FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JULY 1, 2005 TO DECEMBER 31, 2005

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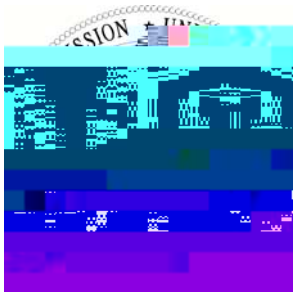

Compiled by
The Office of the Secretary
Ami Joy Rop, Editor

MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JULY 1, 2005 TO DECEMBER 31, 2005

DEBORAH PLATT MAJORAS, *C h*
Took oath of office August 16, 2004.

THOMAS B. LEARY, *C* *
Took oath of office November 17, 1999.

PAMELA JONES HARBOUR, *C*
Took oath of office August 4, 2003.

JON LEIBOWITZ, *C*
Took oath of office September 3, 2004.

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

*Resigned, effective December 31, 2005

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IN THE MATTER OF

OCCIDENTAL PETROLEUM CORPORATION AND VULCAN MATERIALS COMPANY

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

This consent order addresses the acquisition by Respondent Occidental Chemical Company of the chemical assets of Respondent Vulcan Materials Company. The order, among other things, requires the respondents to divest a facility owned by Vulcan in Port Edwards, Wisconsin -- and assets relating to the research, development, marketing, sales, and production of chemicals produced at that facility, including chlorine, caustic soda (sodium hydroxide), KOH (potassium hydroxide), APC (anhydrous potassium carbonate), and hydrochloric acid ("Port Edwards business") -- to ERCO Worldwide ("ERCO") or to another buyer approved by the Commission. An accompanying Order to Maintain Assets requires the respondents to preserve the Port Edwards business as a viable, competitive, and ongoing operation until the divestiture is achieved.

For the Commission:

For the Respondent: and

COMPLAINT

Pursuant to 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 Occidental Petrol

to acquire the chemicals business of Vulcan Materials Company, a corporation subject to the jurisdiction of the Commission, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 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:

United States. Most of Armand's production is of the solid form of potcarb, known as APC or anhydrous potassium carbonate.

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

5. Respondent Vulcan Materials Company ("Vulcan") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its headquarters and principal place of business located at 1200 Urban Center Drive, Birmingham, Alabama 35242.

6. Respondent Vulcan's chemicals business consists of three chloralkali plants and related assets. Vulcan's plants are located in Port Edwards, Wisconsin; Geismar, Louisiana; and Wichita, Kansas. In addition, Vulcan and Mitsui & Co. Ltd. are joint venture partners in a second chloralkali plant and an ethylene dichloride plant in Geismar, Louisiana. Vulcan produces KOH and potcarb at its Port Edwards, Wisconsin facility and sells these chemicals to customers in the United States. Vulcan produces the second largest volume of potassium hydroxide and potassium carbonate in the United States.

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

B. THE PROPOSED TRANSACTION

8. On October 12, 2004, Respondents announced that they had entered into an agreement whereby Occidental, through its subsidiary OxyChem, would purchase Vulcan's chemical business, including Vulcan's three plants and related transportation and distribution assets and assume certain liabilities. Included in the transaction is

the Vulcan-Mitsui joint venture at Geismar. The purchase price is $214 million plus certain contingent future payments, projected to equal approximately $145 million. Throughout this Complaint this transaction is referred to as "the proposed transaction."

C. THE RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant product markets in which to analyze the effects of the proposed transaction are research, marketing, manufacture, and sale of (1) potassium hydroxide (also known as KOH); (2) potcarb; and (3) anhydrous potassium carbonate or APC.

10. KOH is a chemical made by the electrolytic decomposition of potassium chloride brine into chlorine and KOH. It is the most commonly used intermediate form in which inorganic potassium chemicals are manufactured. KOH is the raw material for the production of many potassium chemicals, such as potassium carbonate, potassium permanganate, citrate, acetate, cyanide, benzoate, iodide, and sorbate.

11. Potcarb is the highest volume potassium chemical produced using KOH. It is produced through the carbonation of KOH. End uses for potcarb include nutrition supplements for dairy cattle, video glass for television and computer monitors, other specialty glass, potassium silicates, fertilizers, gas processing, industrial intermediaries, photographic development processes, detergents, and food products.

12. Potcarb can be produced in liquid or solid form. The solid form is known as anhydrous potassium carbonate or APC. The majority of total potcarb production in the United States is of APC. APC requires a more sophisticated production process and greater capital investment than does liquid potcarb production. Most APC users cannot economically substitute liquid potcarb for APC.

13. The relevant geographic market in which to assess the impact of the proposed acquisition is no broader than the United States.

Competition is national in scope, with U.S. producers of the relevant products marketing and selling their products to customers throughout the United States. Imports of the relevant pr

18. If the proposed transaction is consummated, OxyChem will own the potcarb production assets of Vulcan. Because of the relationship between Armand and OxyChem, they are not independent competitors and their capacity and production are considered jointly for concentration analysis.

19. The proposed transaction would increase the HHI for potcarb, as measured by capacity, by over 1800 points to a postmerger HHI of over 7000 points.

c. APC

20. The market for APC is very highly concentrated. Armand and Vulcan are the only two producers of APC in the United States. Together they accounted for all of the APC produced and over 95% of the APC sold in the United States. ASHTA also owns a facility that can produce APC; however, the company idled the facility at the end of 2002.

21. For APC, the proposed transaction would inc Tw[(consld ine( )10(t)tAPC, ters)]TJ]TJ-15.

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24. OxyChem, through Armand, and Vulcan are direct

by the exit of Vulcan as a result of the proposed transaction. It is very unlikely a manufacturer without its own source of KOH would find it economically viable to invest in an APC production facility and compete with manufacturers with internal sources of product.

28. Market conditions in the potcarb market are not conducive to additional APC entry. There is excess APC capacity in the United States due to a decrease in demand over the past several years. Further, available KCl for use in KOH production is extremely tight due to increasing demand in the agricultural market and it is unlikely that increased supplies will be available at least over the next 12 to 24 months. Given the current market conditions and other factors, it is unlikely that either Olin or ASHTA would find it economically viable to enter the APC market within the next two years, even in response to a small but significant increase in price. Further, unless Olin were to make the decision to enter relatively quickly, its putative entry would not be timely as it can take up to 2 years to construct an APC facility.

G. EFFECTS OF THE PROPOSED ACQUISITION

29. The effect 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. It will substantially increase concentration in the markets for KOH, potcarb and APC;

b. It will eliminate Vulcan as the most significant competitor in the KOH market and the only significant competitor in the potcarb and APC markets; and

c. It will lead to a reduction in competition and an increase in the likelihood that OxyChem and Armand will increase prices in the markets for KOH, potcarb, and APC.

H. VIOLATIONS CHARGED

30. The proposed transaction between Occidental and Vulcan violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

31. The proposed transaction between Occidental and Vulcan, if consummated, would violate 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 13th day of July, 2005, issues its Complaint against said Respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Occidental Petroleum Corporation, hereinafter referred to as "Respondent Oxy," of three chemical plants and related assets from Vulcan Chloralkali, LLC and Vulcan Materials Company, hereinafter collectively referred to as "Respondent Vulcan," and Respondent Oxy and Respondent Vulcan ("Respondents") having been furnished thereafter with 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 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 thereupon having issued its Complaint and Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following

B. "Respondent Vulcan" or "Vulcan" means Vulcan Materials Company, a corporation, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, including Vulcan Chloralkali LLC, subsidiaries, divisions, groups and affiliates controlled by Vulcan Materials Company, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.

C. "ERCO" means ERCO Worldwide (USA) Inc., a corporation organized and doing business under the laws Delaware, with its executive offices at 302 The East Mall, Suite 200, Toronto, Ontario, Canada, M9B 6C7, and which is a subsidiary of Superior Holdings (USA) Inc. which is a subsidiary of Superior Plus, Inc. (a Canadian company).

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means either ERCO or any other entity that receives the prior approval of the Commission to acquire the Port Edwards Assets pursuant to Paragraphs II or V of this Order.

F. "Acquisition" means the proposed acquisition by Respondent Oxy of three chloralkali plants and related assets in Geismar, Louisiana, Port Edwards, Wisconsin, and Wichita, Kansas, from Vulcan pursuant to and as described in the Asset Purchase Agreement dated October 11, 2004, between Basic Chemicals Company, LLC, and Vulcan.

G. "Acquisition Date" means the date the Acquisition is consummated.

H. "Assigned Contract Customer" means a KOH or potassium carbonate customer of the Acquirer whose contract was assigned as a part of the Divestiture Agreement and is listed in Confidential Appendix C.

I. "Confidential Business Information" means all information that is not in the public domain related to research, development, manufacture, marketing, commercialization, distribution, importation, cost, pricing, supply, sales, sales support, or use of the particular assets.

J. "Divestiture Agreement" means either the ERCO Acquisition Agreement 2n is other agreement that receives the prior approval of the Commission between Respondents

and an Acquirer (or between a Divestiture Trustee and an Acquirer), as well as all amendments, exhibits, attachments, agreements, and schedules thereto, related to the divestiture of the Port Edwards Assets pursuant to Paragraphs II or V of this Order.

K. "Divestiture Trustee" means any trustee appointed by the

that are to be divested or agreements entered into pursuant to this paragraph at the Acquirer's option, Respondents need not divest such assets or enter into such agreements only if the Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

B. If, at the time the Commission determines to make this Order final, the Commission notifies Respondents that ERCO is not an acceptable acquirer of the Port Edwards Assets or that the manner in which the divestiture was

Agreement or manner of divestiture of the Port Edwards Assets (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; and

b. taking such actions as are necessary to maintain the

Divestiture and as part of the Divestiture Agreement, assign the Potash Contract to the Acquirer.

G. Respondents shall, at the option of the Acquirer, no later than the Effective Date of Divestiture, and as part of the Divestiture Agreement, enter into one or more transition agreements for the short-term provision of services provided by Respondents to the Acquirer.

H. Respondents and Respondents's employees shall not receive, or have access to, or use or continue to use any Confidential Business Information about the Port Edwards Assets or about the production, transportation, delivery, storage, distribution, marketing, and sale of products of the Acquirer from the Port Edwards facility except:

1. As otherwise allowed in the Order to Maintain Assets or this Order;
2. As provided for in a transition services agreement;
3. As consented to by the Acquirer for provision to Respondent Vulcan;
4. As required by law;
5. To the extent that necessary information is exchanged in the course of consummating the Acquisition;
6. In negotiating agreements to divest assets pursuant to this Order and engaging in related due diligence;
7. In complying with this Order or the Order to Maintain Assets;
8. To the extent necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries;
9. In defending legal claims, investigations or enforcement actions threatened or brought against or related to the Port Edwards Assets;
10. In obtaining legal advice.

Respondents shall require any Persons with access to Confidential Business Information to immediately enter into agreements with the Respondents and Acquirer not to disclose any Confidential Business Information to the Respondents or to any third party except for the purposes set forth this paragraph.

I. The purposes of this Paragraph are (1) to ensure the

continuation of Port Edwards Assets as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, and (2) 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 Shared Customer Contracts, Respondents shall, no later

terminal contracts to insure that, as a result of the divestiture, the Acquirer receives:

1. the same terminals as, or terminals of a quality similar to, those retained by Respondent Oxy;
2. terminal space equal to or exceeding the capacity of terminal space used for products delivered by the Port Edwards facility prior to the divestiture and consistent with historical amounts of products delivered by the Port Edwards facility;
3. terminal contracts of similar or longer lengths of time that existed for the products delivered by the Port Edwards facility prior to the divestiture; and
4. terminal capacity in locations similar to the locations used for products delivered by the Port Edwards facility prior to the divestiture.

C. Respondents shall:

1. not receive Confidential Business Information about the transportation, delivery, storage, distribution, marketing, and sale of product by the Acquirer at a terminal owned by Respondents and used by the Acquirer, *O* *O* individual employees of the Respondents may receive and use Confidential Business Information only to the extent required for the operation of a Terminaling Agreement or to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Respondents shall require any Persons with access to Confidential Business Information to immediately enter into agreements with the Respondents and Acquirer not to disclose any Confidential Business Information to the Respondents or to any third party except for the purposes set forth this paragraph.
2. include in any Terminaling Agreement:
   a. a provision prohibiting Respondents or any employee of Respondents from receiving Confidential Business Information about the transportation, delivery,

storage, distribution, marketing, and sale of product by the Acquirer at a terminal owned by Respondents and used by the Acquirer, except at otherwise provided in this Paragraph III.C.; and

b. a provision consistent with the proviso in Paragraph III.C.1., above, regarding non-disclosure of Confidential Business Information.

D. The purposes of this Paragraph are (1) to ensure the continuation of the Port Edwards Assets as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, and (2) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order;

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

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

D. If a Monitor is appointed pursuant to this Paragraph IV,

Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor the Respondents's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
   a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order to Maintain Assets and the Decision and Order in this matter;
   b. Monitoring Terminaling Agreements;
   c. Monitoring any transition services agreements;
   d. Assuring that Confidential Business Information is not received or used by Respondents or Acquirer, except as allowed in the Order to Maintain Assets and the Decision and Order in this matter.

accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

5. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
6. The Monitor Agreement shall state that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order.
7. Respondents may require the Monitor and each of the Monitor’s consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *O O* , such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor’s consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor’s duties.
F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph IV.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as

notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestitures required by this Order.

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

    1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and

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. The Divestiture Trustee shall have the right and authority to negotiate and modify contracts to satisfy the provisions of Paragraph III of this Order. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents'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;

   O *O* 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;

   O *O* that Respondents 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 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

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

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable

Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

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 V.

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.

G. The Divestiture Trustee(s) appointed pursuant to Paragraph V of this Order may be the same Person appointed as the Monitor pursuant to Paragraph IV of this Order.

VI.

IS FURTHER ORDERED that until December 31, 2006, Respondent Oxy, including, but not limited to, its agents and Armand Products Company, shall not solicit any Assigned Contract Customer in an attempt to sell, currently or in the future, such customer KOH (if the contract assigned to the Assigned Contract Customer was for KOH) or potassium carbonate (if the contract assigned to the Assigned Contract Customer was for potassium carbonate) including, but not limited to, making offers pursuant to a "meet or release" or "competitive price" or similar clause in customer contracts. *O* *O* Respondent Oxy may discuss the terms of Respondent Oxy's contract or supply with a Dual Contract Customer, but shall not otherwise solicit an Assigned Contract Customer as prohibited by this Paragraph VI. *O* *O* if an Assigned Contract Customer is no longer under contract with the Acquirer, this Paragraph VI no longer applies to Respondent Oxy in relation to that Assigned Contract Customer.

B. Enter into any contracts to manage or operate any Person that produces potassium hydroxide, potassium carbonate, or potash.

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"), 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 Oxy and not of any other party to the transaction. Respondent Oxy shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Oxy shall not consummate the transaction until thirty 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.

Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Divestiture Trustee or the Monitor, if any Divestiture Trustee or Monitor has been appointed pursuant to this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and

CONFIDENTIAL APPENDIX A

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

CONFIDENTIAL APPENDIX B

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

CONFIDENTIAL APPENDIX C

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

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According to the Commission's proposed complaint, the relevant product markets in which to analyze the effects of OxyChem's proposed acquisition of Vulcan's chemical assets are the production and sale of KOH, potassium carbonate, and APC. KOH is the raw material for the production of many potassium chemicals, such as potassium permanganate, citrate, acetate, cyanide, benzoate, iodide, and sorbate. The largest end use of KOH is the production of potassium carbonate, commonly known as potash. End uses for potassium carbonate include nutrition supplements for dairy cattle, video glass for television and computer monitors, other specialty glass, potassium silicates, fertilizers, gas processing, industrial intermediaries, photographic development processes, detergents; and food products. Potassium carbonate can be produced in liquid or flake (solid) form. Over 90% of total potcarb production in the United States is of the flake form, known as APC. For most APC customers, liquid potassium carbonate is not an economically viable substitute.

The proposed complaint alleges that the markets for KOH, potcarb, and APC are highly concentrated and that OxyChem and Vulcan have been the primary competitors in these markets for many years and are the only producers of APC in the U.S. As the proposed Complaint describes, customers have relied on the competition between these companies to maintain competitive pricing levels. The proposed complaint alleges that OxyChem's proposed acquisition of Vulcan's chemical assets would reduce competition by eliminating direct competition between these two companies. The proposed complaint further alleges that entry into the relevant markets would not be timely, likely, or sufficient to deter or offset the acquisition's adverse competitive effects.

III. Terms of the Proposed Order

The proposed Order also requires that, within 10 days of OxyChem's acquisition of Vulcan's chemical assets, OxyChem divest the Port Edwards business to ERCO Worldwide (USA) Inc., an indirect subsidiary of Superior Plus, Inc., a Canadian company. The Port Edwards business will become part of ERCO Worldwide,

a division of Superior Plus whose parent, Superior Plus Income Fund, is a Canadian income fund. Superior Plus, Inc. has four divisions: Superior Propane; ERCO Worldwide; Winroc; and Superior Energy Management. The market value of the fund is Cdn $2.5 billion. ERCO's total revenues in 2004 were Cdn $396 million.

The assets to be divested under the proposed Order include Port Edwards's manufacturing facilities, related transportation assets (including railcars and terminal contracts), raw material supply agreements, and customer contracts. Port Edwards is Vulcan's only manufacturing facility that has the capacity to produce KOH and APC. The divested assets are sufficient to allow ERCO to effectively continue the production and marketing of KOH, APC, HCl, caustic soda, and chlorine at Port Edwards in amounts, and under terms, equivalent to the historical production and sale of these chemicals from the facility.

The Order further provides that if, at the time the Commission makes this Order final, the Commission notifies Respondents that ERCO is not an acceptable acquirer of the Port Edwards business or that the manner in which the divestiture was accomplished is not acceptable, then, the divestiture to ERCO shall be rescinded and within a six-month period, OxyChem shall divest the Port Edwards business to an acquirer acceptable to the Commission. If, following this six month period, the Port Edwards Assets have not been divested, then the Commission may appoint a Divestiture Trustee to divest the assets in a manner acceptable to the Commission.

The proposed Order to Maintain Assets that is also included in the Consent Agreement requires that Respondents maintain the Port Edwards business as a viable and competitive operation until the business is transferred to ERCO or another Commission-approved acquirer. Furthermore, the order contains measures designed to ensure that no material confidential information is exchanged between Respondents and the Port Edwards business (except as otherwise provided in the Order to Maintain Assets) and measures designed to prevent interim harm to competition in the relevant markets pending divestiture.

The proposed Order also provides for the Commission to appoint a Monitor Trustee to oversee OxyChem's compliance with the terms of the order, and in the Order to Maintain Assets, the Commission appoints Richard M. Klein as Monitor Trustee. Mr. Klein has a Ph.D in Inorganic Chemistry and was the President and CEO of Sybron Chemicals from 1979 to 2001. He serves on the boards of a number of companies and has been appointed by the Commission as Monitor Trustee or Hold

nalysis

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

Complaint

IN THE MATTER OF

VALERO L.P., ET. AL.

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

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This consent order addresses the acquisition by Respondents Valero L.P. and Valero Energy Corporation -- collectively engaged in the transportation and storage of crude oil, and in the refining, transportation, and marketing of petroleum products and related petrochemical products -- of Respondents Kaneb Services LLC and Kaneb Pipe Line Partners, L.P., which collectively own and operate refined petroleum product pipelines and petroleum and specialty liquids storage and terminaling facilities. The order, among other things, requires the respondents to divest three Kaneb petroleum terminals in the Greater Philadelphia, Pennsylvania area; to divest a Kaneb pipeline system that originates in Casper, Wyoming, and terminates in Rapid City, South Dakota (and includes Kaneb petroleum terminals in Rapid City, South Dakota, Cheyenne, Wyoming, Denver, Colorado, and Colorado Springs, Colorado); and to divest Kaneb petroleum terminals in Martinez and Richmond, California. The consent order also requires Respondent Valero L.P. to ensure that customers and prospective customers have non-discriminatory access to commingled terminaling of ethanol at its retained San Francisco Bay terminals -- on terms and conditions no less advantageous than those given to Valero Energy -- and to create firewalls that prevent the transfer of competitively sensitive information between the merged firm and Valero Energy.

For the Commission:

and

For the Respondents:

, and

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission

personnel of Valero L.P. Riverwalk Logistics, L.P. owns a two percent general partnership interest in Valero L.P. At all times relevant herein, Valero GP, LLC and Riverwalk Logistics, L.P. have been indirect wholly owned subsidiaries of Valero Energy Corporation.

4. Respondent Valero L.P. 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 an entity whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Valero Energy Corporation

5. Respondent Valero Energy Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at One Valero Way, San Antonio, Texas 78249.

6. Respondent Valero Energy Corporation is, and at all times relevant herein has been, a diversified energy company engaged, either directly or through affiliates, in the refining of crude oil into refined petroleum products, including gasoline, aviation fuel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel, and aviation fuel; and other related businesses.

7. Respondent Valero Energy Corporation 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 affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Kaneb Pipe Line Partners, L.P.

8. Respondent Kaneb Pipe Line Partners, L.P. is a publicly-traded limited partnership organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 2435 North Central Expressway, Richardson, Texas 75080.

9. Respondent Kaneb Pipe Line Partners, L.P. is, and at all times relevant herein has been, a diversified transportation and terminaling company engaged, either directly or through affiliates, in the transportation and terminaling of crude oil, intermediate refinery feed stocks, finished petroleum product blend components, gasoline, diesel fuel, and aviation fuel; and other related businesses.

10. Respondent Kaneb Pipe Line Partners, L.P. 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 an entity whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Kaneb Services LLC

11. Respondent Kaneb Services LLC is a publicly-traded 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 2435 North Central Expressway, Richardson, Texas 75080.

12. Respondent Kaneb Services LLC is, and at all times relevant herein has been, a company that manages and operates a refined petroleum products and anhydrous ammonia pipeline business and a terminaling of petroleum products and specialty liquids business through the general

partner interest owned by one of its subsidiaries in Kaneb Pipe Line Partners, L.P., a Delaware limited partnership, which in turn owns those systems and facilities through its subsidiaries, and other related businesses.

13. Respondent Kaneb Services LLC 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 affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE MERGERS

14. Pursuant to (1) the Agreement and Plan of Merger, dated as of October 31, 2004, by and among, Valero L.P.; Riverwalk Logistics, L.P.; Valero GP LLC; VLI Sub A LLC; and Kaneb Services LLC; and (2) the Agreement and Plan of Merger, dated as of October 31, 2004, by and among Valero L.P.; Riverwalk Logistics, L.P.; Valero GP LLC; VLI Sub B LLC; Kaneb Pipe Line Partners, L.P.; and Kaneb Pipe Line Company LLC, Valero L.P. intends to acquire all of the equity interests of Kaneb Services LLC and Kaneb Pipe Line Company, L.P. in exchange for cash, Valero L.P partnership units, or a combination of cash and Valero L.P. partnership units. The value of the transaction at the time of the agreements was approximately $2.8 billion. The surviving entity is to be called Valero L.P.

III. TRADE AND COMMERCE

15. A line of commerce in which to analyze the effect of the proposed transaction is the provision of terminaling services for light petroleum products, fuel blending components, intermediate feed stocks for refinery units, and crude oil.

16. A line of commerce in which to analyze the effect of the proposed transaction is the pipeline transportation of light

gasoline also includes oxygenated fuels program reformulated gasoline. CARB gasoline is gasoline meeting the specifications of the California Air Resources Board, and which also meet or exceed U.S. Environmental Protection Agency gasoline specifications for the areas in

h

25. Relevant sections of the country in which to analyze the proposed transaction are the following:

    a. Greater Philadelphia Area, consisting of the metropolitan

27. Refineries, deepwater-capable terminals, and pipeline terminals are direct horizontal competitors from which firms produce or to which firms deliver bulk supplies of light petroleum products. In the Greater Philadelphia Area, local refiners and bulk suppliers sell to independent discount gasoline retailers, oil companies, and wholesalers of light petroleum products.

28. Bulk suppliers of light petroleum products require terminals that can receive, store, and transfer the products to marine vessel, pipeline or truck. There is no substitute for light petroleum products terminals for bulk suppliers.

29. Firms that purchase truck-load quantities of light petroleum products to supply their retail or commercial pumps have no effective alternative to using local light petroleum product terminals.

30. Valero and Kaneb are direct horizontal competitors in the provision of terminaling services for bulk suppliers in the Greater Philadelphia Area.

31. Kaneb is an independent commercial terminal operator. Kaneb does not own or sell any light petroleum products to retail or commercial customers. Thus, in Philadelphia, Kaneb derives its revenue solely from the provision of terminaling services, including receipt and throughput of bulk supplies.

32. Bulk suppliers may purchase light petroleum products from an integrated refiner and terminal operator in the Greater Philadelphia Area ("local suppliers"). The local suppliers in the Philadelphia area include Valero, ConocoPhillips, Premcor, Sunoco, ExxonMobil, and Hess.

33. A reasonable substitute for bulk suppliers to purchasing light petroleum products made by local refineries in the

Greater Philadelphia Area for a significant portion of the time is the purchase of wholesale light petroleum products produced outside the area and physically delivered by a pipeline or marine vessel. The primary sources of these imports are refiners located in the U.S. Gulf Coast region ("Gulf Coast") and outside the United States.

34. Valero L.P. owns a light petroleum products terminal in Paulsboro, New Jersey, from which light petroleum products are delivered by truck into, among other places, the Greater Philadelphia Area. The Valero L.P. terminal is supplied by Valero Energy's Paulsboro refinery.

35. Kaneb owns three terminals in the greater Philadelphia area: two in Philadelphia and one in Paulsboro, New Jersey. Kaneb's "north" Philadelphia terminal is connected to the Colonial Pipeline and is capable of receiving bulk shipments of light petroleum products produced in the Gulf Coast. The terminal also has a dock that permits it to receive bulk marine shipments by barge. Kaneb's "south" Philadelphia terminal is connected to the Colonial Pipeline but does not currently have access to marine shipments. Kaneb's Paulsboro terminal can receive bulk shipments both from the Colonial Pipeline and from deepwater tankers.

36. On April 25, 2005, Valero Energy announced its intent to acquire Premcor Inc. in a transaction valued at approximately $8 billion. The transaction includes Premcor's Delaware City, Delaware, refinery. For the

significantly increase market concentration, and post-merger the market would be highly concentrated. Without Premcor, post-merger, the combined Valero and Kaneb would still control a significant share of bulk supply and terminaling services for light petroleum products in the Greater Philadelphia area.

38. As an independent terminal operator, Kaneb today provides Philadelphia area customers access to bulk supply originating outside the area. Without this competitive constraint, Philadelphia prices, generally limited by either Gulf Coast prices plus pipeline tariff or New York Harbor prices adjusted by the water-borne transportation costs, could rise.

42. Kaneb is an independent pipeline and terminal operator in the Colorado Front Range. Kaneb does not own or sell any of the product that it transports on its pipeline or stores in its terminal. Thus, Kaneb derives its revenue solely from providing pipeline transportation and terminaling services.

43. Bulk supply customers in Denver may purchase light petroleum products from local suppliers. The local suppliers in the Colorado Front Range are Valero, Suncor, ConocoPhillips, and Sinclair.

44. For bulk supply customers, a reasonable substitute for purchasing from local refiners for a significant portion of the time is purchasing wholesale light petroleum products from refineries located outside of the Colorado Front Range and physically delivered into the area by pipeline. Refiners outside of the area, in Montana, Wyoming, Kansas, and Texas, that supply the Colorado Front Range are Frontier, Sinclair, ExxonMobil, ConocoPhillips, and CHS.

45. Valero L.P. owns the McKee-Denver pipeline that originates at the Valero Energy refinery in McKee, Texas, and serves Denver. Valero L.P. has a partial interest in the Borger-Denver pipeline. This pipeline runs from the ConocoPhillips refinery in Borger, Texas, through the Valero Energy refinery in McKee, Texas, and connects to a Valero L.P. terminal in Denver, Colorado.

46. Kaneb owns the West Pipeline system, which originates in Casper, Wyoming, and runs RenUtaSRDaooun Minncor,

47. Post-merger, the combined Valero and Kaneb will control a significant share of bulk supply, and of terminaling services for bulk suppliers, of light petroleum products in the Colorado Front Range. The proposed transaction would significantly increase market concentration, and post-merger the market would be highly concentrated. The proposed transaction would result in Valero having a monopoly in the Colorado Springs area.

48. After the mergers, the combined firm could effectively coordinate with others to raise prices in the markets for bulk supply of, and terminaling services for, light petroleum products in the Colorado Front Range, or unilaterally in parts contained therein.

wholesale or commercial customers. Thus, Kaneb derives its revenue solely from the provision of terminaling services, including receipt of bulk supplies.

52. Kinder Morgan owns the only common carrier pipeline that serves the interior of Northern California. This pipeline provides the only economic means of distributing light petroleum products to Northern California terminals outside of the East Bay.

53. Bulk supply of light petroleum products in Northern California comes from two sources: (1) domestic production by integrated refiner/terminal operators in Northern California and (2) imports via marine vessel by petroleum product traders, largely on behalf of, or for the integrated refiner/marketers in California.

54. Kaneb owns three terminals that participate in this market: Martinez, Richmond, and Selby. All three of the terminals are both accessible to the Kinder Morgan pipeline system and capable of receiving deepwater marine vessels.

55. Valero owns a refinery at Benicia and associated storage tanks. The refinery and associated tanks are used by Valero for its own terminaling and bulk supply needs. Valero L.P. controls crude storage facilities.

56. Post-transaction, Valero and Kaneb will control a significant share of bulk supply and terminaling services for light petroleum products in Northern California. The proposed transaction would significantly increase market concentration, and post-merger the market would be highly concentrated.

57. After the transaction, the combined firm could more effectively coordinate with others to raise prices in the market for bulk supply of and terminaling services for refining components, blending components, and light petroleum products in Northern California.

58. The Kaneb terminals are the only independent marine-accessible terminals with unconstrained access to the Kinder Morgan pipeline system. The Kaneb terminals are therefore the only terminals through which a products trader and other marketers can import and distribute light petroleum products throughout Northern California. Wholesale bulk prices in Northern California would likely increase without access to the Kaneb terminals. In addition, Kaneb provides storage to some Northern California refiners for blending components and feedstocks. Loss of access to this storage would likely result in reduced production at these refineries.

Northern California Bulk Ethanol Terminaling

59. The U.S. Environmental Protection Agency and the California Air Resources Board have mandated the use of oxygenates at various times and in various places in California. Federal regulations require oxygenated gasoline year round in the counties of Los Angeles, Ventura, San Bernardino (partial), Riverside (partial), San Diego, Sacramento, Yolo, El Dorado (partial), Placer (partial), Solano (partial), and Sutter (partial). California regulations require oxygenated gasoline year round in the counties listed above and in Imperial County from November 1 through February 2.

60. California has prohibited the use of oxygenates such as methyl tert butyl ether ("MTBE"). Ethanol is the oxygenate of choice in areas where oxygenated gasoline is required by the U.S. Environmental Protection Agency.

61. Ethanol requires its own storage and cannot be commingled with other light petroleum products. Ethanol can be shipped in bulk quantities from production facilities into California only by rail or by marine vessel. Ethanol cannot be brought into the state by pipeline. Once bulk ethanol shipments have been placed in storage, tank trucks transport ethanol to outlying terminals, where it can be placed in smaller storage tanks pending final blending with pre-oxygenated gasoline ("CARBOB") at the truck rack.

62. Kaneb's Richmond, Selby, and Stockton terminals are the only terminals in Northern California not associated with refineries capable of receiving and distributing bulk volumes of ethanol. Northern California terminals could not be economically supplied with ethanol trucked from Southern California or other locations.

63. Because satellite terminals must receive ethanol supplies by truck, trucking economics strongly influence which bulk ethanol terminal will supply ethanol to finished gasoline terminals.

64. Valero Energy is a significant user and supplier of ethanol for its own finished gasoline sales.

65. After the proposed transaction, Valero could increase prices for or deny access to bulk ethanol terminaling services, causing increased prices for, or reduced supply of, ethanol or finished CARB gasoline.

66. Entry into the relevant markets into relevant sections of the country would be difficult and would not be likely, timely, or sufficient to prevent the anticompetitive effects that are likely to result from the proposed transaction.

IV. VIOLATIONS CHARGED

First Violation Charged

67. Valero L.P. and Kaneb are competitors in the market for terminaling services for bulk suppliers of light petroleum products in the Greater Philadelphia Area.

68. The effect of the proposed transaction, if consummated, may be substantially to lessen competition in the provision of terminaling services for light petroleum products and the bulk supply of light petroleum products in the Greater Philadelphia Area, 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 direct competition between Valero and Kaneb in the provision of terminaling services for bulk suppliers of light petroleum products;

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Valero and Kaneb and their competitors in the provision of terminaling services for bulk suppliers; and

c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between Valero and the other bulk suppliers of light petroleum products;

each of which increases the likelihood that the wholesale price of light petroleum products will increase in the relevant section of the country.

Second Violation Charged

69. Valero and Kaneb are competitors in pipeline transportation and terminaling services for bulk suppliers of light petroleum products in the Colorado Front Range.

70. The effect of the proposed transaction, if consummated, may be substantially to lessen competition in the provision of terminaling services for light petroleum products and the bulk supply of light petroleum products to the Colorado Front Range, and in narrower markets contained therein, 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 direct competition between Valero and Kaneb in the provision of pipeline transportation and terminaling services for bulk suppliers of light petroleum products;

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Valero and Kaneb and their competitors in the provision of pipeline transportation and terminaling services for bulk suppliers;

c. by increasing the likelihood that the combination of Valero and Kaneb will unilaterally exercise market power in the provision of pipeline transportation and terminaling services for bulk suppliers of light petroleum products in the Colorado Springs area; and

d. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between Valero and the other bulk suppliers of light petroleum products;

each of which increases the likelihood that wholesale prices of light petroleum products will increase in the relevant section of the country.

Fourth Violation Charged

73. Kaneb provides services in the upstream market for terminaling for bulk ethanol in Northern California through its terminals at Selby and Stockton. No other independent terminals in Northern California can economically receive and distribute bulk supplies of ethanol.

74. Valero Energy is a significant user of ethanol for the oxygenation of gasoline and a significant seller in the downstream market for CARB gasoline in Northern California.

75. Valero could use information on the use of Kaneb's ethanol terminaling facilities to facilitate collusion in the bulk supply of CARB gasoline in Northern California.

76. The effect of the proposed transaction, if consummated, may be substantially to lessen competition in bulk supply of CARB gasoline in Northern California, in violation of Section 7 of the Clay41.ane in Northern Califors7 coof rn Cmermid, cs U.S.C. § etU.S.C. §

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of June, 2005, issues its complaint against said Respondents.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Valero L.P. of Respondent Kaneb Services LLC and

1. Respondent Valero Energy Corporation is a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at One Valero Way, San Antonio, Texas 78249.

2. Respondent Valero L.P. is a publicly-traded limited partnership, organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at One Valero Way, San Antonio, Texas 78249.

3. Respondent Kaneb Pipe Line Partners, L.P. is a publicly-traded limited partnership, organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 2435 North Central Expressway, Richardson, Texas 75080.

4. Respondent Kaneb Services LLC is a publicly-traded 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 2435 North Central Expressway, Richardson, Texas 75080.

5. The Federal Trade 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

the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. Valero includes Riverwalk Logistics, L.P., and Valero G.P., LLC. Valero does not include VEC.

B. "VEC" means Valero Energy Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by VEC, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. VEC does not include Riverwalk Logistics, L.P., Valero GP, LLC, or Valero.

C. "KPP" means Kaneb Pipe Line Partners, LP, its general partners, directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by KPP, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

D. "KSL" means Kaneb Services LLC, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by KSL; and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Acquirer" means a Person that receives the prior approval of the Commission to acquire assets to be divested pursuant to Paragraphs II., III., IV., or V. of this Order.

F. "Alternative San Francisco Bay Terminals" means the San Francisco Bay Terminals and the Selby Terminal.

G. "Commission" means the Federal Trade Commission.

H. "Kaneb" means Kaneb Services LLC and Kaneb Pipe Line Partners, L.P., collectively and individually.

I. "Merger" means the merger of Valero and Kaneb pursuant to: (1) the Agreement and Plan of Merger, dated as of October 31, 2004, by and among Valero L.P.; Riverwalk

d. loading and unloading racks, equipment and facilities;
e. inventory, equipment, pumps, compressors, machinery, fixtures, tools, and spare parts;
f. all books, records, and files relating to the terminals;
g. offices, buildings, and warehouses; and
h. all other tangible assets;

2. an exclusive right to all intellectual property used solely in the operation of the terminals, and a non-exclusive license to all other intellectual property necessary for the operation of the terminals;
3. all governmental licenses and permits used in the operation of the terminals;
4. all storage, throughput, and Terminaling contracts, and all other contracts, agreements or understandings relating to the terminals or their operation; and
5. all other intangible assets.

M. "Respondents" means:
1. before the Merger, Valero, VEC, KSL, and KPP, individually and collectively, and
2. after the Merger, Valero, VEC, and the entity surviving after the Merger.

N. "Retained San Francisco Bay Terminals" means:
1. If the San Francisco Bay Terminals are divested pursuant to Paragraph IV.A. of the Order, the terminals located at Stockton and Selby, California, which at the time of the Merger were owned by Kaneb; but
2. If the Alternative San Francisco Bay Terminals are divested pursuant to Paragraph V.C.3. of this Order, the terminal located at Stockton, California, which at the time of the Merger was owned by Kaneb.

O. "San Francisco Bay Terminals" means Kaneb's Martinez and Richmond, California, refined petroleum product storage and distribution terminals and all assets relating to the two terminals, including but not limited to:

1. all of Kaneb's rights, title, and interest in and to all tangible assets that are located at, or used in connection with Terminaling at, the two terminals, including but not limited to:
   a. real estate, including existing rights or way and easements;
   b. storage tanks;
   c. local connector pipelines;
   d. loading and unloading racks, equipment and facilities;
   e. inventory, equipment, pumps, compressors, machinery, fixtures, tools, and spare parts;
   f. all books, records, and files relating to the two terminals;
   g. offices, buildings, and warehouses; and
   h. all other tangible assets;
2. an exclusive right to all intellectual property used solely in the operation of the terminals, and a non-exclusive license to all other intellectual property necessary for the operation of the terminals;
3. all governmental licenses and permits used in the operation of the terminals;
4. all storage, throughput, and Terminaling contracts, and all other contracts, agreements or understandings relating to the terminals or their operation; and
5. all other intangible assets.

P. "Selby Terminal" means the Kaneb terminal located at 90 San Pablo Avenue, Crockett, California 94525.

Q. "Terminaling" means the services performed by a facility that provides temporary storage of refined petroleum products received via pipeline, marine vessel, tank trucks, rail, or transport trailers, and the re-delivery of refined petroleum products from storage tanks into tank trucks, rail cars, transport trailers, or pipelines.

