from interception, as well as, keep the data secure from unauthorized access.

6. Since at least 2006, Lookout's website has made the following claim:

> Perimeter Defense – Our servers are continuously monitoring attempted network attacks on a 24 x 7 basis, using sophisticated software tools.

7. Since at least 2006 and continuing through at least the Fall of 2009, respondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on Lookout's networks. Among other things, respondent:

a. failed to implement reasonable policies and procedures for the security of sensitive consumer information collected and maintained by Lookout;

b. failed to establish or enforce rules sufficient to make user credentials (i.e., user ID and password) hard to guess. For example, respondent did not require its customers or employees to use complex passwords to access the I-9 database. Accordingly, users could select the same word, including common dictionary words, as both the password and user ID, or a close variant of the user ID as the password;

c. failed to require periodic changes of user credentials, such as every 90 days, for customers and employees with access to sensitive personal information;

d. failed to suspend user credentials after a certain number of unsuccessful login attempts;

e. did not adequately assess and address the vulnerability of Lookout's web application to widely-known security flaws, such as "predictable resource location," which enables users to easily predict patterns and manipulate the uniform resource locators ("URLs") to gain access to secure web pages;

f. allowed users to bypass the authentication procedures on Lookout's website when they typed in a specific URL;

g. failed to employ sufficient measures to detect and prevent unauthorized access to computer networks, such as by employing an intrusion detection system and monitoring system logs; and

h. created an unnecessary risk to personal information by storing passwords used to access the I-9 database in clear text.

8. In October 2009, and again in December 2009, Lookout's weak authentication practices and web application vulnerabilities enabled an employee of a Lookout customer to gain access to the personal information of over 37,000 consumers.

9. Specifically, in October 2009, the employee obtained a URL for a secure web page during a webinar for the I-9 Solution. She later typed that URL into her browser and gained access to a portion of the I-9 database. By typing the precise URL into the browser, she bypassed the Lookout login page, and was never prompted to provide a valid user credential. The employee then made minimal and easy-to-guess changes to the URL and gained access to the entire I-9 database.

10. In December 2009, the employee visited Lookout's public-facing login web page for the I-9 Solution where she guessed and entered several different user IDs and passwords, including the user ID "test" and the password "test." Because this was a valid user

credential for one of Lookout's customers, entering "test" and "test" gave her access to the personal information of the more than 11,000 consumers employed by that customer. Then, by making minimal and easy-to-guess changes to the URL, the employee again gained access to the entire I-9 database, which included the personal information of more than 37,000 consumers.

11. Because Lookout did not employ an intrusion detection system until October 2009, or adequately monitor system logs until December 2009, it is unknown if other unauthorized persons accessed the personal information in the I-9 database before that time.

12. Following the October and December 2009 breaches, Lookout took steps to prevent additional unauthorized access to the I-9 database, including disabling the "test" account and instituting certain code patches to its application. In January 2010, Lookout mailed breach notification letters to customers whose accounts the employee may have viewed.

VIOLATIONS OF THE FTC ACT

13. Through the means described in Paragraphs 5 and 6, respondent represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect personal information against unauthorized access.

14. In truth and in fact, as described in Paragraph 7, respondent did not implement reasonable and appropriate measures to protect personal information against unauthorized access. Therefore, the representations set forth in Paragraph 13 were, and are, false and misleading, and constitute a deceptive act or practice.

15. As set forth in Paragraph 7, respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to sensitive personal information. Respondent's practices caused, or are likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not

reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

16. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this fifteenth day of June, 2011, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*;

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than

jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent is a Texas corporation with its principal office or place of business at 5909 West Loop South, Suite 300, Bellaire, Texas 77401.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondent" shall mean Lookout Services, Inc., its subsidiaries, divisions, affiliates, successors and assigns.

2. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or

other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number or other government-issued identification number; (g) a bank account, debit card, or credit card account number; (h) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; (i) a biometric record; or (j) any information that is combined with any of (a) through (i) above. For the purpose of this provision, a "consumer" shall mean any person, including, but not limited to, any user of respondent's services, any employee of respondent, or any individual seeking to become an employee, where "employee" shall mean an agent, servant, salesperson, associate, independent contractor, or other person directly or indirectly under the control of respondent.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, website, or other device, shall not misrepresent in any manner, expressly or by implication, the extent to which it maintains and protects the privacy, confidentiality, security, or integrity of personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, shall, no later than the date of service of this order, establish and implement,

and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program.

B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.

D. the development and use of reasonable steps to select and retain service providers capable of appropriately

safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards.

E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of the information security program.

III.

IT IS FURTHER ORDERED that, in connection with its compliance with Part II of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. Professionals qualified to prepare such assessments shall be: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;

C. explain how the safeguards that have been implemented meet or exceed the protections required by Part II of this order; and

D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been completed. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request. Unless otherwise directed by a representative of the Commission, the initial Assessment, and any subsequent Assessments requested, shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the matter of Lookout Services, Inc.*, FTC File No.1023076. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

IV.

IT IS FURTHER ORDERED that respondent shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying:

A. for a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of respondent, including but not limited to, all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts II and III of this order, for the compliance period covered by such Assessment;

B. unless covered by IV.A, for a period of five (5) years from the date of preparation or dissemination, whichever is later, a print or electronic copy of each document relating to compliance with this order, including but not limited to:

1. all advertisements and promotional materials containing any representations covered by this order, with all materials used or relied upon in making or disseminating the representation; and

2. any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question compliance with this order.

V.

IT IS FURTHER ORDERED that respondent shall deliver copies of the order as directed below:

A. Respondent must deliver a copy of this order to (1) all current and future principals, officers, directors, and managers, (2) all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order, and (3) any business entity resulting from any change in structure set forth in Part VI. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. For any business entity resulting from any change in structure set forth in Part VI, delivery shall be at least ten (10) days prior to the change in structure.

B. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in respondent that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in either corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of

Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the matter of Lookout Services, Inc.*, FTC File No.1023076. *Provided, however*, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that respondent, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VIII.

This order will terminate on June 15, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order,

and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to Lookout Services, Inc.

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

The Commission's complaint alleges that Lookout sells a web-based computer product known as the I-9 Solution. This product is designed to help employers comply with their obligations under federal law to complete and maintain a U.S. Citizenship and Immigration Services Form I-9 about each employee in order to verify that the employee is eligible to work in the United States. The complaint alleges that the I-9 Solution routinely collects and stores information about Lookout's customers' employees, including, but not limited to: names; addresses; dates of birth; Social Security

numbers; passport numbers; alien registration numbers; driver's license numbers; and military identification numbers. This highly sensitive information is maintained in Lookout's database (the "I-9 database"). The misuse of such information – particularly Social Security numbers, which do not expire – can facilitate identity theft, including existing and new account fraud, and related consumer harms.

The complaint alleges that, since at least 2006, Lookout engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the personal information it collected and maintained. The challenged practices are fundamental security failures, most of which have been challenged in prior FTC data security cases. Among other things, Lookout:

a. failed to implement reasonable policies and procedures for the security of sensitive consumer information it collected and maintained;

b. failed to establish or enforce rules sufficient to make user credentials (*i.e.*, user ID and password) hard to guess;

c. failed to require periodic changes of user credentials, such as every 90 days, for customers and employees with access to sensitive personal information;

d. failed to suspend user credentials after a certain number of unsuccessful login attempts;

e. did not adequately assess and address the vulnerability of its web application to widely-known security flaws, such as "predictable resource location," which enables users to easily predict patterns and manipulate the uniform resource locators ("URL") to gain access to secure web pages;

f. allowed users to bypass the authentication procedures on Lookout's website when they typed in a specific URL;

g. failed to employ sufficient measures to detect and prevent unauthorized access to computer networks, such as by employing an intrusion detection system and monitoring system logs; and

h. created an unnecessary risk to personal information by storing passwords used to access the I-9 database in clear text.

Each of these failures could have been remedied using well-known, readily available, and/or free or low-cost data security measures.

The complaint further alleges that, as a result of these failures, an employee of a Lookout customer was able to obtain unauthorized access to Lookout's I-9 database on two separate occasions between October and December 2009. In both instances, the employee gained unauthorized access to the personal information, including Social Security numbers, of more than 37,000 consumers. Given the sensitive nature of the personal information exposed, the company's failure to provide reasonable and appropriate security for this information is likely to cause consumers substantial injury as described above. That substantial injury is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. The complaint alleges that Lookout's failure to employ reasonable and appropriate measures to prevent unauthorized access to sensitive personal information is an unfair act or practice and that the company misrepresented that it had implemented such measures, in violation of Section 5 of the Federal Trade Commission Act.

The proposed order applies to personal information that Lookout collects from or about consumers and employees. It contains provisions designed to prevent Lookout from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the privacy, confidentiality, or integrity of personal information

collected from or about consumers. Part II of the proposed order requires Lookout to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to Lookout's size and complexity, the nature and scope of its activities, and the sensitivity of the information collected from or about consumers and employees. Specifically, the proposed order requires Lookout to:

- designate an employee or employees to coordinate and be accountable for the information security program;

- identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks;

- design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures;

- develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from Lookout, and require service providers by contract to implement and maintain appropriate safeguards; and

- evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on its information security program.

Part III of the proposed order requires Lookout to obtain within the first one hundred eighty (180) days after service of the order, and on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer, employee, and job applicant information has been protected.

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Lookout to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, Lookout must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Lookout submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

IN THE MATTER OF

TOPS MARKETS LLC, MORGAN STANLEY CAPITAL PARTNERS V U.S. HOLDCO LLC, AND THE PENN TRAFFIC COMPANY

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

Docket No. C-4295; File No. 101 0074
Filed August 4, 2010 – Decision June 30, 2011

This consent order addresses the allegations regarding the proposed $85 million acquisition by Tops Markets LLC ("Tops") of substantially all supermarkets owned by The Penn Traffic Company ("Penn"), as part of Penn's petition for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 301, *et seq*. The complaint alleges that the acquisition of Penn's supermarkets by Tops would eliminate direct competition in parts of New York and Pennsylvania, resulting in higher grocery prices for consumers. The consent order requires the parties to divest seven Penn supermarkets, together with their related assets, to a Commission-approved buyer and to allow the Commission-approved buyer to operate these supermarkets at their respective locations. The consent order further requires the parties to maintain the competitive viability of these assets pending divestiture. In the event the parties fail to divest the assets within the time period prescribed by the Commission, the consent order permits the Commission to appoint a divestiture trustee to effectuate the divestiture.

Participants

For the *Commission*: *Michelle Fetterman, Jeanne Liu, David von Nirschl,* and *Anthony Saunders.*

For the *Respondent*s: *Kathleen Beasley* and *Jim Wade, Haynes & Boone LLP;* and *Kevin Arquit, Evan Cohen, Aimee Goldstein,* and *Jayma Meyer, Simpson Thacher & Bartlett LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Tops Markets LLC ("Tops"), a subsidiary of Respondent Morgan Stanley Capital Partners V U.S. Holdco LLC ("Holdco"), and Respondent The Penn Traffic Company ("Penn Traffic"), a corporation, all subject to the jurisdiction of the Commission, entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, pursuant to which Tops purchased certain assets of Penn Traffic, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT TOPS

1. Respondent Tops is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 6363 Main Street, Williamsville, New York 14221.

2. Tops is, and at all times relevant herein has been, engaged in the operation of supermarkets in the State of New York and the Commonwealth of Pennsylvania. Tops operates supermarkets under the Tops banner.

3. Prior to its acquisition of substantially all Penn Traffic assets, Tops owned and operated 71 supermarkets in the United States. In addition, five supermarkets with the Tops banner are owned and operated by franchisees in the United States.

4. Tops is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of

Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. RESPONDENT HOLDCO

5. Respondent Holdco is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1585 Broadway, Floor 39, New York, New York 10036.

6. Holdco is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. RESPONDENT PENN TRAFFIC

7. Respondent Penn Traffic is a corporation organized, existing, and doing business under and by virtue of the laws of state of Delaware, with its office and principal place of business located at 1200 State Fair Boulevard, Syracuse, New York 13221.

8. Prior to the acquisition, Penn Traffic was engaged in the operation of supermarkets in the Commonwealth of Pennsylvania and the states of New York, Vermont, and New Hampshire. Penn Traffic operated supermarkets under the banners P&C Foods, Quality Markets, and Bi-Lo.

9. Prior to the acquisition by Tops, Penn Traffic owned and operated 79 supermarkets in the United States.

10. Penn Traffic was, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

IV. THE ACQUISITION

11. On or about January 7, 2010, Respondents Tops, Holdco, and Penn Traffic entered into an agreement for Tops to acquire substantially all of Penn Traffic's assets, including all 79 supermarkets and certain assets related to the operation of the supermarkets. The purchase price was approximately $85 million. In addition, Tops agreed to the assumption of liabilities and the reduction of approximately $70 million in claims.

12. On or about January 29, 2010, Respondents Tops, Holdco, and Penn Traffic closed on the acquisition. The acquisition was conducted pursuant to a fast-track bankruptcy proceeding.

V. NATURE OF TRADE AND COMMERCE

13. For purposes of this complaint, the term "supermarket" means a full-line grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables, shelf-stable food and beverage products, including canned and other types of packaged products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.

14. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different stock-keeping units, as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

15. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery

products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at other supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores.

16. Retail stores other than supermarkets that sell food and grocery products, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, do not, individually or collectively, effectively constrain prices at supermarkets. Those retail stores do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small price increase by supermarkets.

VI. RELEVANT PRODUCT MARKET

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

VII. RELEVANT GEOGRAPHIC MARKETS

18. The relevant geographic markets in which to analyze the likely competitive effects of the acquisition are:

(a) Bath, New York;

(b) Cortland, New York;

(c) Ithaca, New York;

(d) Lockport, New York; and

(e) Sayre, Pennsylvania.

VIII. MARKET CONCENTRATION

19. The relevant markets are highly concentrated, and the acquisition has substantially increased concentration, whether concentration is measured by the Herfindahl Hirschman Index ("HHI") or the number of competitively significant firms remaining in the market. Post-acquisition HHIs in the relevant geographic markets range from 5,000 to 10,000, and the acquisition increased HHI levels by between 1,145 and 4,996 points. These market concentration levels give rise to a presumption that the acquisition is unlawful in each of the affected markets.

IX. ENTRY CONDITIONS

20. Entry would not be timely, likely, or sufficient to deter or prevent anticompetitive effects. The affected markets are insulated from new entry or expansion by significant entry barriers, including the time and costs associated with the need to conduct market research, select an appropriate location for the supermarket, obtain necessary permits and approvals, construct a new supermarket or convert an existing structure to a supermarket, and generate sufficient sales to have a meaningful impact on the market.

X. EFFECTS OF THE ACQUISITION

21. The acquisition has substantially lessened competition in the relevant markets in the following ways, among others:

(a) by eliminating direct competition between Respondents Tops and Penn Traffic;

(b) by increasing the likelihood that Tops will unilaterally exercise market power; and

(c) by increasing the likelihood of successful coordinated interaction among the remaining firms.

22. The ultimate effect of the acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

XI. VIOLATIONS CHARGED

23. The agreement described in Paragraph 11 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the acquisition described in Paragraph 12 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of August, 2010, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of The Penn Traffic Company ("Penn Traffic") by Tops Markets LLC ("Tops"), a subsidiary of Morgan Stanley Capital Partners V U.S. Holdco LLC ("Holdco"), (collectively, "Respondents"), and Respondents having been furnished with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and that, if issued by the Commission, would charge

Respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

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

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

1. Respondent Tops is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 6363 Main Street, Williamsville, New York 14221.

2. Respondent Penn Traffic is a corporation organized, existing and doing business under and by virtue of the laws of state of Delaware, with its office and principal

place of business located at 1200 State Fair Boulevard, Syracuse, New York 13221.

3. Respondent Holdco is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1585 Broadway, Floor 29, New York, New York 10036.

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

ORDER

I.

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

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

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

C. "Holdco" means Morgan Stanley Capital Partners V U.S. Holdco LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Morgan Stanley Capital Partners V U.S. Holdco LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" mean Tops, The Penn Traffic Company, and Holdco, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer(s)" means an Entity(ies) that receives the prior approval of the Commission to acquire any or all of the Penn Traffic Supermarket Business Assets pursuant to this Order.

G. "Acquisition" means the acquisition contemplated by the Asset Purchase Agreement by and between Tops Markets, LLC and The Penn Traffic Company dated as of January 7, 2010, ("Asset Purchase Agreement").

H. "Agency(ies)" means any government regulatory authority or authorities responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the operations of a Supermarket.

I. "Closing Date" means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant Penn Traffic Supermarket Business Assets to an Acquirer pursuant to this Order.

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

K. "Effective Date" means the date on which the Respondents close on the Acquisition pursuant to the Asset Purchase Agreement.

L. "Entity(ies)" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.

M. "Governmental Approval(s)" mean any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests thereof, required by applicable Agencies related to the operation of a Supermarket.

N. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

O. "Interim Monitor" means any monitor appointed pursuant to Paragraph V of this Order or Paragraph III of the related Order to Maintain Assets.

P. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

Q. "Order Date" means the date that this Decision and Order becomes final.

R. "Penn Traffic Supermarket Business Assets" means all Respondents' rights, title and interest in and to all assets

used in, and or reserved for use in, the Penn Traffic Supermarket Businesses to the extent legally transferable, including, without limitation:

1. all real property;

2. all leasehold interests;

3. all equipment and fixtures;

4. all Governmental Approvals;

5. at the relevant Acquirer's option, all Trademarks for transitional purposes of up to one (1) year from the Closing Date;

6. at the relevant Acquirer's option, all Trade Dress for transitional purposes of up to one (1) year from the Closing Date;

7. at the relevant Acquirer's option, all inventory in existence as of the Closing Date;

8. all of the Respondents' books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing.

provided however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to the Penn Traffic Supermarket Businesses and to other businesses of the Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Penn Traffic Supermarket

Businesses; or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to businesses that Respondent Tops is not required to divest pursuant to this Order.

S. "Penn Traffic Supermarket Business(es)" means the business of operating a Supermarket at the locations identified in Schedule A to this Order, including, without limitation, the distribution, marketing, promotion and sale of all products and services offered at such locations.

T. "Relevant Geographic Market(s)" means each of the geographic markets identified in the Complaint as Relevant Geographic Markets.

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

1. any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Penn Traffic Supermarket Business Assets and that has been approved by the Commission to accomplish the requirements of this Order; and/or

2. any agreement between Respondents and a Third Party (or between a Divestiture Trustee and a Third Party) to effect the assignment of the the Penn Traffic Supermarket Business Assets to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

V. "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; frozen and refrigerated food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by Law, wine, beer, and distilled spirits.

W. "Supermarket Employee(s)" means all employees of Respondents who are currently working at the relevant Penn Traffic Supermarket Business(es), or who have, within the twelve (12) months prior to the Order Date, worked at the relevant Penn Traffic Supermarket Business(es).

X. "Trade Dress" means the current trade dress of products marketed or sold at the Penn Traffic Supermarket Businesses including, without limitation, product packaging, and the lettering of the product trade name or

brand name that are or were owned by Respondent Penn Traffic and that were used in or are used in the Penn Traffic Supermarket Businesses.

Y. "Trademark(s)" means all proprietary names or designations, trademarks (whether registered or unregistered), service marks (whether registered or unregistered), trade names, product names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Penn Traffic Supermarket Businesses that are or were owned by Respondent Penn Traffic and that were used in, or are used in, the Penn Traffic Supermarket Businesses.

Z. "Third Party(ies)" means any Entity other than the following: Respondents or the Acquirer for the particular Penn Traffic Supermarket Business Assets.

II.

IT IS FURTHER ORDERED that:

A. Not later than ninety (90) days after the Order Date, Respondent Tops shall divest the Penn Traffic Supermarket Business Assets, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers in a manner that receives the prior approval of the Commission, pursuant to and as required by the terms of this Paragraph II or Paragraph VI of this Order, as applicable.

B. Respondents shall secure all consents and waivers from all Third Parties (including, without limitation, all landlords) that are necessary to permit Respondent Tops

to divest the Penn Traffic Supermarket Business Assets to the relevant Acquirer(s), and/or to permit such Acquirer(s) to continue the operations of the Penn Traffic Supermarket Businesses at the respective locations;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

C. For a period of one (1) year from the Closing Date, Respondents shall, not interfere with the hiring or employing by the Acquirer of the particular Penn Traffic Supermarket Business of the related Supermarket Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Supermarket Employee who receives a written offer of employment from such Acquirer;

provided, however, that this Paragraph shall not prohibit Respondents from continuing to employ any Supermarket Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

D. The purpose of the divestiture of the Penn Traffic Supermarket Business Assets and the related obligations imposed on the Respondents by this Order is:

1. to ensure the continued use of the Penn Traffic Supermarket Business Assets in the operation of Supermarkets at the respective locations;

2. to provide for the future use of the Penn Traffic Supermarket Business Assets in the operation of Supermarkets at the respective locations;

3. to create a viable and effective competitor, who is independent of the Respondents, in the operation of Supermarkets at each of the respective locations; and

4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that until the Closing Date for each respective Penn Traffic Supermarket Business, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business(es), to minimize any risk of loss of competitive potential for such Penn Traffic Supermarket Business(es), and to prevent the destruction, removal, wasting, deterioration, or impairment of the Penn Traffic Supermarket Business Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Penn Traffic Supermarket Business Assets (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Penn Traffic Supermarket Businesses. Respondents' responsibilities shall include each of the responsibilities enumerated in Paragraph II.B. of the Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the Order Date, Respondent Tops shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, within six (6) months prior to the date of such proposed acquisition, in the Relevant Geographic Markets; or

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in the Relevant Geographic Markets;

provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent Tops or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent Top's offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Tops and not of any other party to the transaction. Respondent Tops shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the

first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Tops shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that the provisions of this Paragraph IV shall not apply to any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that:

A. At any time after Respondent Tops sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.

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

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Tops shall execute an agreement that, subject to the prior approval of the

Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

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

1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

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

3. the Interim Monitor shall serve until the date of completion by Respondent Tops of the divestiture of all of the Penn Traffic Supermarket Business Assets in a manner that fully satisfies the requirements of the Decision and Order; *provided further,* that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information

as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

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

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

H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by each Respondent, and any reports submitted by the Acquirer

with respect to the performance of each Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders.

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

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

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

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

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

VI.

