

0910062

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Pamela Jones Harbour
 William E. Kovacic
 J. Thomas Rosch

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1. Respondent TOI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 9251 Belcher Road, Pinellas Park, Florida 33782.
2. The Federal Trade 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 this Order, the following definitions shall apply:

THE PARTIES

- A. “Respondent” or “TOI” means Transitions Optical, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Transitions Optical, Inc.; and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- C. “Analysis to Aid Public Comment” means the public statement provided by the Commission that describes the allegations in the Complaint in FTC Dkt. No. 091-0062 and the terms of this Order.
- D. “Antitrust Compliance Program” means the program to ensure compliance with this Order and with the Antitrust Laws, as required by Paragraph III of this Order.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et. seq.*, the Sherman Act, 15 U.S.C. § 1 *et. seq.*, and the Clayton Act, 15 U.S.C. § 12 *et. seq.*
- F. “Bundled Discount” means any Discount that is conditioned, either formally or informally, directly or indirectly, upon a Direct Customer or Indirect Customer’s purchase, distribution, promotion, marketing, license, or sale of Photochromic Products in more than one Lens Material and/or more than one Refractive Index Range.
- G. “Competing Photochromic Product” means any Photochromic Product other than Respondent’s Photochromic Product.

- H. “Corrective Ophthalmic Lenses” means any lens, whether finished, semi-finished or unfinished, that is designed to be used for vision correction and to be worn in eyeglass frames, including but not limited to, any single vision, bifocal, trifocal, or progressive lens made of or containing glass, polycarbonate, plastic, Trivex[®] or other materials.
- I. “Development Partner” means any Direct Customer that, together with Respondent, invests substantial resources, in terms of time, money and/or technical know-how, in the research and development of a new and innovative Photochromic Product.
- J. “Direct Customer” means any Person who purchases, or otherwise takes delivery or receives directly, from Respondent any Photochromic Product; or who conveys, delivers, consigns, or sells Corrective Ophthalmic Lenses directly to Respondent for the application of Respondent’s Photochromic Materials or Photochromic Treatments. A Direct Customer includes without limitation ophthalmic lens casters, but specifically excludes Shareholders.
- K. “Discount” means any price reduction, rebate, or other incentive that provides pecuniary value to a Direct Customer or Indirect Customer, including but not limited to, marketing funds, co-op funds, and business building funds.

- Z. “Price Term” means the retail or wholesale price, resale price, purchase price, price list, credit term, delivery term, service term, or any other monetary term defining, setting forth, or relating to the money, compensation, or service paid by a Direct Customer or Indirect Customer to Respondent or received by a Direct Customer or Indirect Customer in connection with the purchase or sale of any of Respondent’s Photochromic Product.

- AA. “Product Development Service” means any service, assistance or other support related to the research, development or application of any improved, modified, or innovative Photochromic Product.

- BB. “Product Support” means any service, assistance or other support related to: (i) the qualification or validation process associated with applying Respondent’s Photochromic Materials or Photochromic Treatments on Corrective Ophthalmic lenses; and (ii) examining development or applica

II.

IT IS FURTHER ORDERED that, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, in connection with the licensing, development, production, manufacture, marketing, promotion, purchase or sale of Photochromic Products:

A. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, or understanding that has the intent or effect of achieving Exclusivity with a Direct Customer, including but not limited to:

1. Conditioning the research, development, manufacture, promotion, distribution, marketing, sale, purchase, or licensing of any of Respondent’s Photochromic Products on Exclusivity;
2. Requiring a Direct Customer to purchase minimum amounts (by units, revenue, or any other measure) of Respondent’s Photochromic Products in excess of the Minimum Batch Size;
3. Requiring a Direct Customer to restrain or limit its sales, research, development, production, distribution, marketing, promotion, purchases, or licensing of any Competing Photochromic Product; and
4. Conditioning the availability or applicability of Discounts, Price Terms, Product Support, or Product Development Services for Respondent’s Photochromic Products on Exclusivity.

provided, however that Respondent may enter into a written agreement, contract, or other understanding with any Development Partner(s) that provides for Exclusivity by both the Respondent and the Development Partner(s) regarding the research, development, manufacture, promotion, purchase, or sale of any jointly developed Photochromic Product.

B. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, understanding, or any other requirement with respect to an Indirect Customer that:

1. Contains a condition, term or other provision providing for Exclusivity unless:
 - (a) the Indirect Customer, for any or no cause, and without payment or penalty of any kind, may terminate any condition, agreement, contract or understanding providing for Exclusivity upon thirty (30) days or less written notice;

- (b) the condition, term or other provision providing for Exclusivity can be applied to any subset of Lens Materials and/or any subset of Refractive Index Ranges, if requested in writing by the Indirect Customer; and
 - (c) the Discount terms and rates offered or provided to an Indirect Customer by Respondent for Exclusivity on any Lens Material(s) and/or any Refractive Index Range(s) are the same irrespective of whether or not the Indirect Customer elects to be Exclusive on all Lens Materials and Refractive Index Ranges or only a subset thereof.
2. Provides a flat or lump-sum payment of monies to an Indirect Customer in exchange for any condition, agreement, contract or understanding providing for Exclusivity; and
 3. Provides an In-Kind Contribution to an Indirect Customer in exchange for any condition, agreement, contract or understandingchangn

1. Conditions Price Terms or Discounts offered or provided to a Direct Customer or Indirect Customer based upon the amount o

5. Withholding from the Direct Customer or Indirect Customer Photochromic Products newly developed or introduced by Respondent; and
6. Refusing to deal with the Direct Customer or Indirect Customer on terms and conditions generally available to other Direct Customers or Indirect Customers.

provided, however, that Respondent will not be considered to be in violation of this Paragraph by the mere fact that Respondent markets or competes against a Competing Photochromic Product that is owned or sold by a Direct Customer or Indirect Customer.

- G. Notwithstanding any provision of this Order, Respondent may provide or offer to provide the following without it constituting in and of itself a violation of this Order:
1. Volume Discounts to Direct Customers or Indirect Customers that are calculated, based upon, or reflect actual differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which Respondent's Photochromic Products are sold or delivered;
 2. Discounts to Direct Customers or Indirect Customers that are sufficient to meet but not exceed the Discounts, Price Terms, Product Development Services, or Product Support actually provided or offered to be provided by any Person selling, distributing, promoting, marketing, or licensing Competing Photochromic Products; and
 3. Discounts that are offered or provided to Direct Customers or Indirect Customers with a condition or other requirement that the Discount be used solely in the sale, development, manufacture, distribution, promotion or marketing of Respondent's

IV.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days after the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order. For the period coveredwb TD(se)Tj12.9600 0.0000 TD(tti)Tj10.08025.92(s O)Tj16.3200 0s report,s0.0000 T

3. The name, title, business address, e-mail address, and business phone number of each Person within Respondent's Executive and Sales Staff who received Exhibit A to this Order and In-Person Training on the requirements of this Order and the Antitrust Laws during the reporting period, the date each Person received Exhibit A to this Order and In-Person Training, and a description in reasonable detail of the In-Person Training;
4. A description in reasonable detail of any policy, agreement, contract, understanding, or other requirement by Respondent that a Direct Customer or Indirect Customer deal Exclusively with Respondent with respect to any of Respondent's Other Photochromic Products, and with respect to each such product:
 - (a) Describe in reasonable detail the policy, agreement, contract, understanding, or requirement providing for Exclusivity; and,
 - (b) State the name, address, phone number, and e-mail address of each Person concerning which Respondent has enforced or attempted to enforce the policy, agreement, contract, understanding, or other requirement of Exclusivity; and
5. The name, address, phone number, and e-mail address of each Person who has complained or alleged, orally or in writing (including, but not limited to, pleadings filed in any state or federal court), that Respondent has violated this Order or the Antitrust Laws, a description in reasonable detail of the complaint or allegation, and a description of any action or conduct by Respondent taken or proposed in response to the complaint or allegation.

V.

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

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

EXHIBIT A

[INTERNAL NOTICE]

The Federal Trade Commission (“FTC”) has been investigating various practices used by Transitions Inc. (“

EXHIBIT B

[Transitions letterhead]

Dear [name of customer]:

The Federal Trade Commission (“FTC”) has been investigating various practices used by Transitions Inc. (“TOI”) in the marketing and sale of photochromic materials and coatings used on corrective ophthalmic lenses. The purpose of the FTC’s investigation has been to determine if any of those practices violate federal antitrust laws.

TOI does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines about how TOI can market and sell its products, TOI has reached a settlement with the FTC. Under the settlement, TOI has signed a consent agreement with the FTC agreeing that the FTC can issue and TOI will be bound by a Decision and Order (“Order”) issued by the FTC.

The Order requires TOI to send the enclosed copies of the Order and the FTC’s Analysis to Aid Public Comment to its customers. You also may read and download a copy of the Order from the FTC at its web site at [web li