R. "West Pipeline System" means Kaneb's West Pipeline System of approximately 550 miles of refined petroleum

products pipelines, originating near Casper, Wyoming, and terminating in Rapid City, South Dakota, and Colorado Springs, Colorado; four refined petroleum products terminals; and numerous pump stations; and all assets relating to Kaneb's West Pipeline System, including but not limited to:

1. all of Kaneb's rights, title, and interest in and to all tangible assets relating to Kaneb's West Pipeline System, including but not limited to all of Kaneb's rights, title, and interest in and to all tangible assets that are located at, or used in connection with Terminaling at, all terminals owned by Kaneb located anywhere on the West Pipeline System (including the Kaneb terminals in Rapid City, South Dakota; Cheyenne, Wyoming; Dupont, Colorado; and Fountain, Colorado), including but not limited to:
   a. real estate, including existing rights or way and easements;
   b. storage tanks;
   c. local connector pipelines;
   d. loading and unloading racks, equipment and facilities;
   e. inventory, equipment, pumps, compressors, machinery, fixtures, tools, and spare parts;
   f. all books, records, and files relating to the West Pipeline System or the terminals;
   g. offices, buildings, and warehouses; and
   h. all other tangible assets relating to the West Pipeline System;
2. an exclusive right to all intellectual property used solely in the operation of the West Pipeline System and the terminals located on that system, and a non-exclusive license to all other intellectual property necessary for the operation of the West Pipeline System and the terminals located on that system;
3. all governmental licenses and permits used in the operation of the West Pipeline System and the terminals located on that system;

4. all storage, throughput, and Terminaling contracts, and all other contracts, agreements or understandings relating to the West Pipeline System or the terminals located on that system or their operation; and
5. all other intangible assets relating to the West Pipeline System and the terminals located on that system.

II.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the West Pipeline System absolutely and in good faith, at no minimum price, within six (6) months after the date on which the Merger is effectuated.

B. Respondents shall divest the West Pipeline System 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.

C. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the Acquirer may reasonably request in the Acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents and contractual rights), substitute equivalent assets or arrangements, subject to the prior approval of the Commission. A substituted asset or arrangement will not be deemed to be equivalent unless it enables the pipeline or terminal to perform the same function at the same or less cost.

D. The purpose of this Paragraph II. is to ensure the continued use of the West Pipeline System in the same business in

which it was engaged at the time of the announcement of the proposed Merger and to remedy the lessening of competition in the pipeline transportation and Terminaling of light petroleum products resulting from the proposed Merger, as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Philadelphia Area Terminals absolutely and in good faith, at no minimum price, within six (6) months after the date on which the Merger is effectuated.

B. Respondents shall divest the Philadelphia Area Terminals 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.

C. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the Acquirer may reasonably request in the Acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents and contractual rights), substitute equivalent assets or arrangements, subject to the prior approval of the Commission. A substituted asset or arrangement will not be deemed to be equivalent unless it enables the pipeline or terminal to perform the same function at the same or less cost.

D. The purpose of this Paragraph III. is to ensure the continued use of the Philadelphia Area Terminals in the

same business in which they were engaged at the time of the announcement of the proposed Merger and to remedy the lessening of competition in the Terminaling of light petroleum products resulting from the proposed Merger, as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the San Francisco Bay Terminals absolutely and in good faith, at no minimum price, within six (6) months after the date on which the Merger is effectuated.

B. Respondents shall divest the San Francisco Bay Terminals 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.

C. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the Acquirer may reasonably request in the Acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents and contractual rights), substitute equivalent assets or arrangements, subject to the prior approval of the Commission. A substituted asset or arrangement will not be deemed to be equivalent unless it enables the pipeline or terminal to perform the same function at the same or less cost.

D. The purpose of this Paragraph IV. is to ensure the continued use of the San Francisco Bay Terminals in the same business in which they were engaged at the time of the announcement of the proposed Merger and to remedy

the lessening of competition in the Terminaling of refining components, blending components, and light petroleum products resulting from the proposed Merger, as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested the West Pipeline System, the Philadelphia Area Terminals, or the San Francisco Bay Terminals, absolutely and in good faith, as required by Paragraphs II., III., or IV., respectively, of this Order, the Commission may appoint a trustee to divest the applicable assets as described in Paragraph V.C. below, in a manner that satisfies the requirements of Paragraphs II., III., or IV., of this Order, whichever is applicable.

B. In the event that the Commission or the U.S. Attorney General brings an action pursuant to § 5( ) of the Federal Trade Commission Act, 15 U.S.C. § 45( ), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest the respective assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the U.S. Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5( ) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

C. If Respondents have not satisfied the requirements of

1. Paragraphs II.A and II.B. of this Order, the Commission may appoint a trustee to divest the West Pipeline System;

2. Paragraphs III.A. and III.B. of this Order, the Commission may appoint a trustee to divest the Philadelphia Area Terminals
3. Paragraphs IV.A. and IV.B. of this Order, the Commission may appoint a trustee to divest the San Francisco Bay Terminals or the Alternative San Francisco Bay Terminals.

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

E. Within ten (10) days after appointment of a trustee, Valero shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.

F. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest assets as required by this Order.

2. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the required divestiture, which shall be subject to the prior approval of the Commission. If,

however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *d d h* the Commission may

entity within five (5) days of receiving notification of the Commission's approval.

5. The trustee shall serve, without bond or other security, at the cost and expense of Valero, on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have the authority to employ, at the cost and expense of Valero, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of Valero, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of assets as required by this Order.

6. Valero shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

7. The trustee shall have no obligation or authority to operate or maintain the assets required to be divested pursuant to this paragraph.

8. The trustee shall act in a fiduciary capacity for the benefit of the Commission.

9. The trustee shall report in writing to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

10. Valero may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *h* such agreement shall not restrict the trustee from providing any information to the Commission.

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

H. The Commission may on its own initiative or at the request of the 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:

A. Valero shall not, directly or indirectly, provide, disclose, or otherwise make available any Non-Public Customer Information to VEC; *h* that Valero may provide Non-Public Customer Information only to VEC personnel whose responsibilities do not involve refining, supply, or marketing operations in the State of California and only for the purposes listed below:

1. to ensure compliance with legal and regulatory requirements; to perform required auditing functions; to

provide accounting, information technology and credit-underwriting services, to provide legal services associated with actual or potential litigation and transactions; and to monitor and ensure compliance with governmental environmental, health, and safety requirements; or

2. for inclusion within the periodic financial reports that Valero may provide VEC but only to the extent that any

tanks the ethanol inventory of another customer, upon written approval of both affected customers.

D. Respondents shall take steps to ensure that all of their employees comply with the requirements of subparagraphs VI.A., B. and C., above, including establishing and disseminating applicable policies and procedures to all employees no later than 30 (thirty) days after the Order becomes final.

E. Valero shall provide written notification to the staff of the Commission at least 30 (thirty) days prior to leasing to VEC the use, on an exclusive basis, of any of the tanks (or any portion thereof) at the Retained San Francisco Bay Terminals that, as of the date Respondents executed the Consent Agreement, was designated for commingled storage of ethanol; [illegible], that such notice is not required for tanks leased to VEC at the Selby Terminal so long as at least four hundred thousand (400,000) shell

acquire, directly or indirectly, the Philadelphia Area Terminals or any portion thereof.

B. The prior notification required by the Paragraph VII.A. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as the "Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Secretary of the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until

and every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II., III., IV., or V. of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order;

X.

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

A. Access, during office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of that Respondent related to compliance with this Order; and

B. Upon five (5) days' notice to that Respondent and without restraint or interference from that Respondent, to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that if: (1) within the time period required for divestiture pursuant to Paragraphs II., III., or IV., of this Order, Respondents have submitted a complete application in support of the applicable divestiture (including the acquirer, manner of divestiture, and all other matters subject to Commission approval) as required by such paragraphs; and (2) the Commission has approved the applicable divestiture and has not withdrawn its acceptance; but (3) Respondents have certified to the Commission prior to the expiration of the applicable time period that (a) notwithstanding timely and complete application for approval by Respondents to the State of California under an applicable consent decree to which the State of California and Respondents are parties, the State of California has failed to approve the divestiture that is also required under this Order, or (b) the State of California has filed a timely motion in court seeking to enjoin the proposed divestiture or other relief under an

applicable consent decree to which the State of California and Respondents are parties, then, (4) with respect to the particular divestiture that remains unconsummated, the time in which the divestiture is required under this Order to be complete shall be extended (a) for ninety (90) days or (b) until the disposition of the motion filed by the State of California pertaining to the proposed divestiture, whichever is later. During such period of extension, Respondents shall exercise utmost good faith and best efforts to resolve the concerns of the State of California.

XII.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date this Order becomes final.

By the Commission.

Analysis of Proposed Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has issued a complaint ("Complaint") alleging that Valero L.P.'s proposed acquisition of Kaneb Services LLC and Kaneb Pipe Line Partners, L.P. (collectively "Kaneb") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and has entered into an agreement containing consent orders ("Agreement Containing Consent Orders") pursuant to which Valero L.P., Valero Energy, and Kaneb (collectively "Respondents") agree to be bound by a proposed consent order that requires divestiture of certain assets ("Proposed Consent Order") and a hold separate order that requires Respondents to hold separate and maintain certain assets pending divestiture ("Hold Separate Order"). The Proposed Consent Order remedies the likely anticompetitive effects arising from the proposed acquisition, as alleged in the Complaint. The Hold Separate Order preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Valero L.P. is a publicly traded master limited partnership based in San Antonio, Texas. Valero L.P. shares its headquarters with Valero Energy, which owns 46% of Valero L.P.'s common units. Valero L.P. is engaged in the transportation and storage of crude oil and refined petroleum products and currently derives 98% of its total revenu0491/(g)47.M(eumvi)66..rsrat Valeros Partieswhod pyr feets t usef Valero L.P.'spPiplfines and ermiAnats.s

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petroleum products and related petrochemical products. Valero Energy reported 2004 net income of $1.8 billion on revenues of nearly $55 billion.

Kaneb is a single company represented by two publicly traded

petroleum products in Northern California; and (4) terminaling for bulk ethanol in Northern California.

To remedy the anticompetitive effects of the merger, the Proposed Consent Order requires Respondents to divest the following assets: (1) in the Greater Philadelphia Area, Kaneb's Paulsboro, New Jersey, Philadelphia North, and Philadelphia South terminals; (2) in the Colorado Front Range, Kaneb's West Pipeline system, which originates in Casper, Wyoming, and terminates in Rapid City, South Dakota, and Colorado Springs, Colorado, and includes Kaneb's terminals in Rapid City, South Dakota, Cheyenne, Wyoming, Denver, Colorado, and Colorado Springs, Colorado; and (3) in Northern California, Kaneb's Martinez and Richmond terminals. Finally, the Order also requires Valero L.P. not to discriminate in favor of or otherwise prefer Valero Energy in bulk ethanol terminaling services and to maintain customer information confidentiality at the Selby and Stockton terminals.

The Commission's decision to issue the Complaint and enter into the Agreement Containing Consent Orders was made after an extensive investigation in which the Commission examined competition and the likely effects of the merger in the markets alleged in the Complaint and in other markets.[1] The Commission has concluded that the merger is unlikely to reduce competition significantly in markets other than those alleged in the Complaint.

The Complaint alleges that the merger would violate the antitrust laws in four product and geographic markets, each of which is discussed below. The analysis applied in each market

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[1] The Commission conducted the investigation leading to the Complaint in collaboration with the Attorney General of the State of California. As part of this joint effort, Respondents have entered into a State Decree with California settling charges that aspects of the transaction affecting California consumers would violate both state and federal antitrust laws.

requiring structural relief follows the analysis set forth in the FTC and U.S. Department of Justice
(1997) (“ ”). The relief obtained in the bulk ethanol terminaling market is consistent with the Commission’s past remedies in similarly-structured mergers.

In addition, the Commission focused on the identity and corporate control of the merging parties. Valero Energy owns the general partner of Valero L.P. The general partner is presumed to exercise all operational rights afforded by the partnership agreements and applicable state corporation law. In light of this relationship, and for purposes of competitive analysis, the Commission attributes Valero Energy’s assets and incentives to Valero L.P. The Commission further determined that Valero

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Philadelphia Area. The proposed merger reduces the number of suppliers of terminaling services for transportation fuels and eliminates Kaneb as a source of imported transportation fuel, thereby increasing the likelihood of coordination.

Valero L.P. and Kaneb compete in the supply of terminaling services for bulk suppliers of light petroleum products in the Greater Philadelphia Area, a relevant antitrust market. Terminaling customers such as refiner-marketers, independent marketers, and traders rely on terminals to supply transportation fuel to the area. There are no substitutes for terminals in supplying and distributing transportation fuels in the Greater Philadelphia Area.

The Greater Philadelphia Area includes the city of Philadelphia, the Philadelphia suburbs, and portions of southern New Jersey and northern Delaware. Terminals outside the Greater Philadelphia Area are not economic substitutes for terminals within the area because of additional costs of transporting product by truck from more distant terminals. Post-merger, the remaining terminal operators could profitably impose a small but significant and nontransitory price increase in terminaling services for transportation fuels because no additional terminals can serve the Greater Philadelphia Area without significantly raising the cost of distributing fuel.

Seven firms currently provide terminaling services for transportation fuels in the Philadelphia area: Valero L.P., Kaneb, Sunoco, ConocoPhillips, Hess, Premcor, and ExxonMobil. Each of these firms owns or has contractual rights to one or more terminals in the Greater Philadelphia Area. The proposed merger would significantly increase market concentration, and post-merger the market would be highly concentrated. The change in market concentration understates the competitive significance of the merger because Kaneb is the only terminal system in the Greater Philadelphia Area capable of facilitating imports into the market.

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Valero L.P.'s purchase of Kaneb's terminals in the Greater Philadelphia Area would allow the remaining terminaling owners to profitably impose a small but significant and nontransitory price increase in the price of terminaling services. Eliminating Kaneb as an independent terminaling service competitor would have additional anticompetitive effects in the sale of bulk supplies of transportation fuels. Kaneb does not own or market any of the product in its terminals and earns its revenue solely from providing terminaling services to third parties. The other terminaling services providers, including Valero, also provide bulk supply to the market and sell their own transportation fuels through downstream marketing assets. These terminal owners use their terminal assets primarily for their own marketing needs and often do not provide terminaling services to third parties.

Because Kaneb does not earn any revenue from the sale of product, it has no economic interest in the price of the product. Kaneb's incentive is strictly to obtain as much third party terminaling business as it can. Thus, third party marketers can reliably use the Kaneb terminals to receive and throughput bulk supplies imported by pipeline and by water from outside the Greater Philadelphia Area. These imports are critical in maintaining a competitive market and to keeping prices low for transportation fuels in the Greater Philadelphia Area. The proprietary terminal operators have different incentives from Kaneb. As downstream marketers, higher product prices increase their profitability from their marketing operations, which typically accounts for a much larger portion of their business than terminaling. Post-merger, Valero would control the Kaneb terminals and could restrict access by third parties to these terminals. Without open access to the Kaneb terminals, it would be much more difficult for third party marketers to import product into the Greater Philadelphia Area. The elimination of imports would reduce competitive pressure on the local bulk suppliers, including Valero, thereby allowing them to maintain higher prices for bulk supplies of transportation fuel in the Greater Philadelphia Area.

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Entry into the terminaling market is difficult and would not be timely, likely, or sufficient to preclude anticompetitive effects resulting from the proposed merger. Building a new terminal requires significant sunk costs and would be a very long process, in part due to lengthy permitting requirements. Converting a non-transportation fuel terminal is also expensive and time consuming, and would not be likely in the Greater Philadelphia Area.

The efficiencies proposed by the Respondent, to the extent they relate to this market, are not cognizable under the , and are small compared to the extent of the potential anticompetitive harm. Even if the proposed efficiencies were achieved, they would not be sufficient to reverse the merger's potential to raise the price of bulk supply and terminal services.

Count II Pipeline Transportation and Terminaling Services for Bulk Suppliers of Light Petroleum Products in the Colorado Front Range

The Complaint charges that the proposed acquisition would likely substantially reduce competition in pipeline transportation and terminaling services for bulk suppliers of light petroleum products in Denver and Colorado Springs by (1) eliminating direct competition between Valero L.P. and Kaneb, (2) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in the Denver area, and (3) eliminating all competition in Colorado Springs, making Valero L.P. a monopolist in pipeline transportation and terminaling services. While the relevant market is pipeline transportation and terminaling services, any purchaser of light petroleum products would have to pay for the product to get to the market through pipeline transportation and/or terminals. Therefore, a price increase in these relevant markets would also cause an increase in light petroleum products prices.

Valero L.P. and Kaneb compete in the pipeline transportation and terminaling services for bulk suppliers of light petroleum products in both Denver and Colorado Springs. While light

petroleum products can be trucked to Denver and Colorado Springs, pipeline transportation is the only economic means to ship bulk supplies of light petroleum products to either Denver or Colorado Springs. There is no economically feasible substitute to pipeline transportation to reach these geographic areas.

Light petroleum products reach Denver and Colorado Springs through terminals that can receive product from either pipelines or refineries. Tank trucks pick up the light petroleum products from these local terminals and deliver them short haul distances to retail outlets and other customers. Terminals outside of Denver and Colorado Springs cannot economically supply those areas due to the costs of shipping light petroleum products by truck. Therefore, terminaling services provided by those terminals in the Denver and Colorado Springs areas is a relevant market.

Following the merger, the combined firm would control a significant share of bulk supply and terminaling services for light petroleum products in the Colorado Front Range. The proposed transaction would significantly increase market concentration, and post-merger the market would be highly concentrated. Moreover, the proposed transaction would result in the combined firm having a monopoly in the Colorado Springs area. The change in market concentration underestimates the likely competitive harm because it does not take into account how Valero L.P.'s incentives differ from Kaneb's current incentives in operating the Kaneb West Pipeline system.

Entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects arising from the proposed acquisition. Pipeline entry in Denver or Colorado Springs is very unlikely because of the high expense of constructing a new pipeline to these geographically isolated areas. It is highly improbable, if not impossible, that a new pipeline originating in a distant market could be both approved and constructed within the two-year period required by the .

Terminal entry in Denver or Colorado Springs is also very unlikely. Each refinery in and each pipeline to the Denver and Colorado Springs markets is accommodated by an existing terminal. Given the sufficient terminal capacity for the existing refinery and pipeline infrastructure, it is highly unlikely that a potential entrant could find a financial incentive to make a major investment, involving high sunk costs, in the construction of a new terminal.

The efficiency claims of the Respondents, to the extent they relate to these markets, are not cognizable under the , are small as compared to the magnitude of the potential harm, and would not be sufficient to reverse the merger's

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California. Downstream effects will likely result in increased prices for light petroleum products.

Valero L.P. and Kaneb compete in providing terminaling services for bulk suppliers of refining components, blending components, and light petroleum products in Northern California. Refiner-marketers, independent marketers, and traders use Kaneb's three marine-accessible Northern California terminals to receive and store imported products and to distribute light petroleum products via pipeline to other Northern California terminals. In addition, refiners use the Kaneb terminals to store refining components, blending components, and light petroleum products that are needed to optimize production from their refineries. There are no substitutes for terminaling services for these products.

Northern California is a relevant geographic market. Due to trucking costs, firms need access to the Kinder Morgan intrastate pipeline to distribute bulk volumes of California gasoline and other light petroleum products throughout the state, and Southern California terminals are not connected to Kinder Morgan's Northern California pipeline network. In addition, constraints in Southern California terminal infrastructure make it unlikely that Southern California terminals could handle excess volume in the event of a Northern California terminal services price increase.

The market for terminaling services for bulk suppliers of refining components, blending components, and light petroleum products in Northern California will be highly concentrated following the proposed acquisition. Participants in the market include Kaneb and the five San Francisco Bay Area refiners (Valero Energy, Chevron Corp., ConocoPhillips, Shell, and Tesoro). Other terminals lack sufficient capacity into the Kinder Morgan pipeline system to transport excess product in the event of a price increase. The proposed acquisition would significantly increase market concentration, and post-merger the market would be highly concentrated.

Analysis

Post-acquisition, Valero L.P. would have an incentive to increase light petroleum prices by restricting products moving into and through the three marine-accessible Kaneb terminals in Northern California. Valero L.P. could limit the amount of product reaching that market by (1) limiting out-of-state marine shipments of California-grade gasoline and other products into Northern California; (2) limiting the volume of product entering the Kinder Morgan pipeline system in Northern California; and (3) limiting the ability of other Bay Area refiners to produce California-grade gasoline by restricting their storage for refining components, blending components, and other products needed to optimize refinery output.

The acquisition increases the likelihood of coordinated interaction among the remaining market participants by eliminating the terminal services provider with different incentives. Kaneb is the only market participant that does not also own or market light petroleum products in Northern California. Because after the merger all market participants will benefit from higher prices for light petroleum products, Valero L.P.'s restriction of terminaling services would likely not trigger an offsetting response from its terminaling competitors.

Entry into the market for Northern California terminaling services for these products would not be likely or timely, for the reasons discussed in other terminal markets. Indeed, if anything, entry is even more difficult in California, given that the state imposes an extensive and costly permitting process that would prolong any attempt to secure and develop new terminal space.

The efficiency claims of the Respondents, to the extent they relate to any of these three markets with horizontal overlaps, are not cognizable under the , are small as compared to the magnitude of the potential harm, and would not be sufficient to reverse the merger's potential to raise the price of bulk supply and terminal services.

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Count IV Terminaling for Bulk Ethanol in Northern California

The Complaint charges that the proposed acquisition would likely substantially reduce competition in terminaling services for bulk ethanol in Northern California by changing the owner of Kaneb's Selby and Stockton terminals. Ethanol is a necessary input in producing California-grade "CARB" gasoline. This is the Commission's first opportunity to examine a merger's competitive effects on ethanol since California adopted it as the preferred oxygenate.

In Northern California, Kaneb's Selby, Stockton, and Richmond terminals are the only terminals capable of receiving and storing bulk quantities of ethanol. From these terminals, ethanol is offloaded from large rail or marine shipments, placed into storage tanks, and loaded onto trucks for delivery to other nearby terminals. Once the ethanol reaches these other terminals, ethanol is blended at the truck rack to produce CARB gasoline.

Terminal services for bulk ethanol is the relevant product market. There are no substitutes for these services; large quantities of ethanol received from producers must be broken into smaller volumes for distribution to remote gasoline terminals. Because remote terminals must receive ethanol supplies by truck, the geographic market is limited to Northern California. It is simply not feasible to supply Northern California terminals with ethanol trucked from Southern California terminals. Similarly, customers currently using Kaneb's Stockton terminal would face additional trucking costs if forced to use either of Kaneb's Selby or Richmond terminals.

The proposed acquisition raises vertical issues relating to ethanol terminaling services with likely effects in finished gasoline sales. Valero Energy and the other Northern California refiners do not offer ethanol terminaling services that compete with Kaneb and would not likely be able to do so in the event of a price increase. Post-acquisition, Valero L.P.'s ownership of the

Kaneb terminals would give it control over an input necessary to finish gasoline for portions of Northern California. Valero Energy refines and markets CARB gasoline. By virtue of the merger, Valero L.P. could use control over bulk ethanol terminaling to limit access to ethanol storage by refusing to renew storage agreements with terminaling customers, by canceling contracts at some terminals to force competitors to truck longer distances, or by simply raising prices or abusing confidential information for ethanol terminaling. Because a percentage of ethanol must be added to CARB gasoline where oxygenation is required, any of

competitively sensitive information between the merged firm and Valero Energy. The Commission will appoint James F. Smith as the hold separate trustee.

A. Kaneb's Paulsboro, Philadelphia North, and Philadelphia South Terminals

To remedy the lessening of competition in the supply of terminaling services for bulk suppliers of light petroleum products in the Greater Philadelphia Area alleged in Count I of the Complaint, Paragraph III of the Proposed Order requires Respondents to divest Kaneb's Paulsboro, New Jersey, Philadelphia North, and Philadelphia South terminals. The assets to be divested include the three terminals, and all assets located at or used in connection with these terminals, including truck racks, local connector pipelines, storage tanks, real estate, inventory, customer contracts, and real estate.

The divestiture is designed to ensure that, post-merger, the same number of players will compete in supplying terminaling services as at present. In addition, divesting the Philadelphia area package to an independent terminal operator that does not benefit from higher product prices will complicate the ability of the integrated terminal owners in the Greater Philadelphia Area to coordinate their bulk supply decisions and will maintain the pre-merger competition in this market.

These terminal assets must be divested within six months of the date the merger is effectuated to a buyer that receives that prior approval of the Commission. In a separate Order to Hold Separate and Maintain Assets, Respondents are required to hold all assets to be divested separate and to maintain the viability and marketability of the assets until they are divested.

B. Kaneb West Pipeline System

To remedy the lessening of competition in pipeline transportation and terminaling services for bulk suppliers of light

petroleum products in the Colorado Front Range alleged in Count II of the Complaint, Paragraph II of the Proposed Order requires Respondents to divest the Kaneb West Pipeline System. The assets to be divested include: (1) a refined products pipeline originating near Casper, Wyoming, and terminating in Rapid City, South Dakota, and Colorado Springs, Colorado; (2) refined products terminals in Rapid City, South Dakota; Cheyenne, Wyoming; Dupont, Colorado; and Fountain, Colorado. The assets to be divested also include all assets located at, or used in connection, with these pipelines and terminals, including truck racks, local connector pipelines, storage tanks, real estate, inventory, customer contracts, and real estate.

This divestiture is designed to maintain the likelihood that the new owner of the Kaneb West Pipeline System will not restrict Montana and Wyoming refiners' ability to send product to Denver and Colorado Springs. The divestiture will eliminate the ability of the combined company to raise light petroleum product prices in Denver and Colorado Springs by restricting access to the West Pipeline System. It also ensures that the current competition for pipeline transportation to and terminaling services in Denver and Colorado Springs will be maintained, with the same number of competitors post-acquisition as pre-acquisition. The divestiture of the West Pipeline System will also complicate the ability of the terminal and pipeline owners in these markets to coordinate in raising their pipeline transportation or terminaling service fees. Finally, the divestiture prevents Valero L.P. from controlling light petroleum product pipeline transportation to and terminaling in Colorado Springs. It effectively maintains the pre-merger competition in this market.

These pipeline and terminal assets must be divested within six months of the date the merger is effectuated to a buyer that receives the prior approval of the Commission. In a separate Order to Hold Separate and Maintain Assets, Respondents are required to hold all assets to be divested separate and to maintain the viability and marketability of the assets until they are divested.

C. Kaneb's Martinez and Richmond Terminals

To remedy the lessening of competition in terminaling services

IN THE MATTER OF

CHEVRON CORPORATION, ET. AL.

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

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This consent order addresses the merger of Respondent Chevron Corporation -- a major international energy firm engaged in exploring for, developing and

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 ("FTC" or "Commission"), having reason to believe that Respondent Chevron Corporation ("Chevron") and Respondent Unocal Corporation ("Unocal") have entered into an agreement and plan of merger whereby Chevron proposes to acquire all of the outstanding common stock of Unocal, that such agreement and plan of merger violates 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. RESPONDENTS

1. Respondent Chevron, formerly ChevronTexaco Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6001 Bollinger Canyon Road, San Ramon, California 94583.

2. Respondent Chevron is, and at all times relevant herein has been, a diversified energy firm engaged, either directly or through affiliates, in the exploration for, and production of, petroleum products; the pipeline transportation of crude oil and natural gas; the refining of crude oil into refined products, including gasoline and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel

Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. TRADE AND COMMERCE

8. Gasoline is a motor fuel that is used in automobiles and other vehicles. It is refined from crude oil at refineries in the United States and throughout the world. Gasoline is produced in various grades and formulations, including conventional

addition, Unocal has won a patent infringement suit against major refiners of CARB RFG and obtained a court judgment awarding Unocal royalties of 5.75 cents per infringing gallon produced in California.

13. Relevant lines of commerce in which to analyze the effects of the proposed merger are the marketing and refining of CARB RFG.

14. Relevant sections of the country in which to analyze the proposed merger are the State of California and smaller areas contained therein.

15. The relevant markets for the refining and marketing of CARB RFG are either highly concentrated or moderately concentrated.

16. Entry into the relevant lines of commerce in the relevant sections of the country is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects resulting from the proposed merger.

IV. VIOLATION CHARGED

17. Because of factors such as Unocal's perception of possible actions by the California Air Resources Board or other governmental authorities, Unocal is likely to be constrained in charging the full monopoly level price to licensees of the Unocal patents. Unocal has no operations at downstream levels of the industry through which it could attempt to

recoup any additional profits. Because of its significant operations at the refining and marketing levels, Chevron will have a greater ability than Unocal to obtain additional profits by coordinating with its competitors at the downstream refining and marketing levels.

18. As part of Unocal's license agreements, Unocal regularly collects detailed reports from licensees about their production of CARB RFG and other refinery operations. Such information is not otherwise available to members of the industry, and could be used to facilitate coordination among refiners and marketers of CARB RFG.

19. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the marketing and refining of CARB RFG in the relevant sections of the country, 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 increasing the likelihood of, or facilitating, collusion or coordinated interaction between Chevron and its competitors in the refining of CARB RFG in the relevant sections of the country,

    b. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between Chevron and its competitors in the marketing of CARB RFG in the relevant sections of the country,

    each of which increases the likelihood of anticompetitive price increases for CARB RFG in the relevant sections of the country.

20. The proposed merger between Chevron and Unocal violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated,

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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 27th day of July, 2005, issues its complaint against said Respondents.

1. Respondent Chevron Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6001 Bollinger Canyon Road, San Ramon, California 94583.

2. Respondent Unocal Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245.

3. The Federal Trade 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, the following definitions shall apply:

A. "Chevron" means Chevron Corporation (formerly ChevronTexaco Corporation), its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Chevron Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Unocal" means Unocal Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including but not limited to Union Oil Company of California), divisions, groups and affiliates controlled by Unocal Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. “Respondents” means Chevron and Unocal.

D. “Commission” means the Federal Trade Commission.

E. “Action” means any lawsuit or other action, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, in the United States or anywhere else in the world.

F. “License Agreement” means any contract, agreement, arrangement or other understanding between Unocal and any other party or parties that requires, calls for, or otherwise contemplates, payment of fees, royalties or other monies, in cash or in kind, to practice under the Relevant U.S. Patents.

G. “Merger” means the proposed merger between Chevron and Unocal, as contemplated by the Agreement and Plan of Merger dated as of April 4, 2005 among Unocal Corporation, ChevronTexaco Corporation, and Blue Merger Sub Inc.

H. “Merger Effective Date” means the earlier of the following dates:

1. the date that the certificate of merger for the Merger is filed with the Secretary of State of Delaware or such later time as specified in such certificate of merger, or

2. the date that Chevron acquires control of Unocal Corporation, as "control" is defined by 16 C.F.R. § 801.1(b).

I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

J. “Relevant U.S. Patents” means United States Patent

representation by Respondents with respect to the validity or patentability of the claims of the Relevant U.S. Patents.

B. Respondents shall correct as necessary, and shall not withdraw or seek to nullify, any disclaimers, or dedications filed pursuant to Paragraph III. A.

IV.

IT IS FURTHER ORDERED that, within thirty (30) days following the Merger Effective Date, Respondents shall move to dismiss, with prejudice, all Actions relating to the alleged infringement of any Relevant U.S. Patents, including but not limited to the following actions pending in the United States District Court for the Central District of California: *O C C h C* , Case No. CV-95-2379-CAS and *O C C C* , CV-02- 00593 SVW.

V.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final, Respondents shall distribute a copy of this Order and the complaint in this matter to:

1. any Person that either Respondent has contacted regarding possible infringement of any of the Relevant U.S. Patents,

2. any Person against which either Respondent is, or was, in any Action regarding possible infringement of any of the Relevant U.S. Patents,

3. any licensee or other Person from which either Respondent has collected any fees, royalties or other

payments, in cash or in kind, for the practice of the Relevant U.S. Patents, and

4. any Person that either Respondent has contacted with regard to the possible collection of any fees, royalties or other payments, in cash or in kind, for the practice of the Relevant U.S. Patents.

B. Within thirty (30) days after the date this Order becomes final, Respondents shall distribute a copy of this Order and the complaint in this matter to every officer and director of Respondents having responsibility for any of Respondents' obligations under this Order, and to every employee or agent having managerial responsibility for any of Respondents' obligations under this Order.

C. For a period of five (5) years after the date this Order becomes final, Respondents shall furnish a copy of this Order and the complaint in this matter to each new officer and director of Respondents who will have responsibility for any of Respondents' obligations under this Order, and to each new employee or agent of Respondents who will have managerial responsibility for any of Respondents' obligations under the Order. Such copies shall be furnished within thirty (30) days after each such person assumes his or her position as officer, director, employee, or agent. For purposes of this Paragraph V.C., "new employee or agent" shall include, without limitation, Respondents' employees and agents whose duties change during their employment or agency relationship to include managerial responsibility for any of Respondents' obligations under this Order.

VI.

IT IS FURTHER ORDERED that:

A. Respondents shall, within sixty (60) days after the date this Order becomes final, submit to the Commission a verified

written report setting forth in detail the manner and form in which each Respondent intends to comply, is complying, and has complied with this Order.

B. Respondents shall, one year from the date this Order

dissolution of subsidiaries, or any other change in either Respondent.

IX.

IT IS FURTHER ORDERED that this Order will terminate twenty (20) years after the date it becomes final.

Analysis of Proposed Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has issued a complaint ("Complaint") alleging that the proposed merger of Chevron Corporation ("Chevron," formerly ChevronTexaco Corporation) and Unocal Corporation ("Unocal") (collectively "Respondents") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C4nl§ 18,and Uection 75of the ederal Trade Commission ct, as amendehs antserd ant"oand agreee contintng tconent Oode (c"Agreeerl) wpursuat O"oawhich]TJT*[(espondents" agreeO"oabe boud Uby)58(a croposed)tcon

industrial uses and additives for fuels and lubricants. For 2004, the company had total revenues of approximately $155.3 billion and total assets of approximately $93.2 billion.

B. Unocal

Unocal is also a major international energy firm with operations in North America, Asia, and other locations around the world. Its primary activities are oil and gas exploration, development and production. It has oil and gas operations located in various countries, including Thailand, Myanmar, Indonesia, Azerbaijan, Bangladesh, and Vietnam. Unocal sold most of its downstream operations in the United States to another company in

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The transaction is subject to various closing conditions, including the approval of Unocal shareholders and the expiration or early termination of the waiting period under the Hart-Scott-Rodino Act, 15 U.S.C. § 18A. The parties expect to close the transaction as soon as practicable after the last of the conditions to closing have been satisfied.

IV. The Complaint

The Complaint alleges that the merger of Chevron and Unocal would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the refining and marketing of reformulated gasoline that has been approved by the California Air Resources Board ("CARB") for sale in California. Through its wholly-owned subsidiary, Union Oil Company of California ("Union Oil"), Unocal owns a portfolio of five U.S. patents relating to reformulated gasoline ("RFG"). These patents (the "Relevant U.S. Patents") cover the production and supply of CARB RFG, particularly in warmer weather months. To remedy the alleged anticompetitive effects of the merger, the Proposed Consent Order requires Respondents to take certain actions, including (1) to cease and desist from any efforts to assert or enforce any of the Relevant U.S. Patents against any person, to recover any damages or costs for alleged infringements of any of the Relevant U.S. Patents, or to collect any fees, royalties or other payments for the practice of the Relevant U.S. Patents; and (2) to take the necessary actions to dedicate to the public the remaining terms of the patents.

According to the Complaint, gasoline is a motor fuel used in automobiles and other vehicles. It is produced in various grades and formulations, including conventional unleaded gasoline, low emissions reformulated gasoline ("RFG"), California Air Resources Board ("CARB") compliant reformulated gasoline, and others. CARB compliant reformulated gasoline ("CARB RFG") is a type of gasoline that meets the specifications of the California

Air Resources Board. CARB RFG is cleaner burning and causes less air pollution than conventional unleaded gasoline. The sale of any gasoline other than CARB RFG is prohibited in California, and there is no substitute for CARB RFG as a fuel for automobiles and other vehicles that use gasoline purchased in California. As a result, CARB RFG is a relevant line of commerce in which to analyze the potential effects of the merger.

CARB RFG is produced primarily in California and at a few other locations on the West Coast. The Complaint alleges that the state of California, and smaller areas contained therein, are relevant sections of the country in which to analyze the potential effects of the merger.

Chevron is a leading refiner and marketer of CARB RFG. Unocal does not refine or market CARB RFG. However, through its wholly-owned subsidiary, Union Oil, Unocal owns Relevant U.S. Patents relating to CARB RFG. Refiners must use the technology covered by the Unocal Relevant U.S. Patents for producing CARB RFG during warmer weather months – , CARB "summertime" gasoline. Thus, Unocal controls an important input used by CARB refiners to produce CARB gasoline.

Unocal licenses its RFG patents to others in exchange for payments ranging from 1.2 to 3.4 cents per gallon. In addition,

The Complaint states that, because of factors such as Unocal's perception of possible actions by the California Air Resources Board or other governmental authorities, Unocal is likely to be constrained in charging the full monopoly level price to licensees of the Unocal patents. Moreover, Unocal has no operations at downstream levels of the industry through which it could attempt to recoup any additional profits.

Because of its significant operations at the refining and

contemplates that the Commission would issue the Complaint and enter the Proposed Consent Order requiring the relief described below.

In order to remedy the anticompetitive effects that have been identified, Chevron and Unocal have agreed to take several actions. First, they will cease and desist from any and all efforts, and will not undertake any new efforts, to assert or enforce any of Unocal's Relevant U.S. Patents against any person, to recover any damages or costs for alleged infringements of any of the Relevant U.S. Patents, or to collect any fees, royalties or other payments, in cash or in kind, for the practice of any of the Relevant U.S. Patents, including but not limited to fees, royalties, or other payments, in cash or in kind, to be collected pursuant to any License Agreement. These obligations become effective as of the "Merger Effective Date," which is defined as the earlier of (1) the

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District Court for the Central District of California: O C C h C , Case No. CV-95-2379-CAS and O C C C , Case No. CV-02- 00593 SVW.

Paragraph V of the Proposed Consent Order requires Respondents to distribute a copy of the Order and the Complaint in this matter to certain interested parties, including (1) any person that either Respondent has contacted regarding possible infringement of any of the Relevant U.S. Patents, (2) any person against which either Respondent is, or was, involved in any legal action regarding possible infringement of any of the Relevant U.S. Patents, (3) any licensee or other person from which either Respondent has collected any fees, royalties or other payments, in cash or in kind, for the practice of the Relevant U.S. Patents, and (4) any person that either Respondent has contacted with regard to the possible collection of any fees, royalties or other payments, in cash or in kind, for the practice of the Relevant U.S. Patents.

Paragraph V also requires Respondents to distribute a copy of the Order and the Complaint to present and future officers and directors of Respondents having responsibility for any of Respondents' obligations under the Order, and to employees and agents having managerial responsibility for any of Respondents' obligations under the Order.

Paragraphs VI, VII and VIII of the Proposed Consent Order contain standard reporting, access, and notification provisions designed to allow the Commission to monitor compliance with the order. Paragraph IX provides that the Order shall terminate twenty (20) years after the date it becomes final.