IT IS FURTHER ORDERED that:

A. The Commission hereby appoints The Food Partners LLC as a trustee ("Divestiture Trustee") to divest, assign, grant, license, transfer, deliver or otherwise convey, in a manner that satisfies the requirements of this Order, all of the Penn Traffic Supermarket Business Assets for which, prior to the Order Date, Respondent Tops has not filed a petition for prior approval of divestiture pursuant to Paragraph II.A of this Order. Such divestiture (or divestitures) shall be accomplished exclusively by the Divestiture Trustee;

provided however, that any of the Penn Traffic Supermarket Business Assets (i) that are subject to a petition for prior approval to divest that has been filed by Respondent Tops prior to the Order Date and that is subsequently withdrawn by Respondent Tops or denied by the Commission, or (ii) that are not divested by Respondent Tops following Commission approval of that petition and in the manner approved by the Commission, shall become a part of the assets to be divested exclusively by the Divestiture Trustee.

B. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Tops 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 each divestiture as described in Paragraph VI.A.

and as is required by this Order.

C. Respondent Tops shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets as described in Paragraph VI.A.;

2. the Divestiture Trustee shall have ninety (90) days after the date the Commission approves the 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 ninety (90) day period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission for an additional ninety (90) days; *provided, however*, the Commission may extend the divestiture period only two (2) times; *provided further, however*, that upon the expiration of the divestiture period, including as it may be extended, the Divestiture Trustee's power and any further obligations herein to divest shall terminate, except to the extent such power must continue to accomplish the Divestiture Trustee's accounting and payment of fees, pursuant to Paragraph VI.C.5.;

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 Penn Traffic Supermarket

Business Assets and to any other relevant information, as the Divestiture Trustee may request. Respondent Tops shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

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

5. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission or a court may set.

The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Tops, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Tops, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

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

7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the Penn Traffic Supermarket Business Assets; *provided, however,* that the Divestiture Trustee appointed pursuant to

this Paragraph may be the same Entity appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter;

8. the Divestiture Trustee shall report in writing to Respondent Tops and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish each divestiture; and

9. Respondent Tops may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

E. 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 each divestiture required by this Order.

VII.

IT IS FURTHER ORDERED that:

A. Not later than thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.A. and III of this Order, Respondents shall submit to the

Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II.A. and III of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II and III of the Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent Tops shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

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

A. any proposed dissolution of a Respondent;

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

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

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Decision and Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to a Respondent made to its principal United States offices or headquarter's address, such 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 books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with the Orders, which copying services shall be provided by Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and

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

X.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondent Tops shall include in each Remedial Agreement related to each of the Penn Traffic

Supermarket Businesses a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent Top's obligations to the Acquirer(s) pursuant to this Order.

D. Respondent Tops shall also include in each Remedial Agreement a representation that Respondent Tops shall use commercially reasonable efforts to assist the Acquirer to secure the Governmental Approval(s) necessary to operate the relevant Penn Traffic Supermarket Business.

E. Respondent Tops shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Penn Traffic Supermarket Businesses a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.

F. Respondent Tops shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on June 30, 2021.

By the Commission.

SCHEDULE A

The Supermarkets at the following locations:

1. Penn Traffic Store No. 3115 operating under the P&C trade name, located at 404 W. Morris St., Bath, NY;

2. Penn Traffic Store No. 3095 operating under the P&C trade name, located at 160 Clinton Ave., Cortland, NY;

3. Penn Traffic Store No. 3107 operating under the P&C trade name, located at 315 Pine Tree Rd., Ithaca, NY;

4. Penn Traffic Store No. 3123 operating under the P&C trade name, located at 2309 N. Triphammer Rd., Ithaca, NY;

5. Penn Traffic Store No. 6643 operating under the Quality Markets trade name, located at 7134 Rochester Rd., Lockport, NY;

6. Penn Traffic Store No. 3139 operating under the P&C trade name, located at 448 N. Keystone Ave., Sayre, PA; and

7. Penn Traffic Store No. 3195 operating under the P&C trade name, located at 1730 Elmira St., Sayre, PA.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Tops Markets LLC ("Tops"), a subsidiary of Morgan Stanley Capital Partners V U.S. Holdco LLC ("Holdco"), of certain assets of Respondent The Penn Traffic Company ("Penn Traffic"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Tops is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 6363 Main Street, Williamsville, New York 14221.

2. Respondent Penn Traffic is a corporation organized, existing and doing business under and by virtue of the laws of state of Delaware, with its office and principal place of business located at 1200 State Fair Boulevard, Syracuse, New York 13221.

3. Respondent Holdco is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1585 Broadway, Floor 29, New York, New York 10036.

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

ORDER

I.

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

A. "Tops" means Tops Markets LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Tops Markets LLC, and the respective directors, officers,

employees, agents, representatives, successors, and assigns of each.

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

C. "Holdco" means Morgan Stanley Capital Partners V U.S. Holdco LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Morgan Stanley Capital Partners V U.S. Holdco LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondents" mean Tops, The Penn Traffic Company, and Holdco, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acquired Supermarkets" means the Supermarkets acquired by Respondent Tops pursuant to the Acquisition that (1) are not subject to divestiture pursuant to the Decision and Order and (2) are continuing to be operated by Respondent Tops.

G. "Decision and Order" means the:

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

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

H. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph V of the Decision and Order.

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

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

A. Until the Closing Date for each respective Penn Traffic Supermarket Business, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business(es), to minimize any risk of loss of competitive potential for such Penn Traffic Supermarket Business(es), and to prevent the destruction, removal, wasting, deterioration, or impairment of such Penn Traffic Supermarket Business(es) except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Penn Traffic Supermarket Business Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Penn Traffic Supermarket Businesses.

B. Until the Closing Date, Respondents shall maintain the operations of the Penn Traffic Supermarket Businesses in the regular and ordinary course of business and consistent with past practice (including regular repair and

maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Penn Traffic Supermarket Businesses and shall use their best efforts to preserve goodwill and appropriate business relationships with the following: suppliers; vendors and distributors; customers; Agencies; employees; and others having business relations with the Penn Traffic Supermarket Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the Penn Traffic Supermarket Businesses with sufficient working capital to operate at least at current rates of operation and to meet all capital calls with respect to such business to carry on, at least at their scheduled pace, all critical infrastructure replacement and repair projects and all ordinary course activities for each of the Penn Traffic Supermarket Businesses;

2. providing such resources as may be necessary to respond to competition and/or to prevent any diminution in sales of each of the Penn Traffic Supermarket Businesses after the Acquisition process and prior to the complete divestiture, transfer and delivery of the related Penn Traffic Supermarket Business Assets to an Acquirer;

3. providing such resources and funding as may be necessary to maintain the competitive strength and positioning of each of the Penn Traffic Supermarket Businesses including such funds as are sufficient to:

    a. perform all routine maintenance and all other maintenance as may be necessary to maintain or replace the assets related to such Penn Traffic Supermarket Business; and

b. provide appropriate levels of distribution, marketing and advertising (including, without limitation, circulars, newspaper advertisements, direct mailers, checkout reward coupons), marketing, promotion and sales expenditures for each of the Penn Traffic Supermarket Businesses;

4. providing such support services to the Penn Traffic Supermarket Businesses as were being provided to such businesses by Respondent Penn Traffic as of the date the Consent Agreement was signed by Respondents; and

5. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with each of the Penn Traffic Supermarket Businesses for the relevant supermarket location's last fiscal year including, without limitation, maintaining at current levels all full time equivalent employee hours, and where necessary, increasing such full time equivalent employee hours at each of the Penn Traffic Supermarket Businesses;

6. maintaining the inventory of each of the Penn Traffic Supermarket Businesses at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained at such business by Respondent Penn Traffic and as may be necessary to accommodate all advertising and promotions offered by Respondent Tops within the Relevant Geographic Market and not transferring inventory from any of the Penn Traffic Supermarket Businesses other than in the ordinary course of business consistent with past practices;

7. maintaining the Trademarks, Trade Dress, service marks, or trade names of Respondent Penn Traffic at each of the Penn Traffic Supermarket Businesses;

8. keeping the organization and properties of each of the Penn Traffic Supermarket Businesses intact, including current business operations (including regular hours of operation of the Supermarket and its individual departments), physical facilities, and working conditions;

9. maintaining all operations, programs (including customer loyalty and continuity, reward coupons, discounts, or such similar programs) and departments at each of the Penn Traffic Supermarket Businesses in a manner equivalent to the Acquired Supermarkets;

10. making any payment required to be paid under any contract or lease when due, and otherwise paying all liabilities and satisfy all obligations, for each of the Penn Traffic Supermarket Businesses, in each case in a manner consistent with the practices for the Acquired Supermarkets;

11. maintaining the books and records (including customer loyalty data) of each of the Penn Traffic Supermarket Businesses;

12. not displaying any signs or conducting any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates any of the Penn Traffic Supermarket Businesses will close;

13. not conducting any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any of the Penn Traffic Supermarket Businesses; and

14. not terminating the operation of any of the Penn Traffic Supermarket Businesses.

C. Until Respondent Tops fully and finally divests, transfers and delivers a particular Penn Traffic Supermarket Business Asset to an Acquirer, Respondents shall maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business Asset, shall prevent its destruction, removal, wasting, deterioration, or impairment and shall maintain such Penn Traffic Supermarket Business Asset in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).

D. Until the Closing Date, Respondents shall provide all management level employees that are associated with each of the Penn Traffic Supermarket Businesses with reasonable financial incentives to continue in their positions and to manage, market, and promote each of the Penn Traffic Supermarket Businesses consistent with such practices at the Acquired Supermarkets and/or as may be necessary to preserve the marketability, viability and competitiveness of each Penn Traffic Supermarket Business pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Tops until the Closing Date, including regularly scheduled raises, bonuses, and additional incentives as may be necessary to prevent any diminution of each of the Penn Traffic Supermarket Businesses's competitiveness.

E. For a period of one (1) year from the Closing Date, Respondents shall not interfere with the hiring or employing by the Acquirer of the particular Penn Traffic Supermarket Business of the related Supermarket Employees, and shall remove any impediments within the

control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Supermarket Employee who receives a written offer of employment from the Acquirer;

provided, however, that this Paragraph shall not prohibit Respondents from continuing to employ any Supermarket Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

F. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Penn Traffic Supermarket Businesses through the divestiture, transfer and delivery of the related Penn Traffic Supermarket Business Assets to an Acquirer or Acquirers, to minimize any risk of loss of competitive potential for the Penn Traffic Supermarket Businesses and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Penn Traffic Supermarket Business Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent Tops sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and

perform all of their responsibilities as required by the Orders and the Remedial Agreements.

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

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

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

1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

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

3. the Interim Monitor shall serve until the date of completion by Respondent Tops of the divestiture of all of the Penn Traffic Supermarket Business Assets in a manner that fully satisfies the requirements of the Decision and Order; *provided further*, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

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

G. Respondent Tops shall indemnify the Interim Monitor and

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

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

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

J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate

confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

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

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

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

IV.

IT IS FURTHER ORDERED that not later than thirty (30) days after the Respondents sign the Agreement Containing Consent Order, and every thirty (30) days thereafter until Respondent Tops has fully complied with its obligations to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets as required by Paragraph II.A. of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VII of the Decision and Order.

V.

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

A. any proposed dissolution of a Respondent;

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

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

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to a Respondent made to its principal United States offices or headquarter's address, such 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 books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with the Orders, which copying services shall be provided by Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and

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

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The later of:

1. The day after the divestiture of all of the Penn Traffic Supermarket Business Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or

2. Three (3) days after the related Decision and Order becomes final.

By the Commission.

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

Introduction and Background

The Federal Trade Commission ("Commission") has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Morgan Stanley Capital Partners V U.S. Holdco LLC ("Holdco"), its subsidiary, Tops Markets LLC ("Tops"), and The Penn Traffic Company ("Penn Traffic"), (collectively "Respondents"), that is designed to remedy the anticompetitive effects that would otherwise result from Tops' acquisition of the supermarket assets of Penn Traffic. The proposed Consent Agreement requires divestiture of seven Penn Traffic supermarkets and related assets to a Commission-approved buyer.

On November 18, 2009, Penn Traffic filed for Chapter 11 bankruptcy. Through the expedited bankruptcy proceeding, Tops sought to acquire substantially all of Penn Traffic's assets, including its 79 supermarkets in New York, Pennsylvania, Vermont, and New Hampshire (the "Acquisition"). The purchase price for the Acquisition was $85 million. In addition, Tops agreed to assume from Penn Traffic approximately $70 million in liabilities and claims. Because the only remaining bidder for the supermarkets was a liquidator, the Acquisition represented the only opportunity to avoid mass closing of the Penn Traffic supermarkets.

In light of the extremely tight deadlines inherent in the bankruptcy proceeding, and in an effort to avoid mass liquidation of 79 supermarkets in more than 50 metropolitan areas, Commission staff crafted a remedy that would permit timely consummation of the Acquisition while preserving the Commission's ability to obtain full relief to cure the anticompetitive harm that the Acquisition would otherwise cause in certain local areas where Tops and Penn Traffic

operated competing supermarkets. In light of this extraordinary set of circumstances, the Commission determined that this unique remedy would best serve the interests of consumers.

In particular, before the Acquisition was consummated, Respondents agreed in writing to divest all of the Penn Traffic stores in each local geographic market in which the transaction presented potential competitive concerns. Respondents further agreed to maintain the viability of the acquired stores and to cooperate fully with staff's investigation, which continued after the Acquisition was consummated. As a result of this agreement, even before a meaningful investigation could be completed, Respondents had committed themselves in writing to the broadest relief that might ultimately be necessary, thereby preserving completely the Commission's ability to protect consumers through remedial action, while at the same time enabling Tops to consummate the Acquisition and prevent the mass shuttering of Penn Traffic stores.

In accordance with the agreement reached between Respondents and staff, early termination of the HSR waiting period was granted on January 25, 2010. A few days later, Respondents closed on the Acquisition.

The proposed Complaint alleges that the agreement among Respondents for the sale of the Penn Traffic assets to Tops constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the Acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in connection with the retail sale of food and other grocery products in supermarkets.

The Parties

Tops is a New York limited liability company with its office and principal place of business in Williamsville, New York. Prior to the

Acquisition, Tops owned and operated 71 supermarkets in New York and Pennsylvania, all under the Tops banner. In addition, five supermarkets are owned and operated by franchisees under the Tops banner. Tops is a subsidiary of Holdco, a Delaware limited liability company with its office and principal place of business in New York, New York.

Penn Traffic is a Delaware corporation headquartered in Syracuse, New York. Prior to the Acquisition, Penn Traffic operated 79 supermarkets in New York, Pennsylvania, Vermont, and New Hampshire under the following banners: Bi-Lo, P&C Foods ("P&C"), and Quality Markets.

The Proposed Complaint

As outlined in the proposed Complaint, the relevant product market in which to analyze the Acquisition is the retail sale of food and other grocery products in supermarkets. Supermarkets are full-line grocery stores that carry a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, shelf-stable food and beverage products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids. The hallmark of supermarkets is that they offer consumers the convenience of one-stop shopping for food and grocery products. To achieve this, supermarkets typically carry more than 10,000 different products and have at least 10,000 square feet of selling space.

As alleged in the proposed Complaint, supermarkets compete principally with other supermarkets and base their prices primarily on the prices of food and grocery products sold in other supermarkets. Other types of retail stores, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores (*e.g.*, ALDI, Save-A-Lot), and mass merchants, do not, individually or collectively, effectively constrain the prices of food and grocery products in supermarkets because they

do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. Although stores such as limited assortment stores do sell food and certain other grocery items, they do not offer the breadth of services and products sold at supermarkets and thus do not provide an effective constraint on prices in supermarkets. The evidence and the Commission's conclusions on these issues are consistent with its prior supermarket investigations.

The relevant geographic markets in which to analyze the likely competitive effects of the Acquisition are: Bath, New York; Cortland, New York; Ithaca, New York; Lockport, New York; and Sayre, Pennsylvania. All of these relevant markets were already highly concentrated before the Acquisition, and the Acquisition has substantially increased concentration in each of these markets, as measured by the Herfindahl Hirschman Index ("HHI"). Post-Acquisition HHIs in the relevant geographic markets range from 5,000 to 10,000, and the Acquisition has increased HHI levels by between 1,145 and 4,996 points. The high concentration levels and staff's ultimate conclusions regarding the competitive harm likely to result from the acquisition are not sensitive to changes in the precise contours of the relevant geographic markets. Indeed, the transaction would be presumptively unlawful in the geographic areas at issue even if the relevant geographic markets were defined by radii as large as fifteen to twenty miles.

According to the proposed Complaint, the Acquisition has substantially lessened competition in the relevant markets by eliminating direct competition between Tops and Penn Traffic, by increasing the likelihood that Tops will unilaterally exercise market power, and by increasing the likelihood of successful coordinated interaction among the remaining firms. Absent relief, the ultimate effect of the Acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

For the entry of a new competitor or the expansion of an existing competitor to deter or counteract the anticompetitive effects of an acquisition, entry must be timely, likely, and sufficient. According to the proposed Complaint, new entry or expansion by supermarket competitors in the relevant geographic markets is unlikely to deter the alleged anticompetitive effects of the Acquisition. The affected markets are insulated from new entry or expansion by significant entry barriers, including the time and costs associated with the need to conduct market research, select an appropriate location for the supermarket, obtain necessary permits and approvals, construct a new supermarket or convert an existing structure to a supermarket, and generate sufficient sales to have a meaningful impact on the market. Commission staff evaluated and considered pending and potential future entry by supermarket competitors in each of the affected geographic markets, as well as entry by other retailers such as mass merchants. In many of the markets, there is unlikely to be any entry in a time period that would prevent the anticompetitive effects. And, in those markets where entry may occur in the near future, the acquisition, despite new entry, still would result in highly concentrated markets, and that entry would not eliminate the anticompetitive harm of the acquisition.

The Proposed Consent Agreement

The proposed Consent Agreement includes two proposed orders: a Decision and Order and an Order to Maintain Assets (collectively "Consent Orders"). The purpose of the proposed Consent Agreement is to: (1) ensure the continued use, and provide for the future use, of the Penn Traffic supermarket assets, subject to divestiture, in the operation of supermarkets at the respective locations; (2) create a viable and effective competitor that is independent of the Respondents in the operation of supermarkets in the relevant geographic markets; and (3) remedy the lessening of competition that has resulted from the Acquisition.

To achieve the above goals, the proposed Consent Agreement requires the divestiture of seven Penn Traffic supermarkets, together

with their related assets, to a Commission-approved buyer at no minimum price within ninety (90) days of the Decision and Order becoming final. Tops and Holdco must secure all third-party consents and waivers necessary to facilitate the divestitures and to allow the Commission-approved buyer(s) to continue the operation of the Penn Traffic stores as supermarkets at their respective locations. As set forth in the Consent Orders, the stores to be divested are located in Bath, NY; Cortland, NY; Ithaca, NY (two stores); Lockport, NY; and Sayre, PA (two stores). In the event Respondents do not meet their obligations to divest the Penn Traffic assets, the Commission may appoint a divestiture trustee to divest the assets in a manner consistent with the Decision and Order and subject to Commission approval.

Until all of the Penn Traffic assets are divested, the Consent Orders further require Respondents to maintain the viability, competitiveness, and marketability of the seven Penn Traffic supermarkets and related assets. This includes keeping the supermarkets open for business, performing routine maintenance, providing appropriate marketing and advertising, maintaining inventory levels at the stores, and using best efforts to preserve relationships with suppliers, distributors, customers, and employees. The Consent Agreement provides that the Commission may appoint an interim monitor whose principal duties are to ensure that Tops complies with its obligations under the Consent Orders. The Commission has appointed John J. MacIntyre, a former Penn Traffic employee with more than thirty years of experience in the supermarket industry, as interim monitor.

Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again

review the proposed Consent Agreement, as well as the comments received, and will decide whether to withdraw its acceptance of the proposed Consent Agreement or issue its final Consent Orders.

The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement, nor does it modify its terms in any way.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, January 21, 2011

Order denying respondent's request to postpone the commencement of the administrative trial pending the Commission's consideration of the parties' dispositive motions.

ORDER DENYING EXPEDITED MOTION FOR A LATER HEARING DATE

The Federal Trade Commission issued the Administrative Complaint in the above-captioned matter on June 17, 2010, and it provides -- consistent with Commission Rule 3.11(b)(4), 16 C.F.R. § 3.11(b)(4) -- that the administrative hearing in this matter shall begin on February 17, 2011. On November 2, 2010, Complaint Counsel filed a Motion For Partial Summary Decision ("Summary Decision Motion"), and on November 3, 2010, Respondent filed a Motion To Dismiss. Respondent has now filed an Expedited Motion For A Later Hearing Date ("Expedited Motion"), requesting that the Commission postpone the beginning of the administrative hearing until May 18, 2011. Counsel for Respondent advise that Complaint Counsel intend to oppose the Expedited Motion.

On November 15, 2010, the Commission issued an Order denying Respondent's Motion to stay the proceedings until Respondent's Motion To Dismiss had been determined on the merits. As the Commission noted in that Order, Commission Rule 3.22(b) provides:

> A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders.[1]

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[1] Order Denying Motion For Stay of Proceeding at 1 (Nov. 15, 2010) (hereinafter November 15 Order) (quoting 16 C.F.R. § 3.22(b)).

Thus, when the Commission promulgated the current version of Commission Rule 3.22(b), it stated:

> The purpose of proposed paragraph [3.22](b) was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions . . . .[2]

Commission Rules 3.21(c)(1) and 3.41(b) provide that the Commission may, "upon a showing of good cause," postpone the commencement of the evidentiary hearing. Respondent argues that good cause exists "when a scheduling order deadline 'cannot be met despite the diligence of the party seeking the extension.'" Expedited Motion at 3 (citations omitted). Respondent argues further that the following developments support a finding of good cause: (1) discovery is ongoing; (2) the Summary Decision Motion, the Motion To Dismiss, and Respondent's January 14, 2011 Motion To Disqualify the Commission are pending; and (3) Respondent's Motion For An Order Compelling Discovery is pending. Expedited Motion at 3-7.