VI. Opportunity for Public Comment

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 thirty day comment period will become part of the public record. After

thirty (30) days, the Commission will again review the Proposed Order and the comments received and will decide whether it should withdraw from the Proposed Order or make final the agreement's Proposed Order.

By accepting the Proposed Order 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 invite public comment on the Proposed Order, and to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

IN THE MATTER OF

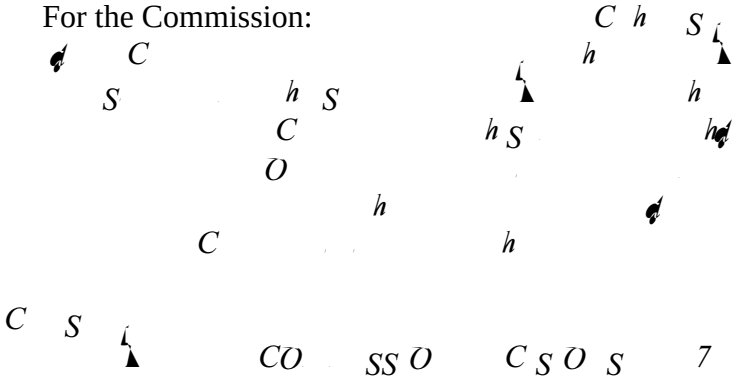
UNION OIL COMPANY OF CALIFORNIA

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

C h 7

This consent order addresses a series of actions taken by Respondent Union Oil Company of California, an international energy firm, with respect to proceedings conducted by the California Air Resources Board ("CARB") to set regulations and standards governing the composition of low emissions, reformulated gasoline ("RFG"), in an effort to reduce California air pollution levels. The order, among other things, requires the respondent to cease and desist from any and all efforts to assert or enforce any of its relevant U.S. patents – including in particular patents covering technology that refiners must use to produce CARB-compliant reformulated gasoline, the only type of gasoline that can be sold in California – against any person to recover any damages or costs for alleged infringements of any of these patents, or to collect any fees, royalties or other payments, in cash or in kind, for the practice of any of these patents. The consent order also requires the respondent, within thirty days, to file with the United States Patent and Trademark Office the necessary documents to disclaim or dedicate to the public the remaining term of the patents. In addition, the consent order requires the respondent, within thirty days, to dismiss with prejudice all pending legal actions relating to the alleged infringement of any of the patents.

For the Commission:



For the Respondent: *h* *C* , and *h* and *C* *h* *C* *h* .

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Union Oil Company of California (hereinafter, "Unocal" or "Respondent") has violated Section 5 of the Federal Trade Commission ("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:

Nature of the Case

1. This case involves Unocal's subversion of state regulatory standard-setting proceedings relating to low emissions gasoline standards. To address California's serious air pollution problems, the California Air Resources Board ("CARB") initiated rulemaking proceedings in the late 1980s to determine "cost-effective" regulations and standards governing the composition of low emissions, reformulated gasoline ("RFG"). Unocal actively participated in the CARB RFG rulemaking proceedings and engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers. Through a pattern of anticompetitive acts and practices that continues even today, Unocal has illegally monopolized, attempted to monopolize, and otherwise engaged in unfair methods of competition in both the technology market for the production and supply of CARB-compliant "summer-time" RFG and the downstream CARB "summer-time" RFG product market.

2. During the RFG rulemaking proceedings in 1990-1994, Unocal made materially false and misleading statements including, but not limited to, the following:

   a. Representing to CARB and other participants that its emissions research results showing, , the directional relationships between certain gasoline properties (most notably the midpoint distillation temperature of gasoline or "T50") on automobile emissions were "nonproprietary," were in "the public domain," or otherwise were available to CARB, industry members, and the general public, without disclosing that Unocal intended to assert its proprietary interests (as manifested in pending patent claims) in these research results;

   b. Representing to CARB that a "predictive model" -- , a mathematical model that predicts whether the resulting emissions from varying certain gasoline properties (including T50) in a fuel are equivalent to the emissions resulting from a specified and fixed fuel formulation -- would be "cost-effective" and "flexible," without disclosing that Unocal's assertion of its proprietary interests would undermine the cost-effectiveness and flexibility of such a model;

   c. Making statements and comments to CARB and other industry participants relating to the cost-effectiveness and flexibility of the regulations that further reinforced the materially false and misleading impression that Unocal had relinquished or would not enforce any proprietary interests in its emissions research results.

3. Through its knowing and willful misrepresentations and other bad faith, deceptive conduct, Unocal created and maintained the materially false and misleading impression that it did not possess, or would not enforce, any relevant intellectual property rights that could undermine the cost-effectiveness and flexibility of the CARB RFG regulations.

4. Although Unocal knew by July 1992 that most of the pending patent claims based on its emissions research had been allowed by the United States Patent and Trademark Office, Unocal concealed this material information from CARB and other participants in the CARB RFG proceedings. Until Unocal's public announcement of its RFG patent rights on January 31, 1995, Unocal continued to perpetuate the false and misleading impression that it did not possess, or would not enforce, any proprietary interests relating to RFG.

5. But for Unocal's fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both. Unocal's misrepresentations, on which CARB and other participants in the rulemaking process reasonably and detrimentally relied, have harmed competition and led directly to the acquisition of monopoly power for the technology to produce and supply California "summer-time" reformulated gasoline (mandated for up to eight months of the year, from approximately March through October). Unocal's "patent ambush" also has permitted it to undermine competition and harm consumers in the downstream product market for "summer-time" reformulated gasoline in California.

6. Unocal did not announce the existence of its proprietary interests and patent rights relating to RFG until shortly before CARB's Phase 2 regulations were to go into effect. By that time, the refining industry had spent billions of dollars in capital expenditures to modify their refineries to comply with the CARB Phase 2 RFG regulations. After CARB and the refiners had become locked into the Phase 2 regulations, however, Unocal commenced its patent enforcement efforts by publicly announcing its RFG patent rights and its intention to collect royalty payments and fees. Since Unocal's public announcement of the issuance of its first RFG patent on January 31, 1995, Unocal has obtained four additional patents

and vigorously enforced its RFG patent rights through litigation and licensing activities.

7. The anticompetitive conduct by Unocal that is at issue in this action has materially caused or threatened to cause substantial harm to competition, and will in the future materially cause or threaten to cause further substantial injury to competition and to consumers.

8. The threatened or actual anticompetitive effects of Unocal's conduct include but are not limited to the following:

   a. increased royalties (or other payments) associated with the use of technology to refine, produce, and supply low emissions, reformulated gasoline for the California market;

   b. increases in the price of low emissions, reformulated gasoline in California;

   c. reductions in the manufacture, output, and supply of low emissions, reformulated gasoline for the California market; and

   d. decreased incentives, on the part of refiners, blenders, and importers, to produce and supply low emissions, reformulated gasoline to the California market.

9. Unocal's enforcement of its patent rights has resulted,

produced by Valero that infringes the '393 patent and the fourth of Unocal's five RFG patents – United States Patent No. 5,837,126 (the "'126 patent"). Taken together, the major refiners and Valero comprise approximately 90 percent of the current refining capacity of CARB-compliant RFG in the California market. Unocal has publicly announced that its "uniform" RFG licenses, with fees ranging from 1.2 to 3.4 cents per gallon, are available to "non-litigating" refiners.

10. Were Unocal to receive a 5.75 cents per gallon royalty on all gallons of "summer-time" CARB RFG produced annually for the California market, this would result in an estimated annual cost of more than $500 million (assuming approximately 14.8 billion gallons per year California consumption, with up to 8 months of CARB summer-time gasoline requirements). Unocal's own economic expert has testified under oath that 90 percent of any royalty would be passed through to consumers in the form of higher retail gasoline prices.

Respondent

11. Union Oil Company of California is a public corporation organized, existing, and doing business under, and by virtue of, the laws of California. Its office and principal place of business is located at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245. Since 1985, Union Oil Company of California has done business under the name "Unocal." Unocal is a wholly-owned, operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware.

12. Unocal is, and at all relevant times has been, a corporation as "corporation" is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, Unocal has been, and is now, engaged in commerce as "commerce" is defined in the same provision.

13. Prior to 1997, Unocal owned and operated refineries in California as a vertically integrated producer, refiner, and marketer of petroleum products. In March 1997, Unocal completed the sale of its west coast refining, marketing, and transportation assets to Tosco Corporation. Currently, Unocal's primary business activities involve oil and gas exploration and production, as well as production of geothermal energy, ownership in proprietary and common carrier pipelines, natural gas storage facilities, and the marketing and trading of hydrocarbon commodities.

14. In its annual report for the year 2001 filed with the United States Securities and Exchange Commission, Form 10-K, Unocal lists as another of its key business activities: "[p]ursuing and negotiating licensing agreements for reformulated gasoline patents with refiners, blenders and importers." Unocal has publicly announced that it expects to reap up to $150 million in revenues a year from licensing its RFG patents.

15. Unocal is the owner, by assignment, of the following patents relating to low emissions, reformulated gasoline: United States Patent No. 5,288,393 (issued February 22, 1994); United States Patent No. 5,593,567 (issued January 14, 1997); United States Patent No. 5,653,866 (issued August 5, 1997); United States Patent No. 5,837,126 (issued November 17, 1998); United States Patent No. 6,030,521 (issued February 29, 2000). These patents all arise from the same scientific discovery and are related in that they all claim priority based on patent application No. 07/628,488, filed on December 13, 1990. These patents share the identical specification.

California Air Resources Board (CARB)

16. The California Air Resources Board is a department of thexpects

and ecological resources of California through the effective and efficient reduction of air pollutants, while recognizing and considering the effects of its actions on the California economy. CARB fulfills this mandate by, among other things, setting and enforcing standards for low emissions, reformulated gasoline.

17. California's Administrative Procedures Act governs CARB's rulemaking proceedings and requires, , notice of any proposed regulations, the development of an evidentiary basis for any proposed regulations, the solicitation of public comments, and the conduct of hearings. Given the scientific and technical nature of the issues involved, CARB relies on the accuracy of the data and information presented to it in the course of rulemaking proceedings.

18. All CARB regulations are subject to review by California's Office of Administrative Law to ensure that such regulations meet statutory standards of necessity, authority, clarity, consistency, reference and nonduplication. CARB's regulations are subject to judicial review to determine whether the agency acted within its delegated authority, whether the agency employed fair procedures, and whether the agency's action was arbitrary, capricious, or lacking in evidentiary support.

Reformulated Gasoline in California

19. CARB's RFG regulations had their genesis in an effort by California to study the viability of alternative fuels for motor vehicles, such as methanol. In 1987, the California legislature passed AB 234, which resulted in the formation of a panel to study the environmental impact of alternative fuels and to develop a proposal to reduce emissions. This panel included representatives from the refining industry,

including Roger Beach, a high level Unocal executive who later became the Chief Executive Officer and Chairman of the Board of Unocal.

20. Based in substantial part on the representations of oil industry executives that the oil industry could, and would, develop gasoline that would be cleaner-burning and cheaper than methanol, the AB 234 study panel eventually recommended exploring reformulated gasoline as an alternative to methanol.

21. In late 1988, the California legislature amended the California Clean Air Act to require CARB to take actions to reduce harmful car emissions, and directed CARB to achieve this goal through the adoption of new standards for automobile fuels and low-emission vehicles. CARB's authority in conducting its Phase 2 RFG rulemaking proceedings was circumscribed by an express and limited delegation of authority by the legislature. CARB's specific legislative mandate, set forth in California Health and Safety Code Section 43018, provided, , that CARB undertake the following actions:

    a. Take "necessary, cost-effective, and technologically feasible" actions to achieve "reduction in the actual thse"t-eautomTJc46. te tin the a(thse"t-e)4 sox

including the "specification of vehicular fuel composition."

22. Following the 1988 California Clean Air Act amendments, CARB embarked on two rulemaking proceedings relating to low emissions, reformulated gasoline. In these rulemaking proceedings – Phase 1 and Phase 2, respectively – CARB prescribed limits on specific gasoline properties.

23. The Phase 1 RFG proceedings resulted in the adoption of regulations in 1990 mandating a reduction in Reid Vapor Pressure ("RVP"), the elimination of leaded gasoline, and a requirement that deposit control additives be included in gasoline. The Phase 1 regulations did not require refiners to make large capital investments.

24. CARB's Phase 2 RFG proceedings represented an effort by CARB to develop stringent standards for low emissions, reformulated gasoline. Participants to the Phase 2 RFG proceedings understood that the CARB Phase 2 RFG regulations would require refiners to make substantial capital investments to reconfigure their refineries to produce compliant gasoline.

25. In its Phase 2 RFG proceedings, CARB did not conduct any independent studies of its own, but relied on industry to provide the needed research and resulting knowledge.

26. CARB's Phase 2 RFG proceedings were quasi-adjudicative in nature. In the course of these proceedings, CARB adhered to the procedures set forth in the California Administrative Procedures Act. CARB provided notice of proposed regulations; provided the language of these proposed regulations and a statement of reasons; solicited and accepted written comments from the public; and conducted lengthy hearings at which oral testimony was received. CARB also issued written findings on the results of its rulemaking proceedings. Following adoption of the

regulations, several parties sought judicial review of the CARB Phase 2 RFG regulations that provided small refiners with a two-year exemption for compliance with the regulations.

27. Unocal management and employees understood that information and data relating to the potential costs of complying with, or relating to the cost-effectiveness of, the Phase 2 regulations were material to CARB's RFG rulemaking proceedings.

Unocal's RFG Research

28. By 1989, Unocal management knew that CARB intended to achieve significant emissions reductions by regulating the chemical and physical properties of gasoline sold in California. Unocal scientists from the company's Science and Technology Division began to design experiments to determine how controlling various properties of gasoline affected automobile emissions. In January 1990, Unocal scientists conducted in-house emissions testing of various gasoline fuels in a single car to determine which gasoline properties had the greatest emissions impact.

29. On May 14, 1990, Unocal scientists Michael Croudace and Peter Jessup presented the preliminary results of the emissions research program to the highest levels of Unocal's management to obtain approval and funding for additional, confirmatory research. These research results were presented to the members of Unocal's Executive Committee, including Richard Stegemeier, the Chief Executive Officer and Chairman of the Board of Unocal. Unocal management approved funding for additional emissions testing, and this project became known as the "5/14 Project."

30. Unocal management approved the filing of a patent application covering the invention and discovery that sprang

from the "5/14 Project," specifically the Unocal scientists' purportedly novel discovery of the directional relationships between eight fuel properties – RVP, T10 (the temperature at which 10 percent of a fuel evaporates), T50 (the temperature at which 50 percent of a fuel evaporates), T90 (the temperature at which 90 percent of a fuel evaporates), olefin content, aromatic content, paraffin content, and octane – and three types of tailpipe emissions – , incompletely burned or unburned hydrocarbons ("HC"), carbon monoxide ("CO"), and nitrogen oxides ("NOx").

31. Unocal management made prosecution of the patent application a high priority. Unocal's chief patent counsel, Gregory Wirzbicki, personally undertook the task of prosecuting the patent application.

32. On December 13, 1990, Unocal filed with the United States Patent and Trademark Office a patent application, No. 07/628,488. This application presented Unocal's emissions research results, including the regression equations and underlying data; detailed the directional relationships between the fuel properties and emissions studied in the "5/14 Project;" and set forth composition and method claims relating to low emissions, reformulated gasoline. All five Unocal RFG patents referred to in paragraph 15 are the progeny of the '488 application.

Unocal's Conduct Before CARB

place within the company concerning how to induce the regulators to use information supplied by Unocal so that Unocal could realize the huge licensing income potential of its pending patent claims.

35. Beginning in 1990, and continuing throughout the CARB Phase 2 RFG rulemaking process, Unocal provided information to CARB for the purpose of obtaining competitive advantage. Unocal gave CARB this information in private meetings with CARB, through participation in CARB's public workshops and hearings, as well as by participating in industry groups that also were providing input into the CARB regulations. This information was materially misleading in light of Unocal's suppression of facts relating to its proprietary interests in its emissions research results and Unocal's active prosecution of patents based on these research results.

36. On June 11, 1991, CARB held a public workshop regarding the Phase 2 RFG regulations. This workshop included discussions of CARB staff's proposed gasoline specifications – , the levels at which certain gasoline properties should be set – to reduce the emissions from gasoline-fueled vehicles. The set of specifications proposed by CARB for discussion at this public workshop did not include a T50 specification.

37. On June 20, 1991, Unocal presented to CARB staff the results of its "5/14 Project" to show CARB that "cost-effective" regulations could be achieved through adoption of a "predictive model" and to convince CARB of the importance of T50. Unocal's pending patent application contained numerous claims that included T50 as a critical limitation, in addition to other fuel properties that CARB proposed to regulate.

conjunction with Unocal's July 1, 1991 letter, the August 27, 1991 letter created the materially false and misleading impression that Unocal agreed to give up any "competitive advantage" it may have had relating to its purported invention and arising from its emissions research results.

43. In reasonable reliance on Unocal's representation that the information was no longer proprietary, CARB used Unocal's equations in setting a T50 specification.

regulations. In making these statements, Unocal again failed to disclose that it had proprietary rights that would materially increase the cost and reduce the cost-effectiveness and flexibility of the regulations that CARB had adopted in reasonable reliance on Unocal's representations.

47. CARB amended the Phase 2 regulations in June 1994 to include a predictive model as an alternative method of complying with the regulations that was intended to provide refiners with additional flexibility. At the urging of numerous companies, including Unocal, this "predictive model" permits a refiner to comply with the RFG regulations by producing fuel that is predicted – based on its composition and the levels of the eight properties – to have equivalent emissions to a fuel that meets the strict gasoline property limits set forth in the regulations.

48. During the development of the predictive model, Unocal continued to meet with CARB, providing testimony and information. Unocal submitted comments to CARB touting the predictive model as offering "flexibility" and furthering CARB's mandate of "cost-effective" regulations. These statements were materially false and misleading because Unocal suppressed the material fact that assertion of its proprietary rights would materially increase the cost and reduce the flexibility of the proposed regulations.

49. On February 22, 1994, the United States Patent Office issued the '393 patent. CARB first became aware of Unocal's '393 patent shortly after Unocal's issuance of a press release on January 31, 1995.

Unocal's Participation in Industry Groups

50. During the CARB RFG rulemaking, Unocal actively participated in the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil" or the "Program"), a

specific gasoline properties. This WSPA study could have

62. Subsequently, after the submission of additional amendments, Unocal received a notice of allowance from the U.S. Patent and Trademark Office for all of its pending claims in February 1993. Unocal did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking.

63. In June 1993, Unocal filed a divisional application (No. 08/77,243) of its original patent application that allowed Unocal to pursue additional patents based on the discoveries of the "5/14 Project."

64. The U.S. Patent and Trademark Office issued the '393 patent to Unocal on February 22, 1994. Unocal waited until January 31, 1995, to issue a press release announcing

67. Unocal subsequently filed additional continuation patent applications on June 5, 1995 (No. 08/464,544), August 1, 1997 (No. 08/904,594), and November 13, 1998 (No. 08/191,924), all claiming priority based on Unocal's original December 13, 1990 patent application.

68. On April 13, 1995, ARCO, Exxon, Mobil, Chevron, Texaco, and Shell filed suit in the United States District Court for the Central District of California seeking to invalidate Unocal's '393 patent. Unocal filed a counterclaim for patent infringement of the '393 patent. The jury in this private litigation determined that Unocal's

9). In its complaint, Unocal seeks damages at the rate of 5.75 cents per gallon for all infringing gallons, and treble damages for willful infringement.

72. Unocal also has enforced its patent claims through licensing activities. To date, Unocal has entered into license agreements with eight refiners, blenders and/or importers covering the use of all five RFG patents. The terms of these license agreements are confidential. Unocal has announced that these license agreements feature a "uniform" licensing schedule that specifies a range from 1.2 to 3.4 cents per gallon depending on the volume of gasoline falling within the scope of the patents. As a licensee practices under the license more frequently, the licensing fee per gallon is reduced.

Relevant Product and Geographic Markets

73. Unocal has obtained and exercised market power and/or monopoly power in two relevant product markets.

74. One relevant product market consists of the technology claimed in patent application No. 07/628,488 (filed on December 13, 1990) and Unocal's issued RFG patents, and any alternative technologies that enable firms to refine, produce, and supply CARB-compliant "summer-time" RFG for sale in California at comparable or lower cost, and comparable or higher effectiveness, without practicing the Unocal technology. The relevant geographic market for such technology is worldwide.

75. Another relevant market consists of CARB-compliant "summer-time" RFG produced and supplied for sale in California. The relevant geographic market is California.

Unocal's Materially False and Misleading Statements During CARB's RFG Proceedings Led to its Market Power

76. By engaging in fraudulent conduct in connection with the CARB rulemaking proceedings, Unocal unlawfully obtained market power. Unocal obtained unlawful market power through affirmative misrepresentations, materially false and misleading statements, and other bad-faith, deceptive conduct that caused CARB to enact regulations that overlapped almost entirely with Unocal's pending patent rights.

b. Having previously asserted that its equations might provide it with a competitive advantage, Unocal informed CARB by letter, dated August 27, 1991, that its emissions research data thereafter would be "nonproprietary" and available to CARB, industry members, and the general public. By this representation, Unocal created the materially false and misleading impression that Unocal had relinquished or would not enforce any proprietary interests in its emissions research results.

c. On numerous occasions after August 27, 1991, Unocal made statements and comments to CARB relating to the "cost effectiveness" of CARB Phase 2 regulations, and the "flexibility" offered by the implementation of a predictive model to reduce refiner compliance costs. These statements and comments include, but are not limited to, both written and/or oral statements made to CARB on the following dates: October 29, 1991, November 21, 1991, November 22, 1991, March 16, 1992, June 19, 1992, August 14, 1992, September 4, 1992, June 3, 1994, and June 9, 1994. Under the circumstances, these statements further reinforced the

RFG regulations. Unocal instead perpetuated false and misleading impressions concerning the nature of its proprietary interests in its "5/14 Project" research results.

84. By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal violated the letter and spirit of the Auto/Oil Agreement and breached its fiduciary duties to the other members of the Auto/Oil joint venture. Such deceptive conduct violated the integrity of the Auto/Oil joint venture's

88. Throughout all of its communications and interactions with WSPA prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties.

89. By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal breached its fiduciary duties to the other members of WSPA. Such deceptive conduct violated the integrity of the WSPA's procedures and subverted WSPA's process of providing accurate data and information to CARB.

90. Participants in Auto/Oil and WSPA reasonably relied on Unocal's misrepresentations and material omissions. But for Unocal's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, (a) advocating that CARB adopt regulations that minimized or avoided infringement on Unocal's patent claims; (b) advocating that CARB negotiate license terms substantially different from those that Unocal was later able to obtain; and/or (c) incorporating knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement. As a result, if other participants in WSPA or Auto/Oil had known the truth, the harm to competition and consumers, as described in this Complaint, would have been avoided.

91. Unocal's fraudulent conduct has resulted in Unocal's acquisition of market power in the following markets: the technology market for the production and supply of CARB-compliant "summer-time" gasoline in California, and the downstream product market for CARB-compliant "summer-time" gasoline in California.

(ii) Unocal's conduct did not constitute petitioning behavior; and (iii) Unocal's misrepresentations and materially false and misleading statements to Auto/Oil and WSPA, two non-governmental industry groups, were not covered by any petitioning privilege.

Anticompetitive Effects of Unocal's Conduct

methods of competition that harm consumers in violation of Section 5 of the FTC Act.

Fifth Violation Alleged

103. As described in Paragraphs 1-98 above, which are incorporated herein by reference, Unocal has willfully engaged in anticompetitive and exclusionary acts and practices, undertaken since the early 1990s, and continuing even today, whereby it has unreasonably restrained trade in the downstream goods market for CARB-compliant "summer-time" gasoline to be sold in California, which acts and practices constitute unfair methods of competition that harm consumers in violation of Section 5 of the FTC Act.

Notice

Notice is hereby given to the Respondent that the fourth day of June, 2003, at 10 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondent's

conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. Requiring Respondent to cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution, or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, through or in which Respondent has asserted that any person or entity, by manufacturing, selling, distributing, or otherwise using motor gasoline to be sold in California infringes any of Respondent's current or future United States patents that claim priority back to U.S. Patent Application Number No. 07/628,488 filed December 13, 1990 or any other Patent Application filed before January 31, 1995.

2. Requiring Respondent not to undertake any new efforts by any means, including without limitation the threat, prosecution, or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, through or in which Respondent has asserted that any person or entity, by manufacturing, selling, distributing, or otherwise using motor gasoline to be sold in California infringes any of Respondent's current or future United States patents that claim priority back to U.S. Patent Application Number No. 07/628,488 filed December 13, 1990 or any other Patent Application filed before January 31, 1995.

3. Requiring Respondent to cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution, or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, through or in which Respondent has asserted that any person or entity, by manufacturing, selling, distributing, or

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having heretofore issued its complaint charging Respondent Union Oil Company of California with violations of Section 5 of the Federal Trade Commission Act, as amended, and Respondent Union Oil Company of California having been served a copy of that complaint, together with a notice of contemplated relief, and Respondent Union Oil Company of California having answered the complaint denying said charges and asserting affirmative defenses but admitting the jurisdictional allegations set forth herein; and the matter having proceeded through the completion of an adjudicative hearing; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by the Respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only, is entered into by Respondent contingent upon the Agreement Containing Consent Order in the Matter of Chevron Corporation and Unocal Corporation, File No. 051-1225 (the "Merger Consent") 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, which admission and statement are contingent upon the consummation of the Merger and are effective only upon the Merger Effective Date; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments received

from interested parties pursuant to § 2.34 of its Rules, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Union Oil Company of California is a corporation organized, existing under and by virtue of the laws of the state of California, with its office and principal place of business located at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245. Respondent Union Oil Company of California is a wholly owned operating subsidiary of Unocal Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware.

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:

A. "Chevron" means Chevron Corporation (formerly ChevronTexaco Corporation), its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Chevron Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Union Oil" means Union Oil Company of California, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Union Oil Company of California, and the respective directors, officers,

employees, agents, representatives, successors, and assigns of each.

C. "Unocal" means Unocal Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including but not limited to Union Oil Company of California), divisions, groups and affiliates controlled by Unocal Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Respondent" means Union Oil.

E. "Commission" means the Federal Trade Commission.

F. "Action" means any lawsuit or other action, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, in the United States or anywhere else in the world.

G. "License Agreement" means any contract, agreement, arrangement or other understanding between Unocal and any other party or parties that requires, calls for, or otherwise contemplates, payment of fees, royalties or other monies, in cash or in kind, to practice under the Relevant U.S. Patents.

H. "Merger" means the proposed merger between Chevron and Unocal, as contemplated by the Agreement and Plan of Merger dated as of April 4, 2005 among Unocal Corporation, ChevronTexaco Corporation, and Blue Merger Sub Inc.

I. "Merger Effective Date" means the earlier of the following dates:

1. the date that the certificate of merger for the Merger is filed with the Secretary of State of Delaware or such later time as specified in such certificate of merger, or

2. the date that Chevron acquires control of Unocal Corporation, as "control" is defined by 16 C.F.R. § 801.1(b).

J. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

K. “Relevant U.S. Patents” means United States Patent Numbers 5,288,393, 5,593,567, 5,653,866, 5,837,126, 6,030,521, and any other patents presently in existence or to be issued in the future that claim priority to United States Patent Application Number 07/628,488, filed December 13, 1990.

II.

IT IS FURTHER ORDERED that, immediately upon the Merger Effective Date, Respondent shall cease and desist from any and all efforts, and shall not undertake any new efforts, by any means, directly or indirectly, in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, to assert or enforce any of the Relevant U.S. Patents against any Person, to recover any damages or costs for alleged infringements of any of the Relevant U.S. Patents, or to collect any fees, royalties or other payments, in cash or in kind, for the practice of any of the Relevant U.S. Patents, including but not limited to fees, royalties, or other payments, in cash or in kind, to be collected pursuant to any License Agreement, provided, however, that nothing in this Order obligates or requires Respondent to refund any fees, royalties or other payments collected in connection with any of the Relevant U.S. Patents prior to the Merger Effective date.

III.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days following the Merger Effective Date, Respondent shall file, or cause to be filed, with the United States Patent and Trademark Office, the necessary documents pursuant to 35 U.S.C. § 253, 37 C.F.R. § 1.321, and the Manual of Patent Examining Procedure to disclaim or dedicate to the public the remaining term of the Relevant U.S. Patents, provided, however, that such disclaimer or dedication to the public shall not constitute an admission or representation by Respondent with respect to the validity or patentability of the claims of the Relevant U.S. Patents.

B. Respondent shall correct as necessary, and shall not withdraw or seek to nullify, any disclaimers, or dedications filed pursuant to Paragraph III. A.

IV.

IT IS FURTHER ORDERED that, within thirty (30) days following the Merger Effective Date, Respondent shall move to dismiss, with prejudice, all Actions relating to the alleged infringement of any Relevant U.S. Patents, including but not

1. any Person that Respondent has contacted regarding possible infringement of any of the Relevant U.S. Patents,

2. any Person against which Respondent is, or was, in any Action regarding possible infringement of any of the Relevant U.S. Patents,

3. any licensee or other Person from which Respondent has collected any fees, royalties or other payments, in cash or in kind, for the practice of the Relevant U.S. Patents, and

4. any Person that Respondent has contacted with regard to the possible collection of any fees, royalties or other payments, in cash or in kind, for the practice of the Relevant U.S. Patents.

B. Within thirty (30) days after the date this Order becomes final, Respondent shall distribute a copy of this Order and the

include managerial responsibility for any of Respondent's obligations under this Order.

VI.

IT IS FURTHER ORDERED that:

A. Respondent shall, within sixty (60) days after the date this Order becomes final, submit to the Commission a verified written report setting forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order.

B. Respondent shall, one year from the date this Order becomes final and annually thereafter for five (5) years, submit a verified written report to the Commission setting forth in detail the manner and form in which Respondent has complied and is complying with the Order.

VII.

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

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel

VIII.

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

IX.

IT IS FURTHER ORDERED that this Order will terminate

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Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order ("Agreement") with Union Oil Company of California ("Union Oil") to resolve matters charged in an Administrative Complaint issued by the Commission on March 4, 2003 ("Complaint"). Pursuant to the Agreement, Union Oil provisionally has agreed to be bound by a proposed consent order ("Proposed Consent Order").

The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. The Agreement is for settlement purposes only and does not constitute an admission by Union Oil that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true. The Proposed Consent Order remedies alleged anticompetitive effects arising from Union Oil's conduct, as alleged in the Complaint.

I. The Commission's Complaint

The Complaint alleges that Respondent Union Oil engaged in a series of acts to subvert state regulatory standard-setting procedures relating to low emissions gasoline. To address California's serious air pollution problems, the California Air Resources Board ("CARB") initiated proceedings in the late 1980s to set regulations and standards governing the composition of low emissions, reformulated gasoline ("RFG"). The Complaint alleges that Union Oil actively participated in CARB RFG rulemaking proceedings and engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers. The Complaint states that Union Oil also engaged in deceptive and exclusionary conduct through its participation in two private industry groups – the Auto/Oil Air Quality Improvement Program ("Auto/Oil") and the Western States Petroleum Association ("WSPA"). According to the Complaint, Union Oil thereby illegally monopolized, attempted to monopolize, and otherwise engaged in unfair

methods of competition in violation of Section 5 of the FTC Act in both the technology market for the production and supply of CARB-compliant "summer-time" gasoline, and the downstream "summer-time" gasoline product market.

Union Oil is a public corporation, organized in, and doing business under, the laws of California. Union Oil is a wholly-owned operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware. Prior to 1997, Union Oil owned and operated refineries in California as a vertically-integrated producer, refiner, and marketer of petroleum products. In 1997, Union Oil sold its west coast refining, marketing, and transportation assets. Currently, Union Oil's primary business activities involve oil and gas exploration and production.

The Complaint alleges that during the CARB "Phase 2" RFG rulemaking proceedings in 1990-1994, Union Oil made a series of materially false and misleading statements. According to the allegations in the Complaint, Union Oil willfully and intentionally:

a. Represented to CARB and other participants that Union Oil's emissions research results showing, , the relationships between certain gasoline properties and automobile emissions, were "nonproprietary," in "the public

Oil's assertion of its proprietary interests would undermine the cost-effectiveness and flexibility of such a model; and

c. Made statements and comments to CARB and other industry participants relating to the cost-effectiveness and flexibility of the regulations that further reinforced the materially false and misleading impression that Union Oil had relinquished or would not enforce any proprietary interests in its emissions research results.

According to the Complaint, Union Oil continued to conceal its intention to obtain a competitive advantage through the enforcement of its proprietary interests relating to RFG even after Union Oil received notice that the pending patent claims were allowed and issued. The Complaint alleges that Union Oil thereby led CARB and two private industry groups – Auto/Oil and WSPA (and their respective industry members) – to believe that Union Oil did not have, or would not enforce, any proprietary interests or intellectual property rights associated with its emissions research results.

The Complaint alleges that Union Oil's conduct caused CARB to adopt Phase 2 "summer-time" RFG regulations that substantially overlapped with Union Oil's concealed pending patent claims. But for Union Oil's deception, according to the Complaint, CARB would not have adopted RFG regulations substantially incorporating Union Oil's proprietary interests; the terms on which Union Oil was later able to enforce its proprietary interests would have been substantially different; or both.

The Complaint alleges that but for Union Oil's deceptive conduct, industry participants in Auto/Oil and WSPA would have taken actions including, but not limited to, (a) advocating that CARB adopt regulations that minimized or avoided infringement

reconfiguration decisions to avoid and/or minimize potential infringement.

According to the Complaint, Union Oil did not announce the existence of its proprietary interests and patent rights relating to RFG until January 1995 – shortly before the relevant CARB Phase 2 RFG regulations were to go into effect. The Complaint alleges that, by that time, the refining industry had spent billions of dollars in capital expenditures to modify their refineries to comply with the CARB Phase 2 RFG regulations, in reliance on Union Oil's representations that its research results were in "the public domain." The Complaint states that once CARB and the refiners had become locked into the Phase 2 regulations, Union Oil commenced vigorous enforcement of its patent rights through litigation and licensing, and obtained four additional patents based on the same RFG research results.

Union Oil's misrepresentations, according to the Complaint, have harmed competition and led directly to the acquisition of monopoly power for the technology to produce and supply California "summer-time" reformulated gasoline (mandated for up to eight months of the year, from approximately March through October). The Complaint alleges that Union Oil's conduct also permitted it to undermine competition and harm consumers in the downstream product market for "summer-time" reformulated gasoline in California. The Complaint alleges that without recourse, Union Oil's conduct would continue materially to cause or threaten to cause further substantial injury to competition and to consumers.

According to the Complaint, Union Oil's enforcement of its RFG patents has resulted, , in a jury determination of a 5.75 cents per gallon royalty on gasoline produced by major California refiners comprising approximately 90 percent of the current refining capacity of CARB-compliant RFG in the California market. The Complaint alleges that Union Oil also has

publicly announced that it will license its RFG patent portfolio, with fees ranging from 1.2 to 3.4 cents per gallon, to "non-litigating" refiners.

The Complaint alleges that Unocal's conduct could result in an estimated annual cost of more than $500 million to the refining industry. According to the Complaint, Union Oil's own economic expert has testified under oath that 90 percent of any royalty would be passed through to consumers in the form of higher gasoline prices.

II. Terms of the Proposed Consent Order

The Commission has provisionally entered into an Agreement with Union Oil in settlement of the Complaint. As discussed below, the provisions of the Agreement are conditioned upon the completion of certain steps in Chevron Corporation's merger with Unocal Corporation, as contemplated by the Agreement and Plan of Merger dated as of April 4, 2005, among Unocal Corporation, ChevronTexaco Corporation, and Blue Merger Sub Inc.

In order to remedy the alleged anticompetitive effects, Union Oil has agreed to take several actions. First, it will cease and desist from any and all efforts, and will not undertake any new efforts to: (a) assert or enforce any of Union Oil's Relevant U.S. Patents against any person; (b) recover any damages or costs for alleged infringements of any of the Relevant U.S. Patents; or (c) collect any fees, royalties or other payments, in cash or in kind, for the practice of any of the Relevant U.S. Patents, including but not limited to fees, royalties, or other payments, in cash or in kind, to be collected pursuant to any License Agreement. These obligations become effective as of the "Merger Effective Date," which is defined as the earlier of (1) the date that the certificate of merger for the Merger is filed with the Secretary of State of Delaware or such later time as specified in such certificate of merger, or (2) the date that Chevron Corporation acquires control of Unocal Corporation, as "control" is defined by 16 C.F.R. § 801.1(b).

Second, the Proposed Consent Order requires that, within thirty (30) days following the Merger Effective Date, Union Oil shall file, or cause to be filed, with the United States Patent and Trademark Office, the necessary documents pursuant to 35 U.S.C. § 253, 37 C.F.R. § 1.321, and the Manual of Patent Examining Procedure to disclaim or dedicate to the public the remaining term of the Relevant U.S. Patents. The Proposed Consent Order further requires that Union Oil shall correct as necessary, and shall not withdraw or seek to nullify, any disclaimers or dedications filed pursuant to the Proposed Consent Order.

Third, the Proposed Consent Order requires that, within thirty (30) days following the Merger Effective Date, Union Oil shall move to dismiss, with prejudice, all pending legal actions relating to the alleged infringement of any Relevant U.S. Patents, including but not limited to the following actions pending in the United States District Court for the Central District of California: *O C C h C* , Case No. CV-95-2379-CAS and *O C C C* , Case No. CV-02-00593 SVW.

Paragraph V of the Proposed Consent Order requires Union Oil to distribute a copy of the Proposed Consent Order and the Complaint in this matter to certain interested parties, including (1) any person that Union Oil has contacted regarding possible infringement of any of the Relevant U.S. Patents, (2) any person against which Union Oil is, or was, involved in any legal action regarding possible infringement of any of the Relevant U.S. Patents, (3) any licensee or other Person from which Union Oil has collected any fees, royalties or other payments, in cash or in kind, for the practice of the Relevant U.S. Patents, and (4) any person that Union Oil has contacted with regard to the possible collection of any fees, royalties or other payments, in cash or in

and future officers and directors having responsibility for any of its obligations under the Proposed Consent Order, and to employees and agents having managerial responsibility for any of its obligations under the Proposed Consent Order.

Paragraphs VI, VII and VIII of the Proposed Consent Order contain standard reporting, access, and notification provisions designed to allow the Commission to monitor compliance with the order. Paragraph IX provides that the Proposed Consent Order shall terminate twenty (20) years after the date it becomes final.

III. Opportunity for Public Comment

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 thirty-day comment period will become part of the public record. After thirty (30) days, the Commission will again review the Proposed Consent Order and the comments received and will decide whether it should withdraw from the Proposed Consent Order or make final the Agreement's Proposed Consent Order.

By accepting the Proposed Consent Order 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 invite public comment on the Proposed Consent Order, and to aid the Commission in its determination of whether it should make final the Proposed Consent Order contained in the Agreement. This analysis is not intended to constitute an official interpretation of the Proposed Consent Order, nor is it intended to modify the terms of the Proposed Consent Order in any way.

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STATEMENT OF THE COMMISSION

Concerning

UNION OIL COMPANY OF CALIFORNIA AND CHEVRON/UNOCAL

The Federal Trade Commission has voted unanimously (4-0-1, with Chairman Majoras recused) to accept two linked consent agreements that resolve both the Commission's monopolization case against Unocal Corporation's subsidiary Union Oil Company of California and any antitrust concerns arising from Chevron Corporation's pending acquisition of Unocal. The key element in the settlements, which will become effective when the acquisition is completed, is Chevron's agreement not to enforce certain Union Oil patents that potentially could have increased gasoline prices in California by over $500 million a year (or almost six cents per gallon). This agreement provides the full relief that the Commission sought in its administrative litigation with Union Oil and also addresses the only possible objection to the Chevron/Unocal acquisition.

On April 4, 2005, Chevron agreed to acquire Unocal in a transaction valued at approximately $18 billion. Chevron and Unocal both have extensive oil and gas operations. However, nearly all of Unocal's operations are in the so-called "upstream" segment of the business – namely, the exploration and production of crude oil and natural gas. Unocal has no refineries or gasoline stations in the United States or anywhere else in the world, and has few other "downstream" operations. As a result, virtually all of the competitive overlaps between the two firms are in unconcentrated upstream markets, and the merger thus creates no competitive risk. For example, Chevron and Unocal combined have only 2.7 percent of world crude oil production, 0.77 percent of world crude oil reserves, 11.3 percent of U.S. crude oil

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production, and 11.4 percent of U.S. crude oil reserves.[1]

It is clear from all we have seen that Chevron's primary motivation is to gain access to Unocal's upstream oil reserves.

The only potential competitive concern with Chevron's proposed acquisition of Unocal involved patents held by Union Oil – the same group of patents involved in the Commission's monopolization case against Union Oil. In order to explain why this is so, it is necessary first to discuss the issues in this monopolization case.

The Commission's administrative complaint against Union Oil charged that the firm had illegally acquired monopoly power in the technology market for producing certain low-emission gasoline mandated by the California Air Resources Board (CARB) for sale and use in California for up to eight months of the year. According to the complaint, Union Oil misrepresented to CARB that certain gasoline research was non-proprietary and in the public domain, while at the same time it pursued a patent that would enable it to charge substantial royalties if the research results were used by CARB in the development of regulations. The complaint further asserted that Union Oil similarly misled its fellow members of private industry groups, which were also participating in the CARB rulemaking process. As a result, if Union Oil were permitted to enforce its patent rights, companies

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[1] Sources for the underlying data include the Energy Information Administration, U.S. Department of Energy, U.S. Crude Oil, Natural Gas, and Liquids Table 2003 Annual Report, Table B5, <http://www.eia.doe.gov>, the FTC Bureau of Economics Staff Study, "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement," August 2004, Table 5-3, <http://www.ftc.gov/os/2004/08/040813/mergersinpetrolberpt.pdf >, and the Oil and Gas Journal.

producing this low-emission CARB gasoline would be required to pay royalties to Union Oil, the bulk of which would be passed on

The settlement of these two matters is thus a double victory for California consumers. The Commission's monopolization case against Unocal was complex and, with possible appeals, could have taken years to resolve. The stakes were high, and substantial royalties could have been paid in the meantime – with an immediate impact on consumers. If the Commission lost the case, the dollar costs to consumers ultimately would have been immense. At the same time, a challenge against the acquisition of Unocal by Chevron would itself be a complex case, with high stakes and an uncertain outcome. The settlement provides the full relief sought in the monopolization case and resolves the only competitive issue with the proposed merger. With the settlement, consumers will benefit immediately from the elimination of royalty payments on the Union Oil patents, and potential merger efficiencies could result in additional savings at the pump.

IN THE MATTER OF

TROPICANA PRODUCTS, INC.

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

C

C

1. Respondent is a Delaware corporation with its principal office or place of business at 555 Monroe Street, Chicago, Illinois 60661.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed food products to the public, including orange juice sold under the "Tropicana" name.

3. Orange juice is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. 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.

5. Respondent has disseminated or has caused to be disseminated national advertising and promotional materials for its orange juice, including but not limited to the television and print advertisements attached as Exhibits A-C. The advertisements contain the following statements and depictions:

Full page, color print advertisement,

Exhibit A)B. ON SCREEN: Older man sings and dances around doctor's examining room while drinking Tropicana orange juice. Camera shots alternate between man and various pieces of medical equipment, including blood pressure monitor.MUSIC: Everybody's smiling. Sunsh

VOICEOVER: A new study finds that 2 glasses of great tasting Tropicana Pure Premium every day can significantly lower your blood pressure from 140 points to below America's fav resulted in an average of of health perk Results may vary. Consu cholesterol-fr on how a healthy diet can improve heart blood pressure.ON SCRE evidence it m ON SCREEN: Arm on c helping to sta

TEXT: Most research on o.j. links a juice habit to healthier hearts. For instance, researchers recently showed that drinking three glasses of Tropicana orange juice a day for four weeks raised HDL, the "good" cholesterol, by 21 percent and improved the ratio of good cholesterol to bad (LDL) cholesterol by 16 percent. . . .

TEXT: Hearts also benefit from folic acid (folate), which lowers levels of a harmful substance called homocysteine. High amounts of this amino acid are associated with increased risk of cardiovascular problems, but drinking orange juice may counter its ill effects. A study from the Medical College of Wisconsin found that drinking 20 ounces of orange

A. Drinking three cups of Tropicana orange juice a day for four weeks will raise HDL cholesterol by 21 percent and improve the ratio of HDL to LDL cholesterol by 16 percent;

B. Drinking 20 ounces of Tropicana orange juice a day will increase blood levels of folate by almost 45 percent and

two cups of Tropicana orange juice a day for six or eight weeks will lower systolic blood pressure an average of 10 points.

Therefore, the making of the representations set forth in Paragraph 9 was, and is, 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.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this 19th day of August, 2005.

DECISION AND ORDER

The Federal Trade Commission having initiated an

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

implication, including through the use of endorsements or the product name that:

A. Drinking three cups of Tropicana orange juice a day for four weeks will raise HDL cholesterol by 21 percent and improve the ratio of HDL to LDL cholesterol by 16 percent;

B. Drinking 20 ounces of Tropicana orange juice a day will increase blood levels of folate by almost 45 percent and decrease homocysteine by 11 percent; or

C. Drinking two cups of Tropicana orange juice a day for six or eight weeks will lower systolic blood pressure an average of 10 points;

unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements or the product name, that drinking such food will affect any biological marker or health-related endpoint by any specific amount; will affect blood cholesterol levels, blood folate levels, blood homocysteine levels, or blood pressure; or will otherwise affect the risk of developing heart disease, stroke, or cancer; unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. Provided, however, that a statement that such product contains a particular nutrient shall not, by itself, be considered a claim for purposes of this Part.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of endorsements or the product name, the existence, contents, validity, results, conclusions, or

other communications with consumers or with

VIII.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days from the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Tropicana Products, 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 or make final the agreement's proposed order.

This matter involves the advertising and promotion of Tropicana's "Healthy Heart" orange juice. According to the FTC complaint, Tropicana represented that (1) drinking three glasses of "Healthy Heart" a day for one month will raise good cholesterol by twenty-one percent and improve the ratio of good to bad cholesterol by sixteen percent; (2) drinking twenty ounces of "Healthy Heart" a day for one month will increase blood folate levels by forty-five percent and decrease homocysteine levels by eleven percent; and (3) drinking two glasses of orange juice a day for eight weeks will lower blood pressure an average of ten points. The complaint alleges that these claims are unsubstantiated. Tropicana also represented that the above three claims were clinically proven. The complaint alleges that this claim is false. Although Tropicana refers to three studies in its advertising, the studies are limited and do not support the claims made.

The proposed consent order contains provisions designed to prevent Tropicana from engaging in similar acts and practices in the future.

Part I of the order requires Tropicana to possess competent and reliable scientific evidence before making the three challenged efficacy claims.

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Part II requires Tropicana to possess competent and reliable scientific evidence before making certain representations that any food will affect: any biological marker or health-related endpoint by any specific amount; blood cholesterol levels, blood folate levels, blood homocysteine levels, or blood pressure; or the risk of developing heart disease, stroke, or cancer. Furthermore, Part II provides that a mere statement that a product contains a particular nutrient will not, by itself, be considered to be a health benefit claim covered by Part II.

Part III of the proposed order prohibits Tropicana from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study.

Part IV permits any representation for any product that is permitted in labeling for such product pursuant to regulations promulgated by FDA pursuant to the Nutrition Labeling and Education Act of 1990.

Parts V through VIII of the order require Tropicana to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of its current and future personnel for three years; to notify the Commission of changes in corporate structure; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

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

CYTODYNE, LLC, EVERGOOD PRODUCTS CORP., AND MELVIN L. RICH

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

C

COMPLAINT

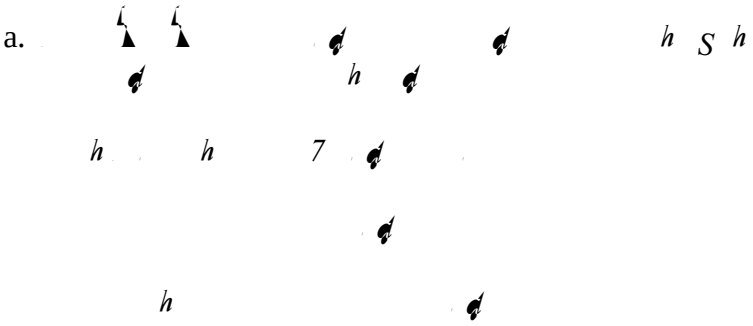
The Federal Trade Commission, having reason to believe that Cytodyne, LLC, a limited liability company, Evergood Products

for approximately $40. From June 2003 through mid-August 2004, sales of Xenadrine EFX exceeded $61 million.

5. Xenadrine EFX is a "food" or "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. 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.

7. Respondents have disseminated or have caused to be disseminated advertisements for Xenadrine EFX, including but not limited to the attached Exhibits A through F. These advertisements contain the following statements and depictions:

a. 

All of these people just discovered the most incredible weight loss product in the world...and it shows!

There's safety in numbers. That's why it's nice to know that there are millions of people around the world happily counting the pounds they've lost with revolutionary new Xenadrine-EFX.

What makes us different than all the rest? Xenadrine-EFX really works! It's been clinically proven to help you burn fat safely and effectively, without ephedrine. Our incredibly advanced thermogenic formula literally "revs up" your body's metabolism for rapid reductions in body-fat and an incredible boost to your energy levels.

Amazingly, Xenadrine-EFX's unique formula of advanced thermogenic compounds actually triggers unprecedented results without the use of ephedrine. In fact, it's the only product of its kind proven than ephedrine-based fat burners in head-to-head clinical testing. Best of all, you'll start to see and feel the difference almost overnight and even without strict dieting or exercise! It's about time you discovered the most incredible weight loss product in the world. Clinically proven Xenadrine-EFX. The Guaranteed Easiest and Fastest Way to Take Off the Weight!

Exhibit A (two-page magazine advertisement)

b. **Video:** Claudette Garza with a photograph labeled " Claudette Garza lost **22 Pounds!**"

Announcer 1: "Xenadrine EFX, the world's number one diet supplement presents swimsuit season."

Video: Joey Anderson with a photograph labeled " Joey Anderson lost **55 Pounds!**"

Announcer 2: "Slip into something sleek and sexy, and start strutting your stuff."

Video: Hazel Nelson with a photograph labeled " Hazel Nelson lost **25 Pounds!**"

Announcer 1: "Xenadrine EFX can help make it happen, fast and easy."

Video: Dan Tedtman with a photograph labeled " Dan Tedtman lost **35 pounds!**"

Announcer 2: "These real people are living proof of Xenadrine EFX's unsurpassed thermogenic power."

Video: Alexis Graham with a photograph labeled " Alexis Graham lost **113 pounds!**"

Announcer 2: "Increase your metabolism and get dramatic results without ephedra."

Video: Bottle of Xenadrine EFX with "CLINICALLY ialpmTED"neb Jt ephedra."

	superscript **"FAST! EASY! EPHEDRA-FREE!**"
Announcer 1:	"So come on, start turning some heads with Xenadrine EFX. Number one in the world because it really works."
Video:	Robert Hale with a photograph labeled " Robert Hale lost **85 pounds!**"

Exhibit B (thirty-second television advertisement)

c. **The Shape Of Things To Come**
. . .With Xenadrine-EFX.

Melissa lost	**Patrick lost**	**Kelly Lost**	**Jennifer Lost**
45 Pounds!	**64 Pounds!**	**110 Pounds!**	**52 Pounds!**

Melissa, Patrick, Kelly and Jennifer are happier than ever before –because they all lost incredible amounts of weight, and kept it off, with Xenadrine-EFX.

"If it wasn't for Xenadrine-EFX, I wouldn't have lost my weight as quickly and as easily as I did." says Melissa. And Patrick agrees. "I've used plenty of products in the past to help with weight loss and improve my energy levels, and Xenadrine-EFX has far surpassed anything I've ever used. I'm a new person thanks to Xenadrine-EFX."

These are just a few of the thousands of people who have achieved real weight loss success with Xenadrine-EFX. Its thermogenic, ephedra-free formula increases metabolism and reduces calories which helped them achieve significant decreases in body fat levels. In fact, the Xenadrine-EFX formula was clinically tested against two leading ephedra-based thermogenic supplements and outperformed them both for the boosting of metabolism and resulting caloric expenditure.

. . .

Xenadrine-EFX

Exhibit C (magazine advertisement)

d. **Losing Weight**
Was The Best Thing
I Ever Did For Myself!

Jennifer Lost An Incredible 52 Pounds
And Kept It Off With Xenadrine-EFX!

"One day, standing in front of my open closet, I started to cry. None of my clothes fit anymore." That's when Jennifer made up her mind to do something about it. She started using Xenadrine-EFX, lost 52 pounds, and has kept off the weight.

"Sure, I'd tried other diets, but with Xenadrine-EFX, it was like the pounds just started disappearing," she says. "And it didJennifer Leight.

But what really makes Claudette story so incredible is that she has managed to keep the weight off for more than a year... with the help of Xeandrine-EFX, a sensible diet, and regular exercise.

What makes Xenadrine-EFX so effective is its exclusive ephedra-free thermogenic formula, which helps to speed up your metabolism and control your appetite. In fact, the Xenadrine-EFX formula has been clinically proven in comparison with two thermogenic ephedra-based supplements, and in both cases, it had better results in stimulating the metabolism and burning calories.

Xenadrine-EFX: The most popular diet supplement

a. Xenadrine EFX is not clinically proven to cause rapid

violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this 23rd day of August, 2005.

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 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 violation of the Federal Trade Commission Act; and

The respondents, their attorneys, 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 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, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Cytodyne, LLC is a New York limited liability company with its principal office or place of business at 200 Adams Boulevard, Farmingdale, NY 11735.

Respondent Evergood Products Corp. ("Evergood") is a Delaware corporation with its principal office or place of business at 200 Adams Boulevard, Farmingdale, NY 11735.

Respondent Melvin L. Rich ("Melvin Rich") is a manager of respondent Cytodyne, LLC and an officer and director of respondent Evergood. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Cytodyne, LLC and Evergood, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Cytodyne, LLC and Evergood.

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 Cytodyne, LLC, a limited liability company, Evergood Products

4. “Substantially similar product” shall mean any product containing one or more of the following ingredients: caffeine, citrus aurantium (bitter orange), or green tea extract.

5. “Weight loss product” shall mean any product, program, or service designed, used, or purported to produce weight loss, reduction or elimination of fat, slimming, or caloric deficit in a user of the product, program, or service.

6. “Food,” “drug,” and “device” shall mean as “food,” “drug,” and “device” are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

7. “Covered product” shall mean any weight loss product, dietary supplement, food, drug, or device.

8. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

9. “Endorsement” shall mean as defined in 16 C.F.R. § 255.0(b).deral

B. That such product enables users to lose weight or fat without the need to increase exercise or reduce caloric intake;

C. That such product causes permanent or long-term weight loss; or

D. About the health benefits, performance, efficacy, safety or side effects, of such product;

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other 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 or study.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other covered product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the actual experience of the endorser as a result of use of the product under the circumstances depicted in the endorsement.

V.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other covered product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about any endorser of such product unless they disclose, clearly and conspicuously, any material connection between such endorser and any respondent or any other individual or entity manufacturing, advertising, promoting, offering for sale, selling, or distributing such product. For purposes of this Paragraph, a "material connection" shall mean any relationship that materially affects the weight or credibility of the endorsement and would not reasonably be expected by consumers, including, but not limited to, monetary payments and the provision of goods, services, or other benefits to any consumer endorser.

VI.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VII.

Nothing in this order shall prohibit respondents 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.

VIII.

IT IS FURTHER ORDERED that respondents shall pay to the Federal Trade Commission the sum of one hundred thousand dollars ($100,000). This payment shall be made in the following manner:

A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, the payment to be made no later than ten (10) days after the date that this order becomes final.

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 from the date of default to the date of payment, shall immediately become due and payable.

C. The funds paid by respondents, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Xenadrine EFX in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of these products is wholly or partially impracticable or is otherwise unwarranted, 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 relinquish all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the

designated consumers. Respondents shall make no claim to or demand for 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.

IX.

IT IS FURTHER ORDERED that respondents must, in connection with this action or any subsequent investigations

B. In the event that respondents receive information that any of respondents' resellers or distributors are disseminating any advertisement or promotional material that contains any representation prohibited by this order, immediately notify each such reseller or distributor that respondents will stop doing business with that reseller or distributor if it continues to use any advertisement or promotional material that contains any representation prohibited by this order.

C. Terminate all sales to any reseller or distributor within twenty (20) days if the reseller or distributor has continued to use any advertisement or promotional material that contains any representation prohibited by this order after receipt of the notice required by Subpart B of this Part.

XI.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notification letters sent to and return receipts from purchasers for resale pursuant to Subpart A of Part X of this order; and

B. Copies of all communications with resellers or distributors pursuant to Subpart B and C of Part X of this order.

XII.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich 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 including videotape recordings of all such broadcast advertisements;

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.

XIII.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich, for a period of ten (10) years after the date of issuance of this order, 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, 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.

XIV.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, each shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure 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. 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.

XV.

IT IS FURTHER ORDERED that respondent Melvin Rich shall for a period of five (5) years after the date of issuance of this order, notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that may affect his compliance obligations arising out of this order. 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. 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.

XVI.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich shall, within sixty (60) days from the date of service of this order, and at such other times as the Federal Trade 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.

XVII.

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 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

ATTACHMENT A

GOVERNMENT-ORDERED DISCLOSURE
[on Cytodyne, LLC Letterhead]

[Insert Date]

Dear Xenadrine EFX Reseller or Distributor,

This letter is to inform you that Cytodyne, LLC recently settled a dispute with the Federal Trade Commission ("FTC") regarding its advertising for Xenadrine EFX. Among other things, the settlement requires us to instruct resellers and distributors to stop using advertising or promotional materials that make any of the representations prohibited by the settlement. We will terminate all sales to resellers or distributors that make any of these prohibited representations.

The FTC complaint alleges that Cytodyne, LLC engaged in deceptive advertising of Xenadrine EFX, and the FTC order imposes various requirements on us in connection with its past and future advertising of these and other products.

The FTC complaint alleges, among other things, that our advertising materials claimed, expressly or by implication, that Xenadrine EFX causes rapid and substantial weight loss and fat loss; that it does so without the need to reduce caloric intake or increase physical activity; and that it causes permanent or long-term weight loss. The complaint alleges that these claims were false and that the information on which we relied in making these claims was not competent and reliable scientific evidence, as required by law. The FTC order prohibits us from making any claims similar to the challenged claims about any weight loss product unless we have competent and reliable scientific evidence to support them.

In addition, the FTC order provides that we must not make any claim about the health benefits, performance, safety, or efficacy of

any weight loss product, dietary supplement, food, drug, or device unless we have competent and reliable scientific evidence to support such claims.

The FTC order further provides that we must not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or scientific research relating to any weight loss product, dietary supplement, food, drug, or device.

The FTC complaint also alleges that our Xenadrine EFX ads represented that the featured consumer endorsers achieved the weight loss reported in those ads solely through the use of Xenadrine EFX, but that endorsers had engaged in rigorous diet and/or exercise programs in order to lose weight. The FTC order prohibits us from making similar misrepresentations in the future.

The FTC order also requires us to monitor resellers' and distributors' advertisements and promotional materials and terminate all sales to resellers and distributors making prohibited claims, whether expressly or by implication, for our products.

Resellers and distributors should visit the Xenadrine website, www.Xenadrine.com, for the most up-to-date promotional materials regarding our products.

If you have any questions, please contact [insert name and telephone number of the responsible Cytodyne, LLC Attorney or Officer].

Sincerely,

Melvin Rich, Manager
Cytodyne, LLC

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Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Cytodyne, LLC, Evergood Products Corp., and Melvin Rich, individually and as a manager of Cytodyne, LLC and an officer of Evergood Products Corp. (together, "respondents").

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

This matter involves practices relating to the advertising and promotion of Xenadrine EFX, a dietary supplement marketed for weight loss. According to the FTC complaint, respondents represented that Xenadrine EFX causes rapid and substantial weight and fat loss, causes permanent or long-term weight loss, and causes rapid and substantial weight loss without the need to diet or increase exercise. The complaint alleges that these claims are false and that the company failed to have substantiation for them. It further alleges that respondents falsely represented that scientific studies prove that Xenadrine EFX causes rapid and substantial weight loss and that it is more effective than leading ephedrine-based diet products.

The FTC complaint also alleges that respondents falsely represented that persons appearing in Xenadrine EFX advertisements achieved the weight loss reported in those ads solely through the use of Xenadrine EFX. According to the FTC complaint, persons who appeared in the Xenadrine EFX advertisements engaged in rigorous diet and/or exercise programs in order to lose weight, and some were provided with a personal trainer. Finally, the complaint alleges that, in presenting testimonials for Xenadrine EFX by consumer endorsers who

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purportedly lost weight in the ordinary course of using Xenadrine EFX, respondents failed to disclose that the endorsers were paid from $1000 to $20,000 in connection with their endorsement, a fact that would be material to consumers in their decisions about purchasing or using the product.

The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future.

Part I of the order prohibits representations that Xenadrine EFX or any other product containing green tea extract, bitter orange, or caffeine causes rapid and substantial weight loss or fat loss. It also prohibits representations that any weight loss product causes rapid or substantial weight loss without the need to diet or increase exercise.

Part II prohibits respondents from representing that any weight loss product, dietary supplement, food, drug, or device causes weight or fat loss, causes permanent or long-term weight loss, or enables users to lose weight or fat without the need to diet or increase exercise unless the claim is true and respondents possess competent and reliable scientific evidence that substantiates the claim. It also prohibits respondents from making any other claims about the health benefits, performance, efficacy, safety, or side effects of any such product unless the claim is true and respondents possess competent and reliable scientific evidence that substantiates the claim.

Part III prohibits any misrepresentation of the existence, contents, validity, results, conclusions, or interpretations of any test or study in connection with the marketing or sale of any weight loss product, dietary supplement, food, drug, or device.

Part IV prohibits any misrepresentation that the experience described in any user testimonial for any weight loss product,

dietary supplement, food, drug, or device represents the actual experience of the endorser as a result of using the product under the circumstances depicted in the endorsement.

Part V prohibits any representation about any endorser of any weight loss product, dietary supplement, food, drug, or device unless the respondents disclose any material connection that exists between the endorser and the respondents or any other person or entity involved in manufacturing, marketing, or selling the product.

Part VI of the proposed order allows the respondents to make any representations for any drug that are permitted in labeling for the drug under any tentative final or final Food and Drug Administration ("FDA") standard or under any new drug application approved by the FDA.

Part VII of the proposed order allows the respondents to make 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 VIII provides for the payment of $100,000 to the Commission.

Part IX requires respondents to cooperate in good faith with the Commission's reasonable requests for documents and testimony in connection with this action or any investigations related to or associated with the transactions or the occurrences that are the subject of the FTC complaint.

Part X requires respondents to send a letter to purchasers for resale of Xenadrine EFX notifying them of the Commission's order. It also provides that if respondents learn that any of its resellers or distributors are disseminating any advertisement or promotional material containing prohibited representations, they are required to request that the resellers or distributors stop making such representations and to stop doing business with

Analysis

resellers or distributors that do not comply with this request. Part XI requires respondents to keep copies of the communications required by Part X.

Parts XII through XVI require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure (for the corporate respondents) and changes in employment (for the individual respondent) that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XVII provides that the order will terminate after twenty (20) years under certain circumstances.

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.

Complaint

IN THE MATTER OF

ADVERTISING.COM, INC. DOING BUSINESS AS, TEKNOSURF.COM, AND JOHN FERBER

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

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This consent order, among other things, prohibits Respondents Advertising.com, Inc., and John Ferber – who advertised and distributed computer software products, including the SpyBlast computer software product, advertised as an Internet security program – from making any representation about the performance, benefits, efficacy, or features of SpyBlast or any of respondents' other executable computer software programs whose principal function is to enhance security or privacy, unless respondents disclose clearly and conspicuously that consumers who install the program will receive advertisements, if that is the case.

For the Commission: *S h h O h C h h h* and *h*

For the Respondent: *C h*

COMPLAINT

The Federal Trade Commission, having reason to believe that Advertising.com, Inc., a corporation, also doing business as Teknosurf.com, and John Ferber, individually and as an officer 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. Respondent Advertising.com, Inc., also doing business as Teknosurf.com, is a Maryland corporation with its principal office or place of business at 1020 Hull Street, Baltimore, Maryland 21230.

2. Respondent John Ferber is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, 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 Advertising.com, Inc.

3. Respondents have developed, advertised, promoted, and distributed to the public computer software products, including the SpyBlast computer software product.

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

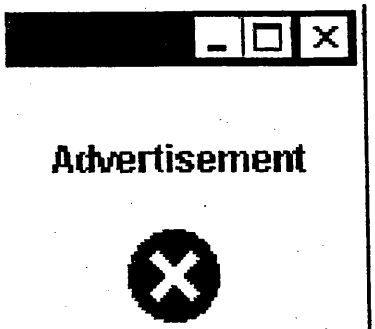
5. Respondents caused ads for SpyBlast to be served on consumers' computers (including Exhibit A). These ads represented that because the consumer's computer was broadcasting an Internet IP address, it was at risk from hackers. Consumers who clicked on this advertisement were shown an ActiveX "security warning" installation box with a hyperlink describing SpyBlast as "Personal Computer Security and Protection Software from unauthorized users" and telling them "once you agree to the License Terms and Privacy Policy – click YES to continue." (Exhibit B).

6. If a consumer clicked "Yed tb0 0 (dftware fas anstallad,]TJ0 -1.18 TD([(vel infthe consum

dnauthorized users" abeor eclEStb0didSpy

visited pages and [the user's] IP address," and that this information allowed the company "to send [a user] advertisements that might be of interest to [the user]."

7. SpyBlast could also be downloaded directly from the www.SpyBlast.com



With this Address,

You represent and warrant that you are the owner of this computer and that you have authorized the download and installation of the Program or that the owner of this computer has authorized you to do so. You agree, with respect to all other users of this computer that you have caused the Program to reside, to (i) provide a copy of the SpyBlast Privacy Statement and End User License Agreement; and (ii) to obtain their

Agreement gives you no rights to such content. Finally, any suggestions, ideas or inventions that you voluntarily and optionally disclose to us through any means will be

[redacted]

you disclose through such means

time. Upon any change in the terms of this Agreement, Teknosurf.com will notify all members through notice on the SpyBlast.com web site. Your continued use of the Program constitutes an affirmative: (1) acknowledgment by you of the terms of this Agreement and any modifications; and (2) agreement by you to abide and be bound by the terms of this Agreement and modifications. Teknosurf.com reserves the right to modify or discontinue the Program with or without notice. Teknosurf.com shall not be liable to your or any third party should Teknosurf.com exercise its right to modify or discontinue the Program.

GENERAL

[redacted]

[redacted]

- **Date and time of the attempted violation**
- **IP address of the violator**
- **Number of attempts the violator has made**

See **SpyBlast** Results **click here!**

Instead of continuing to be a victim, become aware of who is attempting to access your computer with **SpyBlast**. Its simple, convenient, effective, and it just sits in your system tray.

Click here to download your FREE SpyBlast spy software instantly.

* In exchange for usage of the SpyBlast software, user agrees to receive, from time to time, special offers on behalf of SpyBlast's marketing partners. Please see the Spyblast Terms & Conditions.

[redacted]

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 violation of the Federal Trade Commission Act; and

The respondents, their attorneys, 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 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, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Advertising.com, Inc., also doing business as Teknosurf.com, is a Maryland corporation with its principal office or place of business at 1020 Hull Street, Baltimore, Maryland 21230.

2. Respondent John Ferber is an officer of the corporate respondent. Individually or in concert with others, he formulates,

directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of Advertising.com, Inc.

3. 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, "respondents" shall mean Advertising.com, Inc., also doing business as Teknosurf.com, its successors and assigns, and their officers; John Ferber, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

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

3. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

4. "Clearly and prominently" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. Provided, however, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure

shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media, the disclosure shall also be unavoidable and shall be presented prior to the consumer installing or downloading any software code, program, or content and prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

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. 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.

V.

IT IS FURTHER ORDERED that respondent John Ferber, 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. 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, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent Advertising.com, Inc., its successors and assigns, and respondent John Ferber shall, within sixty (60) days after service of this order, and at such other

VII.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Advertising.com, Inc. and John Ferber, individually and as an officer of Advertising.com (together "respondents").

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

Respondents advertised and distributed computer software products, including the SpyBlast computer software product, which was advertised as an Internet security program. This matter concerns the allegation that respondents failed to disclose adequately that SpyBlast included adware that caused consumers to receive pop-up advertisements.

The Commission's complaint alleges that respondents disseminated ads for SpyBlast that represented that because a consumer's computer was broadcasting an Internet IP address, the computer was at risk from hackers. According to the complaint, consumers who clicked on this advertisement were shown an ActiveX "security warning" installation box with a hyperlink describing SpyBlast as "Personal Computer Security and Protection Software from unauthorized users" and telling them "once you agree to the License Terms and Privacy Policy – click YES to continue." If a consumer clicked "Yes," the software was installed, even if the consumer had not clicked on the hyperlink. Only if a consumer clicked on the hyperlink describing SpyBlast as "Personal Computer Security cdenttelyT*ESecftwacc C5mment 88 Tm8 292 666.4123 1460 g scn

User Licensing Agreement ("EULA") appear. The EULA contained a statement that consumers agreed to receive marketing messages, including pop-up ads, in exchange for getting SpyBlast.

The complaint further alleges that SpyBlast could also be downloaded directly from the www.SpyBlast.com website. At the very bottom of the www.SpyBlast.com home page, below several hyperlinks to download SpyBlast, a small disclosure stating that "In exchange for usage of the SpyBlast software, user agrees to receive . . . offers on behalf of SpyBlast's marketing partners" appeared.

According to the Commission's complaint, respondents downloaded bundled adware onto the computers of consumers who installed SpyBlast. The adware collected information about SpyBlast users, including URLs of visited pages and the user's IP address, and this information allowed respondents to send users advertisements that they believed might be of interest to them. Consumers received a substantial number of pop-up advertisements as result of respondents' installation of this adware onto their computers.

The complaint alleges that in representing that SpyBlast is an Internet security program, respondents failed to disclose adequately that SpyBlast included adware that caused consumers to receive pop-up advertisements. The complaint further alleges that the presence of the bundled adware would have been material to consumers in their decision whether to install SpyBlast, and, therefore, that the failure to disclose adequately this material fact was a deceptive practice. This allegation regarding the disclosure of bundled adware applies general Commission law on deception, as enunciated in the *C S C* ., 103 F.T.C. 110, 174-83 (1984). The application of this law in an online context was illustrated in a 2000 FTC Staff Guidance Document, *C O*

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The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. The proposed order is designed specifically to address the facts of the case at hand. However, the limitation in the proposed order to respondents' software programs whose principal function is to enhance security or privacy should not be read more broadly to suggest that the requirement for clear and prominent disclosure is necessarily limited to those situations. Moreover, the problem here was not the security software that Advertising.com disseminated with its adware. Instead, it was the respondents' practice of downloading software onto users' computers, without adequate notice and consent, that generated repeated pop-up ads as the computer users surfed the Web.

Part I of the proposed order prohibits respondents from making any representation about the performance, benefits, efficacy, or features of SpyBlast or any of respondents' other executable computer software programs whose principal function is to enhance security or privacy, unless respondents disclose clearly and conspicuously that consumers who install the program will receive advertisements, if that is the case.

Parts II through VI require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure (for the corporate respondents) and changes in employment (for the individual respondent) that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part VII provides that the order will terminate after twenty (20) years under certain circumstances.

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.

COMPLAINT

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

Nature of the Case

1. This matter concerns agreements among competing physicians, acting through the Respondent, to fix prices charged to health plans and other third-party payors ("payors"), and to refuse to deal with payors except on collectively agreed upon terms. The Respondent had no legitimate justification for these agreements, which increased consumer health care costs in northwestern South Carolina.

Respondent

2. Partners Health, a physician-hospital organization ("PHO"), is a for-profit corporation, organized, existing, and doing businesrrysgree leJ/F1plx2f.ro Tosgreio

4. Partners Health members include more than 225 physicians licensed to practice allopathic or osteopathic medicine in South Carolina, and two non-profit hospitals. The hospitals, Palmetto Health Baptist Easley and Cannon Memorial Hospital, are the only two hospitals in Pickens County, located in northwestern South Carolina. About 150 of the Partners Health physician members practice in Pickens County, and they account for approximately 75% of the physicians in the county. To be marketable in the Pickens County area, a payor's health plan must contract with a large number of physicians who are members of Partners Health.

5. Partners Health's eight-member Board of Directors consists of four physicians and four hospital administrators. The physicians on the Board are elected by the Partners Health physician members to represent the members' interests in Partners Health's affairs.

6. On health plan contracting issues, the Board of Directors receives advice from its Advisory Board, which consists of ten representatives of the physician members and two hospital member representatives.

Jurisdiction

7. At all times relevant to this Complaint, Partners Health has been engaged in the business of contracting with payors, on behalf of Partners Health's physician members, for the provision of physician services.

8. Except to the extent that competition has been restrained as alleged herein, a substantial majority of Partners Health physician members have been, and are now, in competition with each other for the provision of physician services in the Pickens County, South Carolina, area.

9. Partners Health, a for-profit entity, is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. The general business practices of Partners Health, and of its physician members, including the acts and practices herein alleged, are in or affect "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Overview of Physician Contracting with Payors

11. Physicians contract with payors to establish the terms and conditions, including price terms, under which they render physician services to the subscribers to the payors' health plans ("insureds"). Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs and enable them to lower the price of insurance, and thereby result in lower medical care costs for insureds.

12. Absent agreements among them, otherwise competing physicians unilaterally decide whether to enter into payor contracts to provide services to insureds, and what prices they will accept pursuant to such contracts.

13. The Medicare Resource Based Relative Value Scale ("RBRVS") is a system used by the Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. Generally, payors in South Carolina make contract offers to individual physicians or groups at price levels specified by some percentage of the RBRVS fee for a particular year (e.g., "110% of 2004 RBRVS").

Anticompetitive Conduct

14. Partners Health, acting as a combination of its physician members, and in conspiracy with its members, has acted to

restrain competition by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices and other terms at which they would contract with payors; to engage in collective negotiations over terms and conditions of dealing with payors; and to have Partners Health members refrain from negotiating individually with payors or contracting on terms other than those approved by Partners Health.

15. Partners Health physician members have agreed, upon joining Partners Health, to be automatically bound by contracts that Partners Health negotiates on their behalf, unless the member opts out of the contract within 30 days after he or she receives notice of the contract. Physician members also agreed to refer insureds under Partners Health contracts only to other Partners Health physicians, except in medical emergencies.

16. Under the Partners Health contracting system, Partners Health polls its physician members to determine their fee expectations from payor contracts. Partners Health's Executive Director uses the highest of the fees received to formulate a "floor" fee schedule that he presents to payors as Partners Health's "fee expectations." Partners Health then negotiates the fees that the payor will present for the Partners Health members' consideration.

17. Under Partners Health's bylaws, the Board of Directors must approve any fee offer from a payor before the offer may be presented to the Partners Health physician members for their

Health may not contract with individual physicians in Pickens County without the approval of Partners Health.

19. In 2003, after a payor objected to the Partners Health contracting system, Partners Health began referring to its contracting system as a "messenger model." Competing physicians sometimes use a "messenger" to facilitate their contracting with payors, in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Messenger arrangements can reduce contracting costs between payors and physicians. A messenger can be an efficient conduit to which a payor submits a contract offer, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. A messenger may not negotiate prices or other competitively significant terms, however, and may not facilitate coordination among physicians on their responses to contract offers.

20. Despite calling its contracting system a messenger model, Partners Health continued to negotiate with payors the price terms to be offered or paid to the Partners Health physician members.

Contract Negotiations with Beech Street

21. Beech Street had both individual physician contracts with Pickens County physicians, and a letter of agreement with Partners Health for physician services dating to 1996. In November 1996, Partners Health informed Beech Street that it wanted to update the letter of agreement, and sent Beech Street its "physician fee expectations" in a fee schedule. Partners Health's Executive Director told Beech Street that the Partners Health Board of Directors would need to approve the negotiated contract terms before the terms would be presented to the Partners Health physicians for their acceptance. After negotiating price terms, Partners Health entered into a new contract with Beech Street.

22. In 2001, Partners Health approached Beech Street with a request to renegotiate the prices in the contract. Beech Street began negotiations by presenting the standard fee schedule it pays most South Carolina physicians. Partners Health told Beech Street that this offer fell below a "negotiation corridor," and presented a price list for several hundred procedures that was 18% higher than the Beech Street offer. Partners Health claimed it had developed the list based on its view of what the Partners Heath members had considered acceptable in past contract negotiations.

23. Beech Street agreed to the Partners Health fee schedule, with a few modifications. After the parties agreed to the prices and contract language, the final contract was presented to the Partners Health members, who accepted the new contract terms.

Negotiations with CCN & First Health

24. In the summer of 2001, the Partners Health Board of Directors ordered the renegotiation of the CCN contract to get higher prices. In July 2001, Partners Health sent CCN a list of higher fees for the existing contract's fee schedule. In response, CCN offered to pay a percentage of the Partners Health members' billed charges. Partners Health rejected the offer and countered th[22ss 5-15% (higher than(CC'is offe, istellwas a pe)42erc(ntage of)]TJT*[the(member' (billed

CCN was"e (Partner)42.8(s Healt')]TJT*0 Tc0 Tw[stacted t(at it"chanonulyaI)43agred to wo odiffe
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Partners Health based on Partners Health's historical payment expectations and methodology."