None of these circumstances provides any support for the requisite showing of good cause, and in particular, Respondent has not established that it cannot meet the deadlines at issue. With respect to discovery, Chief Administrative Law Judge Chappell issued the Scheduling Order in this matter on July 15, 2010; the Order provides a detailed set of deadlines for all components of the discovery process; and Respondent has thus been aware of that schedule for more than five months. With respect to pending Motions, the Commission has already determined that the pendency of the Summary Decision Motion and the Motion To Dismiss does

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[2] Federal Trade Commission, 16 C.F.R. Parts 3 and 4: Rules of Practice: Interim Final Rules With Request For Comment, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009), *adopted as final*, 74 Fed. Reg. 20205 (May 1, 2009). The amendments thus effected govern all Commission adjudicatory proceedings commenced after January 13, 2009, such as this proceeding. *See* 74 Fed. Reg. at 1804.

not warrant staying the proceedings,[3] and the filing of the Motion To Disqualify provides no support for a different conclusion. With respect to the Motion To Compel, the ALJ has now issued an order denying that motion.[4]

As this discussion establishes, Respondent has not given the Commission any reason to depart from our preference to move Part 3 matters expeditiously. Accordingly,

IT IS ORDERED THAT Respondent's Expedited Motion For A Later Hearing Date be, and it hereby is, denied.

By the Commission, Commissioner Brill recused.

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[3] November 15 Order at 2.

[4] Order Denying Respondent's Motion To Compel (Jan. 20, 2011).

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, February 3, 2011

Opinion and order denying respondent's motion to dismiss administrative complaint and granting complaint counsel's motion for partial summary decision on the issue of whether the state action doctrine exempts respondent from antitrust liability.

OPINION AND ORDER DENYING MOTION TO DISMISS AND GRANTING MOTION FOR PARTIAL SUMMARY DECISION

By KOVACIC, Commissioner, for a Unanimous Commission:[1]

I. INTRODUCTION

This case presents us with an opportunity to decide whether the principles of federalism embodied in the state action doctrine shield respondent, the North Carolina State Board of Dental Examiners (the Board), from antitrust challenge to its pattern of conduct alleged to have impaired competition in the market for teeth whitening services.

The Supreme Court held nearly seventy years ago that Congress did not intend the federal antitrust laws to cover the acts of sovereign states. *Parker v. Brown,* 317 U.S. 341 (1943). Since then, a line of Supreme Court cases, which has come to form the state action doctrine, has developed to exempt acts of the sovereign from antitrust scrutiny. This doctrine does not prevent a state from delegating its sovereign ability to pursue anticompetitive market regulation to non-sovereign actors, such as cities or even private actors. Because the balance between competition policy and federalism embodied in the state action doctrine exempts only sovereign policy choices from federal antitrust scrutiny, non-sovereign defendants invoking the state action defense must clear additional hurdles to ensure that their challenged conduct truly

[1] Commissioner Julie Brill has not participated in this matter.

comports with a state decision to forego the benefits of competition to pursue alternative goals. These requirements vary depending on the extent to which a tribunal is concerned that decision-makers are pursuing private rather than sovereign interests. For example, municipalities can enact anticompetitive regulations as long as they can show that their actions are consonant with a clearly articulated and affirmatively expressed state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). Private parties that engage in anticompetitive conduct, on the other hand, can avail themselves of the state action exemption only if they can show that their actions were both taken pursuant to a clearly articulated and affirmatively expressed state policy and actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In the case before us, the decisive majority of the Board, which is charged with regulating the practice of dentistry in North Carolina, earns a living by practicing dentistry. The Complaint alleges that the Board determined on its own that teeth whitening was a practice that could be performed only under the supervision of a dentist and used the imprimatur of state authority to drive lower-priced non-dentists from the relevant market. We conclude that given the Board's obvious interest in the challenged restraint, the state must actively supervise the Board in order for the Board to claim state action protection from the antitrust laws. Because we find such supervision lacking, we further hold that the Federal Trade Commission Act reaches the Board's conduct.

II. PROCEDURAL BACKGROUND

The Commission issued an administrative complaint against the respondent Board on June 17, 2010. The complaint alleges that the Board violated Section 5 of the FTC Act by classifying teeth whitening as the practice of dentistry and by enforcing this determination through cease and desist orders that were neither authorized nor supervised by the state, and that were designed to, and did, drive non-dentist teeth whiteners from the relevant North

Carolina market. The evidentiary hearing before the Administrative Law Judge is currently scheduled for February 17, 2011. Before us are the Board's motion to dismiss the entire administrative complaint on the ground that its conduct is exempted from antitrust liability by the state action doctrine, and Complaint Counsel's motion for partial summary decision on the propriety of the Board's invocation of the state action doctrine as an affirmative defense. The parties have filed memoranda in support of their motions and their respective responses, replies, and supplemental filings, the latest of which was filed on January 20, 2011[2]. Pursuant to our Rules of Practice, 16 C.F.R. § 3.24(a)(1)-(2), the parties have also filed their respective statements of material facts as to which Complaint Counsel contends there is no genuine issue for trial,[3] and as to some of which the Board contends that a genuine dispute does exist[4]. Our decision here is based on our review of those statements, including their accompanying affidavits and exhibits, as well as on matters of "official or judicial notice," such as "judicial decisions, statutes, regulations, and records and reports of administrative bodies." *S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 240 (2004) (internal quotation marks and citation omitted).

Under our revised Rules of Practice, "[m]otions to dismiss filed before the evidentiary hearing . . . and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the

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[2] The Board filed a motion for leave to file a surreply brief, along with the surreply brief, on January 20, 2011. We note that there are no provisions in the Commission Rules to file a surreply brief. Further, the Board's brief is untimely – coming a month after the last filing by Complaint Counsel – and it does not respond to any new arguments raised by Complaint Counsel's reply brief. Nonetheless, as a matter of discretion, we have considered the Board's filing.

[3] *See* Compl. Counsel's Rule 3.24 Separate Statement of Material Facts As to Which There Is No Genuine Issue (hereinafter "CCSMF").

[4] *See* Respt's Separate Statement of Material Facts As to Which There Are and Are Not Genuine Issues (hereinafter "BSMF").

motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a) (2011). The Commission issued those revisions in 2009 "in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge ('ALJ') and the Commission in Part 3 proceedings." 73 Fed. Reg. 58,832 (Oct. 7, 2008) (Proposed Rule Amendments); *see also* 74 Fed. Reg. 1804 (January 13, 2009) (Interim Final Rules); 74 Fed. Reg. 20205 (May 1, 2009) (Amendments Adopted As Final). Thus, "an early ruling on a dispositive motion may expedite resolution of a matter and save litigants resources where the legal issue is the primary dispute." 73 Fed. Reg. at 58,836; *see also S.C. State Bd.*, 138 F.T.C. at 231. We accordingly decide the motions here *ab initio*.

In light of the close of discovery and the fact that the motion of Complaint Counsel for partial summary decision is based on the same issue underlying the Board's motion to dismiss – the opposition to which the Board has fully briefed, supported by affidavits and other evidence – and in the interests of clarity and efficiency, we exercise our discretion to treat the Board's motion to dismiss as a motion for summary decision on the issue of its qualification for state action exemption. *See S.C. State Bd.*, 138 F.T.C. at 242 ("[T]he Commission always has discretion to consider extra-pleading material and to convert a motion to dismiss to one for summary judgment."); *see also United States v. Purdue Pharma L.P.*, 600 F.3d 319, 326 (4th Cir. 2010) (converting a motion to dismiss into one for summary judgment where the parties provided evidence and thoroughly briefed the matter at issue); *Bosiger v. US Airways, Inc.*, 510 F.3d 442, 450 (4th Cir. 2007) ("It is well settled that district courts may convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment, allowing them to assess whether genuine issues of material fact do indeed exist.").

III. APPLICABLE STANDARD OF REVIEW

We review the parties' motions pursuant to Rule 3.24 of our Rules of Practice, whose "provisions are virtually identical to the

provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts." *Polygram Holding, Inc.*, 136 F.T.C. 310, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002); *see also* 16 C.F.R. § 3.24(a)(2) ("If the Commission . . . determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order."). Such a motion or an opposition thereto may be supported by affidavits, depositions, answers to interrogatories, or other appropriate evidence not in dispute, but "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.24(a)(3). Thus, "[t]he mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion." *Polygram*, 2002 WL 31433923, at *1 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). Once the moving party has adequately supported its motion, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It must instead establish "specific facts showing that there is a genuine issue for trial." *Id.* at 587 (internal citations and quotation marks omitted); *see also* 16 C.F.R. § 3.24(a)(3). And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. UNDISPUTED FACTS

No facts material to the antitrust exemption questions before us are in genuine dispute. For purposes of summary judgment on the state action defense issue, we need not determine whether the

Board's activities violate the relevant antitrust laws. Instead we focus only on whether the Board's conduct is exempt from antitrust scrutiny.[5]

The Board is an agency of the State of North Carolina, tasked with regulating the practice of dentistry in that state. N.C. Gen. Stat. § 90-22(a)-(b). It consists of six licensed dentists, one licensed dental hygienist, and one consumer member, who is neither a dentist nor a dental hygienist. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 1-2; BSMF at 6, ¶¶ 1-2. The licensed dentists of North Carolina elect dentist members to the Board for a three-year term. N.C. Gen. Stat. § 90-22(b); CCSMF at 1, ¶¶ 3-4; BSMF at 6, ¶¶ 3-4. During their tenure, Board members may continue to provide for-profit dental services, including teeth whitening. *See* Feingold Tr. 183:13-184:15; Holland Tr. 58:9-16; Wester Tr. 26:24-28:2; Hall Tr. 33:15-34:25; Allen Tr. 18:1-17. Each Board member must submit annual financial disclosures to the Ethics Commission, which list their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they belong and businesses other than their dental practices. N.C. Gen. Stat. § 138A-22(a); CCSFM at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The Board must submit an annual report to the Secretary of State, the State Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee (JLAPOC), which provides, *inter alia*, aggregate information on the number and disposition of investigations by type. N.C. Gen. Stat. § 93B-2; CX0085; CX0086; CX0088; CX0089; CX0091. The Board also must comply with North Carolina's Public Records Act (N.C. Gen. Stat. § 132-1 *et seq*.), Administrative Procedure Act (N.C. Gen.

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[5] Throughout the opinion we use the following abbreviations for the parties' filings: Board's Memorandum in Support of Motion to Dismiss (Corrected) ("Bd. Memo"); Board's Memorandum in Opposition to Complaint Counsel's Motion for Summary Judgment ("Bd. Opp."); Board's Reply Memorandum in Support of Motion to Dismiss ("Bd. Reply"); Complaint Counsel's Memorandum in Support of Motion for Summary Judgment ("CC Memo"); Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Dismiss ("CC Opp.").

Stat. § 150B-1 *et seq.*), and open meetings law (N.C. Gen. Stat. §143-318.9 *et seq.*). BSMF at 53, ¶ 72. Further, the JLAPOC has the power "[t]o review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a).

The complaint's allegations concern the market for teeth whitening services in North Carolina. Compl. ¶ 7. Teeth whitening services are offered both by dentists, as an in-office procedure or a take-home kit, and by non-dentists, in salons, retail stores, and mall kiosks. CCSMF at 3-4, ¶ 16; BSMF at 10-11, ¶ 16. Dentist and non-dentist teeth whiteners differ in terms of the strength of the solution used, the time involved, and the procedures used. *See generally* CCSMF at 4-7, ¶¶ 17-26; BSMF at 11-16, ¶¶ 17-26. The price for non-dentist teeth whitening typically is less than teeth whitening performed by dentists in their offices. CCSMF at 5,7, ¶¶ 19, 25; BSMF at 12, 15, ¶¶ 19, 25.

The complaint charges that the Board, reacting to the competitive threat by non-dentist providers, sought to exclude, and did exclude, non-dentists from the market for teeth whitening services in North Carolina. Compl. ¶¶ 13-23. The undisputed facts show that the Board on numerous occasions sent letters to non-dentist providers, alleging that those recipients were engaging in the unauthorized practice of dentistry in violation of North Carolina laws, and ordering the recipients to cease and desist from providing teeth-whitening services in North Carolina. CCSMF at 17-18, ¶¶ 55, 60; BSMF at 37, 44, ¶¶ 55, 60. The Board also has sent letters to some mall operators asserting that teeth whitening services offered at mall kiosks are illegal, and asking these mall operators to refrain from leasing space to non-dentist teeth whiteners. CCSMF at 19, ¶ 61; BSMF at 44-45, ¶ 61. The complaint does not challenge any attempts by the Board to bring civil or criminal proceedings against alleged violators of the North Carolina Dental Practice Act (N.C. Gen. Stat. § 90-22 *et seq.*).

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Jurisdiction

Citing *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Board argues that it is not subject to the Commission's jurisdiction. *See* Bd. Memo at 17. We disagree. *California Dental* is inapposite in this case where jurisdiction is asserted over a "person," not a "corporation." The complaint in this case, consistent with this established precedent, asserted jurisdiction because "[t]he Dental Board is a 'person' within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45." Compl. ¶ 5. Under Section 5 of the FTC Act, the FTC may exercise jurisdiction over "persons, partnerships, or corporations," with certain exceptions not relevant here. 15 U.S.C. § 45(a)(2). The jurisdictional question at issue in *California Dental* concerned the scope of the statutory definition of "corporation" and, in particular, whether an entity formally organized as a non-profit could nonetheless be subject to the Commission's jurisdiction as a "corporation" if it were "organized to carry on business for its own profit or that of its members." 526 U.S. at 765-66 (quoting 15 U.S.C. § 44). *California Dental*'s test for jurisdiction over "corporations," therefore, has no relevance to this case.

The Supreme Court has held that states and their regulatory bodies constitute "persons" under the antitrust laws. *See, e.g., Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 155 (1983); *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978); *Georgia v. Evans*, 316 U.S. 159, 162 (1942). Consistent with this precedent, and recognizing that the antitrust statutes should be construed together, the Commission has many times exercised jurisdiction over state boards as "persons" under the FTC Act. *See,*

e.g., *Va. Bd. of Funeral Dirs. & Embalmers*, 138 F.T.C. 645 (2004); *S.C. State Bd.*, 138 F.T.C. 229; *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).[6]

B. The State Action Doctrine

In our "dual system of government, . . . the states are sovereign." *Parker*, 317 U.S. at 351. As such, with "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," the Supreme Court concluded that when "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application," it is exempt from the prohibitions of the Sherman Act. *Id*. at 350-52. Thus, anticompetitive regulation is allowed to withstand antitrust challenge as long as a court is satisfied that the restraint at issue is truly state action. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (the litmus test of the state action exemption has always been whether the conduct at issue can be deemed to be "that of the State acting as a sovereign") (internal quotation marks and citation omitted).

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[6] In *Massachusetts Bd. of Registration in Optometry*, the Commission reasoned that because the Supreme Court had held local governments, as agents of the state, to be persons within the meaning of the Sherman Act and the Clayton Act, so too should they be considered persons under the FTC Act. 110 F.T.C. 549, 608-09 (1988) (citing *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 277-78 (1975)). The Commission also noted that its holding was consistent with Commission precedent, including *Indiana Fed'n of Dentists*, 93 F.T.C. 231 n.1 (1979), and the Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24004 (1979). The Commission found its holding further supported by the legislative history of the FTC Act. *Mass. Bd.*, 110 F.T.C. at 609 n.19. The D.C. Circuit's decision in *California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), is not contrary to the general rule that for purposes of jurisdiction, states and their agents are "persons" under the FTC Act. That decision merely holds that the FTC is not authorized to reach the "'acts or practices'" of States acting in their sovereign capacity. *Id*. at 980 (citations omitted). Because we conclude that the Board is not acting as a sovereign, *California State Bd. of Optometry* has no bearing on this case.

When non-sovereign entities engage in conduct that otherwise would violate the antitrust laws, they too can avail themselves of state action protection as long as the sovereign has put into place sufficient safeguards to assure that non-sovereign actors are pursuing state goals rather than their own. *See id.* at 568 (when the activity at issue is carried out by someone other than the sovereign, "closer analysis is required" because "it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State."). For example, in *Midcal*, the Supreme Court held that private parties can use the state action doctrine as a shield to avoid antitrust liability if they can show that the challenged restraint is (1) pursuant to a "clearly articulated and affirmatively expressed [] state policy;"and (2) "actively supervised by the State itself." 445 U.S. at 105 (internal quotation marks omitted).

Although "[a] municipality must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy" before it is entitled to state action exemption from the antitrust laws, *Town of Hallie*, 471 U.S. at 40, municipalities are not subject to *Midcal*'s active supervision prong. *Id.* at 46. As the Court explained, "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* Accordingly, municipalities should be subject to a lower evidentiary threshold, because unlike the case of a private party where "there is a real danger that he is acting to further his own interests, . . . there is little or no danger that [a municipality] is involved in a *private* price-fixing agreement." *Id.* at 47 (emphasis in original); s*ee also id.* at 45 ("We may presume, absent a showing to the contrary, that the muncipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.").

The Board in this matter is not the sovereign[7]. The questions before us now are whether the Board must meet both of *Midcal*'s requirements to qualify for state action protection, and, if so, whether the Board has met them as a matter of law. We conclude that the Board must meet both prongs of the *Midcal* test and that it has failed to show sufficient state supervision.[8] Complaint Counsel is therefore entitled to partial summary judgment dismissing the state action doctrine as an affirmative defense.[9]

1. The Board Must Meet Both Prongs of *Midcal*

In its motion, the Board argues that its challenged conduct is exempt from the federal antitrust laws because, as an instrumentality of the State of North Carolina, its actions are protected by the state action doctrine. *See* Bd. Memo at 7. More specifically, the Board argues that, to qualify for state action protection, its conduct need only meet, and as a matter of law does meet, the first prong of the

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[7] The Supreme Court has held that the legislature and the state's highest court acting in its regulatory capacity are sovereign, but has left open the possibility that the executive may also be sovereign. *See Hoover*, 466 U.S. at 568 & n.17. It is undisputed that the Board is not an arm of the North Carolina legislature or the North Carolina Supreme Court. Moreover, as discussed below, the Board functions in a manner that makes it wholly inappropriate to treat its actions as presumptively sovereign, even if actions of the Governor or executive agencies subject to plenary gubernatorial control might be.

[8] For purposes of this motion, we have assumed, but not decided, that the Board has satisfied the clear articulation requirement. *Cf. Patrick v. Burget*, 486 U.S. 94, 100 (1988) ("We need not consider the clear articulation prong of the *Midcal* test because the active supervision requirement is not satisfied.") (internal quotation marks omitted).

[9] The Board makes fleeting reference to the *Noerr-Pennington* doctrine in the memorandum supporting its Motion to Dismiss. *See* Bd. Memo at 39-40 (citing *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). Such perfunctory recitation of authority, without development, fails to constitute a colorable basis to dismiss the complaint. Accordingly, we do not address this issue.

Supreme Court's standard, enunciated in *Midcal* – that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." 445 U.S. at 105 (internal quotation marks and citation omitted). The Board argues, moreover, that even if the second prong of that test – that "the policy must be 'actively supervised' by the State itself," *id*. – applies in this case, then North Carolina's "structural legal oversight" of the Board is sufficient as a matter of law to satisfy that condition. *See* Bd. Memo at 34-37.

Complaint Counsel argues that the Board is financially interested in the exclusion of non-dentists from the market for teeth whitening services, and also is beholden to the industry it purports to regulate, by virtue of the fact that it is controlled by its dentist members, who are privately elected by North Carolina's licensed dentists. Therefore, says Complaint Counsel, the Board must meet both of *Midcal*'s prongs in order to qualify for state action exemption. *See* CC Memo at 17-29. Further, Complaint Counsel argues that the North Carolina Dental Practice Act, through which the Board was constituted and from which it derives its authority, does not authorize the Board to order non-dentist teeth whitening providers to cease and desist from providing such services, nor to communicate with prospective providers and third parties that the provision of teeth whitening services by dentists is unlawful. Rather, the Dental Act merely authorizes the Board to petition the North Carolina courts for relief relating to any allegedly unauthorized practice of dentistry. Accordingly, argues Complaint Counsel, the Board cannot satisfy either of the *Midcal* prongs, and thus does not qualify for antitrust exemption. *See* CC Memo at 29-34.

Midcal's active supervision requirement serves to ensure that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint on competition] have been established as a product of deliberate state intervention." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992); *see also Burget*, 486 U.S. at 100 (noting that the active supervision requirement "stems from the recognition that 'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting

to further his own interests, rather than the governmental interests of the State.'") (quoting *Hallie*, 471 U.S. at 47). The Court has held that the active supervision requirement applies to private parties (*e.g., Midcal*; *Patrick*; *Ticor*), and does not apply to political subdivisions of the State such as municipalities (*e.g., Hallie*). Respondent argues, however, that the Court has never ruled directly on the question of whether state agencies must be supervised too, and therefore we should take our guidance from a footnote suggesting they need not[10] and from lower court cases in accord.

Whatever the case may be with respect to state agencies generally, however, the Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants. The Court's jurisprudence in this area leads us to conclude that when determining whether the state's active supervision is required, the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated. As the Court emphasized repeatedly, the "real danger" in not insisting on the state's active supervision is that the entity engaged in the challenged restraint turns out to be "acting to further [its] own interests, rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47; *Patrick*, 486 U.S. at 100.

Thus, in *Goldfarb v. Virginia State Bar*, a fee schedule for real estate title searches that was enforced by the Virginia state bar was found to violate the antitrust laws, even though the enforcement agency was "a state agency by law." 421 U.S. 773, 783, 790 (1975). The Court's reasoning in that case is particularly illuminating. The Court rejected the state action defense, in part, because the state bar's enforcement of the unlawful fee schedule – via its issuance of ethical opinions – was deemed to be undertaken "for the benefit of its members," and, equally significantly, "there was no indication . . . that the Virginia Supreme Court approves the [ethical] opinions." *Id.* at 790-91. We draw two conclusions from *Goldfarb*: First, as the

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[10] Bd. Memo at 30 n.7 (quoting *Hallie*, 471 U.S. at 46 n.10).

Court reasoned, "that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices *for the benefit of its members*." *Id*. at 791 (emphasis added). Thus, the inquiry into the public/private character of the governmental entity's challenged conduct should focus not on the formalities of state law (after all, the subject entity in *Goldfarb* was "a state agency by law," *id*. at 790), but rather on the realities of the decision-maker's independent judgment. The state bar's enforcement of a minimum fee schedule was deemed clearly for the benefit of its member lawyers, not the general public. Second, it seems reasonable to conclude that had the state's supervisory role, in the form of the Virginia Supreme Court's approval of the state bar's ethical opinions, been more vigorous, the Court's conclusion on the application of the state action doctrine may well have been different. Instead, the Court's analysis strongly suggests that such active supervision is crucial, even for a state agency, in circumstances where the state agency's decisions are not sufficiently independent from the entities that the agency regulates.