27. Following the contract termination, Partners Health organized its members' refusal to deal with CCN so as "to strengthen Partners Health Network's position." In December 2001, Partners Health members were instructed that "[i]f CCN makes any attempt to contact your hospital or office in the next two months then please do what you have previously done - refer them to the [Partners Health] office." In February 2002, Partners Health's Executive Director told the Partners Health physicians to continue to refuse to deal with CCN, terminate any direct contracts they may have with CCN, and steer CCN to Partners Health.

28. CCN's attempts at direct contracts with Partners Health members during this period resulted in the physicians directing CCN to Partners Health. Meanwhile, CCN merged with First Health and sought to combine the two companies' contracts with Partners Health into a single joint agreement that still distinguished between the two companies' brand names.

29. First Health sent direct contracts to Pickens County physicians in early 2003, but the physicians either referred First Health to Partners Health or sent First Health's contracting offer materials straight to Partners Health.

30. After receiving the forwarded offers for the First Health portion of the contract, Partners Health contacted First Health and demanded that any First Health portion of the combined contract have the same percentage-of-billed-charges arrangement as in the CCN portion of the contract. First Health refused, and offered Partners Health up to four different fee schedules for the First Health portion of the contract. Partners Health rejected each one, insisted on a discount-off-billed-charges arrangement, and never sent the fee schedules to the Partners Health members.

31. In June of 2003, First Health agreed to take the “Partners Fee Schedule” for the First Health portion of the contract. Partners Health then presented the First Health fee offer to the Partners Health members, and they accepted it.

32. Eventually Partners Health reached a joint First Health/CCN agreement in December 2003. The CCN portion of the contract contained payment terms that were 17% higher than the original CCN offer.

Contract Negotiations with Premier Health Systems

33. Premier Health Systems ("Premier") has contracted with Partners since 1995. Contract renegotiations began in October 2000, when the Partners Health Executive Director told Premier that “general expectations” for a new contract included Premier’s acceptance of an attached fee schedule. Partners Health negotiated fee terms with Premier over the next ten months, ending when Premier accepted Partners Health’s fee expectations, which were 17% higher than Premier’s initial offer.

34. The Partners Health Executive Director informed the Partners Health members of Premier’s agreement to the fees in August 2001, telling them: "As customary regarding physician payment, PHN has negotiated specialized pricing for over 600 [procedures].”

35. In December 2003, Partners Health polled its members to learn what fees they would accept for a new Premier contract. The individual member practices responded with their fee requests, which varied by practice. However, Partners Health presented Premier with a single fee schedule that listed the highest requested rate among the Partners Health practices.

36. On March 10, 2004, Partners Health sent Premier an email: “Bottom line . . . [the attached fee schedule] represent[s] Partners Health’s expectation,” which averaged 12% higher than the currently contracted rates. Premier countered with a 6%

increase over the current rates. Partners Health sent the Premier increase to its members in May 2004, and they accepted the contract.

Contract Negotiations with United Healthcare

37. For years, United Healthcare of South Carolina, Inc. ("United"), accessed Partners Health physician members by contracting with third-party administrator Medcost, which had contracts with Partners Health for physician services.

38. United told Partners Health in March 2003 that it wanted to contract with Partners Health directly, instead of accessing the Partners Health physician members through Medcost. United included a fee schedule for 50 procedures. Partners Health responded with a list of "payment expectations for a contract," including a fee schedule that listed hundreds of procedures with an overall average price almost double United's proposal. United responded with a more comprehensive counteroffer of fees than it had submitted on March 5, on average 39% higher than its original offer.

39. After receiving United's offer, Partners Health suspended negotiations. In May 2003, Partners Health sent its members a memo detailing its decision to cease negotiations with United. Partners Health explained that the two deal-breakers were that United only wanted Partners Health to facilitate individual physician contracts, and that United would "only offer a standard/universal fee schedule (no negotiating flexibility) at rates significantly lower than Medcost." The memo continued by stating that United's requests "are unacceptable to Partners Health because facilitating individual agreements achieves no future clout and defensive strength . . . and accepting rates so much lower is inappropriate in a climate of increasing overhead costs."

40. In July 2003, United sent an antitrust article on messenger arrangements to the Partners Health physician practices, and at the same time it asked Partners Health to messenger the United

physician fee schedule to the Partners Health members. In the August 15, 2003, Advisory Board meeting, after discussing the antitrust issues raised by United's article, the Advisory Board decided to send the first United offer to the Partners Health members, and ask them to communicate their fee expectations to the Executive Director, "who will then messenger back [to United] a comprehensive offer" for the entire membership. The Advisory Board agreed that "[i]f a majority of [Partners Health] members do not want to contract with United at all then Partners Health will suspend negotiations again."

41. On September 24, 2003, Partners Health forwarded United's original offer to its members for the first time. Along with the offer, Partners Health "polled" its members by asking them to identify their preferences for contracting with United -- either through Partners Health, another PHO, directly, or not at all. If the members wanted to contract through Partners Health, they were told to return a list of fee counteroffers for United.

42. An October 15, 2003, follow-up memo to the Partners Health members stressed that Partners Health needed 40 out of the 49 practices to choose to contract through Partners Health "to develop a credible contracting position with [United]." The memo stated "[t]he majority of [Partners Health] members . . .will only contract through Partners Health with [United] as verified by the responses already received." The memo concluded by emphasizing that Partners Health "[has] the market completely on

choosing to directly contract for peer pressure to conform to the group's wishes to jointly contract.

44. In February 2004, Partners Health told United that it messengered United's offers to the Partners Health members, and included what it called the "members aggregated fee expectations," in the form of a single fee schedule.

45. United has been unable to contract with Partners Health, and is still unable to contract with enough physicians to have a viable network in the Pickens County area. Moreover, Partners Health successfully pressured MedCost, through the threat of network termination, to end United's access to the Partners Health members through MedCost, effective as of July 1, 2004.

Contracting with Other Payors

46. Partners Health, on behalf of its physician members, has orchestrated collective negotiations with other payors who do business, or have attempted to do business, in the Pickens County area, including Aetna, Great-West Healthcare, MedCost, Private Health Care Systems, Southcare, United Payors/United Providers, and USA Managed Care, Inc. Partners Health negotiated with these payors on price, making proposals and counter-proposals, as well as accepting or rejecting offers, without transmitting them to members for their individual acceptance or rejection. Partners Health also facilitated collective refusals to deal and threats of refusals to deal with payors. Partners Health's members collectively accepted or rejected these payor contracts, and refused to deal with these payors individually. Due to Partners Health's dominant position in the Pickens area, these coercive tactics have been successful in raising the prices paid to its physician members.

Respondent's Price-fixing Is Not Justified

47. The physician members of Partners Health have not

have they created efficiencies sufficient to justify their acts or practices described in paragraphs 14 through 46.

Respondent's Actions Have Had Substantial Anticompetitive Effects

48. Respondent's actions described in Paragraphs 14 through 46 of this Complaint have had, or tend to have had, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Pickens County area in the following ways, among others:

a. price and other forms of competition among physician members of Partners Health were unreasonably restrained;

b. prices for physician services were increased; and

c. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

Violation of the Federal Trade Commission Act

49. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 19th day of September, 2005, issues its Complaint against Respondent Partners Health.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the Partners Health Network, Inc. ("Partners Health"), hereinafter

address located at 215 East 1st Avenue, Easley, South Carolina 29640-3038.

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

ORDER

I.

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

A. "Respondent Partners Health" means Partners Health Network, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

B. "Hospital" means a health care facility licensed by any state as a hospital, including, but not limited to, Cannon Memorial Hospital and Palmetto Health Baptist Medical Center at Easley.

C. "Medical Group Practice" means a bona fide, integrated firm in which physicians practice together as partners, shareholders, owners, or employees, or in which only one physician practices.

D. "Participate" in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

E. “Payor” means any person that pays, or arranges for payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.

F. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

G. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).

H. “Preexisting contract” means a contract for the provision of physician services that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by Respondent Partners Health, pursuant to Paragraph V.A.3 of this Order, of such payor’s right to terminate such contract.

I. “Principal address” means either (1) primary business address,

K. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:

1. all physicians that participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians that participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

    a. the provision of physician services to payors at a capitated rate,

    b. the provision of physician services for a predetermined percentage of premium or revenue from payors,

    c. the use of significant financial incentives (, substantial withholds) for physicians that participate to achieve, as a group, specified cost-containment goals, or

    d. the provision of a complex or extended course of treatment that requires the substantial coordination of

II.

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

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:

1. to negotiate on behalf of any physician with any payor;

2. to deal, refuse to deal, or threaten to refuse to deal with any payor;

3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or

4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent Partners Health;

B. Exchanging or facilitating in any manner the exchange or transfer of information between or among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including any price terms, on which the physician is willing to deal with a payor;

C. Attempting to engage in any action prohibited by Paragraphs II.A or II.B above; and

D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED HOWEVER, that, subject to the requirements of Paragraph IV of this Order, nothing in this Paragraph II shall prohibit any agreement involving, or any conduct that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement that does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement, or that solely involves physicians in the same medical group practice.

III.

IT IS FURTHER ORDERED that, for three (3) years after the date this Order becomes final, Respondent Partners Health shall notify the Secretary of the Commission in writing ("Paragraph III Notification") at least sixty (60) days prior to entering into any arrangement with any physicians or any medical group practices under which Respondent Partners Health would act as a messenger, or as an agent on behalf of those physicians or those medical group practices, with payors regarding contracts. The Paragraph III Notification shall include the identity of each proposed physician participant; the proposed geographic area in which the proposed arrangement will operate; a copy of any proposed physician participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Paragraph III Notification is not required for Respondent Partners Health's subsequent acts as a messenger pursuant to an arrangement for which this Paragraph III Notification has been given. Receipt by the Commission of any Paragraph III Notification, pursuant to Paragraph III of the Order,

is not to be construed as a determination by the Commission that any action described in such Paragraph III Notification does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, pursuant to each qualified clinically-integrated joint arrangement or qualified risk-sharing joint arrangement ("Arrangement") in which Respondent Partners Health is a participant, Respondent Partners Health shall notify the Secretary of the Commission in writing ("Paragraph IV Notification") at least sixty (60) days prior to:

A. Participating in, organizing, or facilitating any discussion or understanding with or among any physicians or medical group practices in such Arrangement relating to price or other terms or conditions of dealing with any payor; or

B. Contacting a payor, pursuant to an Arrangement, to negotiate or enter into any agreement relating to price or other terms or conditions of dealing with any payor, on behalf of any physician in such Arrangement.

PROVIDED, HOWEVER

a. the identity of each physician participant, the medical or other physician specialty, group practice, if applicable, and the name of each hospital where the physician has privileges;

b. a description of the Arrangement and its purpose, function, and geographic area of operation;

c. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;

d. an explanation of how any agreement on prices, or on contract terms related to price, furthers the integration and achievement of the efficiencies resulting from the Arrangement;

e. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and

f. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for physician services in the Upstate South Carolina Area or in Pickens County, South Carolina, including, but not limited to, the market share of physician services in such market(s); and

2. if, within sixty (60) days from the Commission's receipt of the Paragraph IV Notification, a representative of the Commission makes a written request for additional information to Respondent Partners Health, then Respondent Partners Health shall not engage in any conduct

request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. Further, receipt by the Commission from Respondent Partners Health of any Paragraph IV Notification, pursuant to Paragraph IV of this Order, is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent Partners Health shall:

A. Within thirty (30) days after the date on which this Order becomes final, send a copy of this Order and the Complaint by first-class mail:

1. with delivery confirmation, to each physician and hospital that participates in Respondent Partners Health;

B. For a period of three (3) years after the date this Order becomes

1. A detailed description of the manner and form in which Respondent Partners Health has complied and is complying with this Order;

2. The name, address, and telephone number of each payor with which Respondent Partners Health has had any contact; and

3. Copies of the delivery confirmations required by Paragraph V.A.1 of this Order, and copies of the signed return receipts required by Paragraphs V.A.2, V.A.3, V.B.1, and V.E of this Order;

D. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, at the earliest of:

1. the termination date specified in a written request from a payor to Respondent Partners Health to terminate such contract;

2. the earliest termination or renewal date (including any automatic renewal date) of such contract; or

3. one year from the date this Order becomes final.

PROVIDED, HOWEVER, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent Partners Health a written request to extend such contract to a specific date no later than one (1) year from the date that this Order becomes final, and (b) Respondent Partners Health has determined not to exercise any right to terminate;

PROVIDED FURTHER, that any payor making such request to extend a contract retains the right, pursuant to part (1) of

Paragraph V.D of this Order, to terminate the contract at any time; and

E. Within ten (10) days of receiving a written request from a payor, pursuant to Paragraph V.D (1) of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician and hospital participating in Respondent Partners Health as of the date Respondent Partners Health receives such request.

VI.

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

VII.

IT IS FURTHER ORDERED that Respondent Partners Health shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent Partners Health shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records

and documents in its possession, or under its control, relating to any matter contained in this Order; and

B. Upon five (5) days' notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of the Respondent.

IX.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

be made in writing, and sent to me at the following address: [address].

Sincerely,

[signatory]

[Partners Health to fill in applicable dates]

contracts" for its physician members, and its "primary function" is described as "centralized managed care contracting."

Partners Health's physician members account for approximately 75% of the physicians independently practicing (that is, those not employed by area hospitals) in and around the Pickens County area. To be marketable in this area, a health plan must have access to a large number of physicians who are members of Partners Health.

Although Partners Health purports to operate as a "messenger model"[1] – that is, an arrangement that does not facilitate horizontal agreements on price – it orchestrated such price agreements. The Partners Health Executive Director negotiates physician contracts with payors using a physician fee schedule that he created with input from the Partners Health physician members. This contracting process is overseen from start to finish by the Advisory Board and the Board of Directors. The Advisory Board is a 12-member committee that provides consultation to both the Board of Directors and the Executive Director during contract negotiations.

The Executive Director creates the Partners Health fee schedule by first polling the Partners Health physician practices to determine what prices they would like to receive in managed care contracts. The Executive Director then the takes the highest prices he receives from among the physicians' responses for a given medical procedure, and assembles those highest prices into

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[1] Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice, at 125. *S* http://www.ftc.gov/reports/hlth3s.htm#9.

a single fee schedule. The Executive Director uses this fee schedule to negotiate contract terms with health plans. Whenever

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits Partners Health from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving Partners Health.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Partners Health from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II1e6 enyIge in anyIaction prohibited by Paragraph sII

of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk.

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allows any contract currently in effect to be extended, upon mutual consent of Partners Health and the contracted payor, to any date no later than one year from when the order became final. This extension allows both parties to negotiate a termination date that would equitably enable them to prepare for the impending contract termination. Paragraph V.E requires Partners Health to distribute payor requests for contract termination to all physicians who participate in Partners Health.

Paragraphs VI, VII, and VIII of the proposed order impose various obligations on Partners Health to report or provide access to information to the Commission to facilitate monitoring Partners Health's compliance with the order.

The proposed order will expire in 20 years.

IN THE MATTER OF

TELEBRANDS CORP., TV SAVINGS, LLC, AND AJIT KHUBANI

OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO

[1] Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits "unfair or deceptive acts or practices." Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of any false advertisement that is likely to induce the purchase of food, drugs, devices, services, or cosmetics. A "false advertisement" is any advertisement that is "misleading in a material respect." 15 U.S.C. § 55(a)(1). Under Section 15 of the FTC Act, 15 U.S.C.

inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise. According to the complaint, respondents' failure to substantiate such claims constitutes an unfair or deceptive act or practice and the making of false advertisements in violation of Sections 5 and 12 of the FTC Act.

The ALJ found that the product name, visual images, and statements in respondents' advertising create the net impression that the Ab Force electronic muscle stimulation ("EMS") device provides health, fitness, weight loss, or exercise benefits; that those claims were false and misleading; and that the claims were material to consumers' purchasing decisions. ID at 41-43, 60-61.[2] Accordingly, he entered an order prohibiting respondents, , from representing that the Ab Force, or any substantially similar device, causes loss of weight, inches, or fat; promotes well-defined muscles; or is an effective alternative to exercise. Order ¶ II. The order also prohibits respondents from making such misrepresentations, expressly or by implication, about any EMS device. Order ¶ III. Paragraph IV of the ALJ's order further prohibits respondents from making any representation regarding, , the safety, efficacy, or benefits of any EMS device, or any product, service, or program relating to health, weight loss, fitness, and exercise without "competent and

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[2] References to the record are abbreviated as follows:
IDF Initial Decision Finding
ID Initial Decision
Tr. Transcript of Trial Testimony
CX Complaint Counsel's Exhibit
RX Respondents' Exhibit
JX Joint Exhibit
RAB Respondents' Appeal Brief
CAB Complaint Counsel's Answering and Cross-Appeal Brief
RRB Respondents' Brief in Reply to Complaint Counsel's Brief in Opposition to Respondent's Appeal and in Opposition to Complaint Counsel's Cross-Appeal

[3] "Fencing-in" relief refers to provisions in a final Commission order that are broader in scope than the conduct that is declared unlawful. Fencing-in remedies are designed to prevent

Commission lacks authority to impose such relief, we decline to order it in this case.

I. Factual Background and Proceedings Below

Respondent Telebrands develops, markets, and distributes a wide array of consumer products. IDF 4. It has marketed hundreds of products since 1987, principally through "direct response" advertising. IDF 3, 4, 20, 22; Khubani Tr. 435. Direct response advertising can include program-length infomercials, live TV shopping, or any medium that allows consumers to order products directly from the advertiser. IDF 17-19; Khubani Tr. 431-34.

Telebrands is solely owned by respondent Ajit Khubani, who oversaw the Ab Force promotional campaign and had primary responsibility for developing scripts for radio and TV advertising. IDF 10, 16. As President, CEO, and Chairman of the Board, he sets the general direction of the business and is heavily involved in new product development. IDF 10, 14-16; Khubani, Tr. 247. He tracks trends in the marketplace and in various channels of advertising, using industry publications that collect data and rank direct-response ads on a weekly basis. IDF 126; Khubani Tr. 248-50.

Several times a year, based on Mr. Khubani's assessment of market trends, Telebrands enters the market by offering a product at a lower price than offered by competitors already in the market for the same or similar products. IDF 25; Khubani Tr. 247-48. Once Telebrands decides to market a particular product, it creates "test" advertising. IDF 26-27; Khubani Tr. 440. The term "test" ad is used throughout these proceedings to refer to ads that accompanied the product's initial release and were run on a limited basis by respondents so that they could make a prediction

[4] *S* n.58,

[5] Respomtcftles3 1 Tf1.63 0 TD(n.58,)Tj6iTmDsShvv.L.C., a Connecticut limitedliability co

The Commission, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), filed actions for permanent injunctive and equitable monetary relief against marketers of the AbTronic, Ab Energizer, and Fast Abs in May 2002, alleging that their advertisements made false representations that the devices were an effective alternative to exercise and caused users to lose weight, inches, and fat. IDF 135. In July 2003, the Commission settled with marketers of the Fast Abs device for a stipulated permanent injunction and more than $5 million in equitable monetary relief. *C* *C*, CV-S-02-0648-KJD-LRL (D. Nev. July 24, 2003). In the AbTronic case, the Commission was awarded a permanent injunction and a judgment holding the defendants jointly and severally liable for $83 million. *C* *C* ., No. CV-S-02-0649-

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[8] *S* IDF 119-24 (describing the AbTronic, Ab Energizer, and Fast Abs advertisements and the claims communicated in those infomercials).

On September 30, 2003, the Commission issued an

the ads did not expressly state any purpose for the product;[9] two television ads mentioned a massage function briefly – and then only in a video superscript – but the ALJ ruled that the use of the "single, momentary phrase 'relaxing massage' [in those ads did] not offset or counter the numerous oral and printed statements, in combination with the name and visual images * * *." ID at 42-43; see IDF 97, IDF 100-09. The ALJ also observed that the models in respondents' TV ads did not indicate that wearing the Ab Force device was a relaxing or soothing experience. IDF 108.

In addition, the ALJ considered the surrounding circumstances – most notably, evidence that respondents intended to disseminate the challenged claims. ID at 44-46. He reviewed evidence outside the four corners of the advertisements – ., expert testimony and copy tests – and concluded that this evidence supported his conclusions regarding the meaning conveyed by the text and images in respondents' advertising. The ALJ, however, did not credit the testimony of complaint counsel's marketing expert, Dr. Michael Mazis, regarding so-called "indirect effects" – , the effects on consumers of previous exposure to ab belts through infomercials, word-of-mouth, or retail packaging for other EMS ab belts. ID at 49-51. While noting that respondents' ads specifically invite consumers to think of infomercials for

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[9] IDF 102. While the ads did not expressly state the purpose for the Ab Force, respondents' ads made statements about the purpose of competitors' ab belts – in some cases, direct statements – and indicated that the Ab Force was equally effective, allowing consumers to make the obvious logical connection. *S* CX 1 H, JX 2.

At trial, both complaint counsel and respondents addressed the impact of consumers' preexisting beliefs about the Ab Force belts from sources other than the Ab Force ads themselves. Complaint counsel argued that respondents should be held liable for exploiting consumers' preexisting beliefs; respondents countered that the copy test – even as controlled with a control group – was unreliable because it failed to filter out preexisting beliefs completely. The ALJ rejected the argument that respondents should be liable for exploiting preexisting beliefs on the basis that there was not enough evidence of the "existence, extent, or impact of those preexisting beliefs," but held that the copy test was reasonably reliable and probative. ID at 56-57; ID at 54-57 (reviewing arguments and case law on liability for preexisting beliefs).

Turning next to the question whether the challenged claims were false or misleading, the ALJ noted that respondents had stipulated that use of the Ab Force does not cause loss of weight, inches, or fat; does not create well-defined abdominals; is not an alternative to exercise; and, furthermore, that they had no substantiation for those claims. ID at 60; IDF 270-73. Given these stipulations, the ALJ held that the alleged claims were false and misleading. ID at 60. Moreover, the ALJ held, the claims related to the purpose and effect of using the product, and the evidence showed that respondents intended to make the implied claims. ID at 61. Accordingly, he reasoned, there was no question that the alleged claims were material to consumers' purchasing decisions. ID at 60-61.

Finally, the ALJ addressed the scope of appropriate relief. The ALJ declined to order respondent Khubani to post a performance bond, given the absence of any case law to support such relief in a litigated FTC adjudicative matter. ID at 63. As to fencing-in relief, the ALJ recognized the seriousness, deliberateness, and transferability of respondents' violations. ID at 64-65. Because respondents' history of prior consent orders did not involve findings of liability, the ALJ did not rely on them; he held, however, that a respondent "need not have a history of prior

violations in order for fencing-in relief to be imposed." ID at 65-66. He ordered fencing-in requiring respondents to "possess and rely upon competent and reliable scientific evidence" to substantiate any representation about weight, inch, or fat loss; muscle definition; exercise benefits; or the health benefits, safety, or efficacy of any products, devices, and services promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits. ID at 66, 70.

On appeal, respondents contend that the ALJ erred in concluding that their Ab Force advertising conveyed the challenged claims.[10] Complaint counsel cross-appeal from the ALJ's refusal to require respondents to post a performance bond before selling or promoting any "device," as defined in Section 15 of the FTC Act, 15 U.S.C. § 55. Complaint counsel also contend that the ALJ should have entered a broader order that would have prohibited respondents, in the absence of substantiation, from making any claim for any product, service, or program, instead of covering those products only when respondents made claims promoting their efficacy or pertaining to health, weight loss, fitness, or exercise benefits.

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[10] Although respondents' notice of appeal purports to lodge an appeal from the initial decision insofar as it found that their ads were false or misleading, their brief focuses on the question whether the ads in fact conveyed the alleged claims to consumers. They do not argue that there is any substantiation for the alleged claims, or deny that the alleged claims are false, misleading, or material to consumers. Indeed, respondents and complaint counsel stipulated before trial that use of the Ab Force does not cause loss of weight, inches, or fat; does not cause well-defined abdominal muscles; and is not an effective alternative to regular exercise. ID at 60; IDF 270-72. The parties further stipulated that respondents did not have or rely on substantiation that the Ab Force would have those effects. ID at 60; IDF 273.

F.T.C. at 680. Such evidence might include common usage of terms, expert opinion as to how an advertisement might reasonably be interpreted, copy tests, generally accepted principles of consumer behavior, surveys, or "any other reliable evidence of consumer interpretation." *C* , 103 F.T.C. 110, 166 (1984); *h* *C* ., 104 F.T.C. 648, 789-90 (1984) (expert testimony; consumer survey), , 791 F.2d 189 (D.C. Cir. 1986), , 479 U.S. 1086 (1987); , 127 F.T.C. at 611-12, 617-33, 682-84 (expert testimony; copy tests); , 114 F.T.C. at 121-22 (expert testimony; copy tests); ., 107 F.T.C. 313, 337-39, 377 n.10 (1986) (expert testimony), , 994 F.2d 595 (9th Cir. 1993), , 510 U.S. 1110 (1994).

The Commission has recognized that an ad may be amenable to more than one reasonable interpretation. *S* , 114 F.T.C. at 120-21 n.8; *h* , 104 F.T.C. at 787 n.7. Where an ad conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible. *S* *C* ., 102 F.T.C. 21, 320 (1983), , 738 F.2d 554 (2d Cir. 1984), , 469 U.S. 1189 (1985); *C* *C*, 570 F.2d 157, 161 n.4 (7th Cir. 1977), , 439 U.S. 821 (1978). Moreover, an ad need not mislead a majority of reasonable consumers. An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim. *S* , 114 F.T.C. at 122; *S* , 103 F.T.C. at 177 n.20.

If an ad is targeted at a particular audience, the Commission analyzes ads from the perspective of that audience. *S* , 103 F.T.C. at 178-79. Different target audiences come to an ad with different perceptions. Consumers cannot understand an ad – or any communication – without applying their own knowledge, associations, or cultural understandings that are external to the ad itself. For that reason, the purpose of ad interpretation is to determine the claims that consumers –

particularly the target audience – take away from an ad, whether or not an advertiser intended to communicate those claims. On the other hand, ad interpretation focuses on the impact of the particular ad on reasonable consumers in the target group; an advertiser is not liable for an interpretation of an ad that a consumer may have based on an idiosyncratic perspective.

The final step in the analysis is to determine whether the challenged claims are "material," or likely to affect a consumer's purchasing decision. The Commission presumes that claims are material if, as in this case, they pertain to the "central characteristics of a product * * * such as those relating to its purpose * * * [or] efficacy" or to safety. *h* *ɡ* , 104 F.T.C. at 816-17.

B. Facial Analysis of Respondents' Ab Force Advertising

We turn first to an examination of the text and images in respondents' ads.[11] We agree with the ALJ that the challenged

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[11] Respondents' Ab Force promotion included the following ads: (1) a "test" radio ad (CX 1 H); (2) a "roll-out" radio ad (RX 49); (3) a one-minute "test" TV ad (JX 2 (tape); CX 1 B (transcript)); (4) a one-minute "roll-out" TV ad (JX 4 (tape); CX 1 F (transcript)); (5) a two-minute "test" TV ad (JX 3 (tape); CX 1 D (transcript)); (6) a two-minute "roll-out" TV ad (JX 5); (7) a print ad (CX 1 G; RX 48); (8) an Internet ad (RX 52); and (9) two email ads (RX 50-51). Again, all of the ads – including the so-called "test" ads for radio and TV – were disseminated and generated sales. IDF 43-45, 49. Respondents spent more than $4 million on television advertising. IDF 52. The test ads for TV alone were broadcast nearly 96 times in January 2002; more than 4500 orders were called into the telephone number that appeared in those ads. IDF 44-45. The roll-out versions of respondents' television spots were broadcast more than 11,000 times from January 19, 2002 through April 7, 2002. IDF 46-47. The telephone numbers that appeared in the TV ads were associated

claims are clearly communicated in ads for the Ab Force belt.[12] As shown below, it is not necessary to look beyond the four corners of respondents' ads to reach this conclusion. This is a straightforward case.

1. Visual Images and Ad Copy

a. Radio Advertisements

Respondents opened their promotion in December 2001 with a 60-second radio spot.[13] The ad invites consumers to recall "those

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with more than 300,000 orders for the Ab Force. IDF 48. The radio advertising was more limited, generating a total of only 1,340 orders. IDF 49. The print ad ran for about one week in 13 newspapers and for another week as a newspaper insert. IDF 50. The print and Internet ads together accounted for less than 3 percent of all orders. IDF 50-51.

[12] Respondents challenged the ALJ's findings of fact as to ad interpretation, arguing that the ALJ based the findings on the messages communicated by the Ab Force ad campaign as a whole rather than the messages communicated by each individual ad. We do not agree that the ALJ erred in analyzing the ads but, in any case, the Commission has examined each ad individually and determined that the ads communicate the challenged claims.

[13] The text of respondents' first radio ad – the opening ad of the campaign – is as follows:

> *h*
> *h*
> *h* *h* *h*
> *h* *h* But, they're expensive, selling for up to 120 dollars each! But what if you could get a high quality electronic ab belt for just 10 dollars? That's right, just 10 dollars! Why so cheap?

fantastic Electronic Ab Belt infomercials on TV." It then declares: "They're amazing . . . promising to get our abs into great shape fast – without exercise! They're the latest fitness craze to sweep the country!" CX 1 H. The ad continues by claiming that the Ab Force is "just as powerful and effective" as "the expensive ab belts on TV," and would send "just the right amount of electronic stimulation to [a user's] abdominal area."

Respondents made several minor changes in the ad after "final review and legal review" and "discussions with counsel" – that is, after the test radio ad had aired. IDF 90 (Khubani Tr. 275, 278), IDF 92.[14] These modifications did not change the fundamental ad messages. Again, the rollout radio ad invites comparison to their competitors' "fantastic" and "amazing" ab belts, which they claim are "the latest craze to sweep the country." RX 49. But while the "test" ad claims that the Ab Force is "just as powerful and effective" as "the expensive ab belts on TV" (CX

> Because intense competition and mass production have forced prices down. We cut a deal with the factory to buy up to 1 million units at a very special price and we are passing the savings on to you.
>
> designed to send just the right amount of electronic stimulation to your abdominal area. Best of all, they're only 10 dollars and have a full money back guarantee. Call now [telephone number omitted]. Don't miss out. Get the amazing electronic Abforce (sic) belt – the latest fitness craze for just $10 [phone numbers omitted].

CX 1 H (emphasis added).

[14] Mr. Khubani admitted that he was aware at the time that there was no substantiation for certain claims about Ab Force, for example that a user could get into shape quickly without exercise and could get a flatter stomach without doing sit-ups. IDF 58-60.

1 H), the "rollout" ad declares that the Ab Force has the "same powerful technology as those expensive Ab Belts."[15] IDF 91; RX 49. The revised text does not expressly identify any particular purpose for the Ab Force. It states, however, that it is "[c]apable of directing 10 different intensity levels at [the user's] abdominal area." IDF 100; RX 49.[16]

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[15] The script of the rollout radio ad reads as follows:

> h
> h h h
> h ¢ ¢ The thing is, they're expensive, selling for up to 120 dollars each! That's why we developed the Abforce (sic) that you can buy right now for just 10 dollars. That's right, just 10 dollars! Why so cheap? Well just like cell phones and VCRs, the price of electronic products keeps coming down. We were able to cut a special deal directly with the factory and are passing the savings on to you. h
> h h h
> Capable of directing 10 different intensity levels at your abdominal area (sic). Best of all, the Abforce (sic) is just 10 dollars and has a full money back guarantee. Demand is overwhelming. Don't miss out [on this] tremendous opportunity. Call now [phone numbers omitted].

RX 49 (emphasis added).

[16] Clearly, the process of reviewing and refining advertising claims to remove potentially misleading claims – before an ad is disseminated, not after – is critical, and we encourage advertisers strongly to review their ads. Respondents, however, merely toned down the most obvious false statements in the initial ads. Even though the radio and television rollout ads were revised, the ad copy (and, in the television ads, the visual images) communicated the same messages just as clearly.

exercise apparel wearing Ab Force belts and experiencing abdominal contractions. ID at 41; IDF 73-76. Close-up images highlight the models' trim waists and well-defined abs. JX 2-5. Additionally, the spot ads depict stock images of men without ab belts performing abdominal crunches on an exercise bench (JX 3, 5) and bikini-clad women, also shown without ab belts, showing off their well-toned bodies and trim waistlines in the background. *S* JX 2-5 (Ab Force TV ads); JX 7-10 (infomercials); ID at 41; IDF 83.[17] It was no accident that the models were not only slender and fit but also had well-muscled abdomens – the commercial casting agents were specifically looking for "great abs." IDF 79-80. The producer of the commercials admitted that people viewing the television ads were supposed to aspire to become like the bikini-wearing models in the ads. IDF 85 (JX 6 at 2 (Liantonio Dep. at 70)).

These visual images of well-toned Ab Force users juxtaposed with images of men executing conventional exercises and trim bikini-clad models clearly convey the message that the Ab Force is not only an alternative to exercise, but also that users of the device will achieve the same trim waists and well-developed abdominal muscles as those displayed by respondents' models. The accompanying text reinforces this message. For example, referring to those "fantastic" and "amazing" ab belt infomercials on TV, respondents claim that the Ab Force is "just as powerful and effective" and characterize the impact of those prior ab belts as "the latest fitness craze." JX 2 (tape); CX 1 B (transcript). For example, one of the early 60-second television advertisements claimed as follows:

> [Spokesperson]: I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country and everybody wants one.

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[17] Other stock images in the ads included dollar signs and falling numbers. IDF 81-82.

[18] This ad, like the other television ads, showed well-muscled

In some ads the claims are conveyed in more subtle fashion but still are clearly communicated. For example, in one ad, a 60-second television spot, respondents refer to ab belts as the "latest craze," dropping the word "fitness." IDF 89; JX 4 (tape); CX 1 F (transcript). Additionally, instead of asserting that the Ab Force is as "powerful and effective" as competing ab belts in infomercials, the female spokesperson states that the device has "10 completely different intensity levels directed at your abdominal area." IDF 100; JX 4, CX 1 F. JX 5, a 120-second television spot, likewise claims that the Ab Force has "sophisticated computer components" and the "same powerful technology" as other ab belts advertised in infomercials. Furthermore, respondents claim, with "10 completely different intensity levels directed at [a user's] abdominal area," the product is "designed for comfort in mind" and is "so comfortable [that consumers] can wear it under [their] clothes." To illustrate the point, respondents' spokesperson – again gesturing towards her abdomen – reveals that the device is "working while [she is] working." This is truly "a high quality, comfortable" product that is in high demand, she declares. JX 5 (emphasis added). A consumer would reasonably believe that a product designed – supposedly – to work out for them would help them lose weight or inches, just as exercising would.

While the intended purpose of an Ab Force device – as opposed to competitors' ab belts – is not stated explicitly in any of the ads, the product name and references to "sophisticated" and "powerful" technology strongly suggest that it is effective in honing the abdominal muscles to make them more powerful or forceful. The visual images are used by respondents to convey the impression that their device is an alternative to conventional exercise. The juxtaposition of a male model who is executing abdominal crunches on an exercise bench with men and women in fitness clothing who are wearing Ab Force belts and effortlessly experiencing abdominal contractions drives home the message. Respondents' spokesperson states that her Ab Force belt is "working" while she is "working" in her business suit. Given the spokesperson's business attire, consumers would reasonably

believe that the device can be used in any setting to give their abdominal muscles the stimulation they need to make them fit.

c. Print Advertisement

Respondents' print ad appeared in thirteen newspapers in February 2002 and in a newspaper insert in March 2002. CX 1 G; RX 48. It follows the same basic format as respondents' radio and TV ads – reminding consumers of "the latest craze to sweep the country" and referring to "those fantastic" and "amazing" ab belt infomercials on TV. RX 48. Respondents claim that the Ab Force has the "same powerful technology as those Ab Belts sold by other companies on infomercials" and consumers "can even wear it under [their] clothes." . Indeed, the ad continues, it "is capable of directing 10 completely different intensity levels at [a user's] abdominal area * * *." . Coupled with a close-up photograph of a well-defined male torso wearing an Ab Force belt, respondents' statements strongly imply that consumers can achieve the same well-developed, toned abs as the model merely by wearing an Ab Force belt under their clothes.

d.

2. Product Name

As respondents undoubtedly recognized, IDF 69, a product name can help the advertiser convey a claim about the central attributes of a product. *S ., S C C*, 327 U.S. 608, 609 (1946) ("Alpacuna" suggests that the product contains vicuna); *h* , 104 F.T.C. at 793 (name "Aspercreme" implies the product contains aspirin). The product name "Ab Force" is an artful choice of words that easily suggests that consumers will achieve more forceful or well-developed abdominal muscles. ID at 41; IDF 70. We agree with the ALJ that the product name itself, in combination with the text and visual images in each of the ads, played an obvious role in conveying respondents' implied claims to consumers. ID at 41.

Based on our own review of the challenged advertising, we conclude that consumers would reasonably interpret respondents' Ab Force ads to mean that the device (1) causes loss of weight, inches, or fat; (2) creates well-defined abdominal muscles; and (3) is an effective alternative to regular exercise – even if the consumers had not seen ads for competing ab belts. As shown below, our facial analysis is confirmed by the surrounding circumstances and extrinsic evidence, including expert opinion and a copy test of respondents' most widely disseminated TV ad.

C. Other Considerations

Our facial analysis of the ads is informed by the market context in which the ads were disseminated and respondents' intent to take advantage of that context by presenting the AbForce as a substitute for other heavily advertised but more expensive "ab belts." As discussed above, respondents presented the Ab Force as an "ab belt," and expressly drew comparisons to other products with which many consumers had been made familiar through prior

advertising[19] and which – as respondents knew[20] – were advertised as improving the physical condition of the user's abdominal muscles.[21] It may be possible, of course, for a seller to use a particular product description while at the same time making clear through its advertising that it does not claim a particular functionality for the product. The respondents can point to no such efforts, though, in the context of the Ab Force campaign.

We agree with the ALJ that an advertiser's failure to make a statement about the purpose or core function of its product can play a role in determining which implied claims are conveyed to consumers. ID at 43; *h g C* ., 104 F.T.C. at 793 (noting "absence of any elements giving a contrary impression, such as express disclosures"). Given the absence of any statements in the later TV and radio ads about the purpose of using an Ab Force device (IDF 97) and the express invocation of ads for other ab belts that did communicate the products' purpose, there is nothing to act as a counterweight to respondents' conspicuous visual images or the general notion that an "ab belt" is a device that purports to improve the condition of the abdominal muscles and slim down and firm up users. Although the phrase "relaxing massage" flashes briefly on the screen in two of respondents' TV ads (IDF 100-01; JX 4-5),[22] we agree with

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[19] *S* IDF 125, 127-34 (advertisement monitoring service rankings showing that infomercials for the competing ab belts were among the 50 most frequently disseminated infomercials and in the top 40 direct response spot rankings in the United States on a number of occasions in 2001 and 2002).

[20] *S* , Khubani Tr. 273-74, 445, 461, 471-72.

[21] *S* IDF 117-24 (referencing claims made in infomercials for the Fast Abs, AbTronic, and Ab Energizer ads).