Although the courts of appeals have been less than consistent on this issue, there is ample support for the proposition that financially interested governmental bodies must meet the active supervision prong of *Midcal*. *See, e.g.*, *Wash. State Elec. Contractors Ass'n, Inc. v. Forest*, 930 F.2d 736, 737 (9th Cir. 1991) (whether an entity must show active supervision depends on the realities of its structure, such as having private members who "have their own agenda which may or may not be responsive to state . . . policy"); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) ("[W]hether any 'anticompetitive' Board activities are 'essentially' those of private parties" – and hence subject to active supervision – "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3rd Cir. 1971) (in determining whether state action exemption applies to a state regulatory board, "the relevant distinction is between genuine governmental action controlling the anticompetitive practice, and an attempt by government officials to 'authorize individuals to perform

acts which violate the antitrust laws'") (quoting *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959)); *Asheville Tobacco Bd.*, 263 F.2d at 509 ("[T]he state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials.") (citation omitted).

Leading antitrust commentary supports this view. In their antitrust treatise, for example, Professors Areeda and Hovenkamp also reject the formalities of a governmental body's status under state law in determining whether active supervision should be deemed necessary. They conclude that it is good policy to classify as "private" for state action purposes "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." Phillip E. Areeda & Herbert Hovenkamp, 1A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 227b, at 501 (3d ed. 2009); *see also id.* ¶ 224a, at 500 ("Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required."). Professor Elhauge, moreover, concludes that "financially interested action is always 'private action' subject to antitrust review." Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 689 (1991); *see also id.* at 696 ("[A]n anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint.").

Lastly, requiring active supervision by the state itself in circumstances where the state agency in question has a financial interest in the restraint that the agency seeks to enforce, especially when the state agency is not accountable to the public but rather to the very industry it purports to regulate, is entirely consistent with the policies underlying the *Parker* doctrine. The Supreme Court created the state action doctrine in recognition that states, in their sovereign

capacities, may choose to supplant competition to effect other policy goals. A state decision to take action that contravenes the antitrust laws in theory represents a choice by citizens of that state to forego the benefits of competition in favor of alternative ends. If a state legislature adopts a policy that restricts competition against the wishes of its citizens, it faces political consequences. The Court has explained that the rationale behind the *Midcal* requirements is to assure political accountability:

> States must accept political responsibility for actions they intend to undertake. . . . Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Ticor, 504 U.S. at 635. Accordingly, if a state permits private conduct to go unchecked by market forces, the only assurance the electorate can have that private parties will act in the public interest is if the state is politically accountable for any resulting anticompetitive conduct; when conduct subject to political review is not in the public interest, it can be stopped at the ballot box. Decisions that are made by private parties who participate in the market that they regulate are not subject to these political constraints unless these decisions are reviewed by disinterested state actors to assure fealty to state policy. Without such review, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Therefore, allowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest; absent antitrust to police their actions,

unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' best interests.

Although requiring active supervision of state regulatory bodies that are controlled by private market participants may impose additional costs on states, we believe that this rule is faithful to the Supreme Court's decisions striking the correct balance between our national policy in favor of competition, on the one hand, and principles of federalism on the other. As discussed above, the risk to competition posed by regulatory bodies comprising private market participants is greater than the risk posed by elected representatives, who are accountable directly to the public. At the same time, deference to policy-making by private parties who occasionally are cloaked in a modicum of state authority does not vindicate federalism to the same degree as granting the state sovereign itself wide berth to regulate markets.

We find unconvincing the Board's arguments that a regulatory body controlled by private market participants should not be asked to show active state supervision of its exclusionary conduct. The Board first relies on certain decisions of the courts of appeal that found state agencies need not show active supervision, even in circumstances where the Board's independent judgment and control are not manifest. *See* Bd. Opp. at 18 (citing *Earles v. State Bd. of Certified Public Accountants of Louisiana,* 139 F.3d 1033, 1041 (5th Cir. 1998); *Bankers Ins. Co. v. Florida Residential Property & Casualty Joint Underwriting Ass 'n*, 137 F.3d 1293, 1296-97 (11th Cir. 1998); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989); *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982)). These decisions, however, appear in large part to be based on those courts' examination of a laundry list of attributes of the respective governmental entities (e.g., open records, general financial and ethical oversight) to determine the extent to which they resembled the municipality in *Hallie*, rather than an inquiry into whether the challenged restraint was effected by a body controlled by market participants who stood to benefit from the regulatory action. *See, e.g.*, *Earles*, 139 F.3d at 1041 (examining a list of factors and

concluding that "the Board is functionally similar to a municipality"); *Hass*, 883 F.2d at 1460 (state law provisions governing its public records and meetings, financial audits, and ethical conduct "leave no doubt that the Bar is a public body, akin to a municipality, for the purposes of the state action exemption."). The Eleventh Circuit in *Bankers Insurance*, moreover, appeared to find the fact that the members of the underwriting association *did not* compete in the market that they regulated key to its decision not to require active supervision. 137 F.3d at 1297 ("This impossibility of competition is an indicator that the Association represents public interests, rather than competing private interests.")[11]. *Gambrell*, a case on which the respondent relies heavily, is also distinguishable from the instant case. There, the Kentucky Board of Dentistry was enforcing a clear, unambiguous legislative prohibition on denture producers taking orders from anyone other than licensed dentists. 689 F.2d at 618 (defendant's conduct "emanates directly from the mandate of the state law in a well-developed and long-established statutory scheme. It is not left to the private sector to decide what the policy is and whether it is to be complied with."). Here, by contrast, the Board has exercised discretion to implement a policy to exclude non-dentists from a market in which they compete against North Carolina dentists. Accordingly, with the possible exception of *Earles*, which we decline to follow, we do not read these cases to be contrary to our holding here[12].

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[11] Further, the rule at issue in *Hass* required participation in a malpractice insurance pool; the challenged regulation did not implicate competition among the regulators themselves. Although the *Hass* court did not focus on this fact as a ground for its decision, the absence of such competition suggests that there was limited danger that private parties were "further[ing their] own interests, rather than the governmental interests of the State." *Town of Hallie*, 471 U.S. at 47.

[12] As Complaint Counsel points out in its opposition memorandum, *see* CC Opp. at 7 n.8, the *Earles* court's reliance on cases it perceived as relevant precedents, but which do not in fact involve regulatory bodies controlled by private market participants, confirms our view that the court's holding there is not squarely on point with the allegations here. Moreover, unlike the Board here, the *Earles* Board members "are chosen by the governor . . . and they must be

The Board also argues that *Goldfarb* and *Bates* predate *Hallie*'s dicta that state agencies likely would not be required to show active state supervision, and thus those cases should not be accorded much weight in our analysis. Bd. Reply at 10. We disagree. First, *Midcal*'s two-pronged test itself was extracted from the Court's prior state-action decisions, including *Goldfarb*. *See* 445 U.S. at 104-05 ("These decisions establish two standards for antitrust immunity under *Parker v. Brown*") (referring to *Goldfarb*; *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); and *New Vehicle Motor Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)). A Supreme Court decision that is directly on point here should not be ignored because of a subsequent passing comment by the Court, especially when the *Hallie* Court made it amply clear that it was not deciding the state agency issue. *See Hallie*, 471 U.S. 46 n.10. Second, the dicta in footnote 10 of *Hallie* must be reconciled with the Court's other language and reasoning in that same decision. The *Hallie* Court distinguished *Goldfarb* and *Cantor* on the basis that those cases "concerned private parties – not municipalities." *Id*. at 45. The party claiming the state action exemption in *Goldfarb* was the Virginia State Bar, explicitly acknowledged by the Court to be "a state agency by law." *See Goldfarb*, 421 U.S. at 789-90. Yet, the *Hallie* Court distinguished the Virginia State Bar from a municipality, on the ground that the latter "is an arm of the State" and thus is presumed to "act[] in the public interest," while "[a] private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." 471 U.S. at 45. Thus, the Court clearly did not view state regulatory bodies such as the Virginia State Bar as equivalent to municipalities with respect to their incentives to pursue public as opposed to private ends – and therefore excused from *Midcal*'s active supervision requirement – as the Board would have us read footnote 10 of the *Hallie* opinion. The *Hallie* Court based its public/private distinction on the realities of the specific economic interests involved, as we do here.

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confirmed by the state senate," 139 F.3d at 1035, thus providing some of the political accountability lacking in this case.

We accordingly hold that a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine[13]. We further conclude that the Board is such a state regulatory body. Because North Carolina law requires that six of the eight Board members be North Carolina licensed dentists, the Board is controlled by North Carolina licensed dentists. *See* CCSMF at 1, ¶ 1; BSMF, at 6, ¶ 1; N.C. Gen. Stat. § 90-22(b). Although there may be some factual dispute over the relative importance of teeth whitening revenues to a dental practice's total revenues, the undisputed facts show that North Carolina dentists – including some of those dentists who complained to the Board about non-dentist teeth whitening – perform teeth whitening in their private practices. *See* CCSMF at 11-12, ¶¶ 37-40; BSMF at 21-23, ¶¶ 37-40. Non-dentists also provide teeth whitening services in North Carolina, and advertise themselves as a lower-priced alternative for dentist teeth whitening. CCSMF at 6, 9, ¶¶ 23, 30; BSMF at 14, 18, ¶¶ 23, 30. Under these circumstances, "common sense and economic theory, upon both of which the FTC may rely," *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 456 (1986), dictate the conclusion that Board actions in this area could be self interested. Absent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession.

Our conclusion that the Board must meet the active supervision requirement is reinforced by the Board's accountability to North Carolina's licensed dentists; the six dentist members of the Board are elected directly by their professional colleagues, the other licensed dentists in North Carolina. N.C. Gen. Stat. § 90-22(b); *see also*

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[13] Because the Board is so clearly controlled by market participants, we need not consider the extent to which the active supervision prong should apply to state regulatory bodies comprising other types of private actors, where the risk of harm to competition and the level of political accountability might be balanced differently.

CCSMF at 1, ¶¶ 1-3; BSMF at 6, ¶¶ 1-3. The dentist members of the Board can run for reelection, and some of them have served two or more terms. CCSMF at 1, ¶ 4; BSMF at 6-7, ¶ 4. The Board's judgment under such economic and political pressures can hardly be characterized as sufficiently independent that the Board may bypass active supervision by the state, yet still enjoy the antitrust exemption accorded only to a state's sovereign acts.

The Board argues that Complaint Counsel has presented no evidence that the individual dentist members of the Board have a financial conflict of interest or that they derived substantial revenues in their private practice from teeth whitening services. *See, e.g.,* Bd. Memo at 38, 40; Bd. Reply at 13-14. We find this argument unpersuasive. First, we hold that the determinative factor in requiring supervision is not the extent to which individual members may benefit from the challenged restraint, but rather the fact that the Board is controlled by participants in the dental market. North Carolina dentists stand to reap economic gains when the Board takes actions to exclude non-dentists from competing to provide certain services. Second, although our holding is not predicated on the Board members' actual financial interests, the undisputed facts show that many of the Board members do perform teeth whitening in their private practice. *See* Feingold Tr. 183:13-22; Holland Tr. 58:9-16; Wester Tr. 26:24-28:2; Hall Tr. 33:15-34:25; Allen Tr. 18:1-17. Third, Respondent's reference to conflicts of interest is misplaced. The complaint allegations here, and the policies underlying the *Midcal* test for antitrust exemption, do not concern issues of official misconduct or unethical behavior – which might be addressed by a state ethics law – but rather target the incumbent dentists' efforts to exclude their competitors from a particular economic market[14]. That alleged conduct lies at the heart of the federal antitrust laws, and is the only conduct with which we deal here.

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[14] As discussed *infra*, the Ethics Commission review for financial conflicts of interest does not include an examination of substantive Dental Board policies.

The Board points to the various ways in which the State of North Carolina purportedly "is heavily involved in the State Board's proceedings," and argues that the Board thus meets the criteria articulated in *Hass* and *Bankers Insurance* that would allow it to bypass the active supervision requirement. Bd. Memo at 32-33. As discussed above, however, rather than formalities such as financial audits of Board funds and taking oaths to uphold the state law, the most salient factor to consider in determining whether active state supervision ought to be required is that the Board is controlled by members who continue to participate in the private market that the Board is charged with regulating. This latter factor, bolstered in this case by the fact that the Board members are selected by other North Carolina dentists, strongly suggests a lack of judgment and control independent of the regulated industry, which are the hallmarks of the *Midcal* active supervision test.

Accordingly, we conclude that for the Board to succeed in its claim of antitrust exemption under the state action doctrine, it must show that it satisfies both prongs of *Midcal*.

2. The Board's Conduct Was Not Actively Supervised

The Board argues that even if it were subject to *Midcal*'s active supervision requirement, the state of North Carolina's oversight of the Board would be sufficient to confer state action protection. *See* Bd. Memo at 34; Bd. Reply at 16-17. We disagree. As discussed above, the active supervision requirement exists to guarantee that self-interested parties are restricting competition in a manner consonant with state policy. In this manner, the active supervision converts private conduct, which is subject to antitrust review, into a sovereign policy choice, which is not. Toward this end, the active supervision requirement "mandates that the State *exercise* ultimate control over the challenged anticompetitive conduct[;] . . . [t]he mere presence of some state involvement or monitoring does not suffice." *Burget*, 486 U.S. at 101 (emphasis added); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987) (holding that certain

forms of state scrutiny of a private restraint did not constitute active supervision because they did not exert "any significant control over" the terms of the restraint); *Midcal*, 445 U.S. at 105-06 (California system for wine pricing fails the active supervision requirement because "[t]he State does not . . . engage in any 'pointed reexamination' of the program"); *Parker*, 317 U.S. at 352 (stressing that the challenged marketing plan could not take effect unless approved by state board).

On prior occasions, the Commission has explained that it would consider the following elements in determining whether a state has actively supervised private anticompetitive conduct: (1) the development of an adequate factual record; (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the substantive standards established by the legislature. *See* Opinion of the Commission*, Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 405, 420-21 (2005), *aff'd sub nom. Kentucky Household Goods Carriers Ass'n v. FTC*, 199 Fed. Appx. 410, 2006 WL 2422843 (6th Cir. 2006); *see also Analysis of Proposed Order to Aid Public Comment*, *Indiana Household Movers and Warehousemen, Inc.*, 135 F.T.C. 535, 555-561 (2003); FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 55 (Sept. 2003). Although no single one of these elements is necessarily a prerequisite for active supervision, the Board has presented no evidence that any of these elements are satisfied here. The lack of any evidence that an arm of the State of North Carolina developed a record, or rendered a decision that assessed the extent to which the Board's policy toward non-dentist teeth whitening comported with North Carolina state policy, strongly suggests a lack of state supervision.

Respondent cites a litany of North Carolina statutes and constitutional provisions as evidence that the Board's actions are subject to review by various state entities. *See, e.g.,* BSMF at 51-53, ¶ 72. Most of these laws are irrelevant to the active supervision

inquiry[15]. Other, potentially more relevant provisions of North Carolina law that the Board highlights as evidence of active supervision include requirements that: each Board member submit detailed financial disclosures to the Ethics Commission; the Board submit an annual report to the Secretary of State, the State Attorney General, and the JLAPOC; and the Board submit an annual audited financial report. *See* Bd. Opp. at 29; BSMF at 51-53, ¶ 72. This sort of generic oversight, however, does not substitute for the required review and approval of the "*particular* anticompetitive acts" that the complaint challenges. *Patrick*, 486 U.S. at 101 (emphasis added). For instance, the Board's annual reports provide only aggregate information on the number and disposition of investigations by type, providing no hint as to the underlying substance of any of these matters, let alone a discussion of the Board's policy toward non-dentist teeth whitening. *See* CCSMF at 22, ¶ 74; CX0085; CX0086; CX0088; CX0089; CX0091. Board members' financial disclosures to the Ethics Commission list only their assets and liabilities, state that they are engaged in the practice of dentistry, and identify the professional associations to which they belong and businesses other than their dental practices. *See* CCSMF at 22-23, ¶¶ 75-76; Newson Decl. at 5, ¶ 11; CX0395; CX0396. The declaration of the Executive Director of the North Carolina Ethics Commission states that "the

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[15] *See, e.g.*, N.C. Gen. Stat. § 6-19.1 (attorney's fees to parties appealing or defending against agency decision); N.C. Gen. Stat. § 7A-3 (judicial power, transition provisions); N.C. Gen. Stat. § 50-13.12(a)(1) (forfeiture of licensing privileges for failure to pay child support or for failure to comply with subpoena issued pursuant to child support or paternity establishment proceedings); N.C. Gen. Stat. § 55B-2(3) (definition of professional corporation); N.C. Gen. Stat. §§ 66-58(a) & (e) (sale of merchandise by government units); N.C. Gen. Stat. §§ 66-68(a) & (e) (certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name); N.C. Gen. Stat. § 114-8.2 (charges for legal services); N.C. Gen. Stat. §115C-457.1 (creation of civil penalty forfeiture fund; administration); N.C. Gen. Stat. §115D-89 (state board of community colleges to administer Article; issuance of diplomas by schools; investigation and inspection; rules); N.C. Gen. Stat. § 147-69.3 (administration of State Treasurer's investment programs); N.C. Gen. Stat. §§ 153A-134, 160A-194 (regulating and licensing businesses).

Commission . . . has not assessed whether Dental Board members have sought to regulate or restrict the business practices of non-dentist providers of teeth whitening services." Newson Decl. at 6, ¶ 14; *see also id.* at 6, ¶ 15 ("The Commission's primary focus is on the avoidance of unlawful conflicts of interest by individual members of covered Boards and other entities; not on the specific substantive actions taken by covered boards."). Similarly, the Board's audited financial statements include no information regarding the Board's actions generally, or its policy regarding non-dentist teeth whitening, specifically. *See* CCSMF at 22, ¶ 73.

In sum, none of these legislative provisions suggest that a state actor was even aware of the Board's policy toward non-dentist teeth whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement.

The Board also points to requirements that it comply with North Carolina's Public Records Act, Administrative Procedure Act, and open meetings law when conducting its business, *see* Bd. Opp. at 29, and to the JLAPOC's power "[t]o review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a)[16]. The Board, however, presents no evidence that any state actor became aware of the Board's non-dentist teeth whitening policy pursuant to these, or any other, provisions of North Carolina law. Even had these provisions made a disinterested state actor aware of the Board's non-dentist teeth whitening policy, moreover, the Board provides no evidence that the JLAPOC, or any other state actor, reviewed or approved the Board's challenged conduct. For

[16] It is unclear whether the JLAPOC even has the ability to review the Board's non-dentist teeth whitening policy to the extent that the Board's actions were classified as "individual disciplinary actions." *See* N.C. Gen. Stat. § 120-70.101(3a) (JLAPOC review "shall note include decisions concerning . . . individual disciplinary actions."). Further, the open records requirement does not guarantee that enforcement actions regarding the unauthorized practice of dentistry will not be addressed in closed session. *See* Board's Resp. and Objections to Compl. Counsel's First Set of RFAs at 17, ¶ 44.

state action purposes, silence on the part of the state does not equate to supervision. In *Ticor*, for example, the Supreme Court rejected the argument that private conduct was adequately supervised when the state merely was made aware of privately-set rates and took no action, holding that "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." 504 U.S. at 638. Rather, to satisfy the active supervision standard, a state official must "have *and* exercise power to review particular anticompetitive acts." *Patrick*, 486 U.S. at 101 (emphasis added). Further, the Supreme Court has made clear that ex-post consideration of a restraint via the political process is also insufficient to satisfy *Midcal*'s active supervision requirement. *See Lafayette*, 435 U.S. at 406; *Duffy*, 479 U.S. at 345. Accordingly, the mere fact that the Board's decisions possibly could have been discovered by the public or subject to review by the JLAPOC is not active supervision for state action purposes.

The Board also argues that several other means by which it could exclude non-dentists from performing teeth whitening are subject to state supervision. *See* Bd. Memo at 35. For example, a criminal suit or civil suit to enjoin illegal teeth whitening must be brought in a North Carolina court; a rule on teeth whitening is subject to the state's Administrative Procedure Act and subject to review by legislative committees; and a binding interpretation of the Dental Practice Act regarding teeth whitening must be made pursuant to the state's Administrative Procedure Act. *Id*. Even if ex-post review by a North Carolina court of the Board's decision to classify teeth whitening as the practice of dentistry were to constitute adequate supervision – an issue on which the Supreme Court has yet to decide, *see Burget*, 504 U.S. at 104, and which we do not address – the Board did not choose this path. Rather, the Board evaded judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision[17]. Similarly,

[17] Our holding is not meant to suggest that the Board must always proceed directly to court against individuals whom it suspects may be involved in the

although ex-post judicial, legislative, or executive review of a formal rule making or binding interpretation of the Dental Practice Act might constitute adequate supervision for state action purposes in some circumstances, the Board chose to forgo these formal means to address non-dentist teeth whitening.

In the end, the Board has presented no evidence to suggest that its decision to classify teeth whitening as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board's conduct into conduct of the state of North Carolina.

* * *

We conclude that because the Board is controlled by practicing dentists, the Board's challenged conduct must be actively supervised by the state for it to claim state action exemption from the antitrust laws. Because we find no such supervision, we hold that the antitrust laws reach the Board's conduct.

VI. CONCLUSION

For the reasons discussed above, we deny the Board's motion to dismiss (which we have treated as a motion for summary decision) based on a claim of state action exemption from the antitrust laws, and we grant Complaint Counsel's motion for partial summary decision on the same issue. We issue herewith an order rejecting the Board's invocation of the state action doctrine as a basis for exempting its challenged conduct from the federal antitrust laws.

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unauthorized practice of dentistry. For example, the Board may be authorized to send warning letters as incidental to its authority to bring civil actions. We hold only that for the Board to enjoy state action exemption from the antitrust laws, the state of North Carolina must supervise the Board's actions that restrain competition.

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, February 3, 2011

Order denying respondent's motion to dismiss, granting complaint counsel's motion for partial summary decision, denying respondent's motion to disqualify the Commission, and granting respondent's motion for leave to file limited surreply brief.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS, GRANTING COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION, DENYING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION, AND GRANTING RESPONDENT'S MOTION FOR LEAVE TO FILE LIMITED SURREPLY BRIEF

The Commission has considered Respondent's Motion to Dismiss on state action grounds (which the Commission has treated as a motion for summary decision) and Complaint Counsel's Motion for Partial Summary Decision on state action grounds, Respondent's Motion to Disqualify the Commission, and Respondent's Motion for Leave to File Limited Surreply Brief, as well as both parties' memoranda of law in support of and in opposition to these motions. For the reasons set forth in the accompanying Opinion, the Commission has determined to deny Respondent's Motion to Dismiss, to grant Complaint Counsel's Motion for Partial Summary Decision, to deny Respondent's Motion to Disqualify the Commission,[1] and to grant Respondent's Motion for Leave to File Limited Surreply Brief. Accordingly,

I.

IT IS ORDERED THAT Respondent's Motion to Dismiss (which the Commission has treated as a motion for summary decision) be, and it hereby is, **DENIED**.

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[1] An opinion setting forth the reasons for denying this motion is forthcoming.

II.

IT IS FURTHER ORDERED THAT Complaint Counsel's Motion for Partial Summary Decision, be, and it hereby is, **GRANTED** and Respondent's state action defense is **DISMISSED**.

III.

IT IS FURTHER ORDERED THAT Respondent's Motion to Disqualify the Commission, be, and it hereby is, **DENIED**.

IV.

IT IS FURTHER ORDERED THAT Respondent's Motion for Leave to File Limited Surreply Brief, be, and it hereby is, **GRANTED**.

By the Commission, Commissioner Brill recused.

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, February 9, 2011

Order denying respondent's motion for reconsideration of its request to postpone the commencement of the administrative trial and denying respondent's request for the Commission to review the administrative judge's ruling denying respondent's motion to compel discovery.

ORDER DENYING (1) RESPONDENT'S MOTION FOR RECONSIDERATION OF THE ORDER DENYING EXPEDITED MOTION FOR A LATER HEARING DATE AND (2) RESPONDENT'S APPLICATION FOR REVIEW OF THE ALJ'S ORDER DENYING RESPONDENT'S MOTION TO COMPEL

The Federal Trade Commission issued the Administrative Complaint in the above-captioned matter on June 17, 2010. The Complaint provides – consistent with Commission Rule 3.11(b)(4), 16 C.F.R. § 3.11(b)(4) – that the administrative hearing in this matter shall begin on February 17, 2011.

Commission Rules 3.21(c)(1) and 3.41(b) provide that the Commission may, "upon a showing of good cause," postpone the commencement of the evidentiary hearing. 16 C.F.R. §§ 3.21(c)(1), 3.41(b). On January 19, 2011, Respondent filed an Expedited Motion for a Later Hearing Date. On January 21, 2011, the Commission issued an Order ("January Order") denying that motion[1]. As the Commission noted in its January Order, the date on which the evidentiary hearing will begin has been known since June 17, 2010, when the Commission issued the Administrative Complaint in this matter. The Commission determined that none of the circumstances described by Respondent provided the requisite showing of good cause to change the evidentiary hearing date.

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[1] *Commission Order Denying Expedited Motion For A Later Hearing Date* (January 21, 2011).

On January 24, 2011, Respondent filed a motion for reconsideration of the January Order ("Respondent's Motion"),[2] and on February 1, 2011, Complaint Counsel filed a memorandum in opposition to Respondent's Motion. Respondent first suggests that the pending status of a number of motions and related discovery disputes supports reconsideration of the January Order. Respondent's Motion at 2-5. Respondent also suggests that the fact that Respondent filed an application for review of the ALJ Order denying its motion to compel discovery -- on January 24, 2011, after the Commission issued the January Order -- constitutes a new material fact supporting reconsideration of the January Order. Respondent's Motion at 5-6. These factors do not, however, provide a basis for reconsideration. It would be anomalous to permit a party to secure a delay in commencement of the evidentiary hearing simply by filing a variety of motions and then arguing that postponement must be granted because the motions have not yet been addressed. In any event, the motions on which Respondent relies have now been addressed[3]. As a result, neither the date on which the evidentiary

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[2] This is Respondent's third motion to the Commission seeking a delay in these proceedings. On November 15, 2010, the Commission denied Respondent's Motion For Stay of Proceeding. *Commission Order Denying Motion For Stay of Proceeding* (November 15, 2010).

[3] First, on January 20, 2011, the Chief Administrative Law Judge ("ALJ") denied Respondent's Motion For An Order Compelling Discovery, and on February 1, 2011, denied Respondent's application for review of that order. Second, on January 25, 2011, the ALJ denied Respondent's Motion To Change Hearing Location, and on February 7, 2011, denied Respondent's application for review of that order. Third, on January 25, 2011, the ALJ denied Respondent's Expedited Motion To Amend the Scheduling Order. Fourth, on February 3, 2011, the Commission issued an Opinion and an accompanying Order that denied Respondent's Motion To Dismiss, granted Complaint Counsel's Motion for Partial Summary Decision, denied Respondent's Motion to Disqualify the Commission, and granted Respondent's Motion for Leave to File Limited Surreply Brief. These documents may all be reviewed on the page for this proceeding, at the following location:
http://www.ftc.gov/os/adjpro/d9343/index.shtm.

hearing will begin nor the place at which it will be conducted has changed since the Complaint was issued more than seven months ago.

We dispose of one other matter in this Order. On February 2, 2011, Respondent filed an application ("Respondent's Application") seeking Commission review of the ALJ's February 1 Order denying Respondent's Application for Review of Order Denying Respondent's Motion to Compel. On February 8, 2011, Complaint Counsel filed an opposition. As Complaint Counsel points out, the Commission's Rules of Practice do not permit Respondent's Application. Interlocutory appeals to the Commission are governed by Rules 3.23(a) and 3.23(b). 16 C.F.R. § 3.23(a), (b). Commission Rule 3.23(a) does not permit interlocutory appeals to the Commission from ALJ rulings on motions to compel discovery. 16 C.F.R. § 3.23(a). Commission Rule 3.23(b) does permit interlocutory appeals to the Commission from ALJ rulings on such motions but only when (1) the ALJ *fails to rule* on an application to take an interlocutory appeal or (2) the ALJ *grants* the application to take an interlocutory appeal. 16 C.F.R. § 3.23(b). In this case, the ALJ denied Respondent's application to take an interlocutory appeal on a timely basis. No interlocutory appeal to the Commission therefore may be taken.

* * *

As the foregoing discussion establishes, Respondent has not made the requisite showing of good cause to reconsider the Commission's January 21, 2011 Order Denying Expedited Motion For A Later Hearing Date. Accordingly,

IT IS ORDERED THAT Respondent's Motion For Reconsideration Of The Order Denying Expedited Motion For A Later Hearing Date be, and it hereby is, denied; and

IT IS FURTHER ORDERED THAT Respondent's Application For Review To The Commission Of The Administrative

Law Judge's Order Denying Respondent's Motion To Compel Discovery be, and it hereby is, denied.

By the Commission, Commissioner Brill recused.

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, February 15, 2011

Order denying respondent's motion to stay the administrative proceedings pending the resolution of a parallel federal court action.

ORDER DENYING RESPONDENT'S EXPEDITED MOTION FOR STAY OF PROCEEDINGS

The Federal Trade Commission issued the Administrative Complaint in this proceeding on June 17, 2010. The Complaint provides – consistent with Commission Rule 3.11(b)(4), 16 C.F.R. § 3.11(b)(4) – that the administrative hearing in this matter shall begin on February 17, 2011. On February 1, 2011, Respondent filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the Federal Trade Commission in the United States District Court for the Eastern District of North Carolina (Western Division), and on February 2, 2011, Respondent filed a Motion for Temporary Restraining Order and Other Equitable Relief in that Court. On February 9, 2011, the District Court issued an Order which, *inter alia*, denied that motion, stating in relevant part:

> Upon careful consideration of the issues raised, the undersigned concludes that plaintiff has failed to satisfy the requirements for a temporary restraining order. Among other things, plaintiff has failed to show that the threatened harm is sufficiently immediate so as to warrant the extraordinary remedy of a temporary restraining order. . . . Substantive issue of or relating to the likelihood of plaintiff's success on the merits looms large concerning whether plaintiff seeks this court improperly to enjoin ongoing administrative enforcement proceedings. The present showing is not

> sufficient to warrant a temporary restraining order. Plaintiff's request for temporary restraining order is DENIED.[1]

The District Court also requested a briefing schedule on the request for a preliminary injunction within two weeks. The court thus did not seek to prohibit or delay the evidentiary hearing in this administrative proceeding from beginning as scheduled on February 17, 2011.

On February 10, 2011, Respondent filed in this proceeding an Expedited Motion for Stay of Proceedings Pending Outcome of a Motion for Preliminary and Permanent Injunction in the federal court action[2]. We understand from Respondent's filing that Complaint Counsel intends to oppose this motion. Commission Rule 3.41(f) provides that "[t]he pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs." *See also* 74 Fed. Reg. 1816 ("the granting of a stay [under 3.41(f)] is likely to implicate public interest considerations . . ."). Respondent has failed to demonstrate good cause to depart from the usual rule that the pendency of a collateral

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[1] *North Carolina State Board of Dental Examiners, Plaintiff, v. Federal Trade Commission, Defendant* (Eastern District of North Carolina, Western Division), No. 5:11-CV-49-FL, Order (February 9, 2011) (denying plaintiff's motion for a temporary restraining order and directing filing of joint report and plan on case scheduling matters within fourteen days).

[2] This is Respondent's fourth motion to the Commission seeking a delay of these proceedings. On November 15, 2010, the Commission denied Respondent's Motion For Stay of Proceeding. *Commission Order Denying Motion For Stay of Proceeding* (November 15, 2010). On January 19, 2011, Respondent filed an Expedited Motion for a Later Hearing Date. On January 21, 2011, the Commission issued an Order ("January Order") denying that motion. *Commission Order Denying Expedited Motion For A Later Hearing Date* (January 21, 2011) On January 24, 2011, Respondent filed a motion for reconsideration of the January Order ("Respondent's Motion"), and on February 9, 2011, the Commission issued an Order denying that motion as well. *Commission Order Denying Motion to Reconsider Respondent's Motion for A Later Hearing Date* (Feb. 9, 2011).

proceeding in federal court does not constitute a basis for staying FTC administrative proceedings[3]. More generally, the Commission's Rules of Practice encourage an expeditious resolution of administrative proceedings. The Rules governing these proceedings begin by articulating the Commission's policy that administrative proceedings shall be conducted "expeditiously." 16 C.F.R § 3.1. In addition, "counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." *Id*. The District Court's denial of Respondent's motion for a temporary restraining order strongly supports the Commission's determination that good cause to ignore the foregoing principles and delay the beginning of the evidentiary hearing has not been established.

Respondent asserts that the pendency of the collateral District Court proceeding likely will result in "duplicative and unnecessary litigation efforts by both Complaint Counsel . . . and the State Board." Motion at 3. Respondent, however, provides no support for that assertion, and the District Court order refutes it. Indeed, Respondent's motion appears to be little more than an attempt to relitigate the temporary restraining order motion it filed in District Court, and the District Court refused to grant that relief. Moreover, Respondent's claims of undue burden ring hollow, given that Respondent initiated the district court proceeding and waited to do so until three weeks before the administrative proceeding was scheduled to begin. To allow respondents to stay FTC proceedings based on the pendency of collateral federal court actions that they themselves have initiated would create perverse incentives to attempt to create duplicative proceedings, and would place respondents,

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[3] Over the past few years, the Commission has denied similar motions where the Commission was in federal court under Section 13(b) of the FTC Act to secure preliminary injunctions in merger cases. *See* Whole Foods Market, Inc., *Order Amending Scheduling Order and Denying Respondent's Motion to Stay Proceeding* (Dec. 19, 2008); INOVA Health System Foundation, *Order Denying Respondents' Motion to Stay Administrative Proceedings* (May 29, 2008).

rather than the Commission, in control of the administrative proceedings schedule.

Neither the date on which the evidentiary hearing will begin nor the place at which it will be conducted has changed since the Complaint was issued more than seven months ago on June 17, 2010. The pendency of a collateral proceeding in federal district court does not provide the requisite showing of good cause to change the evidentiary hearing date. In short, as the foregoing discussion establishes, Respondent has not made the requisite showing of good cause for the Commission to stay the administrative proceedings. Accordingly,

IT IS ORDERED THAT Respondent's Expedited Motion for Stay of Proceedings Pending the Outcome of a Motion for Preliminary and Permanent Injunction in U.S. District Court for the Eastern District of North Carolina be, and it hereby is, **DENIED**.

By the Commission.

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, February 16, 2011

Order denying respondent's motion to disqualify the Commission on the basis that the Commission lacks constitutional authority to determine whether it has jurisdiction over respondent and that the Commission's actions evidence bias and prejudgment.

OPINION DENYING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

By KOVACIC, Commissioner, for a Unanimous Commission: [1]

Respondent, the North Carolina State Board of Dental Examiners (the "Board"), moves the Commission, pursuant to Commission Rules 3.22(a), 3.42(g), and 4.17 (16 C.F.R. §§ 3.22(a), 3.42(g), 4.17), to "disqualify and remove itself as the adjudicator of the State Board's Motion to Dismiss, and Complaint Counsel's Motion for Partial Summary Decision." *See* Respondent's Motion to Disqualify the Commission at 1 (Jan. 14, 2011) ("Bd. Mot.")[2]. The Board bases its claim on three grounds: first, the Commission "lacks the legal authority to rule on the constitutionality of its exercise of jurisdiction over the State Board;" second, the Commission "has prejudged its ability to exercise jurisdiction over the State Board;" and finally, the Commission "already has determined . . . that the State Board must satisfy the [active supervision] prong of the *Midcal* test." Bd. Mot. at 1-2. On January 27, 2011, Complaint Counsel filed a brief in

[1] The Commission approved this Opinion on February 16, 2011, with Commissioner Brill not participating by reason of recusal.

[2] Respondent also moves the Commission "to disqualify and remove itself as the Administrative Law Judge." Bd. Mot. at 1. Neither the Commission, nor any individual Commissioner, is serving as the administrative law judge in this case, so we need not consider this motion. Although rules 3.42(g)(2) and 4.17(b)(1) require motions for disqualification to be supported by "affidavits and other information setting forth with particularity the alleged grounds for disqualification," we agree with the Board that an affidavit is unnecessary in the instant matter. *See* Bd. Mot. at 2.

opposition to the Board's motion. Having considered all arguments in support of, and opposition to, the Motion, we deny the Board's Motion to Disqualify the Commission for the reasons explained below.

I. THE COMMISSION'S ABILITY TO RULE ON JURISDICTIONAL MATTERS

The Board first argues that the Commission lacks the constitutional authority to decide whether it has jurisdiction over the Board[3]. The Board appears to take the position that the determination of whether the Board enjoys state action exemption from the antitrust laws is a jurisdictional question posing constitutional issues that the Commission lacks legal authority to consider[4]. *See* Bd. Mot. at 4.

As a threshold matter, the Board seems to misunderstand the

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[3] Although crafted by Respondent as an argument to disqualify, lack of jurisdiction is not an argument for disqualification. Rather, jurisdiction regards the power of the Commission to entertain this dispute in the first instance.

[4] Respondent argues that "[i]n light of Congress' silence with regard to delegation of jurisdiction over the sovereign acts of the States to the Commission – combined with the express reservation of non-delegated powers afforded to the states by the Tenth Amendment – it is clear that the Commission lacks the legal authority to rule on the constitutionality of its own jurisdiction," citing *Parker v. Brown*, 317 U.S. 341 (1943), and incorporating by reference the arguments addressing the Board's state action exemption from the Federal Trade Commission Act found in its memoranda of law in support of the Board's motion to dismiss. Bd. Mot. at 4 n.1. *See also* Bd. Mot. at 5 ("[T]he present case requires the Commission to consider its own jurisdiction over issues of constitutional law, in absence of implied or express Congressional authority and in light of the Tenth Amendment and the limits of the Commerce Clause.") (emphasis omitted). Respondent makes jurisdictional arguments in its memoranda in support of the Board's Motion to Dismiss related to the Commission's statutorily-mandated lack of jurisdiction over not-for-profit entities. The Commission considered and rejected these arguments in its February 3, 2011 opinion. *See* Opinion of the Commission, North Carolina State Board of Dental Examiners, Dkt. No. 9343, at 5-6 (Feb. 3, 2011) ("SJ Opinion"), *available at* http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf.

nature of the state action doctrine in two important ways. First, jurisdiction concerns a tribunal's "statutory or constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis in original); *see also Morrison v. Nat'l Bank of Australia Ltd*., 130 S.Ct. 2869, 2877 (2010) ("Subject-matter jurisdiction . . . refers to a tribunal's power to hear a case.") (quoting *Union Pac. R.R. Co. v. Locomotive Eng's & Trainmen Gen. Comm. of Adjustment, Central Region*, 130 S.Ct. 584, 596 (2009) (internal quotation marks omitted); *In re Nat'l Labor Relations Bd*., 304 U.S. 486, 494 (1938) (jurisdiction "is the power to hear and determine the controversy presented, in a given set of circumstances"). The viability of a state action exemption claim, on the other hand, concerns the reach of a federal statute; a party claiming state action exemption is arguing that Congress never intended the antitrust laws to cover the challenged conduct. *See S. C. State Bd. of Dentistry v. FTC*, 455 F.3d. 436, 445 (4th Cir. 2006) ("A party denied *Parker* protection, . . . is in much the same position as a defendant arguing that his conduct falls outside the scope of a criminal statute."); *see also Northwest Airlines, Inc. v. County of Kent,* 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional."). Second, because the state action doctrine is rooted in statutory interpretation – the congressionally intended reach of the antitrust laws in light of our federalist form of government, *see FTC v. Ticor Title Ins. Co*., 504 U.S. 621, 633 (1992) (the state action doctrine "was grounded in principles of federalism") – determining whether a party enjoys state action protection does not call for a tribunal to decide constitutional questions. *See S. C. Bd.,* 455 F.3d at 444. ("Simply put, *Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.'"); *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) ("'*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act . . . ."). Thus, the predicate for the Board's argument fails because the Commission's determination that the Board does not enjoy state action protection for its challenged conduct touches on

neither jurisdictional nor constitutional questions. *See* SJ Opinion at 6-17.

Even if the Commission's consideration of the Board's state action exemption from the antitrust laws were properly characterized as a jurisdictional determination, the law is clear that the Commission may decide such questions in the first instance. *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972) (as a general rule, an agency should make the initial determination of its own jurisdiction); *see also Christensen v. FTC*, 549 F.2d 1321, 1324 (9th Cir. 1977); *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979). In *Christensen*, for example, the court embraced this principle and held, for reasons of judicial economy and agency efficiency, that the Commission, rather than a federal court, was to determine the state action question in the first instance:

> If no cease-and-desist order is entered, the courts need never concern themselves with the jurisdictional issue. The same is true if the proceeding becomes moot because of voluntary conduct or the passage of time. Also of importance is the avoidance of premature interruption of the administrative process. Such interruptions undermine both the efficiency and the autonomy of the agency.

549 F.2d at 1324 (internal quotations and citation omitted)[5]. Other circuits have reached the same conclusion, finding that the FTC, rather than a federal court, should determine state action exemption issues initially. *See FTC v. Markin*, 532 F.2d 541, 544 (6th Cir. 1976); *FTC v. Feldman*, 532 F.2d 1092, 1097-98 (7th Cir. 1976); *cf.*

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[5] Exceptions to the presumption that an agency has the authority to determine whether it has jurisdiction "are justified only when it appears early and plainly that the agency is operating outside the scope of its authority." *Christensen*, 549 F.2d at 1324. *See*, *e.g., Leedom v. Kyne*, 358 U.S. 184 (1958) (allowing immediate appeal of a National Labor Relations Board (NLRB) decision to certify a collective bargaining unit that contained professional and non-professional employees without a poll when Congress had specifically withheld from the NLRB such power). No such circumstance exists here.

S.C. Bd., 455 F.3d 436 (holding that a state action determination by the Commission is not immediately appealable).

Our conclusion, moreover, would not change if the state action question were characterized as a constitutional one. It is true that the Supreme Court has said that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); *see also Johnson v. Robinson*, 415 U.S. 361, 368 (1974). But the Court also has explained that "[t]his rule is not mandatory," and that it may be "of less consequence" when "petitioner's statutory and constitutional claims . . . can be meaningfully addressed in the Court of Appeals." *Thunder Basin*, 510 U.S. at 215. That any Commission decision on a claim of state action exemption is fully reviewable by a Court of Appeals, *South Carolina Bd.*, 455 F.3d at 445, militates allowing the FTC to consider it initially even if such a claim were properly characterized as a constitutional one.

In summary, we reject the Board's arguments that the Commission lacks the authority to determine whether the Board is exempt from the Federal Trade Commission Act under the state action doctrine.

II. PREJUDGMENT

FTC Rule 4.17 provides that a party may move to disqualify a Commissioner from a proceeding. 16 C.F.R. § 4.17 (b). The standard for disqualification based on prejudgment is an exacting one. *See Whole Foods Mkt., Inc.*, Dkt. No. 9324, 2008 WL 4153583, at *2 (Sept. 5, 2008). A party moving for disqualification must show that "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schools, Inc.. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). The moving party must demonstrate that the minds of the Commission members "are irrevocably closed" with regard to the legality of the conduct at issue in the adjudication. *FTC v. Cement Institute*, 333 U.S. 683, 701

(1948). In this case, the Board points to four alleged sources of prejudgment: the 2003 Report of the State Action Task Force ("State Action Report"); a 2010 speech by Commissioner J. Thomas Rosch; the FTC's decision to issue an administrative complaint against the Board; and the FTC's press release concerning that decision. As we explain below, none of these examples evidences prejudgment.

We note at the outset that the Board's motion is not timely. Rule 4.17 requires a party to bring a motion to disqualify "at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification." 16 C.F.R. § 4.17 (b)(2). The Board's alleged grounds for disqualification consist of the State Action Report, which the Board has been aware of at least since preparing its response to the administrative complaint, which the Board filed on July 7, 2010 (*see* Bd. Response to Compl. at 8 (July 7, 2010), *available at* http://www.ftc.gov/os/adjpro/d9343/100707dentalexamcmpt.pdf), over six months prior to the Board's instant filing; a speech made by Commissioner Rosch on August 5, 2010, over five months prior to the Board's instant filing; the legal standard the Commission employed to issue the administrative complaint; and a press release accompanying the administrative complaint, which was issued on June 17, 2010, seven months prior to the Board's instant filing. The Board either had actual knowledge, or reasonably should have had knowledge of these grounds well before the instant filing on January 14, 2011. Whether on timeliness grounds, however, or on the merits of the Board's arguments, we reach the same conclusion to deny the motion.