[22] We recognize that a few ab belts – including the respondents' own Ab Pulse – have been advertised as a massage

the ALJ that it is not nearly sufficient to offset the central message that respondents convey repeatedly with the name of the product and the audio and video elements of the ads. ID at 42-43; , 114 F.T.C. at 123-24; *C* , 111 F.T.C. 206, 294 (1988), , 884 F.2d 1489 (1st Cir. 1989); *h* , 104 F.T.C. at 797-98. It is not clear, for example, why an ad for a massage product would include images of men performing ab crunches on exercise equipment, or why an ad for a massage product would reference competing products' claims to "get [one's] abs into great shape fast – without exercise!" Indeed, the visual images of men and women experiencing rapid and intense abdominal contractions through electronic muscle stimulation seem inconsistent with any commonsense notion of a relaxing experience. As noted by the ALJ, the men and women who were shown wearing an Ab Force device in the TV ads gave no indication that wearing the device was a soothing or relaxing experience. IDF 108; JX 4-5. Finally, at oral argument, counsel for respondents repeatedly declined to represent that the product was intended as a massage device. In fact, he repeatedly stated that he did not know what the Ab Force product was supposed to do. *S* Oral Argument Tr. at 7-11. For example:

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tool. Clearly, however, despite a passing reference to "relaxing massage" – in only two of the Ab Force ads – the product was not intended as a massage tool. *S* ; Oral Argument Tr. at 7-11 (colloquy about purpose of Ab Force product in which respondents' counsel claimed he did not know the purpose of the product). The primary focus of the advertising for ab belts as a product category was their supposed efficacy as a health, weight loss, and fitness device. IDF 120-24, 142-46. In fact, respondents' advertising for Ab Pulse, which attempted to position that product as a massage product, tried to distinguish the product from other ab belts on the market. IDF 112; CX 2. Unlike ab belts that were sold for health, weight loss, and fitness, the Ab Pulse product was unsuccessful and quickly pulled from the market. ID at 44; IDF 113; Khubani, Tr. 281.

Commissioner Swindle: * * * What was the purpose of the ab belt, I mean, the Abforce belt?

Counsel: I have no idea, Your Honor. I'm basically saying what I'm taking is the language of the commercial. They have the same technology, but they're a lot cheaper.

In fact, all Mr. Khubani was trying to do was to provide a reference point to other products that were being advertised.

Chairman Majoras: What does the technology do?

Counsel: I don't know what the technology does.

at 8-9.

Moreover, there is ample evidence that respondents intended to convey the challenged claims, which provides further support for our facial analysis. ID at 45-46; , IDF 65-102. A showing of an intent to make a particular claim is not required to find liability for violating Section 5 of the FTC Act. , *C h C C*, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); , 127 F.T.C. at 683; , 114 F.T.C. at 121. However, a showing of intent is powerful evidence that the alleged claim in fact was conveyed to consumers. ., , 127 F.T.C. at 683; *h* , 104 F.T.C. at 791.

The timing of respondents' decision to enter the market – after reading about the AbTronic and determining that it was a "hot category" – coupled with their decision to invite consumers to recall the (deceptive) advertisements for those products while viewing the Ab Force ads suggests strongly that respondents intended to jump on that bandwagon with the same messages for consumers that had turned ab belts into "one of the hottest categories to hit the market." IDF 63 (Khubani Tr. 255). As demonstrated by the text of the ads, respondents' promotion specifically targeted consumers who were already familiar with ab belt infomercials. , CX 1 H ("Have you seen those

fantastic Electronic Ab Belt infomercials on TV? They're amazing . . . promising to get our abs into great shape fast – without exercise!"); JX 2 (tape), CX 1 B (transcript) ("I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country and everybody wants one."); RX 49 ("Have you seen those fantastic electronic ab belt infomercials on TV? They're amazing! They're the latest craze to sweep the country and everybody wants one!"). By explicitly referencing the ads for their/tl◊C

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[23] Many consumers did see the competitors' ads based upon the rankings – clearly, the respondents assumed that they had and the frequency with which those ads aired bears out that assumption. S IDF 125, 127-34. Moreover, because consumers typically watch TV in multiple time slots, a viewer could easily see an infomercial for one or more of respondents' competitors and also see an ad for the Ab Force on a different channel and in a different time slot. Mazis Tr. 184-85.

[24] A "bandwagon effect" refers to the advertiser's effort to generate interest in a product based on the idea that consumers should buy a product because of its popularity. IDF 96.

They contend that consumers would want to purchase the Ab Force simply because it is a popular product that other people are buying, even if they are unaware of the product's function. As noted above, respondents' ads clearly communicated the product's purpose within the four corners of the ad. In any case, the suggestion that consumers were buying a product like the Ab Force – without knowing what the product was for – merely because the ad promised that many other people were buying it is not only not credible but also disingenuous. While a product's perceived popularity may motivate a consumer's purchase of items such as clothing or decorations or novelties – witness the "Pet Rock" fad of the 1970s – it is not plausible that consumers would have purchased an Ab Force belt without any idea as to its purpose or function. The comparability claims – ., that the Ab Force has the same "powerful" technology and is "just as effective" as their more expensive competitors – reinforced the message that the Ab Force was effective. The references to competitors' (admittedly deceptive) advertisements make little sense unless respondents expected and knew that significant numbers of consumers would recall the claims that respondents' competitors made in their infomercials and interpret respondents' ads with those in mind.[25]

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[25] Similarly, in respondents' ad campaign for a later product that was positioned as a massage tool, the respondents also acknowledged that consumers had likely seen the infomercials for the competing ab belts, although respondents attempted to distinguish the Ab Pulse product from those products. Respondents cautioned viewers not to confuse the Ab Pulse "with an electronic ab belt you've seen on infomercials," emphasizing the point by depicting a red "X" superimposed on the image of a model wearing an ab belt and the on-screen legend, "infomercial ab belts." CX 2. To be sure, the ALJ erred in finding that respondents brought the Ab Force to market after disappointing sales of the Ab Pulse belt. *C* ID at 44-45 */*CX 31 & CX 108. Nonetheless, regardless of the time sequence, it is doubtful that respondents would have found it necessary to

D. Extrinsic Evidence Supplements and Confirms the Commission's Facial Analysis of the Ab Force Ads

Based on our facial analysis of respondents' Ab Force ads, we conclude that they clearly convey the claims alleged in the Commission's complaint. Although extrinsic evidence is not necessary to reach our decision, consistent with our practice we have examined the extrinsic evidence that the parties have offered about the meaning of the challenged Ab Force ads. *S* , , *S* , 118 F.T.C. at 799. This includes (1) Dr. Mazis's expert testimony and report regarding how respondents' TV ads would be perceived by consumers; (2) a copy test that Dr. Mazis designed, based on the most widely disseminated TV ad; and (3) a critique by respondents' expert, Dr. Jacob Jacoby, of the methodology that Dr. Mazis adopted. As discussed below, we conclude that the extrinsic evidence confirms our facial analysis of the Ab Force ads.[26]

1. Expert Testimony

Dr. Mazis testified that respondents' ads communicated certain core performance claims to consumers as a direct result of the text and images in the ads ("direct effects") and, indirectly, as a result

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distinguish their Ab Pulse from "infomercial ab belts" in this manner unless they assumed that consumers would associate the images of models wearing an ab belt in the Ab Pulse ads with the express fitness claims made for the "infomercial ab belts."

[26] Although, as respondents note (RAB at 42 n.6), the extrinsic evidence offered by complaint counsel relates to the trial and rollout versions of respondents' TV ads, many of the elements considered by Dr. Mazis also appear in the print, radio, Internet, and email ads.

[27] Dr. Mazis testified that the ads conveyed four implied claims. According to Dr. Mazis, the two most prominent claims – that users of the Ab Force will achieve well-developed muscles and lose inches around the waist – were conveyed through the visual imagery in respondents' ads. Mazis Tr. 61. Dr. Mazis also testified that consumers may associate the Ab Force with losing weight and view the product as a substitute for exercise principally because of the association with previous ab belt ads. Mazis Tr. 61-62. Of course, even if one had not seen the prior ads, those claims were neatly incorporated into the Ab Force ads themselves. *S*

[28] Respondents' expert, Dr. Jacoby, was also qualified to testify as an expert witness in consumer behavior, consumer psychology, and consumer comprehension, but did not offer his own views as to the meaning of the ads.

[29] According to Dr. Mazis, "[t]hese are claims that appear in some of the ads for the other EMS ab belts," but they are not as "prominent" as claims that the products cause users to develop well-defined abs and to lose inches around the waist. CX 58 ¶ 21.

respondents' Ab Force ads. CX 58 ¶¶ 16, 19-21, 48; Mazis Tr. 48, 59-67. As described by Dr. Mazis,

> There are depictions of well-muscled men and trim women with well-defined abdominal muscles in advertisements for Ab Force and for AbTronic, AB Energizer, and Fast Abs. The models in the Ab Force ads are similar to the models shown in ads for the other EMS ab belts. Also, the brand names are similar – Ab Force, AbTronic, AB Energizer, and Fast Abs use the term "ab" or "abs" to refer to the abdominal muscles.

CX 58 ¶ 19.

Based on the psychological and consumer behavior theory of "categorization,"[30] Dr. Mazis testified that those consumers who had been exposed to infomercials for competing ab belts, word-of mouth, and retail packaging for ab belts would have developed an "ab belt category of beliefs." IDF 163, 166, 169. Such general category beliefs would have included an association between ab belts with well-developed abs, loss of weight and inches, and alternatives to regular exercise. IDF 164. According to Dr. Mazis, respondents' Ab Force ads would trigger such beliefs and cause consumers to read them into the Ab Force ads. IDF 167.

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[30] The consumer behavior theory of "categorization" is premised on evidence that people place objects in categories based on their similarity. ID at 49-50; IDF 169.

[31] Respondents' ads referred to "those fantastic ab belt infomercials." As shown in industry monitoring publications, infomercials for the AbTronic, Ab Energizer, and Fast Abs EMS ab belts aired frequently in the period leading up to, and during much of, respondents' Ab Force promotion. IDF 125. Indeed, they were the only ab belt infomercials among the 50 most frequently aired infomercials during the relevant time period. IDF 134. Although the GymFitness device was advertised in infomercials, it was not widely advertised; it did not achieve a Top 50 infomercial ranking at any point during respondents' promotion of the Ab Force. IDF 143. While respondents placed on the record promotional materials for other EMS devices (IDF

consumer behavior for federal and state governments and for private industry. IDF 148-49. Additionally, he has conducted hundreds of surveys and research studies and published numerous articles in academic journals. IDF 151. Based on his knowledge and experience, he was properly qualified by the ALJ as an expert in the area of consumer perception.

Respondents contend that Dr. Mazis did not attempt to explain how his expertise was relevant to his opinions, or how his opinions were logically related to that expertise. RAB at 44. Accordingly, they claim, under the standards established in *h* , ., 509 U.S. 579 (1993) and *h C C h* , 526 U.S. 137 (1999), his facial analysis must be set aside. RAB at 43-49.[32] We reject respondents' contention that and *h* require the Commission to reject Dr. Mazis's testimony. In the context of the so-called "soft sciences," federal district courts are allowed discretion to choose which factors are appropriate and relevant, according to the expertise in question and the subject of the proffered expert testimony. *h*, 526 U.S. at 149-50; , ., *C h* ., 300 F.3d 325, 329-30 (3d Cir. 2002) (in trademark infringement case district court did not abuse discretion in receiving expert opinion

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[32] and *h* do not apply directly to administrative agencies' adjudicative proceedings. *S* , ., *h* , 354 F.3d 652, 660 (7th Cir. 2004); *C C C* , 255 F.3d 465, 469 (7th Cir. 2001); *C C* , 333 U.S. 683, 705-06 (1948) (FTC adjudicative proceedings are not governed by the "rigid rules of evidence"). The Commission nonetheless is guided by the spirit of and *h* in making a determination as to the admissibility of expert testimony. *S* 16 C.F.R. § 3.43(b)(1) ("[R]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded."). *S* , 354 F.3d at 660; . *S* , 193 F.3d 1361, 1366 (Fed. Cir. 1999).

[33] Dr. Mazis relied in part on the psychological and consumer behavior theory of "categorization" to discuss the effects of consumers' prior exposure to ab belts and ab belt advertising on their perception of messages in respondents' ads. ID at 49-50. Respondents' expert did not question the validity of categorization

empirical evidence was required to demonstrate that the wave of infomercial ab belt advertising influenced consumers' perceptions of respondents' Ab Force ads. *S* ID at 51. By crafting an advertising campaign that expressly capitalized on consumers' familiarity with the infomercial EMS ab belts, respondents effectively conceded – and in fact intended – that the content of their competitors' ads wou 1 Tf14Ttonsumeou 1 T(e wouts)]TJT*0 Tc0 Tw' percti9(thei' Ab Fc

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S , it is not necessary for the Commission to address the question that troubled the ALJ (ID at 50-51) – ., what empirical evidence would be necessary to establish that consumers' prior exposure to infomercial advertising influenced their perception of claims in respondents' advertising.

2. Copy Test

Dr. Mazis designed a copy test of the most widely disseminated

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[34] The tape that Dr. Mazis used in the copy test was received into evidence as CX 104. It depicts the same ad – the most widely disseminated AB Force TV ad – as the tape that was received as JX 4. The transcript of the ad was received as CX 1 F.

added the statement "Ab Force for a relaxing massage" to suggest a massage purpose. CX 58 ¶ 28.

As Dr. Mazis explained, a control ad is the equivalent of a placebo in medical studies – ., it accounts for responses that are attributable to factors other than the ad itself.[35] Mazis Tr. 83-84. A control ad is similar to the challenged or "test" ad but, to the extent possible, it is cleansed by eliminating those elements of the ad that allegedly communicate the challenged claims. IDF 216. Generally, the numbers of consumers who perceive the challenged claim in the control ad are subtracted from the numbers who perceive the challenged claim in the test ad. IDF 258-62. If all the challenged elements have been removed from the control ad, the difference between the two figures ("net takeaway") represents the percentage of consumers whose perception of the challenged claims is based on the particular elements of the test ad. *S* CX 58 ¶ 28; *S* , 118 F.T.C. at 762 (Initial Decision).

Survey participants saw the test ad or control ad twice. IDF 227. Eighty-one participants were eliminated from the study after they could not recall the name of the product. IDF 228-30. The remaining participants were asked a series of questions, beginning with an open-ended (., "unguided") question which asked consumers to state in their own words what they perceived in the ads. IDF 231-32. Consumers were then asked about their perceptions using a progressively narrowing series of open-ended

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[35] The control group responses represent what is sometimes referred to as "noise" – ., preexisting beliefs, confusion, or other factors other than the ad at issue that would account for the participant's affirmative response. Absent other considerations, a survey generally tests more precisely the influence of the stimulus at issue when this "noise" is deducted from the test group responses. *S* , , 127 F.T.C. at 619 (Initial Decision); *S* , 118 F.T.C. at 806.

and closed-ended questions.[36] After eliminating consumers whose responses to a "filtering question" indicated they would be inclined to guess,[37] interviewers instructed participants that they would hear a list of statements (., the "closed-ended questions") of which some, all, or none may have been implied by or made in the ad.[38] IDF 236. Participants were then presented with eight

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[36] By asking questions in this order of successively narrowing focus, Dr. Mazis ensured that consumers' answers would not be biased by knowing the content of the questions in advance. *S* , ., , 114 F.T.C. at 70 (Initial Decision); *S* , 118 F.T.C. at 804.

[37] The filtering question asked: "Does or Doesn't (sic) the Ab Force commercial say, show, or imply that Ab Force improves users' appearance, fitness, or health?" CX 58 ¶ 33. Consumers who answered that the commercial does not say, show, or imply that Ab Force improves users' appearance, fitness, or health were not asked to respond to the five key closed-ended statements. They were funneled to the next question in the survey because their responses to the more specific questions might not be reliable. *S* CX 58 ¶ 33; Mazis Tr. 95.

[38] Only five of the statements that were read to study participants related to claims alleged in the Commission's complaint:

"Using Ab Force causes users to lose inches around the waist."
"Using Ab Force results in well-defined abdominal muscles."
"Using Ab Force removes fat deposits."
"Using Ab Force is an effective alternative to regular exercise."
"Using Ab Force causes users to lose weight."

IDF 238.

statements, five of which related to the allegations of the Commission's complaint, and provided the opportunity to select one of three possible answers: (1) "YES, it is implied by or made in the Ab Force Commercial;" (2) "NO, it is not implied by or made in the Ab Force commercial;" or (3) "You DON'T KNOW or you have NO OPINION." IDF 237-40. An additional three statements – relating to matters that were not at issue (stomach ulcers, nausea, and blood pressure) – were "masking" or "control" questions that Dr. Mazis used to ensure that participants were paying attention and not merely just saying yes to every question (., "yea-saying"). IDF 239.

The copy test results demonstrate that respondents' most widely disseminated TV ad conveyed each of the claims alleged in the Commission's complaint. In this particular copy test, there are three different ways to look at the copy test results: 1) the responses to the open-ended questions (no controls are necessary for these responses); 2) the responses to the closed-ended questions as controlled by the control group responses; and 3) the responses to the closed-ended questions as controlled by the control or "masking" questions.

a. Open-ended Questions

Open-ended questions allow survey participants themselves to articulate the central claim or claims in the ad – those that first come to mind. Marketing experts have found that credible evidence can be obtained from the responses to open-ended questions. *S* , , *S* 118 F.T.C. at 781 (Initial Decision). We agree with the ALJ that it is appropriate to consider the open-ended responses without netting out any controls. ID 58 (*S* , 118 F.T.C. at 808). In this instance, the open-ended question "What did the commercial say, show, or imply about Ab Force?" was followed by asking, "Anything else?" to elicit additional responses. CX 58 ¶ 32.

The copy test showed that a total of 22.3% of participants who viewed the test ad indicated that the ad conveyed that Ab Force

causes users to achieve leaner or flatter abs, loss of weight or fat, a better physique, or loss of inches around the waist. IDF 256-57; CX 58 ¶ 42. As the ALJ determined, these results show that a significant number of respondents took away those claims. ID at 59. These results, if anything, likely understate the consumer take-away because consumers are unlikely to volunteer all of the messages they glean from an ad. The response rate for open-ended questions is usually "much lower than for closed-ended questions where the respondent need only check off the response." *S C* ., 95 F.T.C. 406, 451 (1980) (Initial Decision), *a* 676 F.2d 385 (9th Cir. 1982). *S S* , 118 F.T.C. 746 at 805 (citing testimony of an expert for Stouffer that "often a researcher must rely on open-ended responses in the

[39] The ALJ's findings report a net difference of 15.7% for the question relating to weight loss. *See* IDF 258. It is apparent, however, that this figure is a typographical error and the ALJ inadvertently used the figures that Dr. Mazis reported for the closed-ended questions relating to loss of inches around the waist. *Cf.* IDF 258 *with*

indicating that the test ad did not clearly communicate this claim compared to the control ad. IDF 260.[40]

c. Closed-ended Questions as Controlled by Control Questions

Closed-ended responses in copy tests can also be adequately controlled by control or masking questions. *S S* , 118 F.T.C. at 808-09. These questions typically ask about a product attribute reasonably associated with the advertised product or product category, but not one closely linked to the explicit claims in the ad. *S* at 806 & n.24. Responses to the control question or questions – like a control group – measure the number of participants who answered based upon yea-saying, inattention, the halo effect, or other "noise." *S* at 806. To eliminate the effect of such external factors, the responses to the control or masking questions are subtracted from responses to the test questions.[41]

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[40] All of the results were also reported in terms of statistical significance. IDF 266; CX 58 ¶ 44, 46. The results for the question relating to well-defined abdominal muscles was statistically significant at the .001 level. Mazis Tr. 106. The questions relating to loss of inches around the waist and loss of weight were statistically significant at the .01 level. Mazis Tr. 106-07. The net difference for the question relating to using the Ab Force as an effective alternative to exercise was statistically significant at the .05 level. Mazis Tr. 107. The net difference for the question relating to fat deposits was not statistically significant. *S* CX 58 ¶ 47.

[41] When a copy test uses control or masking questions to control for noise in responding to closed-ended questions, one only needs to examine the results from the test ad group. *S S* , 118 F.T.C. at 806. Results for the control ad group can be ignored.

In this case, the control or masking questions that Dr. Mazis used asked about stomach ulcers, nausea, and blood pressure. CX 58 ¶ 34. Claims about those conditions were not communicated in the ad, so participants should have responded in the negative to closed-ended questions asking whether the ad made claims about those conditions. The highest percentage of participants who responded affirmatively to one of the three control questions – whether due to inattention, preconceptions about the product, or some other reason – was 5 percent. To be conservative, this "noise" was eliminated by subtracting 5 percent from the percentage of participants who responded affirmatively to each of the five closed-ended questions that related to the claims challenged in the Commission's complaint. After eliminating this noise level from each of the closed-ended questions, 38% of the survey participants perceived the message that using the Ab Force belt results in loss of weight. To the statement that using the Ab Force causes users to lose inches around the waist, 53.1% of survey participants responded affirmatively. The statement that using Ab Force results in well-defined abs got positive responses from 60.4% of participants. For the statement that the Ab Force is an effective alternative to conventional exercise, there was an affirmative response of 34.1%. Finally, for the statement that the Ab Force removes fat deposits, 17.9% of survey participants responded in the affirmative. IDF 264. These results show that – with the exception of the fat deposit claim – at least one third of survey participants found that the ad communicated the

[42] As noted by Dr. Mazis, the level of affirmative responses for the control was relatively high, most likely due to the influence of the product name, visual images, and preexisting beliefs about ab belts on the study participants' perceptions of the test Ab Force

and could not be – cleansed of every element that communicated the challenged claims.[44] ID at 54; IDF 217-220. Dr. Mazis acknowledged this limitation (IDF 221; Mazis Tr. 108),[45] but this purported "flaw" actually worked in respondents' favor. Regardless of the cause – whether due to preexisting beliefs or ad elements that could not be removed altogether from the control ad – the net difference between the test group and control group responses was, if anything, as a result of the relatively high percentage of control group participants who reported affirmative responses to the closed-ended questions. ID at 54. Thus, there is no merit to the contention that respondents were prejudiced by using an incompletely "cleansed" control ad, as any reduction in net takeaway would favor respondents.[46]

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control is invariably required. , 118 F.T.C. at 810.

[44] This case illustrates the difficulties inherent in designing a control ad where the product name and visual elements appearing throughout the ad communicate the challenged messages to consumers. On the one hand, it may not be feasible in such cases to excise all of the ad elements without creating something that would not be recognizable as an actual ad. On the other hand, writing a completely new control ad to show consumers is not a viable option because it would introduce new, uncontrolled sources of bias into the copy test.

[45] While the copy test may be flawed for its failure to excise from the control ad all of the elements that communicated the challenged claims, copy tests do not have to be flawless to be reasonably reliable and probative. ., , 127 F.T.C. at 699 n.24; , 118 F.T.C. at 807; C , 85 F.T.C. 688, 744 (1975).

[46] Respondents suggest that the random assignment of copy test participants to the test group or the control group is inadequate to control for preexisting beliefs. RAB at 54-57. That is exactly what the control group is for, however. One cannot

Regardless of the reduction in the difference between the test group and control group responses, the ALJ held correctly that as a matter of law the net takeaway – which ranged from 10.5% to 17.3% for all claims except the fat deposit claim[47] – was sufficient to conclude that the challenged claims were communicated. ID at 57-58 (setting forth Commission cases and Lanham Act cases where net takeaway of 10% – or even lower – supported finding that the ads communicated the claims at issue); , *C* *C*

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possibly account for all of the differences between people – whether based on education level, income, ethnicity, or any other factor – that could possibly affect consumers' perception of an ad. Randomization is the proper technique to control for these possible differences. Mazis Tr. 153. Statistically significant results for comparisons of the test group and control group responses – here, for all but the fat deposit claim – belie the suggestion that the results could be due to chance assignment between the two groups.

[47] For this claim, the 3.9% net difference is not statistically significant. Thus, this result indicates nothing about consumer perception of this particular claim.

may have contributed to consumers' exposure to previous claims, thus influencing their results." RAB at 53-54. Yet respondents' strategy in promoting the Ab Force was to invite consumers to recall the claims in advertising that consumers had previously seen for other ab belts – advertising to which respondents referred in every one of their ads.[48] Indeed, it was exactly that "other, heavily disseminated advertising" that respondents took pains to evoke in their own advertising – including claims that respondents knew were unsubstantiated. *S* Khubani Tr. 273-74, 490; ID at 45; IDF 58-60; CX 1 H.[49] Where, as here, an advertiser exploits preexisting beliefs deliberately by inviting consumers to recall the claims in other ads to help convey a message, it makes little sense to remove the influence of those other ads. *S S C C*, 579 F.2d 1137, 1146 (9th Cir. 1978) (the fact that a false belief "is attributable to factors other than the advertisement itself does not preclude the advertisement from being deceptive"). Accordingly, we believe that the copy test results as controlled by the control group – which serves to filter out the effects of preexisting beliefs – likely understate the extent to which the challenged claims were communicated.

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[48] IDF 114. *S* , CX 1-H ("Have you seen those fantastic Electronic Ab Belt infomercials on TV? They're amazing . . . promising to get our abs in great shape fast – without exercise!"); JX 2 (tape), CX 1 B (transcript) ("I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country and everybody wants one."); RX 49 ("Have you seen those fantastic electronic ab belt infomercials on TV? They're amazing! They're the latest craze to sweep the country and everybody wants one!").

[49] This is not a case where an advertiser selling an item for one purpose is simply aware of a consumer misperception that the product is effective for another use. Respondents' campaign was built around the existence of and exploited that misperception.

In this instance, because of respondents' consistent, overt references to competitors' advertising claims, it is clear that respondents specially targeted consumers who had preexisting misperceptions based on those ads. We recognize, however, that many cases may not be so simple. In some cases, for example, an advertiser might not be liable for misperceptions that consumers hold – even if the advertiser is aware of them – if an ad does not exploit that misperception. In other cases, however, an advertiser might be liable if the ad leads reasonable consumers to take away a misleading message, even if the ad does not invoke other ads and even if there is no evidence that the advertiser intended to communicate a misleading message. Our holding, therefore, is limited to these facts: here, it is unnecessary to control for preexisting beliefs that are due in part to the extensive prior advertising that respondents' ads invoke.

We turn next to respondents' contentions that Dr. Mazis improperly excluded 81 survey participants, used an overbroad sampling universe, and asked leading open-ended and closed-ended questions. RAB at 51. We agree with the ALJ (ID at 57) that Dr. Mazis's exclusion of inattentive participants was consistent with the goal of a copy test – to identify a universe of potential purchasers of the product and determine what messages they perceive in an ad. Given that persons who cannot recall the name of a product would not be likely to purchase it (Mazis Tr. 94), it was reasonable for Dr. Mazis to exclude such inattentive participants from the survey universe and, in fact, it is commonly done. Mazis Tr. 102; ., , 114 F.T.C. at 70 n.2 (excluding participants who could not remember brand name or responded "don't know" to a question asking them to restate the points in the ad).

Respondents' remaining objections to the copy test similarly lack merit. With regard to the sampling universe, the ALJ rejected respondents' contention that the survey population – ., those who in the last 12 months had purchased a product or service for weight loss, toning, or massage and also purchased any product by responding to a direct response TV ad – was

overbroad. ID at 52-53. Respondents would have limited the survey to those who had purchased a product for weight loss, toning, or massage from a direct response ad. Jacoby Tr. 355-56; RAB at 51. The ALJ held that Dr. Mazis's definition of the survey universe was "reasonably reliable and probative." ID at 53. We agree. The goal of the study was to determine whether potential purchasers of the Ab Force – ., those consumers that respondents intended to persuade – perceived the misrepresentations that were alleged in the Commission's complaint. CX 58 ¶ 22. There is no basis for assuming that only consumers who had purchased weight loss, toning, or massage products from direct response TV, rather than by some other means, would be potential Ab Force purchasers. As they had already purchased other products through that venue and demonstrated an interest in this type of product, it is not unreasonable to include them as potential Ab Force purchasers.

With regard to the allegation that the closed-ended questions were leading (RAB at 51), we conclude that the copy test instructions (CX 58 ¶ 34 & Exh. D) were adequate to ensure that participants would give equal weight to all possible responses. *S* ID at 53. In addition, using two different versions of the questionnaire, Dr. Mazis changed the order of the questions. CX 58 ¶ 29; Mazis Tr. 92, 96. The rotation in the order in which the questions were posed supplemented other controls. ID at 53-54; Mazis Tr. 96.

Turning to respondents' allegation (RAB at 51) that the wording of the closed-ended questions invited "yea-saying," we agree with the ALJ that Dr. Mazis used appropriate techniques to ensure that the copy test results would not be compromised by the yea-saying phenomenon or other factors. ID at 53. These techniques included using a filter question to eliminate guessing; rotating the order of questions; and reading the three possible answers to each question before asking any survey question. *f* Dr. Mazis also used control or "masking" questions – ., questions about attributes that are not closely linked to the alleged

answers to closed-ended questions about the test ad could be attributed to yea-saying, inattention, or other factors. *Id.* at 53-54.

To summarize, we conclude that, although extrinsic evidence was not required to find liability, the copy test and other extrinsic evidence helped confirm our own determination that respondents' ads communicated the challenged claims to significant numbers of reasonable consumers.

III. First Amendment Claims

Respondents' contention that the First Amendment limits the Commission's ability to conduct a facial analysis of ads to "a narrow category of cases" in essence rearticulates their previous objections to the ALJ's interpretation of their ads. RAB at 64. Simply put, respondents' First Amendment argument is equally without merit: they cannot manufacture a constitutional issue out

Commission's facial analysis of the implied claims is buttressed by extrinsic evidence, including expert testimony and a copy test.

Moreover, contrary to respondents' claim (RAB at 67), nothing in , 455 U.S. 191, 202 (1982), or its progeny suggests that facial analysis runs an "inherent risk" (RAB at 68) of restricting protected commercial speech. Indeed, in *O C* , 471 U.S. 626, 652-53 (1985), the Supreme Court squarely rejected that proposition, ruling that no consumer survey was required to prove that the public would be misled by a law firm's ad that claimed "if there is no recovery, no legal fees are owed by our clients." Although at issue was the public perception of the distinction between such technical terms as "fees" and "costs," the Court relied on commonsense assumptions as to how consumers would interpret the language to

S *C* *C*, 695 F.2d 681, 687 n.10 (3d Cir. 1982) (argument that the First Amendment requires an order to be based on empirical evidence that the public was misled is "distortion" of .). When implied claims are self-evident, as they are in this case, there is no constitutional mandate for the government to survey consumers before it can find that an ad is misleading. , 471 U.S. at 652-53; w[(ads would)85 r TD0.004 tionycTc-v(n.1;6.7(

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[50] Even if facial analysis might, in rare cases, raise the sorts of concerns that respondents have raised about an "inherent risk of restricting protected speech" (RAB at 68), that problem would not arise with respect to an order that, as here, simply prohibits false and deceptive claims and requires advertisers to have substantiation for any claims they might make in the future.

[51] Respondents also contend that a facial analysis is necessarily a "subjective measure that looks into the minds of the Commissioners." RAB at 62. According to respondents, such an analysis effectively denies a respondent "meaningful appellate review" of the Commission's decision except in "the most extreme cases" because a reviewing court may not inquire into the minds of agency decision makers. RAB at 65. Given that a reviewing court can conduct an independent review of the ads, there is no foundation for the argument that a facial analysis of the ads would deny respondents effective review of an adverse Commission decision. Moreover, this contention would logically apply to any exercise of the Commission's authority to determine implied claims; yet respondents admit that, except in unusual cases, the Commission has authority to determine implied claims.

corroborates the Commission's own interpretation of the ads. Thus, respondents' concern about an "inherent risk of restricting protected speech" (RAB at 68) is inapposite. The challenged claims are obvious from the face of the ads. *S* , 970 F.2d at 320-21.

In its amicus brief, the National Association of Chain Drug Stores ("NACDS") raises concerns about chilling commercial speech, specifically comparative advertising. NACDS asks the Commission to clarify when the sponsor of a "compare and save" advertisement may be deemed "derivatively liable" for misleading implied claims in an advertisement that is part of the "target universe" for the sponsor's "compare and save" advertisement. Amicus at 13. To be sure, truthful comparative advertising, including "compare and save" advertising, is generally valuable for consumers and competition. *S C S C* , 16 C.F.R. § 14.15(b) (1979). Head-to-head product comparisons can demonstrate a product's superiority over a competitor or highlight a price differential. As noted above, however, this case does not stand for the proposition that compare and save advertisers are derivatively liable for all advertising claims made by a competitor by virtue of a comparison. Putting aside the fact that respondents' ads communicated the challenged claims within the four corners of the ads, the comparisons in this case are readily distinguishable from the prototypical "compare and save" advertising where an advertiser places a terse, "Compare to ___" message on a product package or "shelf talker" that names a competing brand's product. Respondents' ads expressly referred consumers to advertisements for the comparison products – not just to the products themselves – and then proceeded to repeat and incorporate claims from those ads. Moreover, as respondents knew,[52] ab belts as a product class were consistently positioned as products that would improve a user's health or fitness or cause weight loss, but the competing ab

[52] *S* , Khubani Tr. 273-74, 445, 461, 471-72.

belts – and the Ab Force, as respondents again knew[53] – had no actual value for those purposes. This case does not present the question, and the Commission does not address, what implied claims are communicated when an advertiser merely claims that it is comparable to a competitor's product without conveying additional information.

As for the possible "chilling effect" on the dissemination of truthful "compare and save" advertising, we reject the proposition that implied claims are inherently unpredictable. , 970 F.2d at 320-21 (rejecting First Amendment challenge "when the alleged deception although implied, is conspicuous"). Indeed, this case provides a good example of implied claims that are so conspicuous and self-evident from the face of an ad that extrinsic evidence is simply not required to determine what messages the ad likely conveys to a reasonable consumer. We recognize, of course, that the role of consumer perception creates an inevitable continuum of meaning in ad interpretation.[54] It does not follow, however, that finding liability based in part on respondents' parroting of competitors' ad claims will have a "chilling effect" on the dissemination of legitimate "compare and save" advertising. *S* ., , 517 U.S. 484, 523 n.4 (1996) (Thomas, J., concurring) (commercial speech, the "offspring of economic self-interest," is a "hardy breed of expression") (*C* *C* *S* *C* , 447 U.S. 557, 564 n.6 (1980) (internal quotation marks omitted)).

A respondent who believes that an advertisement does not communicate an implied claim may, of course, choose to conduct a copy test or submit other evidence demonstrating that consumers

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[53] *S* ID at 45; IDF 58-60; Khubani, Tr. 490; JX 6 ¶¶ 16-19.

[54] Indeed, even where extrinsic evidence has been introduced, differences of opinion can emerge as to which claims are conveyed to consumers.

do not take away such a claim. These respondents did not. The Commission will consider carefully all the extrinsic evidence, including consumer surveys, that the parties may introduce as to the meaning of challenged ads. *S S* , 118 F.T.C. at 799; , 114 F.T.C. at 121-22; *h* , 104 F.T.C. at 789-90.

IV. Remedy

In considering the breadth of appropriate fencing-in, the ALJ acknowledged respondents' substantial resources, their experience and sophistication in marketing a broad array of products, and the deliberate nature of their violations. ID at 64-65. He nonetheless limited fencing-in relief to any product, service, or program "promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits." ID at 66. Complaint counsel contend that more comprehensive fencing-in relief is necessary, including a performance bond and a requirement that respondents have substantiation prior to advertising the "Ab Force, any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program" for any representation "about weight, inch, or fat loss, muscle definition, or the health benefits, safety, or efficacy" of the product. CAB at 67. We conclude that more comprehensive fencing-in relief is warranted but are not persuaded that the record supports a performance bond requirement.

Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that it must bear a reasonable relationship to the unlawful practices. *S* , *C* *C* ., 380 U.S. at 394-95; *C* *C* ., 343 U.S. 470, 473 (1952); *S* *C* , 327 U.S. at 612-13. In determining the appropriate scope of relief, the Commission considers three factors: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violation may be transferred to other products; and (3) whether the respondent has a history of prior violations. *S S* , 118 F.T.C. at 811;

[57] Indeed, as described by respondent Khubani, a strategy that Telebrands has used on a number of occasions (one or two times a year on average) is to identify existing popular products and then enter the market as a competitor at a lower price. Khubani Tr. 439. To be clear, there is nothing wrong with this approach, but the fact that respondents' deceptive practice here is easily

the FTC[58] – the third element that we consider – provides additional support for more stringent fencing-in. Thus, we disagree with the ALJ's conclusion that Mr. Khubani's previous consent agreements "cannot be utilized to form the basis for

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[58] In the past 15 years, Mr. Khubani has entered into three separate consent agreements with the Commission resolving alleged law violations – some addressing multiple counts – and agreed to a modification of one consent agreement; Mr. Khubani and Telebrands paid more than $900,000 in civil penalties. In 1990, respondent Khubani and a mail order company he operated, Direct Marketing of Virginia, settled allegations they were violating the Commission's Mail Order Rule by paying a $30,000 civil penalty. *S* ., No. 90-CV-2412-PLN (S.D.N.Y. April 12, 1990). Subsequently, in September 1996, Mr. Khubani and Telebrands paid a $95,000 civil penalty to settle charges that they failed to ship their products in a timely manner in violation of the Mail Order Rule. *S* *C* ., Civ. No. 96-0827-R (W.D. Va. Sept. 18, 1996). Also in 1996, Mr. Khubani and Telebrands settled charges that they had made unsubstantiated performance and efficacy claims for two products, the WhisperXL hearing aid and Sweda Power Antenna, and misrepresented the terms of a money-back guarantee. They stipulated to entry of an administrative cease and desist order that prohibited them from making unsubstantiated or false performance claims with respect to the Sweda Power Antenna and any hearing aid. *C* ., 122 F.T.C. 512 (1996). Finally, in 1999, respondents Telebrands and Mr. Khubani stipulated to a modification of the 1996 Mail Order Rule civil penalty order providing that those respondents pay $800,000 in civil penalties and requiring, as an additional remedy, that they fund an independent monitor with expertise in mail or telephone order fulfillment. *S* *C* ., Civ. No. 96-0827-R (W.D. Va. Sept. 1, 1999).

[59] The ALJ held that broad fencing-in relief was warranted based on the deliberateness and seriousness of the violations and the ease with which respondents' unlawful conduct could be transferred to other products. ID at 66. With regard to complaint counsel's contention that respondents' history of prior consent orders should also be considered, the ALJ ruled that the consent orders were not in evidence and did not involve any findings of liability. ID at 65. Accordingly, he declined to consider them in determining the appropriate scope of fencing-in relief.