A. Report of the State Action Task Force

The Board contends that certain statements in the State Action Report are indicative of "bias and prejudgment." Bd. Mot. at 7. Specifically, the Board points to the Report's call for the FTC to engage in litigation as a means to clarify the state action doctrine, and its observation that the doctrine is "a serious impediment to achieving national competition policy goals." Bd. Mot. at 5-6 & n.3. We

disagree with the Board's contentions.

First, the State Action Report is a report by members of the staff of the FTC. Though the Commission voted to release it publicly, the State Action Report is not a statement by the Commission or any individual Commissioner. *See* State Action Report at 1. Further, even if the content of the State Action Report were properly attributable to the Commission, it would not support a finding of prejudgment. The courts have been clear that members of regulatory commissions can form views about laws and policy on the basis of their experience. *See Cement Institute*, 333 U.S. 683; *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980). For example, in *Cement Institute*, parties moved to disqualify the Commission from adjudicating a base-point pricing conspiracy case because the Commission had issued reports and given testimony contending that the challenged practice was illegal under the antitrust laws. 333 U.S. at 700. The Supreme Court upheld the Commission's refusal to disqualify itself, explaining that "prior ex parte investigations [by the Commission] did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices." *Id.* at 701. Similarly, in *American Medical Ass'n*, petitioners argued that the Chairman of the FTC should be disqualified from the adjudication for publicly expressing opinions about the misuse of licensing procedures to restrain competition. The Second Circuit disagreed, noting that "it is not improper for members of regulatory commissions to form views about law and policy on the basis of their prior adjudications of similar issues which may influence them in deciding later cases." *American Med. Ass'n*, 638 F.2d at 448 n.4.

The connection between the State Action Report and the instant action is much more tenuous than the connection between the reports or speeches at issue in *Cement Institute* and *American Med. Ass'n* and the adjudicatory matters in those cases. FTC staff released the State Action Report nearly seven years before the Commission issued the administrative complaint against the Board, and accordingly the State Action Report has no mention of the specific facts of this case. Further, none of the current FTC Commissioners were

Commissioners when the FTC authorized the release of the State Action Report. Although the State Action Report does discuss some of the legal policy issues surrounding the state action doctrine that are relevant to the instant action, to require the Commission to disqualify itself from adjudicating matters that involve legal issues similar to those it may have considered in prior reports would mean that "experience gained from their work as commissioners would be a handicap instead of an advantage." *Cement Institute*, 333 U.S. at 702. Congress could not have intended such a result when it established the FTC as a body that would develop and apply expertise in exercising its authority to proscribe unfair trade practices. *See id*.

We conclude that Commission authorization of the release of the State Action Report in 2003 does not suggest the Commission has "adjudged the facts as well as the law of [this] particular case," *Cinderella*, 425 F.2d at 591, and hence does not provide grounds for disqualification.

B. Speech by Commissioner J. Thomas Rosch

The second source alleged by the Board to evidence prejudgment is an August 5, 2010 speech by Commissioner J. Thomas Rosch, in which he discusses FTC litigation activity in the recent past, and remarks that the FTC "is suing and litigating as an active prosecutor should." Bd. Mot. at 6 (quoting Commissioner J. Thomas Rosch, "So I Serve as Both Prosecutor and Judge – What's the Big Deal?," Am. Bar Ass'n Ann. Meeting at 2 (Aug. 5, 2010)). The Board contends that this statement is "indicative of the bias and prejudgment with which the Commission has approached this present litigation." *Id*. at 7.

Although courts have found that public remarks given by FTC Commissioners that touch on the facts of specific cases can give rise to an appearance of prejudgment, *see, e.g., Cinderella*, 425 F.2d at 591, this is not the case here. The Board's asserted link between Commissioner Rosch's remarks and any facet of the instant case does not exist; the speech never mentions the state action doctrine, the complaint issued against the Board, or any legal or factual issues

relevant to the instant case. Rather, the speech merely informed the public generally about the Commission's litigation efforts. The law is clear that such general statements about FTC activity are not grounds for disqualification. In *American Medical Ass'n*, for example, the FTC had sued the AMA for an alleged antitrust violation involving licensing restrictions. The AMA moved to disqualify the Chairman on the basis of a speech that discussed the use of licensing procedures to restrain competition, without any specific mention of the case, and another that mentioned the AMA case as one of many activities undertaken by the FTC in the medical field. *Am. Med. Ass'n* 683 F.2d at 448. The Second Circuit held that such statements were not grounds for disqualification, remarking that "[a]t most, the public statements . . . indicate that the chairman was informing the Congress and the public as to FTC's activities and policies in general, including those in the medical field." *Id*. at 449 (citation omitted). Similarly, *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972), concerned claims that an interview by an FTC Commissioner using the allegations of a complaint against the plaintiff to illustrate how the FTC analyzes mergers evidenced prejudgment. The Tenth Circuit rejected this argument, holding that merely discussing the complaint in a specific matter, without more, was insufficient to show that the Commissioner had "prejudged the central issue of the case." *Id*. The connection between Commissioner Rosch's speech and the legal and factual issues in the instant case is nowhere near that between the cases and the public statements at issue in *Cinderella* or *Kennecott*.

We can see no way in which Commissioner Rosch's speech could lead a "disinterested observer" to conclude that he had "in some measure adjudged the facts as well as the law" in this case. *Cinderella,* 425 F.2d at 591. Consequently, we reject this ground for disqualifying Commissioner Rosch or the Commission as a whole.

C. The Issuance of the Administrative Complaint

The Board also argues that the Commission's issuance of an administrative complaint against the Board in this matter is evidence of prejudgment. Specifically, the Board points to the Complaint's

allegation that the Board "'acted without any legitimate justification or defense, including the 'state action' defense.'" Bd. Mot. at 8-9 (quoting Compl. at 1). The Board maintains that by voting to issue the administrative complaint, the Commission has "reached the legal conclusion that the State Board was subject to, and had violated, the FTC Act." *Id*. at 9.

As a threshold matter, it has long been decided that an administrative agency can combine investigative and adjudicatory functions. *See Withrow v. Larkin*, 421 U.S. 35, 57 (1975); *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982); *Kennecott*, 467 F.2d at 79; *FTC v. Cinderella Career & Finishing Schools, Inc*., 404 F.2d 1308, 1315 (D.C. Cir. 1968); *see also* 5 U.S.C. § 554(d)(2)(C) (prohibition on a person engaged in the investigation functions of a matter from acting as an adjudicator in the same matter does not apply to FTC Commissioners). Thus, any challenge to the fact that FTC Commissioners approve the issuance of an administrative complaint and also act as adjudicators in the same matter fails as a matter of law.

That the Commission found sufficient justification to issue the administrative complaint against the Board in this matter is also legally insufficient to establish prejudgment. The Commission issues a complaint when it has "reason to believe" that a violation of the FTC Act has occurred. 15 U.S.C. § 45(b). This legal standard is distinct from the ultimate determination required to find liability or to reject a defense to the Federal Trade Commission Act. As the Supreme Court has explained:

> [J]ust as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute.

Withrow, 421 U.S. at 57. Thus, merely finding reason to believe that the Board does not have a viable state action defense does not mean

that the Commission had prejudged the case. Accordingly, we reject this ground for disqualification.

D. The Press Release

Finally, the Board argues that that the press release issued in conjunction with the issuance of the administrative complaint is evidence of prejudgment. *See* Bd. Mot. at 7 (the press release announcing the FTC complaint against the Board "constitutes the Commission's public views on the matter and speaks for itself with respect to the Commission's prejudgment of its ability to fairly prosecute the complaint and to fairly exercise jurisdiction over the State Board.").

This ground for disqualification is also without merit. In *FTC v. Cinderella Career & Finishing Schools, Inc.*, for example, the defendant argued that the issuance of a press release "constitutes an alignment, or appearance of alignment, of the Commission with the prosecution, resulting in a prejudgment . . . of the merits of a complaint prior to hearing." 404 F.2d at 1312-13. The D.C. Circuit rejected this contention, explaining that the Commission has the authority to issue factual press releases to inform "the widely spread public" of practices that it has reason to believe violate the FTC Act, and that exercising this authority does not result in prejudgment or bias that would deprive a defendant of due process in a subsequent administrative proceeding on the merits. *Id.* at 1314-15; *see also American Med. Ass'n*, 638 F.2d at 448-49 (holding that public statements mentioning a specific trial were merely "informing Congress and the public as to the FTC's activities," and did not evidence prejudgment).

The press release in question merely informed the public that the Commission had found reason to believe that the Board's challenged actions had violated the FTC Act, and that the Board did not have a viable state action defense. The press release also contained specific language explaining that by issuing the complaint, the Commission had not found the Board in violation of the antitrust laws:

> The Commission issues or files a complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that proceeding is in the public interest. The complaint is not a finding or ruling that the named parties have violated the law. The administrative complaint marks the beginning of a proceeding in which the allegations will be ruled upon after a formal hearing by an administrative law judge.

Federal Trade Commission Press Release, *Federal Trade Commission Complaint Charges Conspiracy to Thwart Competition in Teeth-Whitening Services* (June 17, 2010), *at* http://www.ftc.gov/opa/2010/06/ncdental.shtm.

Accordingly, we reject the Board's argument that the press release announcing the complaint against it shows prejudgment.

III. CONCLUSION

We find no merit to the Board's arguments that the Commission should disqualify itself. The Commission has jurisdiction to decide whether the Board can avail itself of the state action exemption, and the Board has presented no evidence of prejudgment. Accordingly, we deny the Board's motion to disqualify the Commission. [6]

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[6] The Commission issued the Order denying the Board's Motion to Disqualify the Commission on February 3, 2011. *See* Order Denying Respondent's Motion to Dismiss, Granting Complaint Counsel's Motion for Partial Summary Decision, Denying Respondent's Motion to Disqualify the Commission, and Granting Respondent's Motion for Leave to File Limited Surreply Brief, *available at* http://www.ftc.gov/os/adjpro/d9343/110208commorder.pdf.

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, March 7, 2011

Order denying respondent's request for an order requiring complaint counsel to disclose each individual attorney's duties and states of licensure.

OPINION DENYING RESPONDENT'S APPLICATION FOR REVIEW TO THE COMMISSION OF THE ADMINISTRATIVE LAW JUDGE'S RULING DENYING RESPONDENT'S MOTION FOR DISCLOSURE

On February 14, 2011, the Administrative Law Judge (ALJ) in this case issued an Order Denying Respondent's Motion for Disclosure. That motion sought an order requiring Complaint Counsel to provide Respondent with information regarding the duties and states of licensure of the individual attorneys designated as Complaint Counsel. On March 1, 2011, the ALJ denied Respondent's application for interlocutory Commission review of the ALJ's February 14 Order. On March 3, 2011, Respondent filed an Application for Review to the Commission of the Administrative Law Judge's Ruling Denying Respondent's Motion for Disclosure -- citing Commission Rule 3.23(b), 16 C.F.R. § 3.23(b) as the basis for that application -- and on March 4, 2011, Complaint Counsel filed their Opposition to that Application.

As Complaint Counsel point out, the Commission has consistently declined to entertain interlocutory appeals from routine discovery rulings in any given matter pending before an ALJ[1]. To that end, Commission Rule 3.23(b) permits interlocutory appeals to the Commission from ALJ rulings only if (1) the ALJ *fails to rule* on an application to take an interlocutory appeal or (2) the ALJ *grants* the application to take an interlocutory appeal. 16 C.F.R. § 3.23(b). In this case, the ALJ issued a timely Order denying Respondent's

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[1] Complaint Counsel Opposition at 3 (Proposed Order), *citing In the Matter of Bristol-Myers Co., et al., American Home Products Corporation, et al.,* and *Sterling Drug, Inc., et al.,* 90 F.T.C. 273 (1977) (Interlocutory Order).

application to take an interlocutory appeal. No interlocutory appeal to the Commission therefore may be taken.[2] Accordingly,

IT IS ORDERED THAT Respondent's Application for Review to the Commission of the Administrative Law Judge's Ruling Denying Respondent's Motion for Disclosure be, and it hereby is, **DENIED**.

By the Commission, Commissioner Brill recused.

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[2] On February 9, 2011, the Commission issued an Order which in relevant part denied Respondent's application for Commission review of an earlier ALJ Order denying Respondent's Motion to Compel. In the February 9 Order, the Commission apprised Respondent of the circumstances under which an interlocutory appeal to the Commission from an ALJ decision may be taken. February 9 Order at 2.

AGRIUM, INC.

Docket No. C-4277. Order, March 7, 2011

Order granting respondent's petition to reopen and set aside the consent order entered in this matter because the acquisition on which the consent order was based never occurred.

ORDER REOPENING AND SETTING ASIDE ORDERS

Agrium, Inc. filed its Petition To Reopen and Set Aside Orders on November 23, 2010. Agrium bases the Petition on the changed fact that Agrium's pending hostile takeover of CF Holdings, Inc., upon which the Commission's final Decision and Order, and the Order to Hold Separate ("Orders"), were premised, ultimately never occurred and has been abandoned. For the reasons stated below, the Commission has determined to grant the Petition and has reopened and set aside the Orders.

I. BACKGROUND - THE COMMISSION'S COMPLAINT AND ORDERS

This matter arose from Agrium's proposed acquisition of CF. Agrium pursued a hostile tender offer for CF that began in February 2009, and continued throughout most of 2009. CF, however, rebuffed Agrium's advances and launched its own tender offer to acquire the much larger Terra Industries. Agrium's proposed acquisition of CF raised competitive concerns in the anhydrous ammonia terminal markets in Ritzville, Washington, and Marseilles, Illinois.

Agrium agreed to settle the matter, and on December 22, 2009, the Commission accepted an agreement containing consent orders for public comment. At that time, the Commission issued its Complaint alleging that the merger between Agrium and CF, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC

Act[1]. At the same time, the Commission also issued and served its Order to Hold Separate and Maintain Assets ("Hold Separate Order"), which became final. Following a public comment period, the Commission issued and served the Decision and Order on February 3, 2010. The Decision and Order requires Agrium to divest CF's Ritzville, Washington, and Agrium's Marseilles, Illinois, anhydrous ammonia terminals to Terra and to terminate its distribution agreement with Rentech Energy Midwest Corporation – all triggered by completion of Agrium's acquisition of CF. The Hold Separate Order requires Agrium to maintain and hold separate Agrium's Marseilles, Illinois terminal pending its divestiture. As a part of the divestiture, Agrium also agreed to sell its 50% interest in the Carseland Nitrogen Operations facility in Alberta, Canada, which produces anhydrous ammonia and would supply the Ritzville terminal.

Ultimately, Agrium was not successful in acquiring CF. Agrium announced on March 11, 2010, that it would not go forward with the acquisition, and let its outstanding offer for CF expire on March 22, 2010[2]. CF completed its acquisition of Terra on April 19, 2010. Agrium withdrew its Hart-Scott-Rodino ("HSR") filing to acquire CF on November 23, 2010[3]. Although Agrium's obligations to divest never ripened, it has been holding the Marseilles terminal separate as required by the Hold Separate Order.

II. AGRIUM'S PETITION

Agrium states that the remedial purpose of the Orders was to remedy the lessening of competition resulting from the Agrium-CF

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[1] Complaint ¶ 17.

[2] Petition at 2-3.

[3] Petition at Exhibit 1: Letter to Premerger Notification Office from Joseph J. Simons, November 23, 2010.

acquisition as alleged in the Commission's Complaint.[4] Agrium adds, "Similarly, the purpose of the Hold Separate Order is to facilitate the purpose of the Consent Agreement in remedying the lessening of competition as alleged in the Complaint."[5] Agrium notes that the Agrium-CF acquisition never occurred and that Agrium "no longer intends to purse an acquisition of CF."[6] Agrium asserts that these circumstances constitute changed conditions of fact that eliminate the need for the Orders[7].

Agrium also asserts that the public interest warrants setting aside the Orders because the Orders are imposing significant costs on Agrium[8]. Agrium claims to have lost the flexibility to operate the terminal as it chooses. Specifically, Agrium states that the Orders "limit how Agrium conducts business at the Marseilles Terminal: limiting Agrium from transferring or firing employees; requiring it to maintain current contracts; requiring it to continue existing levels of maintenance and continue with previously planned improvements; preventing it from selling any part of the Marseilles Terminal property or using it as collateral; requiring Agrium to maintain corporate financial support; and requiring it to continue EH&S and engineering support services."[9]

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[4] Petition at 4.

[5] *Id.*

[6] *Id.* and Petition at Exhibit A, Affidavit of Joni Paulus in Support of Petition of Agrium, Inc. To Reopen and Set Aside Orders ("Affidavit") ¶¶ 12-13.

[7] Petition at 5 ("Without the Agrium-CF acquisition, the factual underpinnings of the Commission's Complaint and subsequent Orders have been eliminated.").

[8] Petition at 5.

[9] Petition at 5, citing Affidavit ¶ 9. Agrium also states that the periodic reports require a considerable amount of time and impose costs that create no value for Agrium and "are passed on to Agrium's customers and its shareholders." *Id.*

No public comments were filed during the Commission's public comment period.

III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). First, Section 5(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require[10]. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition[11]. The Commission's Rule 2.51(b) requires such "satisfactory showing" to include affidavits setting forth admissible facts.[12]

Second, Section 5(b) provides that the Commission may also reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the

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[10] *See also Supplementary Information, Amendment to the Commission's Rules of Practice* § 2.51(b), 16 CFR 2.51(b) (August 15, 2001).

[11] 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.").

[12] 16 C.F.R. § 2.51(b).

requested modification[13]. In the case of "public interest" requests, Rule 2.51(b) requires an initial "satisfactory showing" of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A "satisfactory showing" requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification[14]. This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. Just as for petitions based on changed conditions, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,[15] and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of the

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[13] Hart Letter at 5; 16 C.F.R. § 2.51.

[14] 16 C.F.R. § 2.51.

[15] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

Commission's orders[16]. All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[17]

IV. THE ORDERS WILL BE REOPENED AND SET ASIDE

The Commission has determined to reopen and set aside the Orders as requested by Agrium. The Orders were premised on the Complaint's allegation that Agrium's acquisition of CF would be unlawful. The Decision and Order's divestiture requirements would remedy that violation, and the Hold Separate Order is intended to be a temporary order to maintain assets and keep them separate, viable, and competitive pending the divestiture.

The Decision and Order explicitly states that the purpose of the Order is "to remedy the lessening of competition alleged in the Commission's complaint."[18] As noted above, the Complaint alleges that the merger between Agrium and CF, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act[19]. Agrium has categorically abandoned its efforts to acquire CF and has withdrawn its HSR Notification for the acquisition. This fundamental premise to the Commission's Complaint is now effectively a nullity[20].

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[16] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[17] 16 C.F.R. § 2.51(b).

[18] Final Order ¶¶ II.K., III.H., IV.B.

[19] Complaint ¶ 17.

[20] It is very unlikely that Agrium would attempt to acquire CF again. *See* Petition at Exhibit A, Affidavit ¶ 13: Joni Paulus, General Counsel for Agrium states: "Agrium has withdrawn its HSR filing and no longer intends to pursue an acquisition of CF." Any renewed attempt by Agrium to acquire CF again would require a new HSR Notification.

Accordingly, it is altogether unlikely that the Decision and Order's divestiture obligations will ever arise, and so they should be set aside. Further, without the divestiture requirement in place, there is no reason to retain Agrium's obligations to continue observing the temporary requirements under the Hold Separate Order. The Hold Separate Order was implemented as a temporary requirement to keep the assets-to-be-divested in good operating order pending their divestiture. Its requirements are obviated if the obligation to divest the held-separate assets is terminated. There is no continuing need to restrict Agrium's flexibility to control, operate, or dispose of the Marseilles terminal as it so chooses.

Setting aside the Orders in this case is consistent with the Commission's determination to set aside the final order in *Johnson & Johnson*, C-4154 (2005). In that case, Johnson & Johnson ("J&J") had an agreement to acquire Guidant Corporation. Following an investigation, the Commission entered an order, with J&J's consent, requiring J&J to divest assets, license technology, and end certain distribution arrangements. The order became final in December 2005. Before J&J could complete its acquisition of Guidant, however, Boston Scientific Corporation ("BSC") made a competing bid for Guidant. Eventually, Guidant agreed to be acquired by BSC, and on January 25, 2006, Guidant terminated its agreement with J&J. Later in 2006, the Commission accepted for public comment an agreement containing consent order with BSC, and BSC then completed its acquisition of Guidant. On May 26, 2006, the Commission granted J&J's petition to set aside the J&J order.[21]

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[21] Order Reopening and Setting Aside Order, *Johnson & Johnson*, Docket No. C-4154, at 4 ("The acquisition agreement between J&J and Guidant has been terminated, and the acquisition was never consummated. Accordingly, the basic premise of the Order, the unlawful acquisition that it was designed to remedy, did not come to pass. Therefore there is no reason to keep the Order in place."). *See also PacifiCorp*, File No. 971-0091 (Commission withdrawal from the consent agreement and closing of the matter when PacifiCorp withdrew its bid for TEG after the Commission had accepted the consent for public comment, but before the order was made final); Order Reopening and Setting Aside Order, *In the Matter of Entergy Corporation and Entergy-Koch, L.P.*, Docket No. C-3998 (2005) (Commission reopened and set aside the order when Entergy sold its

Agrium has terminated and abandoned its proposed acquisition of CF and has withdrawn its HSR filing; and there is no indication that it will be reprised.[22] This constitutes changed facts that eliminate the need to retain the Orders.

IT IS ORDERED that this matter be, and it hereby is, reopened and that the Decision and Order and Order to Hold Separate be, and they hereby are, set aside.

By the Commission.

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interest in the assets that gave rise to the competitive concerns addressed by the order).

[22] Additionally, CF's acquisition of Terra has created additional market overlaps that very likely would be implicated by any future combination of Agrium and CF, all of which could be reviewed pursuant to a new HSR filing.

ALAN B. MILLER, UNIVERSAL HEALTH SERVICES, INC., AND PSYCHIATRIC SOLUTIONS, INC.

Docket No. C-4309. Order, June 3, 2011

Order approving respondent's application for Commission approval of proposed divestiture of Delaware Divestiture Assets to PHC, Inc., in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Barbur and Mr. Belelieu:

This letter responds to the Application for Approval of Divestiture of the Delaware Divestiture Assets filed by Universal Health Services, Inc., on April 12, 2011, requesting that the Commission approve Universal's proposed divestiture of the Delaware Divestiture Assets to PHC, Inc., pursuant to the order in this matter. The application was placed on the public record for comments until May 12, 2011, and no comments were received.

After consideration of the proposed divestiture as set forth in the Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture of the Delaware Divestiture Assets to PHC. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Universal's Application, and has assumed them to be accurate and complete.

By direction of the Commission.

THE DOW CHEMICAL COMPANY AND ROHM & HAAS

Docket No. C-4323. Order, June 14, 2011

Order denying respondent's petition to reopen the Commission's final order and respondent's request for additional time to divest certain assets related to acrylic acid monomers and latex polymers.

LETTER DENYING PETITION TO REOPEN AND MODIFY COMMISSION ORDER

Dear Mr. Cary:

This letter responds to the Petition of The Dow Chemical Company To Reopen And Modify Order ("Petition To Reopen") filed by The Dow Chemical Company ("Dow") on February 14, 2011. The Federal Trade Commission ("Commission") has considered Dow's Petition To Reopen, as well as the affidavits filed with it by Dow. For the reasons stated here, the Commission has denied Dow's Petition To Reopen, and has also denied Dow's request for a further extension of time to divest.

On March 31, 2009, the Commission issued the Order by consent to remedy the effects on competition in markets in North America from the acquisition by Dow of Rohm & Haas Company. The Order requires, *inter alia*, Dow to divest assets and businesses relating to the research, development, manufacture, sale, and distribution of acrylic acid monomers and latex polymers to an acquirer approved by the Commission in a manner approved by the Commission. *See generally*, Order ¶¶ III.A. and related definitions. The Order requires Dow to divest these assets and businesses at "no minimum price." *Id*.

The assets that the Order requires Dow to divest include the Torrance Facility located in Torrance, CA. The Torrance Facility is defined by the Order to include "all of [Dow's] right, title and interest in Facility Assets" located at the real property described in Exhibit 5

to the Order. *See* Order ¶ I.XXX. The Order defines Facility Assets to mean, "all real property interests, including rights, title, and interests to and in owned or leased property," as well as fixtures, machinery, and equipment located at the facility. *See* Order ¶ I.LL. Generally described, the Torrance Facility includes Dow's latex polymers plant, but also a parcel leased to Praxair Company ("Praxair") and three smaller lots not presently used by Dow.

The Order required Dow to complete this divestiture within 240 days after the Commission accepted the Agreement Containing Consent Order for public comment. The Commission accepted the consent agreement for public comment on January 23, 2010. Accordingly, Dow should have divested the acrylic acid monomers and latex polymers assets and businesses by November 29, 2009.

Dow filed an application on August 14, 2009, seeking the Commission's approval to divest Dow's acrylic acid monomers and latex polymers businesses to Arkema Inc. ("Arkema"). Dow proposed to lease the latex polymers plant and the real property used for it to Arkema, and retain all ownership and other rights to the Torrance Facility not leased or granted to Arkema. The Commission's staff and Dow's counsel discussed the variance between the proposed lease and the Order's requirement that Dow sell all of its rights to the Torrance Facility.

On November 10, 2009, while Dow's divestiture application was still pending, Dow filed a petition to reopen and modify the Order to relieve Dow of its obligation to divest outright the Torrance Facility, which would thereby conform the Order to the divestiture Dow had negotiated with Arkema. Dow withdrew this petition on December 11, 2009, and requested instead that the Commission extend the time for Dow to divest the Torrance Facility as required by the Order for at least one year. Dow stated that Dow, "is prepared to divest the

entire property in order to consummate the divestiture . . . as quickly as possible."[1]

On January 20, 2010, the Commission approved Dow's application to divest the acrylic acid monomers and latex polymers businesses to Arkema. In its letter informing Dow that it had approved the divestiture, the Commission also extended the time to divest the Torrance Facility, as requested by Dow, to one year from the date Dow closed on the divestiture to Arkema. Dow closed on the divestiture to Arkema on January 25, 2010. Accordingly, under the extension granted by the Commission, Dow was required to divest the Torrance Facility (less the leasehold rights already conveyed to Arkema) by January 25, 2011.

Dow still has not completed the divestiture of the Torrance Facility as required by the Order, notwithstanding the one year extension granted by the Commission on January 20, 2010. In the months prior to the expiration of the extended divestiture deadline, the Commission's staff alerted Dow many times that if Dow intended to seek a modification of the Order's divestiture obligation or a further time extension it should do so before the January 25, 2011, extended divestiture deadline.

On February 14, 2011, Dow filed its Petition To Reopen. Dow asks the Commission to reopen and modify the Order pursuant to Rule 2.51 of the Commission's Rules of Practice to relieve Dow of its obligation to divest, or in the alternative, to extend again the time to divest the Torrance Facility, this time for an additional three years. Dow contends that the Order should be reopened and modified on grounds of both changed circumstances and the public interest. Dow's Petition To Reopen fails to make the required showing that

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[1] Dow also had represented in the Agreement Containing Consent Order that Dow "can accomplish the full relief contemplated by" the Order. *See* Agreement Containing Consent Order ¶ 11. Dow's representation that it could accomplish the relief required by the Order included its ability successfully to divest the Torrance Facility.

the Order should be reopened either due to changed conditions of fact or law or on public interest grounds. Dow also fails to show good cause why the Commission should grant it another extension of time to divest.

STANDARD FOR REOPENING AND MODIFYING FINAL COMMISSION ORDERS

Section 5(b) of the FTC Act, 15 U.S.C. § 45, provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 4, 1986), at 4; *See* S.Rep. No. 96-500, 96th Cong. 2d Sess. 9 (1979)(significant changes or changes causing unfair disadvantage); *Phillips Petroleum Co.*, Docket No. C-1088, 78 F.T.C. 1573, 1575 (1971)(no modifications for changes reasonably foreseeable at time of consent negotiations); *Union Carbide Corp.*, Docket No. C-2902, 111 F.T.C. 748, 751 (1988)(must show changes in statutory or decisional law that have the effect of bringing the provisions into conflict with existing law, so that to continue the order would work an injustice, citing, *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)).[2]

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[2] In an earlier petition to reopen and modify by *Union Carbide Corp.*, the Commission had refused to reopen and modify its order prohibiting Union Carbide from engaging in exclusive dealing arrangements, on the basis of a change in law, because exclusive dealing arrangements always were considered under the rule of reason and "Carbide's asserted changes in law, at most, reflect a shift in focus among the several factors traditionally considered under a rule of reason analysis as applied to exclusive dealing." 108 F.T.C. 184, 186 (1986).

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Thus, Rule 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must make a *prima facie* "satisfactory showing" of a legitimate public interest reason or other reasons justifying the requested modification.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the requisite satisfactory showing to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why the public interest requires that the order should be modified[3]. If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981)(strong public interest considerations support repose and finality).

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[3] The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

DOW'S PETITION TO REOPEN FAILS TO SHOW CHANGED CIRCUMSTANCES THAT REQUIRE REOPENING AND MODIFYING THE ORDER

Dow represents in its Petition To Reopen [redacted] is a changed circumstance from a year earlier. Petition To Reopen at 17. However, the circumstances [redacted] have not changed significantly, [redacted].

[redacted]

[redacted]

[redacted][4]

[redacted][5] [redacted][6] [redacted]

[redacted] This changed circumstance is insufficient to support reopening the Order.

[redacted]

[redacted][7]

[redacted][8] [redacted], Dow has not made the requisite showing to support reopening the Order under Rule 2.51. [redacted]

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[4] [redacted]

[5] [redacted]

[6] [redacted]

[7] [redacted]

[8] [redacted]

[redacted][9] [redacted]

The Commission is not obliged to reopen and modify the Order unless Dow identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. [redacted]

[redacted] Moreover, Dow has nowhere asserted that any of these changes make the Order's divestiture obligation "harmful to competition," as stated in Section 5 of the F.T.C. Act.

[redacted] In any event, what is relevant is the change in circumstances since the Order issued (March 31, 2009), and not a year prior to the date the Petition To Reopen was filed (February 14, 2010). Dow has failed to establish that a significant change in circumstances eliminates the need for the Order or makes its continued application inequitable.

Accordingly, Dow has not made the requisite showing required by Section 5 of the F.T.C. Act or Rule 2.51 of the Commission's Rules of Practice to warrant reopening and modifying the Order based on changed circumstances.

DOW'S PETITION TO REOPEN DOES NOT SHOW THAT THE ORDER SHOULD BE MODIFIED ON PUBLIC INTEREST GROUNDS

Dow argues in its Petition To Reopen that [redacted] the public interest requires that Dow be allowed to retain ownership of it and manage it. However, Dow's Petition To Reopen and the accompanying affidavits also suggest that almost any buyer could manage the Torrance Facility properly because the owner's day-to-day responsibilities at the Torrance Facility are minimal. Dow asserts that it has no day-to-day responsibilities at the Torrance Facility

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[9] [redacted]

because Arkema provides necessary services to itself and other site occupants. Petition To Reopen at 11-12. Dow states that its only responsibilities are to maintain two environmental permits, and to make sure that property users don't interfere with each other's property rights. *Id.* [redacted][10] Petition To Reopen at 17-19. [redacted] Therefore, Dow has not made the satisfactory showing required by Rule 2.51 that the public interest requires Dow to continue to operate the Torrance Facility.

Dow also argues that its limited role as landlord at the Torrance Facility has eliminated the need for the Order's requirement that Dow divest the Torrance Facility. However, the Commission's rationale for issuing an Order that requires Dow to divest absolutely the Torrance Facility remains valid today. If it becomes necessary for Dow to maintain or construct easements across the portion of the property where Arkema operates the divested latex polymers plant, Dow may well do this work in a manner that would affect adversely Arkema's operation of the plant. Should Arkema seek an expansion of the capacity of utility easements or other infrastructure at Torrance to support adding capacity to Arkema's latex polymers plant, Dow might cooperate less willingly with its competitor in the Complaint market than would a third party owner of the property who could only benefit from Arkema's expansion of the latex polymers plant. For these reasons, leaving in place the Order's requirement for Dow to divest the Torrance Facility promotes achieving the Order's remedy.

Dow has not made the requisite showing that Dow is the only potential owner of the Torrance Facility with the resources and experience necessary to operate the property in a manner to achieve the Order's purposes. Dow also has failed to establish that there is less risk today than when the Commission issued the Order that Dow,

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[10] Dow states that it is willing to employ a third party manager to manage the site to make sure that Dow would operate it properly. Petition To Reopen at 22. If Dow could hire a manager to manage the site, so could any of the other potential purchasers.

as Arkema's landlord, may interfere with Arkema's ability to optimize its use of the Torrance plant to compete in the Complaint market. Dow has not made an adequate showing of legitimate public interest to support reopening and modifying the Order to relieve Dow of its obligation to divest the Torrance Facility.

In addition, the public interest in the repose and finality of Commission Orders is particularly strong in this case. In order to get Commission approval of its acquisition of Rohm & Haas, Dow consented to an Order requiring divestiture of the entire Torrance parcel. Dow then negotiated a divestiture to Arkema that retained Dow's ownership of the parcel and filed a petition to reopen asking the Commission to relieve Dow of its divestiture obligation. When it was unsuccessful in obtaining Commission's staff's support for the divestiture to Arkema with the right to keep this property, Dow withdrew its petition, representing that it was prepared to divest the entire Torrance Facility after it completed the divestiture to Arkema. Having obtained Commission approvals for the Arkema divestiture and for a one-year extension of the time to divest the Torrance Facility, Dow once more asks the Commission to relieve Dow of its obligation to sell the Torrance Facility that Dow twice before has told the Commission that it would and could sell. Absent strong countervailing reasons, the public interest is not well-served by permitting a respondent repeatedly to seek to reopen and modify a final Commission Order to obtain relief from a divestiture to which the respondent consented.

The public interest in the finality and repose of the Order in this matter is clear. Dow has repeatedly affirmed that it is willing and able to divest the entire Torrance Facility. The Commission approved the Agreement Containing Consent Order and Dow's petition to divest the acrylic acid monomer and latex polymers businesses to Arkema, at least in part, based on that promise. Dow has not shown how its ability to compete in any market would be harmed by the required divestiture, nor how competition in any other respect would be injured. Under these circumstances, the public interest in the finality

of Commission Orders would not be promoted by relieving Dow of its obligation to divest the entire Torrance Facility.

Rule 2.51 of the Commission's Rules of Practice requires Dow to establish facts by affidavit to show a sufficient legitimate public interest to overcome the public interest in the repose and finality of Commission orders. Dow has failed to establish any legitimate public interest in Dow's continued ownership of the Torrance Facility, and failed to establish that the concerns that prompted the divestiture requirement no longer exist. Dow's interest in maintaining ownership of the Torrance Facility does not overcome the public interest in the finality of Commission Orders.

DOW HAS NOT SHOWN GOOD CAUSE FOR A FURTHER EXTENSION OF TIME TO DIVEST

Dow's Petition To Reopen seeks the alternative relief of a three-year extension of time to divest the Torrance Facility if the Commission denies its petition to eliminate its obligation to divest the Torrance Facility. Petition To Reopen at 23. Rule 4.3(b) of the Commission's Rules of Practice provides that, "the Commission, for good cause shown, may extend any time limit prescribed . . . by order of the Commission. [W]here a motion to extend is made after the expiration of the specified period, the motion may be considered where the untimely filing was the result of excusable neglect." The "good cause" standard is not defined by the Rules of Practice, and provides the Commission with flexibility to extend the time provided by Commission Orders for respondents to act. However, the request to extend the time period presumptively must be filed before the period expires. *See* Rule 4.3(b); *see also*, 42 Fed. Reg. 30,150 ("This rule amendment deals with the situation where a motion to extend a time limit is itself filed out of time. In such a situation a movant will have to show that there was excusable neglect for the late filing."), and *In the Matter of General Mills, Inc.*, 86 F.T.C. 687 (1975) (absent excusable neglect and substantial prejudice, extension denied where request filed late).

Dow first requested an extension of time to divest the Torrance Facility on December 11, 2009, after it negotiated an agreement with Arkema to lease rather than sell the Torrance latex polymers plant. At that time Dow requested an extension of at least one year to divest the remaining property. *See* Letter (December 11, 2009) from George S. Cary/Dow to Donald Clark at 2. The Commission extended the divestiture period to one year from the date that Dow closed on the divestiture to Arkema. *See* Letter (January 20, 2010) from Donald S. Clark to George S. Cary/Dow. Dow closed on the divestiture to Arkema on January 25, 2010, and so Dow should have divested the Torrance Facility by January 25, 2011.

Dow's request to extend the time for divestiture essentially argues [redacted]. The Order requires, however, that Dow divest the assets "at no minimum price." Order ¶ III.A.

Dow has therefore not made a sufficient showing of good cause to extend the time for divestiture of the Torrance Facility. Dow has argued that the Torrance Facility is harder to sell than it expected. It has not, however, offered any support for that assertion or explained what it will be able to do to sell the assets in the coming year that it could not have done in the past year. [redacted][11] However, Dow appears unwilling or unable to negotiate the sale of the property despite the extension of time already granted by the Commission that extended the divestiture period from November 27, 2009, to January 25, 2011. Dow has had an adequate opportunity to divest the

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[11] As a separate matter, Dow filed its request for an extension of time about three weeks after the end of the divestiture period. Rule 4.3(b) of the Commission's Rules of Practice provides that the Commission may extend any time limit prescribed by an Order "for good cause shown," except that when a motion to extend is made after the expiration of the specified period, the requester must also show "excusable neglect" for failing to file before the period expired. Dow has not provided any facts or argument to explain why Dow did not request an extension before the extended divestiture period expired. Therefore, Dow has not made any showing that its failure to request on time an additional extension of the divestiture period resulted from excusable neglect.

Torrance Facility. Good cause to extend the divestiture deadline is lacking.

Accordingly, the Commission denies Dow's request for a second extension of the divestiture period. Dow has failed to establish good cause for the extension, nor excusable neglect for failing to request an additional extension before the expiration of the divestiture period.

By direction of the Commission.

E.I. DUPONT DE NEMOURS & COMPANY

Docket No. 9108. Order, June 22, 2011

Order extending *in camera* treatment for certain trial exhibits for an additional ten years and placing remaining trial exhibits on the public record.

ORDER EXTENDING IN CAMERA TREATMENT FOR CERTAIN DOCUMENTS AND ORDERING OTHER DOCUMENTS PLACED ON THE PUBLIC RECORD

During the administrative hearings in this matter, Administrative Law Judge Miles J. Brown ordered that certain trial exhibits receive *in camera* protection until September 4, 1979. On August 10, 1979, Judge Brown issued a second order, which granted *in camera* treatment to those exhibits until the date the Commission issued its final order or until such time as the Commission ordered otherwise. The Commission thereafter issued orders dated January 21, 1981, and June 12, 1984, in response to motions from E.I. Du Pont de Nemours & Co. ("DuPont") requesting three year extensions of *in camera* treatment. On April 25, 1990, the Commission granted an extension of ten years for forty-seven pages of documents that contained detailed cost information. DuPont was granted another ten-year extension on December 21, 2000, for eighteen pages of documents. Shortly before the 2000 Order would have expired, DuPont once again moved for a ten-year extension of *in camera* treatment for one document in its entirety, and portions of several other documents that contain detailed cost and operations data.

DuPont argues that the exhibits identified in its Motion have an "unusual competitive sensitivity" because they contain detailed cost information and that the release of the data contained in the documents would cause "clearly defined, serious injury" to DuPont. Respondent further maintains that its competitors, if granted access to such detailed cost and operations information, could ascertain DuPont's current costs through the use of readily available extrapolation techniques. Finally, DuPont claims that its competitors

could gain valuable insight about DuPont's closely held and proprietary production process.

The Commission concludes that the remaining exhibit pages continue to meet the standard for *in camera* treatment set forth in *H.P. Hood & Sons, Inc.,* 58 F.T.C. 1184 (1961), as refined by *Bristol-Myers Co.,* 90 F.T.C. 455 (1977), and *General Foods Corp.,* 95 F.T.C. 352 (1980), and that they also possess a uniqueness that extends their competitive sensitivity beyond the three-year period normally considered sufficient for confidential business data to have lost most of its competitive relevance. The Commission also concludes that the competitive value of this type of data will not quickly diminish and that its release has the potential to inflict serious competitive injury upon DuPont for the foreseeable future. The Commission recognizes that certain types of information, regardless of age, warrants protection from public disclosure. *See, e.g., Kaiser Aluminum & Chemical Corp.,* 103 F.T.C. 500 (1984); F.T.C. Rule 3.45 (b)(3).

Given the unusual level of detailed cost and operations data contained in the identified trial exhibits, the existence of precise extrapolation techniques, and the limited amount of technological innovation that has occurred in the titanium dioxide industry, the Commission finds that DuPont has made a sufficient showing that these particular documents merit protection for another ten years.

IT IS THEREFORE ORDERED that the following exhibits presently in the *in camera* record of Docket No. 9108 shall remain *in camera* for ten years from the date of this Order, at which time DuPont may show cause why these documents should not be made public.

Exhibit Numbers	Document Numbers
*CX 64 D, E, H, I	08265, 08266, 08269, 08270

* Redacted portions of these exhibit pages will be placed on the public record consistent with Exhibit C of DuPont's Motion.

*CX 81 A, C, E	09429, 09431, 09433
*CX 82 A	04789
*CX 208 A-B	70736, 70737
*CX 210 D, E, G, H	70849, 70850, 70852, 70-854
CX 209 T-V, X	70839-70841, 70843

IT IS FURTHER ORDERED THAT the Secretary shall place on the public record, no sooner than ten (10) calendar days after receipt of this notification by the Respondent and once all documents are located, the remaining exhibits that were identified in and subject to the Commission's December 21, 2000 *in camera* order in this matter as well as the portions of the above exhibit pages for which *in camera* treatment is not granted.

By the Commission.

* Redacted portions of these exhibit pages will be placed on the public record consistent with Exhibit C of DuPont's Motion.

SIMON PROPERTY GROUP, INC.

Docket No. C-4307. Order, June 23, 2011

Order approving respondent's application for divestiture of assets to Tanger Properties Limited Partnership, in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Nigro:

This letter responds to the *Petition of Simon Property Group, Inc. for Expedited Approval of Proposed Divestiture* ("Petition") filed by Simon Property Group, Inc. ("Simon"), on April 22, 2011, requesting that the Commission approve Simon's proposed divestiture of the Prime Outlets - Jeffersonville Outlet Center Assets and Business to Tanger Properties Limited Partnership, pursuant to the order in this matter. The application was placed on the public record for comments until June 1, 2011, and no comments were received.

After consideration of the proposed divestiture as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture of the Prime Outlets - Jeffersonville Outlet Center Assets and Business. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Simon's Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

TOPS MARKETS LLC, MORGAN STANLEY CAPITAL PARTNERS V U.S. HOLDCO LLC, AND THE PENN TRAFFIC COMPANY

Docket No. C-4295. Order, June 30, 2011

Order approving respondent's application for Commission approval of proposed divestiture of assets to Hometown Markets, LLC, in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Ms. Goldstein:

This letter responds to the *Petition for Approval of Proposed Divestitures to Hometown Markets, LLC* ("Petition") filed by Tops Markets, LLC and Morgan Stanley Capital Partners V U.S. Holdco LLC (collectively, "Tops"), on May 4, 2011, pursuant to the Decision and Order in this matter. In the Petition, Tops requests that the Commission approve Tops' proposed divestiture to Hometown Markets LLC of the Penn Traffic Supermarket Business Assets at the following locations: No. 3095, 160 Clinton Avenue, Cortland, New York; No. 3107, 315 Pine Tree Road, Ithaca, New York; and No. 3195, 1730 Elmira Street, Sayre, Pennsylvania. The Petition was placed on the public record for comments until June 6, 2011, and no comments were received.

After consideration of the proposed divestiture as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Tops' Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

CHURCH & DWIGHT CO., INC.

FTC File No. 091 0037 Decision, January 31, 2011

RESPONSE TO CHURCH & DWIGHT CO., INC.'S PETITION TO QUASH, LIMIT OR STAY SUBPOENAS AD TESTIFICANDUM

Dear Mr. Hittinger:

This letter advises you of the Commission's disposition of Church & Dwight Co., Inc.'s December 15, 2010 request that the full Commission review the denial of Church & Dwight's petition to quash, limit or stay four subpoenas *ad testificandum* directed to Church & Dwight employees. The Commission issued the subpoenas on October 15, 2010; Church & Dwight petitioned to quash them on November 4, 2010; and Commissioner Brill directed the issuance of a letter ruling denying the petition to quash on December 8, 2010. For the reasons set forth below and more fully in Commissioner Brill's letter ruling, the Commission affirms that ruling.