We agree with the ALJ that the deliberateness, seriousness, and transferability of respondents' violations are sufficient, without more, to warrant broad fencing-in relief. However, we do not agree with the ALJ that complaint counsel's failure to offer the prior consent orders into evidence precludes the Commission from considering them in fashioning its order. The Commission may take official notice of them to the extent they are on the public record. *S C h C* ., 2005 FTC LEXIS 70 at *39 n.82 (2005) (taking official notice of SEC K-1 filing); *S hC S* , FTC Docket No. 9311, slip op. at 11-12 (July 30, 2004) (matters of official notice include those contained in public records, such as judicial decisions, statutes, regulations, and reports and records of administrative agencies); ., 82 F.T.C. 391, 464 n.31 (1973) (taking official notice of U.S. Census report), , 511 F.2d 70 (7th Cir. 1975), , 423 U.S. 833 (1975). Furthermore, while complaint counsel could have filed a formal motion before the ALJ to take judicial notice of the consent orders earlier in the proceedings, respondents have no claim of prejudice; indeed, the existence of the consent orders is undisputed. As for complaint counsel's alleged "failure to follow the formalities" (RRB at 63), the Commission's adjudicative rules specifically anticipate the possibility that in rendering a decision on the merits the Commission will take official notice of a material fact. *S* 16 C.F.R. 3.43(d) ("When any decision of an [ALJ] or of the59See6Tj /F689

recognize that litigants may settle matters for a variety of reasons; indeed, whether in federal court or at the Commission, most litigation is settled. Settlement is often an efficient way of resolving legal disputes. Holding a prior consent agreement against a party in a subsequent action may affect that party's decision to settle. Having said that, if every consent agreement were inadmissible, the Commission could never fashion relief appropriate to address a pattern of conduct by someone who repeatedly violates the law but invariably settles. Moreover, we are well aware that a majority of the Commissioners must have "reason to believe" that the law has been violated before issuing a proposed complaint, 15 U.S.C. § 45, including any proposed complaint accompanied by a proposed consent agreement.

Thus, we hold that it is appropriate to consider a pattern of consent agreements. The fact that a party has entered into one prior consent agreement with the Commission may say little about the appropriate scope of relief in a future case. *S h* *d*, 104 F.T.C. at 833 n.78 ("Because consent orders do not constitute a legal admission of wrongdoing, we will not use a single consent order as a basis for concluding that Thompson has a history of past violations."). The Commission, however, may properly take into account a respondent's pattern and practice of alleged law violations that result in a succession of narrowly tailored injunctive orders in determining whether more comprehensive relief is called for. *S S* ., 102

Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."). Thus, the Commission's ability to take official notice of a fact does not turn on whether any of the parties has filed a formal motion before the ALJ, as respondents seem to suggest. *C S*, 195 F.3d 970, 973 (7th Cir. 1999) (taking judicial notice of updated country conditions in light of parties' failure to introduce such information).

F.T.C. 395, 793 n.54 (1983) (five outstanding advertising orders,

selected has no reasonable relation to the unlawful practices found to exist"). *S* *C* ., 598 F.2d 1244 (2d Cir. 1979), , 444 U.S. 980 (1979) (affirming Commission order fencing-in claims for all products). We recognize that this order will impose some additional burden on respondents to substantiate claims for products that the ALJ's order would not cover, but Commission law requires such substantiation for any advertiser in any case. *S* *S* *S* , 104 F.T.C. at 839. In limiting these provisions to a prohibition on deceptive and unsubstantiated claims, the Commission's order leaves respondents free to advertise in any way they choose, except deceptively. Moreover, respondents market a wide range of products; efficacy claims for most of these products would not be covered by the ALJ's order as they do not relate to health, weight loss, fitness, or exercise benefits.[60] In fact, one of the respondents' previous consent orders[61] relates to unsubstantiated performance and efficacy claims for an antenna – the type of deception that would violate Section 5 of the FTC Act but not the ALJ's order. As the Commission held in , 97 F.T.C. 1 (1981), , 676 F.2d 364 (9th Cir. 1982):

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[60] Products respondents have marketed in the past include Ambervision Sunglasses, the Magic Hanger, Dental White Tooth Whitening System, the Safety Can Opener, the Audobon Singing Bird Clock, the Better Pasta Pot, and the Roll-a-Hose Flat Hose. IDF 22. Another recent Telebrands product was the Cyclone Diet, a blended powder that would supposedly cause users to "lose ten pounds in two days," a seemingly impossible claim. Khubani Tr. 251-52. *C* Federal Trade Commission, *h* *C* , <www.ftc.gov/bcp/conline/edcams/redflag/beyond.html> (setting forth claims for weight loss products that are false on their face because they are not scientifically feasible).

[61] *S* *C* ., 122 F.T.C. 512 (1996).

transferability of the unlawful practices to other products or situations. As discussed above, after consideration of those factors, we believe that broad injunctive relief is warranted here.

The Commission, of course, also considers other factors to decide whether a performance bond is reasonably necessary to supplement other forms of fencing-in. In this instance, we decline to order Mr. Khubani to obtain a performance bond because complaint counsel has presented insufficient evidence as to the amount of the performance bond that would likely be necessary to prevent future law violations. The Commission must determine whether a performance bond is reasonably necessary to secure Mr. Khubani's compliance with the order yet there is no evidence in the record as to his financial resources. Such information would assist the Commission in determining whether a bond requirement is appropriate – and, if so, at what amount – to ensure his compliance and in assessing the financial burden that a bond might impose on him. The amount may have to be more than the $1 million requested or less than that amount, but the Commission does not have enough information to weigh the reasonableness of the request. Although Mr. Khubani's compliance with the order will not be secured by the performance bond, we believe that the order's requirement that respondents substantiate objective claims for all of their products – while not a substitute for the bond – will help protect consumers in the future.

V. Conclusion

Contrary to respondents' claim, this case does not involve a novel theory of liability. It involves false and unsubstantiated claims that are communicated with such utter clarity that, even without any consideration of extrinsic evidence, we are able to conclude with confidence that the claims were made.

even putting aside the claims used in the so-called "test" phase of their Ab Force promotion – which generated sales, like the rollout ads – the images and text in the other ads clearly conveyed each of the claims alleged in the Commission's complaint. The copy test amply confirms this conclusion. We emphasize, moreover, that this is not a case in which the product was merely "oversold." Respondents' advertising left no doubt that the Ab Force was an amazing tool that would work wonders on the body, but they had no evidence that the product did any such thing. The product is useless for the health, weight loss, and fitness purposes for which it was advertised, as respondents were well aware. The idea that consumers were purchasing the Ab Force simply to share in the excitement of buying a popular product is not credible.

For all the foregoing reasons, we affirm the ALJ's finding as to liability and conclude that a broad cease and desist order applicable to all products is appropriate here. As discussed above, however, we decline to require respondent Khubani to obtain a performance bond.

FINAL ORDER

This matter having been heard by the Commission upon the

3. “EMS device” shall mean any appliance or machine, or any accessories thereof, used to stimulate the muscles of the human body with electricity.

4. “Food,” “drug,” “device,” and “cosmetic” shall mean as “food,” “drug,” “device,” and “cosmetic” are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

5. Unless otherwise specified, “respondents” shall mean Telebrands (a corporation), TV Savings (a limited liability company), their successors and assigns and their officers; Ajit Khubani, individually and as president of Telebrands and sole member of TV Savings; and each of the above’s agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Ab Force EMS device or any substantially similar device in or affecting commerce, shall not represent, in any manner, including through the use of pictures,

C. use of any such device for any period of time is an effective alternative to regular exercise, including but not limited to sit-ups, crunches, or any substantially similar exercises; or

D. any such device makes a material contribution to any system, program, or plan that produces the results

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ab Force, any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program, shall not make any representation, in any manner, expressly or by implication, about weight, inch, or fat loss, muscle definition, or the health benefits, safety, performance, or efficacy of any product, service, or program, unless, at the time the representation is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

IV.

Nothing in this Order shall prohibit respondents from making any representation for any device that is specifically permitted in labeling for that device under any premarket approval application or premarket notification approved or cleared by the Food and Drug Administration.

V.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings, and their successors and assigns, and respondent Khubani 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 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 Telebrands and TV Savings, and their successors and assigns, and respondent Khubani 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, 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 respondents Telebrands and TV Savings and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation or limited liability company 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. *h* , 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, respondents 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, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent Khubani, 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 phone number and a description of the nature of the business or employment and his duties and responsibilities. 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, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings, and their successors and assigns, and respondent Khubani shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

X.

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;

d d h , that the filing of such a complaint will not

inal rder

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 under this Part.

h , 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.

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Telebrands Corp. ("Telebrands"), TV Savings, LLC ("TV Savings"), and Ajit Khubani ("Khubani"), individually and as president of Telebrands and sole member of TV Savings (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 Telebrands is a New Jersey corporation with its principal office or place of business at 79 Two Bridges Road, Fairfield, NJ 07004.

2. Respondent TV Savings is a Connecticut limited liability company with its principal office or place of business at 79 Two Bridges Road, Fairfield, NJ 07004.

3. Respondent Khubani is president of Telebrands and sole member of TV Savings. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of these two business entities, including the acts and practices alleged in this complaint. His principal office or place of business is the same as those of Telebrands and TV Savings.

4. The foregoing respondents have operated as a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force, an electronic muscle stimulation ("EMS") device, which is a "device" within the meaning of Sections 12 and 15 of the FTC Act.

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

The Ab Force EMS Device

6. The Ab Force EMS device is comprised of: (1) a black elasticized belt; (2) a thin black pad measuring approximately 8 inches by 4 inches; and (3) a small control unit, powered by a coin-sized battery, which attaches to the pad and, in some models, enables the user to control the intensity of electronic stimulation. These three components assemble to form a belt with the pad and unit in the middle. According to respondents' instructions, the user should apply a water-based gel to the pad and place this pad against the abdomen, bicep, or thigh to send the electrical current generated by the control unit to the body.

Advertising and Promotion of the Ab Force EMS Device

7. From December 2001 to May 2002, respondents disseminated, or caused to be disseminated, advertisements and promotional materials for the Ab Force, including but not necessarily limited to 60 and 120 second television commercials, Internet advertisements, radio advertisements, and print advertisements. Respondents offered the Ab Force for the price of $10. Gross sales of the Ab Force, including accessories like batteries and gels, exceeded $19 million.

8. Respondents spent more than four million dollars to televise commercials for the Ab Force. These commercials appeared more than 10,000 times on cable, satellite, and broadcast television outlets, and were among the most frequently aired commercials on cable television during the weeks and months in which they appeared, according to an industry monitoring service.

9. Through advertisements for the Ab Force, respondents represented that the Ab Force used the same technology and was just as powerful and effective as other more expensive EMS devices that were advertised on program-length television commercials ("infomercials") during or shortly before the time period in which the Ab Force commercials appeared.

10. The Ab Force advertisements, including but not limited to the attached Exhibits A through H, contained the following statements or depictions, among others:

a. PAT MURPHY: I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country and everybody wants one.
ON SCREEN: UP TO $120 EACH!
PAT MURPHY: The problem is, they're expensive, selling for up to $120 each.
ON SCREEN:
****
AB FORCE
PAT MURPHY: Well, that's why we developed the Ab Force that you can buy right now for just $10.
ON SCREEN: JUST $10!
PAT MURPHY: That's right, just $10.
. . .
PAT MURPHY: . . . The Ab Force is just as powerful and effective as those expensive ab belts sold by others - -
ON SCREEN: ELECTRONIC STIMULATION
PAT MURPHY: - - designed to send just the right amount of electronic
stimulation to your abdominal area!
—Exhibit A (videotape of television commercial); Exhibit B (Certified transcript of 60-second television commercial).

These statements are accompanied by the following images, among others:
(1) over a dozen depictions of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contractions; and (2) two close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles.

Comfortable
PAT MURPHY: The Ab Force is high quality, powerful, comfortable - -
ON SCREEN:
****
AB FORCE
JUST $10
PAT MURPHY: - - and best of all it's just $10
ON SCREEN: 30 DAY
SATISFACTION GUARANTEE!
PAT MURPHY: . . demand for the ab force is overwhelming and - -
ON SCREEN: NOT AVAILABLE IN STORES
PAT MURPHY: - - it's not available in stores anywhere. So, don't miss out on this incredible opportunity. Call to reserve your electronic Ab Force now.
—Exhibit C (videotape of television commercial); Exhibit D (Certified transcript of 120-second test television commercial).

These statements are accompanied by the following images, among others:
(1) over a dozen depictions of well-muscled, bare-chested men and lean, shapely women wearing Ab Force belts and experiencing abdominal muscle contractions; (2) two close-up images of a bikini-clad woman showing off her trim waist and well-defined abdominal muscles; and (3) one close-up image of a well-muscled, bare-chested man performing a crunch on an exercise bench.

c. **ON SCREEN: Consult Your Physician Before Using the Ab Force**
PAT MURPHY-STARK: Hi, Pat Murphy-Stark here.
ON SCREEN:
****
AB FORCE
Do not use if you have a pacemaker, a heart or medical condition, or are pregnant.

bikini-clad woman showing off her trim waist and well-defined abdominal muscles.

d. "I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing! They're the latest craze to sweep the country and everybody wants one. The thing is they're expensive selling for up to $120 each. That's why we developed the

electronic stimulation to your abdominal area. . . . Don't miss out. Get the amazing electronic Ab [F]orce belt—the latest fitness craze for just $10."

—Exhibit H (radio advertisement).

Advertising and Promotion of Other EMS Devices on Infomercials

11. From April 2001 through May 2002, during or shortly before the time period in which the Ab Force commercials appeared, several other EMS devices were offered for sale, sold, and distributed throughout the United States. Three of these EMS devices, the "AbTronic," "AB Energizer," and "Fast Abs," were substantially similar in appearance to the Ab Force, were comprised of components substantially similar to those identified in Paragraph 6, and were widely advertised through television infomercials. All three EMS devices were more expensive than the Ab Force.

12. The AbTronic EMS device was offered for the price of

12. T 0 Tsther EMS devivice was offered for the pric59.95f

the AB Energizer EMS device, including accessories like batteries and gels, exceeded two million units, that is, approximately $120 million.

14. The Fast Abs EMS device was offered for the price of $39.95. According to an industry monitoring service, Fast Abs infomercials appeared more than 1,200 times on cable television stations between November 2001 and February 2002, at an estimated cost of more than $12 million. Fast Abs infomercials were among the most frequently-aired infomercials on cable television during the weeks and months in which they appeared. Gross sales of the Fast Abs EMS device, including accessories like batteries and gels, exceeded 660,000 units, that is, more than $26 million dollars.

15. Infomercials for the AbTronic, AB Energizer, and Fast Abs devices contained the following depictions, among others: (1) well-muscled, bare-chested men and lean, shapely women wearing EMS devices around the waist and experiencing abdominal muscle contractions; (2) men and women performing conventional abdominal exercises such as sit-ups or crunches; and (3) close-up images of men and women in revealing clothes showing off their trim waists and well-defined abdominal muscles.

16. Infomercials for the AbTronic, AB Energizer, and Fast Abs devices contained the following representations, among others, that the advertised device causes the loss of weight, inches, or fat:

a. **ON SCREEN: K.T. Roberge**
Homemaker
Results based on use and muscle response
TESTIMONIALIST K.T. ROBERGE: When I first started using the AbTronic System, I was skeptical at first, thinking it’s just too easy, strapping it on, nothing to plug

in, and it just contracts your muscles. But for three weeks, I have used it now and I've lost two inches in my waist.

— *C* , CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 19.

b. **ON SCREEN: Kathy Horn**
Tanning Salon Owner
TESTIMONIALIST KATHY HORN: After using the AbTronic System, I've lost three inches on my waist in the matter of two weeks and my abdominals look so much better.

— *C* , CV- S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 32-33.

c. **ON SCREEN: Before and After photographs**
UNIDENTIFIED MALE: The Ab Energizer System I've used for five weeks and I've gotten incredible results.
ON SCREEN: Lost 40 lbs.
Size 37 to 34
Results not typical. Individuals results may vary.
UNIDENTIFIED MALE: I've lost 40 pounds. I've gone from a waist 37 to a waist 34. The Ab Energizer and the Ab Energizer System has changed my life and it's really given my life back to me.

S *h* *7* *C* *7*

e. MALE ANNOUNCER: People everywhere are sitting back and relaxing while they firm up, slim down, and shed inches quickly.

C C C S (May 7, 2002), Complaint Exhibit B at 4, 23, 54; Complaint Exhibit D at 4, 23-24, 45, 57.

f. MALE ANNOUNCER: You'll drop four inches in the first 30 days. We guarantee it.

C C C S, (May 7, 2002), Complaint Exhibit B at 31, 59; Complaint Exhibit D at 32, 63.

17. Infomercials for the AbTronic, AB Energizer, and Fast Abs devices contained thefollowing representations, among others, that the advertised device causes well-defined abdominal muscles:

a. MALE ANNOUNCER: AbTronic is the electronic dream machine that will show you immediate improvement without strenuous time-consuming workouts. You'll develop that six-pack you've always wanted in the easiest way imaginable.

— *C* , CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 13, 27, 38.

b. MALE ANNOUNCER: Now, with one touch of a button, you can get that six-pack you always wanted, guaranteed.

— *C* , CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 4 at 3.

c. MAIL ANNOUNCER: Now, with a touch of a button, you can go from flab to rock-hard abs.

would feel like. When I did use it, I had a very strong contraction, a lot stronger than doing sit-ups. Even after 100 sit-ups, you don't get the kind of contraction you get here, because normally, when doing sit-ups you get tired first. Then it starts to work. Doing the first AbTronic systems, the first contraction feels like you've done already 100, 150 sit-ups.

— *C* , CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 20.

c. MALE ANNOUNCER: [W]atch as your ab muscles contract as if you're doing a sit-up. . . . Ten minutes on the AbTronic is the equivalent of 600 sit-ups. That's why we guarantee you'll lose two inches off your midsection in less than a month or your money back.

— *C* , CV-S-02-0649-PMP, (May 7, 2002), Complaint Exhibit 2 at 14, 27, 39; Complaint Exhibit 4 at 3.

d. MALE ANNOUNCER: The secret is Ab Energizer's electronic impulses that stimulate your abs so they contract and relax as if you're doing a sit-up.

ON SCREEN: Up to 700 Muscle Contractions 10 Minutes!

— C C S (May 7, 2002), Complaint Exhibit B at 15.

f. MALE ANNOUNCER: The secret is EMS, electronic muscle stimulation. This tiny transformer sends out safe, gentle impulses that trigger your motor nerves and activate deep muscle contractions. Tests have proven that this unique isometric action can be—

ON SCREEN: 30% More Effective!

MALE ANNOUNCER: —30 percent more effective than anything you can do on your own with normal exercise.

— C C S (May 7, 2002), Complaint Exhibit B at 24.

g. SPOKESWOMAN KATHY DERRY: In fact, just 10 minutes of Fast Abs is like doing 600 sit-ups. Imagine that. 600 sit-ups.

ON SCREEN: 10 minutes = 600 sit ups.

— C C S (May 7, 2002), Complaint Exhibit B at 11; see also Fast Abs Ex. B at 5, 23, 35, 43, 50, 54-55

Violations of Sections 5 and 12 of the FTC Act

19. Through the means described in Paragraphs 9 and 10, respondents represented, expressly or by implication, including, but not limited to, references to products and infomercials with representations such as those described in Paragraphs 11 through 18, that:

a. Ab Force causes loss of weight, inches, or fat;

b. Ab Force causes well-defined abdominal muscles; and

c. Use of Ab Force is an effective alternative to regular exercise.

20. In truth and in fact:

a. Ab Force does not cause loss of weight, inches, or fat;

b. Ab Force does not cause well-defined abdominal muscles; and

c. Use of Ab Force is not an effective alternative to regular exercise.

Therefore the representations set forth in Paragraph 19 were, and are, false and misleading.

21. Through the means described in Paragraphs 9 and 10,

NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless

otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of

ORDER

DEFINITIONS

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

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

2. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. "EMS device" shall mean any appliance or machine, or any accessories thereof, used to stimulate the muscles of the human body with electricity.

4. "Food," "drug," "device," and "cosmetic" shall mean as "food," "drug," "device," and "cosmetic" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

5. Unless otherwise specified, "respondents" shall mean Telebrands (a corporation), TV Savings (a limited liability company), their successors and assigns and their officers; Ajit Khubani, individually and as president of Telebrands and sole member of TV Savings; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering

V.

IT IS FURTHER ORDERED that respondent Khubani, directly or through any corporation, subsidiary, division, or other entity, shall not engage in or assist others in engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device, as that term is defined in Section 15(d) of the FTC Act, 15 U.S.C. § 52, unless, prior to engaging in that activity, respondent Khubani first obtains a performance bond ("the bond") in the principal sum of $1,000,000. The terms and conditions of the bond requirement are as follows:

A. The bond shall be conditioned upon compliance with Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and Parts I through III of this Order. The bond shall be deemed continuous and remain in full force and effect as long as defendant is engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device. Respondent Khubani shall maintain the bond for a period of three years after he provides notice to the Commission that he has ceased engaging in any manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any device. The bond shall cite this Order as the subject matter of the bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Sections 5(a) and 12 of the FTC Act, or Parts I through III of this Order.

B. The bond shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each state in which respondent Khubani, or any entity directly or indirectly under his control, is doing business and that holds a Federal

Federal Trade Commission for the benefit of any consumer injured as a result of any activities that required obtaining the bond.

C. The bond required pursuant to this Paragraph is in addition to, and not in lieu of, any other bonds required by federal, state or local law.

D. At least 10 days before commencing any activity that requires obtaining the bond, respondent Khubani shall provide notice to the Commission describing in reasonable detail the activities and include in the notice a copy of the bond obtained.

E. Respondent Khubani, directly or through any business entity, shall not disclose the existence of the bond to any consumer, or other purchaser or prospective purchaser in connection with advertising, promoting, marketing, offering for sale, or sale of any product, service, or program.

h that this provision does not apply to the handling of consumer complaints and cancellation and refund requests so long as respondent Khubani, directly or through any business entity, also discloses, at the same time, that the bond is "required by Order of the Federal Trade Commission to resolve an action charging that Ajit Khubani engaged in deceptive practices as alleged in *h* *C* , Docket No. 9313." The disclosure shall be stated or set forth in a clear and prominent manner. If in print, the disclosure shall be separated from all other text, in 100 percent black ink against a light background, in print at least as large as the main text of the sales material or document, and enclosed in a box containing only the required disclosure.

VI.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings, and their successors and assigns, and respondent

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. ¢ ¢ h , 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, respondents 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, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Khubani, 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 phone number and a description of the nature of the business or employment and his duties and responsibilities. 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, Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondents Telebrands and TV Savings, and their successors and assigns, and respondent Khubani shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission athig

XI.

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;

, 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 under this Part.

, 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.

THEREFORE, the Federal Trade Commission this thirtieth day of September, 2003, has issued this complaint against respondents.

INITIAL DECISION

By Stephen J. McGuire, Chief Administrative Law Judge

I. INTRODUCTION

A. Overview and Summary of Decision

This case addresses the advertising campaign for the Ab Force, an electronic muscle stimulation ("EMS") ab belt device. Telebrands Corporation ("Telebrands"), TV Savings, L.L.C. ("TV Savings"), and Ajit Khubani ("Khubani") (collectively "Respondents") marketed the Ab Force through spot television, print, radio, internet, and email advertisements. Complaint Counsel alleges: (1) that Respondents' advertising campaign for the Ab Force makes claims that the use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise; (2) that these claims are false or misleading; and (3) that these claims are material to consumers. Respondents' primary argument is that the Ab Force advertisements did not contain the challenged claims.

The parties focus on the issue of whether Respondents should be held liable for dissemination of ads that capitalize on preexisting consumer beliefs regarding the effects of using ab belts. As disculd i 64 yht,d i 64SeffeatiIB)s: (wheTims

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The hearing record was closed pursuant to Commission Rule 3.44(c) by Order dated June 18, 2004. This Initial Decision is filed within one year of the issuance of the Complaint and within ninety days of the close of the record, pursuant to Commission Rule 3.51(a).

D. Evidence

The Initial Decision is based on the transcript of the testimony, the exhibits properly admitted in evidence, and the briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties. Citations to specific numbered Findings of Fact in this Initial Decision are designated by "F." n1

n1 References to the record are abbreviated as follows:

CX -- Complaint Counsel Exhibit
RX -- Respondents Exhibit
JX -- Joint Exhibit
Tr. -- Transcript of Testimony before the Administrative Law Judge
Dep. -- Transcript of Deposition
CCPFF -- Complaint Counsel's Proposed Findings of Fact
CCRPFF -- Complaint Counsel's Response to Respondents' Proposed Findings of Fact
CCB -- Complaint Counsel's Post Hearing Brief
CCRB -- Complaint Counsel's Post Hearing Reply Brief
RPFF -- Respondents' Proposed Findings of Fact
RRPFF -- Respondents' Response to Complaint Counsel's Proposed Findings of Fact
RB -- Respondents' Post Hearing Brief
RRB -- Respondents' Post Hearing Reply Brief

This Initial Decision addresses only material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses

Service Agreement between Telebrands and TV Savings. (JX 1, P 14).

b. TV Savings, L.L.C.

7. Respondent TV Savings, L.L.C. ("TV Savings"), a Connecticut limited liability company, was organized on January 22, 2002. (JX 1, PP 4, 5).

8. TV Savings has offices at 81 Two Bridges Road, Fairfield, New Jersey 07004. (JX 1, P 3). TV Savings shares office space with Telebrands. (Khubani, Tr. 282).

9. TV Savings was created to handle the Ab Force campaign. (Khubani, Tr. 282-83).

c. Ajit Khubani

10. Respondent Ajit Khubani ("Khubani") is the president, chief executive officer, chairman of the board, and sole owner of Telebrands. (JX 1, P 7). Khubani is also the sole member of TV Savings. (JX 1, P 8).

11. Khubani's office is located at 79 Two Bridges Road, Fairfield, New Jersey 07004. (Answer, P 3).

12. Khubani has been involved in direct response television ("DRTV") since 1987 and has been involved with the direct response advertising industry since 1983. (Khubani, Tr. 434).

13. Khubani is a guest lecturer at Princeton University and belongs to the Electronic Retailing Association, where he served on the Board of Directors from 1999 to 2002. (Khubani, Tr. 430-31).

14. Individually or in concert with his officers and employees, Khubani formulates, directs, or controls the policies, acts, and practices of Telebrands and TV Savings. (JX 1, P 9).

15. Khubani was appointed by Telebrands as the "Program Manager" pursuant to the Service Agreement dated January 22, 2002 between Telebrands and TV Savings. (JX 1, P 13). He was also TV Savings' representative under the Service Agreement. (JX

as TV Savings' representative under the Service Agreement, Khubani represents both entities with regard to the responsibilities and duties of each under the Service Agreement. (JX 1, P 13).

16. Khubani was ultimately responsible for overseeing the marketing and creative design of the Ab Force advertising and promotional campaign and was primarily responsible for the creation and development of the scripts for the Ab Force television and radio advertising of the Ab Force product. (JX 1, P 11; Khubani, Tr. 271-72). Khubani also set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, P 12).

2. The Direct Response Advertising Industry

17. Direct response advertising typically describes a product and offers the consumer a vehicle to order the product directly by telephone, by internet, or through a mailing address. (Khubani, Tr. 431-32). Unlike most traditional advertising, direct response advertising allows a consumer to order the product directly from the advertiser. (Khubani, Tr. 432).

18. The direct response industry is significant in scope and includes every form of advertisement to which a customer responds by ordering the product directly, including the internet, catalogues, direct mail, credit card inserts, print media, radio, and television. (Khubani, Tr. 434, 441).

19. DRTV advertising generally takes three forms. One is long form commercials, also called "infomercials." (Khubani, Tr. 432). These are usually program length commercials, typically 28 minutes, 30 seconds in length. (Khubani, Tr. 432). The second form is short form spot DRTV, which are commercials that are typically 30 seconds, 60 seconds, 90 seconds or 120 seconds in length. (Khubani, Tr. 432). The third form is live shows, many of which are broadcast twenty four hours per day, seven days a week. These include QVC, Home Shopping Network, and Shop NBC. (Khubani, Tr. 432-33).

3. Telebrands' Marketing Practices and Techniques

20. Telebrands sells a variety of products directly to consumers through direct response channels (telephone numbers and addresses contained in the advertising for the product) and through retail stores. (Khubani, Tr. 245-46; JX 1, P 2).

21. Telebrands has employed all three types of DRTV -- infomercials, short form, and live television -- but relies primarily on short form commercials. (Khubani, Tr. 433). Khubani testified that short form commercials are most effectively used to advertise simple products typically sold for twenty dollars or less. (Khubani, Tr. 433).

22. Telebrands has marketed hundreds of products throughout its history and has had a number of successful products that have sold three to fifteen million units each. (Khubani, Tr. 435) (successful products include: Ambervision Sunglasses, the Magic Hanger, Dental White Tooth Whitening System, the Safety Can Opener, the Audubon Singing Bird Clock, the Better Pasta Pot, and the Roll-a-Hose Flat Hose).

23. Telebrands uses a variety of strategies in determining whether to market a product. (Khubani, Tr. 438-43).

24. Khubani typically will observe trends in the marketplace and in various channels of advertising and distribution and will evaluate what products would be appropriate for advertising on television. (Khubani, Tr. 438). This includes assessing what stage the product has reached in its life cycle and evaluating what steps competitors are taking in the marketplace. (Khubani, Tr. 438).

25. If Telebrands believes it has a competitive advantage and/or strategy for competing, Telebrands will compete with products already in the market. (Khubani, Tr. 439tsnqD-sal times per year, Telebrands identifies existing popular products in the marketplace and enters the market as a competitor by offering a similar product at a lower price. (Khubani, Tr. 439-40).

26. Once Telebrands decides to market a product, it undertakes se-sal steps to bring that product to the marketplace. (Khubani, Tr. 440-43).

27. Telebrands first creates test advertising, which involves creating an actual advertisement that is disseminated in a number of markets on a limited basis, and with a limited advertising

side of the pad that divides the silver/gray side of the pad into two areas; and a small, battery powered control unit attached to the purple side of the pad. (Answer, P 6).

35. The Ab Force ab belt is an electronic muscle stimulation ("EMS") device which uses electronic stimulation intended to cause stimulation of the muscles. (JX 1, P 15). Electronic muscle stimulation makes one's muscles contract involuntarily. (Khubani, Tr. 455, 505).

36. The Ab Force is designed so that some amount of electricity goes into the body. (Khubani, Tr. 506).

37. Khubani contacted an overseas manufacturer and, with that manufacturer, began to develop the ab belt product to be sold by Telebrands. (JX 1, P 19).

38. The manufacturer of the Telebrands ab belt product informed Khubani that it was also the manufacturer of the AbTronic ab belt, another EMS device. (Khubani, Tr. 264; JX 1, P 20).

39. The manufacturer informed Khubani that the Telebrands ab belt product would have the same power output as two other advertised ab belt products, the AbTronic and the Fast Abs belts. (Khubani, Tr. 266; CX 18). Khubani believed that he could sell products with the same technology and same or similar power output to consumers for a significantly lower cost than that offered by other ab belt advertisers. (JX 1, P 20).

40. Khubani posed the question of technical comparability to the manufacturer because he wanted to make sure that his advertisements were truthful in saying that the Ab Force used the same technology as ab belts which sold "for as much as $ 120." (Khubani, Tr. 266-67). The AbTronic sold for $ 120 and was the ab belt to which Khubani was referring. (Khubani, Tr. 267).

b. Sales

41. Gross sales for the Ab Force, including accessories such as batteries and gels, exceeded nineteen million dollars. (JX 1, P 36).

42. Respondents sold approximately 747,000 units of the Ab Force and consumers placed a total of 330,510 orders for the Ab Force. (JX 1, PP 25-26).

43. Each of the ads disseminated by Respondents for the Ab Force generated orders from consumers. (JX 1, PP 25-26).

44. The 60 second and 120 second test television commercials (AB-B-60 and AB-B-120, respectively) ran in January of 2002 and were cleared for broadcast nearly ninety-six times. (JX 1, P 24; RX 6O).

45. Consumers placed 2,392 orders for the Ab Force by using the telephone number found in the 60 second test commercial. (JX 1, P 27). Consumers also placed 2,238 orders for the Ab Force by using the telephone number found in the 120 second test commercial. (JX 1, P 28; RX 61).

46. The final versions of the 60 second and 120 second television commercials for the Ab Force (AB-E-60 and AB-E-120, respectively) ran from January 19, 2002 until April 7, 2002. (JX 1, P 29).

47. The AB-E-60 and AB-E-120 versions of the television spots were cleared for broadcast 11,508 times. (JX 1, P 30). The Ab Force spots ran during all media day parts and appeared on cable, satellite, and broadcast television outlets in major national markets. (Khubani, Tr. 513; Answer, P 8).

48. Consumers placed 74,566 orders for the Ab Force using the telephone number displayed in the 120 second spot (AB-E-120) and 240,440 orders using the telephone number listed in the 60 second spot (AB-E-60). (JX 1, P 31; RX 61). This constitutes approximately ninety five percent of all orders placed. (JX 1, P 31; RX 61).

49. The radio advertisement ran from December 23, 2001 through January 23, 2002. (RX 61; Khubani, Tr. 272-73). The radio advertisement generated a total of 1,340 orders, 211 for the test spot, and 1,129 for the final radio spot. (Khubani Tr. 493-94; JX 1, P 32; RX 61).

50. The print advertisement was not run in any publication until February 14, 2002. (JX 1, P 34). At that time, it ran approximately one week in thirteen newspapers, and again as a newspaper insert from March 10, 2002 to March 17, 2002. (JX 1, P 34). The print advertisement generated a total of 6,871 orders, or approximately two percent of all Ab Force orders placed. (JX 1, P 34; RX 61).

51. The internet advertising ran from February 26, 2002 through April 6, 2002 and generated 2,663 orders in response, totaling less than one percent of all orders placed. (RX 61).

52. Respondents spent over four million dollars to televise commercials for the Ab Force. (Complaint, P 8; Answer, P 8).

53. Khubani set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. (JX 1, P 12).

c. Advertisements

54. Khubani wrote the scripts for the radio and print ads on December 18, 2001. (Khubani, Tr. 480-81, 488-89).

55. Khubani testified that he provided those two scripts to Collette Liantonio, the producer of the television advertisements, "so she would have a basis for writing her TV commercials." (Khubani, Tr. 482).

56. Liantonio has a regular working relationship with Telebrands. (RX 81 (Liantonio, Dep. at 26)). Her firm has produced more than a dozen television commercials for Telebrands. (RX 81 (Liantonio, Dep. at 26)).

57. Liantonio testified, however, that no one at Telebrands told her what the Ab Force was designed to do. (RX 81 (Liantonio, Dep. at 53)). She stated that she had no product, no literature, and no written information from Telebrands regarding Ab Force before the day that the television commercial was originally recorded. (RX 81 (Liantonio, Dep. at 30, 32-33)).

58. On December 22, 2001, the day the commercials were shot, Liantonio provided Khubani with a script which began with

the statement: "do you wish you could get into shape fast without exercise? Wouldn't you love to have a flatter tummy without painful sit-ups?" (Khubani, Tr. 490).

59. Khubani rewrote Liantonio's scripts, creating two new scripts (AB-B-60 and AB-B-120) that were used to shoot the test ads. (Khubani, Tr. 490, 492-93). It was Khubani's regular practice to rewrite Liantonio's scripts. (RX 81 (Liantonio, Dep. at 36)).

60. Khubani testified that he did not want to make the express claims in Liantonio's scripts "because we didn't possess substantiation to make those claims." (Khubani, Tr. 490).

66. The alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are not expressly made in the Ab Force advertisements. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

67. Khubani's intention regarding the advertising did not change from one draft to the other. (Khubani, Tr. 492, 498). For example, Khubani testified that "all these scripts were the same message" and that the "message was . . . still the same" even after changes were made to the scripts. (Khubani, Tr. 492, 496, 497, 498).

68. Each television commercial refers to the product name, includes visual images of primary models and stock footage, and includes oral and written statements. (JX 2; JX 3; JX 4; JX 5).

a. Product Name

69. Khubani testified that he selected the name Ab Force because "it was designed to work primarily on the abdominal area" and he thought it "was catchy, sort of like Air Force." (Khubani, Tr. 264).

70. The name Ab Force implies that the device applies a force to the abdominal muscles and also implies that use of the device will make the abdominal muscles more forceful. (See JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

71. In the short test ad, AB-B-60, the name Ab Force is mentioned three times and in the long test ad, AB-B-120, the name Ab Force is mentioned nine times. (JX 2; JX 3). Moreover, in both test ads, the name Ab Force appears on the screen in a large font size at least four times, not including the order screen. (JX 2; JX 3).

72. In the short rollout ad, AB-E-60, the name Ab Force is mentioned four times and in the long rollout ad, AB-E-120, the name Ab Force is mentioned ten times. (JX 4; JX 5). Moreover, in both rollout ads the name Ab Force appears on the screen in a large font size at least four times, not including the order screen. (JX 4; JX 5).

b. Visual Images

i. Primary Models

73. The television advertisements all feature a female spokesperson, two female models, and a male model. (JX 2; JX 3; JX 4; JX 5).

74. The spokesperson is wearing a business suit; the male model is bare chested with exercise shorts or pants and both female models are wearing sports bras and exercise shorts or pants. (JX 2; JX 3; JX 4; JX 5).

75. Each model has abdomens that are bare except for the Ab Force. (JX 2; JX 3; JX 4; JX 5). Each model is thin with well-defined abs. (JX 2; JX 3; JX 4; JX 5).

76. There are over a dozen depictions of the models wearing the Ab Force and experiencing abdominal muscle contractions. (JX 2; JX 3; JX 4; JX 5).

77. In the longer test and rollout ads, the spokesperson indicates that she is wearing the Ab Force under her business suit, although it is not visible in the ads. (JX 3; JX 5) ("I'm wearing one right now, and it's working while I'm working.").

78. Khubani testified that he used models in the Ab Force ads with slim physiques showing bare parts of their bodies, such as their abs, partly because he felt "this was a product that forced the muscles to involuntarily contract, and the only way you could see what this product was doing and demonstrate what this product does was to show people that were slim enough to show that happening." (Khubani, Tr. 518).

79. Liantonio and her employees at Concepts TV made handwritten notes in the course of creating television commer
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mudels we

80. AConcepts TV mtle ntcontfirmaionwstteou abs,is nimortsnto" (KC 46

amazing . . . promising to get our abs into great shape fast -- without exercise!" (CX 1 H). Khubani testified that this language was included in the test radio script while he was determining "what sounds the best." (Khubani, Tr. 489).

87. The "abs into great shape fast without exercise" language was eliminated from the rollout radio ad and was not included in any of the other ads, although Khubani stated that he felt the print ad and television commercials had the same message as the radio ad. (Khubani, Tr. 488-89, 492, 496, 498).

88. Khubani was asked "there's a reference in the radio ad to no exercise, and the subsequent radio ad did not have that reference. Do you recall that change?" to which he answered, "yes." (Khubani, Tr. 498). The next question asked "did you intend to change the meaning from one ad to the next?" to which Khubani answered, "no, I didn't." (Khubani, Tr. 498).

89. The test ads refer to the "latest fitness craze" while the rollout ads refer to the "latest craze." (JX 2; JX 3; JX 4; JX 5). However, Khubani testified that the message was still the same. (See Khubani, Tr. 495-96).