As highlighted in Church & Dwight's request for full Commission review and in the December 8 letter ruling, Church & Dwight's objections to the subpoenas *ad testificandum* are the same objections it has made to a subpoena *duces tecum* and a Civil Investigative Demand the Commission issued in June 2009. In particular, Church & Dwight has argued that information relating to (1) non-condom products and (2) the marketing of condoms in Canada is not reasonably relevant to the Commission's investigation. Both the full Commission, in a letter ruling dated February 16, 2010, and the United States District Court for the District of Columbia, *FTC v. Church & Dwight Co., Inc.*, No. 10-mc-149, 2010 WL 4283998 (D.D.C. Oct. 29, 2010), have rejected these arguments. Commissioner Brill's December 8 letter ruling on the subpoenas *ad testificandum* details why; there is no need to repeat the analysis here, other than to note that we agree with it.

In the alternative, Church & Dwight asks the Commission to stay the investigational hearings at issue until the Court of Appeals can hear its arguments. On December 23, 2010, the federal district court denied the same request with respect to the June 2009 subpoena *duces tecum* and CID, holding that Church & Dwight must comply with them before its appeal is exhausted. *FTC v. Church & Dwight Co., Inc.*, No. 10-mc-149, 2010 WL 5209257 (D.D.C. Dec. 23, 2010). The court found that Church & Dwight had not satisfied applicable stay standards, including by failing to demonstrate a likelihood of success on the merits and irreparable harm from producing information relating to non-condom products. *Id.* In its January 27, 2011 *per curiam* order on Church & Dwight's emergency stay motion, the Court of Appeals for the D.C. Circuit similarly concluded that Church & Dwight had not met the stringent standards for a stay pending appeal.

We find the district court's reasoning persuasive and agree with both courts' results. In its request for full Commission review, Church & Dwight does not identify how it would be irreparably harmed by appearing at the investigational hearings as scheduled. Church & Dwight states that questioning on non-condom related information would "sacrifice the integrity of its right to appeal." Request for Review at 4. But as the district court found, "[i]t is not irreparable harm ... for the FTC to see information it would not be entitled to see [if Church & Dwight prevails on appeal]." *Id.* at *5. Other remedies would remain available to Church & Dwight, including exclusion from any enforcement proceeding of the disputed information. *See id*. On the other hand, requiring Commission staff to wait until the appeal is decided before asking relevant questions about non-condom products could delay the investigation substantially.[1]

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[1] By way of example, the Commission resolution authorizing the use of compulsory process in this investigation indicates that one potentially relevant line of questioning is whether Church & Dwight has employed its marketing of "other products" in attempting to acquire or maintain a monopoly in the sale of condoms. As another example, it is plausible that a document addressing

For the foregoing reasons, **IT IS ORDERED THAT** the December 8, 2010, letter ruling is **AFFIRMED**.

By direction of the Commission.

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marketing strategies for both condom and non-condom products would naturally elicit questions about non-condom products designed to help Commission staff understand the conduct at issue in the investigation.

W.L. GORE & ASSOCIATES, INC.

FTC File No. 101 0207 Decision, May 23, 2011

RESPONSE TO W.L. GORE & ASSOCIATES, INC.'S PETITION TO LIMIT OR QUASH SUBPOENA DUCES TECUM

Dear Mr. Nelson:

On April 19, 2011, the Commission received from counsel for W.L. Gore & Associates, Inc. ("Gore") a petition to limit or quash a subpoena *duces tecum* issued by the Commission on March 10, 2011, and directed to Gore. The Commission issued the subpoena in connection with its investigation of whether Gore has engaged in unfair methods of competition "by contracts, exclusionary practices, or other conduct relating to waterproof or waterproof and breathable membranes or technologies and related products."[1] This letter advises you of the Commission's disposition of the petition, effected through the issuance of this ruling by Commissioner Julie Brill, acting as the Commission's delegate[2].

For the reasons explained below, the petition is denied, and the documents required by the subpoena must be produced on or before June 7, 2011[3]. Gore has the right to request review of this ruling by the full Commission, and any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling[4]. The timely filing of a request for review of this ruling

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[1] Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, File No. 101-0207 (Feb. 16, 2011).

[2] *See* 16 C.F.R. § 2.7(d)(4).

[3] Gore has been in possession of the subpoena for over ten weeks and therefore has had ample opportunity to study and develop a plan for responding.

[4] 16 C.F.R. § 2.7(f). This letter ruling is being delivered by email and courier delivery. The email copy is provided as a courtesy, and the deadline by

by the full Commission does not stay the return date established by this ruling. [5]

I. PROCEDURAL POSTURE

The subpoena required Gore to produce the demanded documents by April 1, 2011. At Gore's request, and pursuant to Commission Rules 2.7(c) and 2.7(d)(3), on March 18, 2011, Commission staff extended both the return date on the subpoena and the deadline for the filing of a petition to quash to Friday, April 15, 2011. In early April, Gore made a token production, totaling approximately two boxes of documents.

On April 15, 2011, Gore submitted a petition labeled "Confidential" to limit or quash the subpoena. This version did not comply with Commission Rules 4.2(d)(4) and 4.9(c), because Gore did not simultaneously submit (1) an explicit request for confidential treatment, conforming to the requirements of Rule 4.9(c); (2) a redacted public version; and (3) copies of the exhibits to the petition. Gore's counsel was notified by the Commission's Secretary that a redacted public version of the petition and a request for confidential treatment had to be filed at the same time as the version labeled "confidential."

On April 18, 2011, Gore submitted the exhibits to the petition, and on April 19, 2011, Gore submitted a version of the petition labeled "Public Version" that included many redactions, and in particular redacted Gore's name. Gore's counsel also submitted a cover letter with its April 19, 2011 submission which in its view supported the request for confidentiality of the redacted material. Pursuant to authority delegated by the Commission, the Commission's Principal Deputy General Counsel, David C. Shonka,

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which an appeal to the full Commission must be filed shall be calculated from the date Petitioners receive the ruling by courier delivery. *Id.*

[5] *Id.*

addressed Gore's request for confidential treatment in letters dated May 3, 2011 and May 9, 2011, granting in part and denying in part Gore's request for confidential treatment of the redacted material.

Although Gore attempted to correct the above deficiencies, it did not finalize that effort until April 19, 2011, after the April 15, 2011 filing deadline. Thus, its petition was not timely filed. As a matter of discretion, this petition will be considered on the merits. Petitioners are reminded that the Commission's Rules provide that if they wish to request confidential treatment with respect to any portion of a petition to quash, they must adhere to the Commission's Rules. Specifically, they are required simultaneously to provide the Commission with (1) a specific statement making such a request, as described in Rules 4.2(d)(4)(i) and 4.9(c)(1); and (2) a redacted public version of the petition and any supporting exhibits[6]. Thus, any petitions labeled "confidential" that redact the identity of the petitioner or matter name, or lack an accompanying public redacted version "will be rejected for filing pursuant to [Commission Rule] 4.2(g), and will not stay compliance with any applicable obligation imposed by the Commission or the Commission staff * * *[,]" including in particular the obligation to comply with the subpoena or CID at issue.[7]

II. ANALYSIS

A. The subpoena is not unduly burdensome

Gore's principal contention is that the subpoena should be quashed because it is unduly burdensome. In support, Gore claims that compliance could require production of documents from over

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[6] 16 C.F.R. §§ 4.2(d)(4), 4.9(c). In particular, Rule 4.2(b) provides that the identity of the petitioner and the matter name – which constitute the title of the action – must be "clearly show[n]" and may not be redacted. 16 C.F.R. § 4.2(b).

[7] 16 C.F.R. § 4.2(d)(4).

1,500 employees, requiring a search of over 1.3 terabytes of data that would require possibly hundreds of thousands of hours of personnel time and cost up to ten million dollars. Gore also argues that the time period for relevant documents identified in the subpoena is unduly burdensome because it demands documents dating back to 2001. Gore argues that complying with this requirement would require it to investigate archived storage and dated electronic records, including files of long-departed employees. Gore further argues that the requirement to produce documents current to within 14 days of "full compliance" would also be unduly burdensome because of the volume of documents demanded by the subpoena. Finally, Gore argues that requiring a privilege log is overly burdensome because a large number of documents responsive to the subpoena are likely privileged.

As a preliminary matter, Gore's claims of undue burden are premised on an erroneous reading of the case law relevant to administrative investigations. Indeed, all of the cases cited in Gore's petition involve third party discovery under the Federal Rules of Civil Procedure.

The applicable standard for burden in the context of an administrative investigation is well-established. Over thirty years ago, in *FTC v. Texaco, Inc.*, the D.C. Circuit stated that "the question is whether the demand is *unduly* burdensome or *unreasonably* broad[,]" meaning that it "threatens to unduly disrupt or seriously hinder normal operations of a business."[8] The court distinguished "undue burden" from the "expected" and "necessary" costs imposed

[8] 555 F.2d 862, 882 (D.C. Cir. 1977) (emphasis in original). *Accord Solis v. Food Employers Labor Rel'ns Ass'n. & United Food & Comm'l Workers Pension Fund*, No. 10-1687, 2011 U.S. App. LEXIS 9110, *8 (4th Cir. May 4, 2011); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089, 1090 (D.C. Cir. 1992); *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986); *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 8 (D.D.C. 2010).

in any investigation[9]. Moreover, the court found that the fact that a burden resulted from a recipient's chosen method of operating did not make that burden undue[10].

In citing to cases involving third party discovery, Gore is using standards derived from the Federal Rules of Civil Procedure and applying them – improperly – to an administrative investigation. By their own terms, the Federal Rules of Civil Procedure apply only to civil actions brought in the United States district courts[11]. But administrative investigations are not such civil actions. They are not conducted in court, and, in fact, they may never appear in court[12]. Indeed, the Federal Rules themselves recognize that subpoenas in administrative investigations should be treated differently from subpoenas for discovery; the Advisory Committee Notes that accompanied adoption of Rule 45 specifically recognized that the Rule does not apply to administrative process, including, among others, subpoenas issued pursuant to the FTC Act[13]. Moreover, the Federal Rules of Civil Procedure are intended to serve a purpose completely different from that of an administrative investigation[14]. The Federal Rules of Civil Procedure were created "to secure the

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[9] *Texaco*, 555 F.2d at 882.

[10] *Id.*

[11] FED. R. CIV. P. 1.

[12] *See e.g.*, *Texaco*, 555 F.2d at 874 ("The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, *and that a complaint may not, and need not, ever issue*.") (emphasis added).

[13] Fed. R. Civ. P. 45 advisory committee's note (1937). *See also Maryland Cup*, 785 F.2d at 477-78.

[14] *See*, *e.g.*, *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it.") (citations omitted).

just, speedy, and inexpensive determination of every action and proceeding."[15] In contrast, through administrative investigations, the FTC is investigating possible violations of law[16].

Applying the proper standards to this case, it is apparent that Gore has failed to meet them. Gore has the responsibility of establishing undue burden in complying with a Commission subpoena[17]. "[T]he presumption is that compliance [with Commission subpoenas] should be enforced to further the agency's legitimate inquiry into matters of public interest."[18] In order to overcome this presumption and establish undue burden, Gore must show that compliance "threatens to unduly disrupt or seriously hinder normal operations of a business."[19] The target of a subpoena must expect to incur some burden in responding to a subpoena and the evidence required to demonstrate an undue burden increases when the burden is in large part attributable to the magnitude of the recipient's

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[15] FED. R. CIV. P. 1.

[16] *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (stating that the FTC can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."). Consistent with this broad authority, agencies are not required to tie their investigations to particular theories or specific violations. "[I]n the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case." *Texaco*, 555 F.2d at 874 (emphasis in original); *see also Invention Submision Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) ("[T]he Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of a violation."). To require an agency to identify its specific needs for information before allowing the agency to obtain that information would run contrary to these principles.

[17] *In re Nat'l Claims Serv., Inc.,* 125 F.T.C. 1325, 1328-29 (1998).

[18] *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980).

[19] *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 8 (D.D.C. 2010) (quoting *Texaco*, 555 F.2d at 882).

business operations and the comprehensive nature of the investigation[20].

In particular, in asserting claims of burden, subpoena recipients must consider first how technology may help reduce any burdens associated with review and production of electronically stored information ("ESI"). There are a myriad of "advanced analytical software applications and linguistic tools" available to help reduce any burden of reviewing and producing ESI[21]. Thus, a party who claims burden related to ESI should include in its petition a discussion of the tools or techniques considered and how these have affected or mitigated the burden alleged.

It is not enough for a party to simply say, without more, that a Commission subpoena is broad or unduly burdensome. To the extent a party wishes to reduce its burden, it is incumbent on that party to come forward and present staff with information about the company and how it stores its electronic information and with affirmative suggestions about how the scope of the subpoena might be narrowed

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[20] *See Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) ("There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one – and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations."); *In re FTC Corporate Patterns Report Litig.*, Nos. 76-0126, 76-0127, 1977 WL 1438, at * 16 (D.D.C. July 11, 1977) (concluding that "there is no doubt that the relative size and complexity of the corporate parties' business operations contribute to the compliance burden" and noting that "the cost of compliance for the corporate parties, even if high in an absolute sense, is not high compared to other costs borne by such large corporations.").

[21] FED. R. EVID. 502 advisory committee's note (Nov. 28, 2007). *See also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) ("Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying."); John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, NEW YORK TIMES, Mar. 4, 2011, at A1, *available at*, http://www.nytimes.com/2011/03/05/science/05legal.html.

in order to focus the inquiry. This responsibility is particularly necessary given the prevalence of ESI and the current realities of e-discovery. Such affirmative suggestions could include limiting the scope to key custodians, narrowing the applicable time periods, proposing search methodologies such as the use of keywords, predictive coding, or concept searches, or utilizing other search and review techniques.

Gore has done none of that in this case. For example, Gore has not demonstrated through concrete evidence or declaration that the costs imposed by this subpoena are outside of the normal costs to be expected in an investigation, that these costs are unduly burdensome in light of the company's normal operating costs, or that these costs would seriously hinder or threaten its normal operations[22]. To the extent that the subpoena requires Gore to review millions of documents collected from hundreds of workers, including laborers, that burden is "in large part attributable to the magnitude of [Petitioners'] business operations" and is not by itself undue[23]. Gore's complaints about searching large numbers of documents or hundreds of custodians, or paying millions of dollars, without more, is insufficient to support a claim of undue burden.[24]

Gore's claim of burden from the production of ESI includes only a token reference in one of its exhibits to the impact of advanced analytical techniques or tools. Gore has claimed that it potentially has a terabyte or more of data, even after de-duplication, but Gore has not demonstrated that it has explored avenues for otherwise meeting staff's investigative demands, or offered the types of affirmative suggestions for reducing its burden described above.

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[22] *Maryland Cup*, 785 F.2d at 479.

[23] *Texaco*, 555 F.2d at 882.

[24] *Shaffner*, 626 F.2d at 38 (rejecting as insufficient "conclusory allegation that compliance . . . would 'severely interfere, disrupt and temporarily terminate'" recipient's business).

B. The subpoena is not unreasonably broad

Gore argues that the subpoena is overly broad (with respect to both relevant time period and breadth of demanded documents) because it demands production of numerous broad categories of documents ranging across a broad portion of Gore's business, dating back more than ten years, to January 1, 2001. Gore also argues that the subpoena is not limited to information relevant to whether the business practices at issue violate Section 5 of the FTC Act, and seeks irrelevant information.

At the investigative stage, however, Commission subpoenas are necessarily broad in coverage, so as to aid the Commission in making a determination as to whether to file a complaint. The D.C. Circuit, among others, has favored such a broad approach, stating:

> At the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint. The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally * * *. [52]

For these reasons, specifications in a subpoena also may be more general and may cover a wide breadth of material. Indeed, broad subpoenas are often necessary at the outset of an investigation as a practical matter because staff lacks information on how a subpoena recipient keeps or maintains documents in the normal course of its business. It is for this reason that staff is authorized to negotiate the scope of a subpoena in order to obtain those documents necessary and relevant to the investigation.

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[25] *Invention Submission Corp.*, 965 F.2d at 1090 (citing *Texaco*; citations omitted, emphasis in original). Furthermore, district courts must defer to an agency's determination of the information relevant to an investigation, unless it is "obviously wrong." *Id.* at 1089 (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980)).

The scope of an investigation is necessarily determined by the nature of the conduct under investigation, and investigations into conduct that spans years of activities, or multiple participating entities may well require broadly-sweeping subpoenas. Here, the breadth of the subpoena is not unreasonable compared to subpoenas issued in similar investigations. For example, in the Church & Dwight matter, in June 2009 the FTC issued and in October 2010 the federal court enforced a subpoena that included 23 specifications, some of which dated back to 2001, and a Civil Investigative Demand that included 21 specifications, some of which dated back to 1999[26]. Moreover, both the subpoena and CID called for documents and information kept in Canada by Church & Dwight's Canadian subsidiary. In light of these requests, the single subpoena issued to Gore, which included 15 specifications dating back to 2001, is not unreasonable.

Having failed to meet the standards demonstrating undue burden or unreasonable breadth, we deny Gore's petition and direct it to comply with the subpoena as issued. [7]2

* * *

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** W.L. Gore & Associates, Inc.'s Petition to Limit or Quash is **DENIED**; and

IT IS FURTHER ORDERED THAT W.L. Gore & Associates, Inc. shall comply with the Commission's subpoena by June 7, 2011.

By direction of the Commission.

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[26] *See* Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* and Civil Investigative Demand Issued in Furtherance of a Law Enforcement Investigation, *FTC v. Church & Dwight Co., Inc.*, Case No. 1:10-mc-00149-EGS, at Dkt. No. 1, Exs. 3-4 (D.D.C. Feb. 26, 2010).

[27] Staff retains the discretion to modify the subpoena should Gore come forward with such acceptable proposals in the future.

W.L. GORE & ASSOCIATES, INC.

FTC File No. 101 0207 Decision, June 27, 2011

RESPONSE AFFIRMING DENIAL OF W.L. GORE & ASSOCIATES, INC.'S PETITION TO LIMIT OR QUASH SUBPOENA DUCES TECUM

Dear Mr. Nelson:

This letter advises you of the Commission's disposition of W.L. Gore & Associates, Inc.'s ("Gore") request that the full Commission review the denial of Gore's petition to limit or quash a subpoena *duces tecum* directed to Gore. The Commission issued the subpoena on March 10, 2011; Gore petitioned to limit or quash it on April 19, 2011; and Commissioner Brill, acting as the Commission's delegate, *see* 16 C.F.R. § 2.7(d)(2), directed the issuance of a letter ruling denying the petition to limit or quash on May 23, 2011. For the reasons set forth below and more fully in Commissioner Brill's letter ruling, the Commission affirms that ruling.

The Commission issued the subpoena in connection with its investigation of whether Gore has engaged in unfair methods of competition "by contracts, exclusionary practices, or other conduct relating to waterproof or waterproof and breathable membranes or technologies and related products."[1] In its petition to limit or quash, Gore requested relief from the subpoena on the grounds that the subpoena is overly broad and that complying with the subpoena would be unduly burdensome. Gore argued that complying with the subpoena would require searching the computer files and offices of 1,500 employees or more, encompassing 1.3 terabytes of data or more, and would require potentially hundreds of thousands of hours of personnel time and cost many millions of dollars. Gore also argued that the subpoena's call for documents dating back to January 1, 2001 is unduly burdensome and overly broad because it requires

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[1] Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, File No. 101-0207 (Feb. 16, 2011).

Gore to investigate archived storage and dated electronic records, including files of long-departed employees. Finally, Gore argued that the subpoena is unduly burdensome because it seeks numerous privileged documents and requires a log to be submitted on or before the return date of the subpoena as to any documents withheld. Gore argued that the cost of preparing the privilege log would be significant, and many of the documents sought would be tangential to the investigation.

In its request for full Commission review, Gore essentially repeats these same arguments and does not supply any additional facts or legal arguments in support of its petition to limit or quash. Though Commissioner Brill's May 23, 2011 ruling offered guidance to Gore on the information necessary to establish a claim of burden, Gore has not supplemented its claim by providing, for instance, information regarding the use of advanced analytical technologies to aid search, review and production of electronic information, or any discussion as to why the subpoena presents an undue burden from the standpoint of Gore's normal operating resources and costs.

Instead of supporting its claim of burden, Gore describes in detail ongoing negotiations with the Commission staff. The Commission welcomes such discussions between subpoena recipients and the Commission staff because they enhance staff's ability to obtain the information it needs to carry out the Commission's law enforcement mission efficiently, while reducing the burden on recipients. In fact, the Commission's Rules of Practice anticipate and require such discussions between staff and subpoena recipients. *See*, *e.g.*, 16 C.F.R. § 2.7(d)(2). The fact that such discussions are ongoing does not provide a basis for quashing or limiting the subpoena.[2] To the contrary, such negotiations undercut Gore's arguments regarding the

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[2] Gore claims that Commission staff have departed from FTC procedures in their negotiations over Gore's compliance with the subpoena. But Gore has not shown that there are inconsistencies between Commission policy or practice and the ongoing negotiations with Gore regarding its compliance with the outstanding subpoena.

alleged undue burden of the subpoena. *See FTC v. Texaco, Inc.,* 555 F.2d 862, 882-83 (D.C. Cir.) (en banc) (noting that the alleged burdensomeness of the subpoena was "substantially mitigated" by extensive negotiations between FTC staff and Mobil Oil), *cert. denied*, 431 U.S. 974 (1977).

The Commission has reviewed the record created by Gore in support of its petition to limit or quash and its request for full Commission review. For the reasons explained in Commissioner Brill's May 23, 2011 letter ruling and in this ruling, Gore has failed to meet the proper standard demonstrating unreasonable breadth of a Commission subpoena and undue burden in complying with a Commission subpoena. Accordingly, Gore has not carried its burden of proof establishing its entitlement to relief from the subpoena. *See SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973) (holding that the petitioner has "the burden of showing that an agency subpoena is unreasonable . . . and, where, as here, the agency inquiry is authorized by law and the material sought are relevant to the inquiry, that burden is not easily met"), *cert. denied*, 415 U.S. 915 (1974). Because Gore did not request a stay pending full Commission review as permitted by Commission Rule 2.7(f), the now-expired June 7, 2011 subpoena return date set by the Commission's May 23, 2011 letter ruling remains in effect.

For the reasons set forth in the Commission's letter ruling of March 23, 2011 denying Gore's petition to limit or quash, **IT IS ORDERED THAT** such ruling should be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

TABLE OF COMMODITIES

DECISIONS AND ORDERS