90. Khubani took out the word "fitness" during a "final review and legal review" and "based on discussions with counsel." (Khubani, Tr. 275, 278).

91. The rollout ads refer to the "same powerful technology as those expensive ab belts" and "same powerful technology as those ab belts sold by other companies," while the test ads state that the Ab Force is "just as powerful and effective" as other ab belts. (JX 2; JX 3; JX 4; JX 5).

92. The sentence "Ab Force is just as powerful and effective" was changed to "Ab Force uses the same powerful technology" during the legal and final review process, although according to Khubani "quite frankly, not that I thought that the other copy was inaccurate." (Khubani, Tr. 276).

93. The opening to the test commercials contain the statements: "I'm sure you've seen those fantastic electronic ab belt infomercials on TV. They're amazing. They're the latest fitness craze to sweep the country, and everybody wants one. The

problem is they're expensive, selling for up to $ 120 each." (JX 2; JX 3; CX 1 B; Khubani Tr. 491).

94. Khubani testified that this language was included to serve as a point of reference for his price saving claims. (Khubani, Tr. 486-89).

95. Khubani also testified that this language was included to create excitement as part of an "everyone wants one" bandwagon effect. (Khubani, Tr. 491-92).

96. A "bandwagon effect" is a frequently observed phenomenon in advertising used to generate interest in a product based on the idea that the product is popular and that consumers should buy it to join in the popularity. (Jacoby, Tr. 373).

97. There are no oral statements in the television or radio advertisements about the purpose or effects of using the Ab Force. (JX 2; JX 3; JX 4; JX 5; CX 1 H).

ii. Written Statements

98. The words on the screen in the rollout ads include the name Ab Force, the price, and ordering information. (JX 4; JX 5).

99. While the announcer is discussing the price savings, the words that appear reinforce that message by stating: "Price of Electronics Comes Down; Mass Production; Factory Deal; Pass Savings On To You!" (JX 2; JX 3; JX 4; JX 5).

100. In the 60 second rollout ad, the phrase "RELAXING MASSAGE" flashes for a brief moment while the spokesperson says "capable of directing." The words then change to "10 INTENSITY LEVELS" while the announcer says "ten different intensity levels at your abdominal area." (JX 4; Khubani, Tr. 279).

101. In the 120 second rollout ad, the phrase "RELAXING MASSAGE" appears briefly while the spokesperson says "it is so comfortable that you can even wear it under . . ." (JX 5). As the words disappear, she finishes the sentence, saying ". . . your clothes." (JX 5).

102. There are no other written statements in the advertisements about the purpose or effect of using the Ab Force. (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

d. No Massage Claims Made

103. Telebrands prepared two User's Manuals to accompany the two different models of the Ab Force product. (Khubani, Tr. 499; RX 45; RX 46).

104. The first lines of both User's Manuals state: "Ab Force is intended to provide a relaxing massage. Ab Force is not intended for medical use, for the treatment of any medical condition, or for any permanent physical changes." (RX 45; RX 46) (emphasis omitted).

105. Consumers did not receive the Ab Force User's Manual until after they received the Ab Force ab belt. (Khubani, Tr. 551).

106. The television and radio scripts written by Khubani do not use the word "massage." (Khubani, Tr. 538; CX 1 H). The print, internet, and email ads Khubani wrote also do not use the word "massage." (CX 1 G; RX 50; RX 51; RX 52).

107. Operations Manager of CCT Marketing, Mark Golden, who worked on the Ab Force campaign, was never told that Ab Force was a massager. (Golden, Tr. 223).

108. In the Ab Force television commercials, the models who were depicted using the Ab Force did not indicate, through gestures or utterances, that they were being soothed or felt more relaxed. (JX 2; JX 3; JX 4; JX 5).

109. None of the Ab Force advertisements used the term electrical muscle stimulation or "EMS." (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 50; RX 51; RX 52).

e. Surrounding Circumstances

i. The Ab Pulse Campaign

110. Ab Pulse was another ab belt marketed by Telebrands. (Golden, Tr. 191). Ab Pulse was similar in appearance to the Ab Force. (CX 2). The Ab Pulse was expressly described in the television advertisement as a "massaging ab belt." (Golden, Tr. 218; CX 2).

111. Elements of the television advertisements for the Ab Pulse were strikingly similar to elements in the television advertisements for the Ab Force. Both advertisements contained: identical oral statements regarding a cost savings from mass production and special deals with the factory; identical oral statements that "I'm wearing one right now and it's working while I'm working;" the identical written statement "Price of Electronics Comes Down; Mass Production; Factory Deal; Pass Savings On To You!"; the same stock images of falling numbers, wheels of technology, and the American flag; the same spokeswoman; and male and female models in sports clothing with abdominal area bare except for the ab belt. (CX 2; JX 2, JX 3; JX 4; JX 5).

112. The primary difference from the Ab Force advertisements was that the Ab Pulse ad affirmatively stated that Ab Pulse was unlike electronic ab belts sold through infomercials by: describing the product as "the most innovative massaging ab belt to hit the market," stating, "don't confuse the Ab Pulse with an electronic ab belt that you've seen on infomercials," and by showing a graphic of a red X superimposed on an ab belt displayed alongside the on-screen legend "infomercial ab belts." (Golden, Tr. 218-19; CX 2). In addition, there are express claims in the Ab Pulse ads that the belt is soothing and comfortable and the product is distinguished from other ab belts which "some people find uncomfortable." (CX 2).

113. Based on sales results, Khubani considered the Ab Pulse campaign a failure. (Khubani, Tr. 281). Ab Pulse was offered for about a month and did not receive high call volume. (Golden, Tr. 222).

ii. Other Companies' Ab Belt Infomercials

114. Unlike the Ab Pulse advertising campaign, the four Ab Force televisions ads, the radio, print, and internet ads, and one of the email ads expressly referred to those "fantastic electronic Ab belt infomercials on TV." (JX 2; JX 3; JX 4; JX 5; CX 1 G; CX 1 H; RX 49; RX 51; RX 52). The other Ab Force email ad expressly referred to "Ab belts sold by other companies on infomercials." (RX 50).

115. When Respondent Khubani wrote the script for the Ab Force radio, print, and television ads, and the text for the internet and email ads, he testified that he was attempting to create a "compare and save" advertisement and to establish a point of reference. (JX 1, P 11; Khubani, Tr. 486-87, 489-90).

116. Khubani testified that in "compare and save" advertising, there must be a point of reference for comparison; otherwise the consumer doesn't know "what you're comparing to." (Khubani, Tr. 487).

117. The AbTronic, Ab Energizer, and Fast Abs infomercials were among the ab belt infomercials to which Khubani was referring. (Khubani, Tr. 273-74).

118. AbTronic, Ab Energizer, and Fast Abs were EMS ab belts that were advertised by television infomercials in the United States prior to and during the time period when the Ab Force commercials appeared. (JX 1, P 37).

119. AbTronic, Ab Energizer, and Fast Abs were substantially similar in appearance to the Ab Force, and were comprised of components substantially similar to those used by the Ab Force. (JX 2; JX 3; JX 4; JX 5; JX 7; JX 8; JX 9; JX 10; Mazis, Tr. 60). The Fast Abs and the AbTronic resemble the Ab Force in the button configuration on the belts. (Khubani, Tr. 271).

120. The advertising for the AbTronic, Ab Energizer, and Fast Abs ab belts made express and strongly implied claims that consumers using these devices would lose weight, fat, and inches; gain well-defined abdominal muscles; and achieve such results without the need for exercise. (JX 7; JX 8; JX 9; JX 10; Mazis, Tr. 47-48).

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121. The television advertising for the AbTronic, Ab Energizer, and Fast Abs ab belts contained extensive footage of thin male and female models with well-defined abs wearing the belts over their abdominal areas. (JX 7; JX 8; JX 9; JX 10). These images were displayed on the screen while the infomercial hosts repeatedly represented that the devices caused weight, inch, or fat loss; caused well-developed abs; and were an effective alternative to regular exercise. (JX 7; JX 8; JX 9; JX 10).

122. The AbTronic infomercials stated: "well, you can lose all the weight in the world that you want, but unless you have good muscle tone underneath, you're not going to have a washboard abdomen;" "with systems like the AbTronic where we can stimulate these muscles and you do both things, both the system of losing some weight, losing those inches, and then firming and toning the muscles underneath, that muscle definition will, therefore, show through much better and give you better cosmetic improvement;" and "watch as ycles contract as if you're doing a sit-up . . . . Ten minutes on the AbTronic is the equivalent of 600 sit-ups. That's why we guarantee you'll lose two inches off your midsection in less than a month or your money back." (JX 7; CX 96, Ex. 2 at 10-11, 14, 27, 39).

123. The Ab Energizer infomercial contains statements: that the Ab Energizer was "absolutely incredible for people who want tighter abs and want to lose inches around the midsection" and that "with a touch of a button, you can go from flab to rock-hard abs." (JX 8; CX 98, Ex. 2 at 3, 10, 11). The 60 second television spot for the Ab Energizer ab belt contains the following statements: "the secret is Ab Energizer's electronic impulses that stimulate yodr abs so they contract and relax as if you were doing a sit-up;" "now you can get up to 700 muscle contractions in just 10 minutes and get the tone and definition you've always wanted;" "I've gone from a waist 37 to a waist 34;" and "if you don't lose at least two inches off yodr waist in the first 30 days, return it for a full refund." (CX 98, Ex. 4 at 3, 4, 5).

124. The Fast Abs infomercial contained the following statements: "you'll drop four inches in the first 30 days. We guarantee it;" "in fact, just 10 minutes of Fast Abs is like doing

53, 59; CX 100, Ex. D at 32, 63).JX 1, P 37). The J.W. Greensheet is a DRTV industry publicatio

130. The Ab Energizer infomercial appeared nineteen times in the Top 50 infomercial rankings published in the J.W. Greensheet reports between October 15, 2001 and March 4, 2002. (Towers, Tr. 297; CX 77 at T011161; CX 78 at T011145; CX 79 at T011129; CX 80 at T011112; CX 62 at T011098; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011407; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011350; CX 95 at T011504).

131. The Ab Energizer television spot appeared nineteen times in the Top 40 direct response spots rankings published in the J.W. Greensheet reports between October 15, 2001 and March 4, 2002. (CX 77 at T011163; CX 78 at T011147; CX 79 at T011131; CX 80 at T011114; CX 62 at T011100; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85 at T011339; CX 86 at T011327; CX 87 at T011315; CX 88 at T011301; CX 89 at T011287; CX 90 at T011409; CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011351; CX 95 at T011505).

132. Fast Abs infomercials appeared fifteen times in the Top 50 infomercial rankings published in the J.W. Greensheet reports between November 19, 2001 and March 4, 2002. (Towers, Tr. 298; CX 62 at T011099; CX 82 at T011084; CX 83 at T011071; CX 84 at T011060; CX 85 at T011337; CX 86 at T011325; CX 87 at T011313; CX 88 at T011299; CX 89 at T011285; CX 90 at T011406; CX 91 at T011393; CX 92 at T011379; CX 93 at T011364; CX 94 at T011349; CX 95 at T011503).

133. The Fast Abs television spot appeared fifteen times in the Top 40 direct response spots rankings published in the J.W. Greensheet reports between November 19, 2001 and March 4, 2002. (CX 62 at T011101; CX 82 at T011086; CX 83 at T011073; CX 84 at T011062; CX 85 at T011340; CX 86 at T011328; CX 87 at T011315; CX 88 at T011301; CX 89 at T011287; CX 90 at T011410;CX 91 at T011395; CX 92 at T011381; CX 93 at T011366; CX 94 at T011352; CX 95 at T011506).

134. AbTronic, Ab Energizer, and Fast Abs were the only ab belts that appeared in the J.W. Greensheet Top 50 infomercials rankings between early September 2001 and mid-April 2002. (Towers, Tr. 305).

T011327; CX 87 at T011315; CX 88 at T011301; CX 90 at T011409; CX 91 at T011395; CX 92 at T011381; CX 93 at T011367).

140. The Mini Wireless Massage System product is not an electronic ab belt and was advertised in spot advertising, not infomercials. (RX 73; Towers, Tr. 301, 304). The television commercial for the Mini Wireless Massage System promises a "soothing and relaxing massage" and promises to "relieve muscle pain, soreness, and stiffness." (RX 73; Khubani, Tr. 459). The television spot for the Mini Wireless Massage System did not appear in the Top 40 commercial spot rankings published in the J.W. Greensheet from September 2001 through February 2002. (CX 62; CX 72-CX 95).

141. The Accusage product is not an electronic ab belt. (RX 74; Towers, Tr. 301-02). The Accusage promises a "relaxing muscle massage." (RX 74). The Accusage was listed once in the Top 40 Direct Response Spots in the J.W. Greensheet for the weeks of December 24, 2001 (CX 86 at T011328) and January 14, 2002 (CX 88 at T011309).

142. The television spot for the Smart Toner ab belt states that the product is "the fast, easy, sexy way to have the slim, sexy

gym." (RX 76). The infomercial for the GymFitness ab belt did not appear in the Top 50 infomercial rankings or the Top 40 commercial spot rankings in the J.W. Greensheet from September 2001 through February 2002. (Towers, Tr. 302-03; see also CX 62; CX 72-CX 95).

144. The ElectroGym advertisement provided by Respondents was a short spot, not an infomercial. (RX 77). The ElectroGym

2001 through February 2002. (See Towers, Tr. 305; CX 62; CX 72-CX 95).

2. Extrinsic Evidence

147. Complaint Counsel offered the expert opinion of Michael

152. Respondents offered the expert opinion of Jacob Jacoby, Ph.D who severely criticized Mazis's analysis and conclusions. (Jacoby, Tr. 335 et. seq).

153. Jacoby holds an endowed chair at the Stern School of Business at New York University where he teaches research methodology and consumer behavior courses. (Jacoby, Tr. 336-37).

154. Jacoby served as a peer reviewer on the chapter on survey research evidence in the Reference Manual on Scientific Evidence published by the Federal Judicial Center and wrote the chapter on consumer psychology in the International Encyclopedia of the Social and Behavioral Sciences. (Jacoby, Tr. 337-39).

155. Jacoby served as president of the Association for Consumer Research and the Society for Consumer Psychology and is a fellow of both institutions and has received awards from the Association for Consumer Research and from the Society for Consumer Psychology for research excellence. (Jacoby, Tr. 339-40).

156. Jacoby received several major grants from the National Science Foundation and from the American Association of Advertising Agencies to study the comprehension and miscomprehension of advertising. (Jacoby, Tr. 339).

a. Mazis's Facial Analysis of the Ab Force Ads

157. Mazis opines that consumers took away from the Ab Force ads certain core performance claims that were either the result of familiarity with ads for other ab belts or implied by images and words within the four corners of the Ab Force ads. (Mazis, Tr. 61-62).

i. Direct Effects Within the Fe Ab Fhs-Q6D[Mrsciation for

4mplied blaims (Jazis, Tr. 61667().

159. "Even if you had never heard of an ab belt before, even if you didn't have any category beliefs about ab belts, you could see the ad and you could make inferences because there's certain implied claims in the ads." (Mazis, Tr. 66).

160. "Visual images are really more important than the verbal messages, because they really remain in people's memories." (Mazis, Tr. 59).

161. Direct effects in the challenged ads include the appearance of fit, trim models and the depiction of the Ab Force belt, itself, shown visibly pulsating the abdominal muscles of the models. (Mazis, Tr. 66-67).

162. Another direct effect is the name Ab Force which could have a double effect on consumers: "on the one hand, it applies force to your abs because of this stimulation, and you can also say it makes your abs a force. In other words, it makes your abs noticeable, that they . . . are really well developed." (Mazis, Tr. 60).

ii. Indirect Effects of the Ab Force Ads

163. Mazis refers to the effects generated on consumers because of previous exposure to ab belts through either the infomercials for AbTronic, Ab Energizer, or Fast Abs, word-of-mouth about ab belts, and retail packaging for ab belts as "indirect effects" which cause consumers to develop an ab belt category of beliefs. (Mazis, Tr. 48, 65-66).

164. Mazis testified that these beliefs would cause consumers to associate ab belts with well-developed abs, losing inches, losing weight, and effective alternatives to exercise. (Mazis, Tr. 48). As a result of these indirect effects, Mazis opines that the Ab Force television spots contain implied claims that using Ab Force will result in well-developed abs and loss of inches around the waist. (Mazis, Tr. 61).

165. In identifying indirect effects that could shape and influence a consumer's category beliefs, Mazis reviewed and considered the Complaint and exhibits in this matter; transcripts and videotapes of the infomercials for AbTronic, Ab Energizer,

and Fast Abs; and infomercial ranking reports for the AbTronic, Ab Energizer, and Fast Abs products. (Mazis, Tr. 120-21; CX 58, P 9).

166. Mazis testified that the ab belt category beliefs may be effected by word-of-mouth communication generated by viewers of the infomercials, or by people who have purchased an ab belt and communicated their impressions to others who did not see the ads, or by seeing the packaging for them on display in retail outlets. (Mazis, Tr. 64-65, 169-70). According to Mazis, people could be exposed to claims that appear on the retail packaging for ab belt products that appear on the shelves of retail outlets and they could use such information to form their own category beliefs. (Mazis, Tr. 139-40, 170-71).

167. According to Mazis, people exposed to infomercials for other ab belts do not necessarily remember the specifics of the ads they saw, rather, the ab belt infomercials produce general category beliefs about ab belts that would be triggered by the Ab Force ads. (Mazis, Tr. 156-57).

168. Mazis provided no empirical evidence that Ab Force advertisement viewers who happened to see the ads for AbTronic, Ab Energizer, or Fast Abs would remember or take away that information. (Mazis, Tr. 184).

169. Mazis's opinion is grounded in the psychological/consumer behavior theory of "categorization." (Mazis, Tr. 49, 156-57). He testified that according to the categorization theory, people take objects such as products and group them together in categories based on their similarity. (Mazis, Tr. 49, 156-57).

170. The categorization theory is generally accepted in the field of consumer behavior. (Mazis, Tr. 49). A leading proponent of the theory, Mita Sujan, published a well-known peer-reviewed article on the subject in the Journal of Consumer Research about fifteen years ago. (Mazis, Tr. 49).

171. According to Sujan, the "basic premise [of the categorization approach] is that people naturally divide the world of objects around them into categories enabling an efficient

understanding and processing of the environment. . . . If a new stimulus can be categorized as an example of a previously defined category, then the affect associated with the category can be quickly retrieved and applied to the stimulus." (CX 57 at 31).

172. Sujan investigated if and how novice and expert consumers processed information regarding one category of cameras in relation to another. (CX 57). In reaching a conclusion, Sujan designed an experiment whereby two descriptions were given in simulated print ads and were used to match or mismatch conditions to eliminate the confound between the manipulation of information match/mismatch and the actual content of the

sufficient to trigger any category beliefs that consumers may have. (Jacoby, Tr. 367).

177. Jacoby indicated that in order to determine whether there was an impact on consumers, further research needs to be conducted. (Jacoby, Tr. 370-72).

178. Mazis, however, testified that four key elements in the Ab Force commercials would cause consumers to categorize the Ab Force with the AbTronic, Ab Energizer, and Fast Abs ab belts. (Mazis, Tr. 59-60). These four elements are: references in Ab Force ads to the other ab belts on television, the visual images of models with well-developed abs and slim bodies, the physical appearance of the Ab Force product which is similar to the other ab belts, and the similarity of the name Ab Force to the names of the other ab belts. (Mazis, Tr. 59-60).

179. When asked at trial whether he should have considered other EMS ab products in reaching his opinions, Mazis testified that while consumers would form a category belief based on seeing EMS ab belts, they would not include in that category other EMS ab products unless they were "relatively similar" in appearance. (Mazis, Tr. 135-36).

180. When asked whether products with a number of patches as opposed to one patch, and which made similar claims, could be considered in the category, Mazis admitted that he would need to examine the product and the ads before he could reach any opinion: "It would be one of those things where I would have to see the product and look at the -- look at the advertisements. I just -- answering it hypothetically is basically impossible." (Mazis, Tr. 136).

181. Mazis indicated that there "might be a different category" established for products that looked different (for example, products that had wires) and that made some different claims. (Mazis, Tr. 136).

have necessarily retained or even comprehended the ads. (Mazis, Tr. 172). He testified that retention would depend on "a lot of factors that go into that," none of which he described or demonstrated applied in this case. (Mazis, Tr. 172).

188. Mazis admitted that he had seen no empirical data about the ability of viewers to remember what they saw in the infomercials for AbTronic, Ab Energizer, and Fast Abs. (Mazis, Tr. 184). He conceded that his opinions "about the take-away from those ads are just based on my facial analysis of those ads." (Mazis, Tr. 184).

189. Mazis did not know what messages were being conveyed by advertisements or packaging for other EMS ab products. (Mazis, Tr. 167-71). Mazis did not know what messages were being conveyed by word-of-mouth communication. (Mazis, Tr. 169-70). Mazis did not know what other print or radio advertisements were being disseminated. (Mazis, Tr. 181-82). Indeed, Mazis admitted that when he referred to category beliefs, he was referring only to "ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer, and Fast Abs]." (Mazis, Tr. 171-72).

190. Despite having no reliable information regarding how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired, Mazis stood by his belief that "many consumers would have been exposed to these ads." (Mazis, Tr. 166).

191. Because Mazis failed to test the theory that consumers necessarily formed or retained categorization beliefs about EMS ab products prior to viewing the Ab Force ads, or whether they even saw any of the ads for AbTronic, Ab Energizer, or Fast Abs prior to seeing the Ab Force ads, Mazis's opinion that there was categorization by consumers is merely speculation, not evidence of the association. (Jacoby, Tr. 347-51).

192. Mazis's assumption that consumers who saw the Ab Force ad also likely saw the ads for AbTronic, Ab Energizer, and Fast Abs is mere speculation that was untested in this matter. (Jacoby, Tr. 367). Mazis's opinion that consumers actually

developed categorization beliefs is mere untested speculation. (Jacoby, Tr. 347-51).

b. The Copy Test

193. Mazis conducted a consumer survey in which he designed a copy test of an Ab Force television spot. (Mazis, Tr. 67).

194. A copy test is an in-person survey in which people are shown an advertisement, and asked a number of questions in terms of their perceptions of the advertisement, which is sometimes referred to as the "take-away" from the advertisement. (Mazis, Tr. 67).

195. The purpose of the copy test was to assess whether a 60 second advertisement for Ab Force communicates to consumers that using Ab Force results in well-developed abdominal muscles; causes users to lose inches around the waist; causes users to lose weight; is an effective alternative to exercise; and removes fat deposits. (CX 58, P 22).

196. Copy testing the Ab Force ad was preferable to surveying past purchasers of Ab Force ab belts because people are not likely to remember why they bought a product a year or more ago or exactly what claims the ads made, and they might make up(ment.)]Td re0ar oeemake1ref tsactlya

i. The Universe for the Copy Test Was Properly Defined

199. The copy test was conducted in nine shopping malls located in Albuquerque, NM; Austin, TX; Colorado Springs, CO; Orlando, FL; Poughkeepsie, NY; St. Louis, MO; Schenectady, NY; Seattle, WA; and Toledo, OH. (Mazis, Tr. 67-68; CX 58, P 24).

200. The choice of the mall locations assured geographic diversity throughout the country and facilitated achieving an approximately equal number of interviews in the four Census regions. (Mazis, Tr. 71).

201. Copy test interviews were conducted in December, 2003 and January, 2004. (CX 58, P 25).

202. Interviewers from U.S. Research approached shoppers in the selected malls and asked them if they would answer a few brief questions. (Mazis, Tr. 72).

203. Interviewers used a screening questionnaire ("screener") designed by Mazis to determine whether potential respondents were qualified to participate in the study. (Mazis, Tr. 68; CX 58, P 26; CX 58, Ex. C).

204. Age and sex quotas for copy test survey participants were based upon the results of a 1996 survey of consumers who were trying to lose weight and which was published in the October 13, 1999 issue of the Journal of the American Medical Association. (Mazis, Tr. 71-72; CX 58, P 23).

205. The survey called for a survey universe of sixty percent females, forty percent males with twenty percent 18-29 years of age, forty five percent 30-49 years of age, and thirty five percent 50 years of age and older. (Mazis, Tr. 71-72; CX 58, P 23).

206. The screener asked both "inclusion" questions and "exclusion" questions. (Mazis, Tr. 73-76; see CX 58, P 26). These questions were designed to bring into the study people who might have some propensity to buy the product and eliminate people who wouldn't be typical consumers. (Mazis, Tr. 68).

207. The questionnaire screened out people who worked for an advertising agency, a public relations firm, or a marketing

research firm because they would have specialized knowledge of research technique. (Mazis, Tr. 75; CX 58, Ex. E).

208. Likewise, the questionnaire screened out people who worked for a store or company that sells exercise, fitness, weight loss products or programs, or products to massage the body because such people would have specialized knowledge about fitness, exercise, weight loss, or massage and consequently would not be typical consumers who would have a propensity to purchase the Ab Force. (Mazis, Tr. 75; CX 58, Ex. E).

209. In order to qualify for the study, potential survey participants had to have purchased in the past twelve months a product or used a service to help them lose weight, tone muscles, or massage the body. (CX 58 at 26; Mazis, Tr. 73-74). Consumers who had bought products or used a service to lose weight, tone their muscles, or massage their body were in a class of likely purchasers of the Ab Force ab belt. (Mazis, Tr. 73). Jacoby opined that this particular question was appropriate. (Jacoby, Tr. 353-54).

210. In addition, potential respondents, in the past twelve months, had to have purchased a product by calling a toll-free number that was included in a television ad, program, or infomercial. (CX 58, P 26; Mazis, Tr. 74-75). Consumers who never bought products by calling toll free numbers in response to television ads, programs, or infomercials would be unlikely purchasers of the Ab Force. (Mazis, Tr. 75).

211. The screening questionnaire did not ask about prior purchases of ab belts. (Mazis, Tr. 152).

212. The screening questionnaire did not ask about whether people had been exposed to advertising for ab belts. (Mazis, Tr. 153-54).

213. The screening questionnaire also included "masking" questions regarding working for companies that sell personal computers or prescription drugs that served to disguise the true intent of the study and prevent people from assuming that the study was for a fitness or massage product. (Mazis, Tr. 74; CX 58, Ex. E).

ii. The Control Advertisement

214. Survey respondents who qualified to participate in the study were randomly assigned to either a test group or a control group. (CX 58, PP 12, 27). The test group (consisting of 182 survey respondents) watched a version of the Ab Force ad (CX 104) that Respondents aired most often (AB-E-60). (Mazis, Tr. 79; CX 58, PP 12, 27). The control group (consisting of 220 survey respondents) saw an advertisement created by Mazis (CX 105) that was a "cleansed" (60 second) version of one of the 120 second rollout commercials for Ab Force. (Mazis, Tr. 83; CX 58, P 28).

215. "Use of a control group is an attempt to essentially remove preexisting beliefs as a possible cause of the results we see." (Mazis, Tr. 157).

216. A "cleansed" or control ad may have allegedly misleading elements removed and/or a statement correcting the alleged deception. (CX 58, P 28).

iii. The Questions Were Unbiased and Appropriate

222. The control ad included the following statement at the end of the commercial: "Ab Force for a relaxing massage" which appeared on the screen and was read by an announcer. (Mazis, Tr. 88-89; CX 58, P 28).

223. Survey respondents who qualified for the study were escorted to the interviewing facility maintained by the research organization and were administered one of the two versions of the "main" questionnaire. (Mazis, Tr. 77-78).

224. Approximately one half of the survey respondents were administered questionnaire version Version 1A and the other half Version 1B. (Mazis, Tr. 92). Each version contained exactly the same questions, but the order was changed to control for bias resulting from question ordering. (Mazis, Tr. 92; CX 58, P 29).

225. In addition, each version of the questionnaire was color coded blue or green to correspond to either the "blue dot" test ad or the "green dot" control ad. (Mazis, Tr. 91-92). Respondents were initially asked to identify the color of the dot on the tape cassette they were about to view. (Mazis, Tr. 91-92). This was done to assure that respondents viewed the correct commercial. (Mazis, Tr. 91; CX 58, P 30).

226. Survey participants were assigned to the test group or the control group at random. (Mazis, Tr. 90).

227. Each survey participant saw the test ad or the control ad twice before the questionnaire was administered. (CX 58, P 31; Mazis, Tr. 92).

228. Survey participants were asked to identify the brand name of the product that was advertised in the commercial they had just seen. (CX 58, P 31). The eighty one survey participants who were unable to identify the sponsor were not asked any of the subsequent questions and were eliminated from the study. (Mazis, Tr. 93, 147-48; CX 58, P 31).

229. Mazis testified that the failure of eighty one participants to recall the name of the product indicated to him that those

participants were not paying attention to the ad, which he considered a good reason not to include them in the final result. (Mazis, Tr. 147).

230. Eliminating inattentive participants from the survey, although not required, was not unreasonable because inattentive survey respondents may have been unlikely to give meaningful responses to the ensuing questions. (See Mazis, Tr. 94).

231. The remaining participants were then asked an open-ended question: "what did the commercial say, show, or imply about Ab Force?" (CX 58, P 32).

232. Open-ended questions are questions in which there are no defined answer categories. (Mazis, Tr. 95) ("People just give the answer in their own words, and the interviewer records that response verbatim.")

233. Question 4 asked respondents whether the commercial said, showed, or implied that Ab Force improves users' appearance, fitness, or health. (CX 58, P 33). Participants were shown a card with only three possible answers: "yes, it does," "no, it doesn't," or "don't know or no opinion," and asked to provide one of those three answers. (CX 58, P 33). This is a "filter" question designed to reduce guessing to subsequent questions. (CX 58, P 33).

234. Only participants who answered question 4 in the affirmative were asked the ensuing close-ended questions. (CX 58, P 33; Mazis, Tr. 95).

235. The purpose of the filtering question was to eliminate participants who might be prone to guess in answering subsequent closed-ended questions. (Mazis, Tr. 95; CX 58, P 33). If participants did not see a fitness, health, or appearance claim in the commercial, their answers to the more specific questions would not be very reliable. (Mazis, Tr. 95).

236. Question 5 began with participants being informed that they would be read a list of statements, of which, some, all, or none, may have been implied by or made in the Ab Force commercial. (Mazis, Tr. 95-96).

237. This instruction was followed by a series of eight statements with the order rotated throughout the questionnaires so that there was no order bias. (CX 58, P 34; Mazis, Tr. 96).

238. Five of the eight statements were at issue in the case:

> "Using Ab Force causes users to lose inches around the waist."
> "Using Ab Force results in well-defined abdominal muscles."
> "Using Ab Force removes fat deposits."
> "Using Ab Force is an effective alternative to regular exercise."
> "Using Ab Force causes users to lose weight."

(CX 34; Mazis, Tr. 97-98).

239. The three other statements (regarding stomach ulcers, nausea, and blood pressure) were included to mask the intent of the study. (CX 58, P 34). Mazis explained that these were included to assure that participants were paying attention and not just saying yes to every question. (Mazis, Tr. 97).

240. After each statement was read to participants, they had the opportunity to select one of three possible answers: "YES, it is implied by or made in the Ab Force Commercial," "NO, it is not implied by or made in the Ab Force commercial," or, "You DON'T KNOW or you have NO OPINION." (Mazis, Tr. 96; CX 58, P 34).

241. Question 6 asks "does or doesn't the Ab Force commercial say, show, or imply that the Ab Force gives users a massage?" (Mazis, Tr. 98). Mazis explained that this question was included in anticipation of Respondents' claim that their ads conveyed a massage claim. (Mazis, Tr. 98).

242. This massage question was asked before question 4 (the appearance, fitness, health question) in half of the questionnaires to control for order bias. (Mazis, Tr. 98-99).

243. Question 7 asks whether, in the last thirty days, respondents had seen, read, or heard a news story or stories featuring an abdominal device. (Mazis, Tr. 100).

244. Question 7 was added just before the study was about to go into the field and was prompted by recent news accounts on television discussing an FTC action regarding companies making weight loss claims with depictions of ab belts. (Mazis, Tr. 99).

245. Those who answered affirmatively were asked "as best you can remember, what did the news story or stories say about abdominal belt ab belts?" (CX 58, P 36).

252. After validation, Mazis removed the questionnaires of the forty one people who, in response to question 7, indicated either that ab belts were ineffective, didn't cause weight loss, were dangerous, or were a false advertising scam. (CX 58, P 41; Mazis, Tr. 100, 154-56).

253. Mazis also did not include the eighty one partially completed questionnaires of survey respondents who were inattentive and unable to identify Ab Force as the sponsor of the advertisement. (Mazis, Tr. 102; CX 58, P 41).

254. Therefore, 389 questionnaires were included in the data tabulations. (CX 58, P 41).

iv. Results

255. Copy test results were reported in total percentages, and then in terms of statistical significance. (CX 58).

256. Under Mazis's supervision, U.S. Research developed a coding framework for the open-ended question: "what did the commercial say, show, or imply about Ab Force?" (CX 58, P 38; CX 58, Ex. F; Mazis, Tr. 104). Two independent coders, who were unaware of the study's purpose, coded the responses to the open-ended question. (Mazis, Tr. 102).

257. The responses to this open-ended question reveal that 22.3% of survey respondents in the test ad group and 11.9% of the survey respondents in the control group indicated that the advertisement communicated that using Ab Force results in well-defined abdominal muscles, in loss of weight or inches around the waist, or in an improved physique. (CX 58, P 42; Mazis, Tr. 104-05).

258. For the statement that using Ab Force causes users to lose weight, 43% of the test group and 28.1% of the control group responded affirmatively. (Mazis, Tr. 107). The net difference between the test group and the control group for the lose inches around the waist statement was 15.7%. (Mazis, Tr. 106). That result was statistically significant at the .01 level. (Mazis, Tr. 107).

259. To the statement that using Ab Force causes users to lose inches around the waist, 58.1% of the test group and 42.4% of the control group responded affirmatively. (Mazis, Tr. 106). The net difference between the test group and the control group for the lose inches around the waist statement was 15.7%. (Mazis, Tr. 106). That result was statistically significant at the .01 level. (Mazis, Tr. 106).

260. For the statement that using Ab Force removes fat deposits, 22.9% of the test group and 19.0% of the control group responded affirmatively. (Mazis, Tr. 107). The net difference between the test group and the control group of 3.9% was not statistically significant. (Mazis, Tr. 107).

261. To the statement that using Ab Force results in well-defined abdominal muscles, 65.4% of the test group and 48.1% of the control group responded affirmatively. (Mazis, Tr. 106). The net difference between the test group and the control group for the well-defined muscles statement was 17.3%. (Mazis, Tr. 106). That result was significant to the .001 level. (Mazis, Tr. 106).

262. For the statement that using Ab Force was an effective alternative to exercise, 39.1% of the test group and 28.6% of the control group responded positively. (Mazis, Tr. 107). The net difference between the test group and the control group for the lose inches around the waist statement was 10.5%. (Mazis, Tr. 107). That result was statistically significant at the .05 level. (Mazis, Tr. 107).

263. The following chart summarizes the affirmative responses to each of the five key closed-ended statements posed in Question 5:

-nitial ecision

Using Ab Force . . .	TEST AD	CONTROL AD
Results in well-defined abdominal muscles	117 (65.4%)	101 (48.1%)
Causes users to lose inches around the waist	104 (58.1%)	89 (42.4%)
Causes users to lose weight	77 (43.0%)	59 (28.1%)
Is an effective alternative to exercise	70 (39.1%)	60 (28.6%)
Removes fat deposits	41 (22.9%)	40 (19.0%)
Lowers blood pressure	9 (5.0%)	6 (2.9%)
Relieves nasea	2 (1.1%)	4 (1.9%)
Relieves pain from stomach ulcers	0 (0%)	9 (4.3%)

(CX 58, P 47).

264. If the maximum percent of participants who responded affirmatively to the control questions is subtracted from the percent responding affirmatively to the tested ad, then the claims at issue were found by 60.4% (well-defined abdominal muscles); 53.1% (lose inches around the waist); 38% (lose weight); 34.1% (alternative to exercise) and 17.9% (removes fat deposits). (See F. 258-63, 267-69).

265. The level of affirmative responses for the control ad was relatively high, particularly for the well-defined abdominal muscles response (48.1%) and the inches around the waist response (42.4%). (Mazis, Tr. 107-08; CX 58, P 45).

266. Mazis attributed the high level of response to survey respondents' prior knowledge of ab belts and the presence in the control ad of the name Ab Force and the visual image of an ab belt around the waist. (Mazis, Tr. 108; CX 58, P 45).

267. None of the test group and only 4.3% of the control group answered yes to the statement about stomach ulcers. (CX 58, Ex. H at 12).

268. To the statement about relieving nausea, only 1.1% of the test ad participants and 1.9% of the control ad participants answered yes. (CX 58, Ex. H at 15).

269. Only 5.0% of the test group and 2.9% of the control group said yes to the statement that Ab Force lowers blood pressure. (CX 58, Ex. H at 17).

C. The Ab Force Does Not Cause Loss of Weight, Inches, or Fat; Does Not Cause Well-Defined Abdominal Muscles; and Is Not an Effective Alternative to Regular Exercise

270. Use of the Ab Force does not cause loss of weight, inches, or fat. (JX 6, P 16)

271. Use of the Ab Force does not cause well-defined abdominal muscles. (JX 6, P 17)

272. Use of the Ab Force is not an effective alternative to regular exercise. (JX 6, P 18)

273. Respondents did not possess and rely upon substantiation for the alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. (JX 6, P 19)

D. Claims That Use of the Ab Force Causes Loss of Weight, Inches, or Fat; Causes Well-Defined Abdominal Muscles; and Is an Effective Alternative to Regular Exercise Are Material to Consumers

274. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise relate to the central purpose of the Ab Force and are material to consumers. (See F. 97, 102-109).

275. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise involve appearance, fitness, or health claims and are material to consumers. (See CX 58).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2); FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994); American Fin. Services Assoc. v. FTC, 767 F.2d 957, 966 (D.C. Cir. 1985); Koch v. FTC, 206 F.2d 311, 315 (6th Cir. 1953)). The Ab Force ab belt, an EMS device which uses electronic stimulation of the muscles, is a device within the meaning of Section 15 of the FTC Act which defines "device" as including "an instrument, apparatus, implement, machine, [or] contrivance . . . which is. . . intended to affect the structure or any function of the body of man." 15 U.S.C. § 55(d). Respondents engaged in a nationwide advertising campaign to offer for sale and sell the Ab Force. F. 41-53. Respondents were engaged in and affected commerce, as "commerce" is defined in Section 4 of the FTC Act. 15 U.S.C. § 44. Respondents do not dispute that the acts and practices of Respondents challenged in the Complaint have been and are now in or affecting commerce, as "commerce" is defined in the FTC Act, or that the Federal Trade Commission has jurisdiction in this proceeding. RRPFF at 157, 159. Accordingly, the Commission has jurisdiction over Respondents and the subject matter of this proceeding.

2. Burden of Proof

Under Commission Rule of Practice 3.51(c)(1), "an initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1). The Commission made amendments to its Rules of Practice, effective May 18, 2001. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622 (April 3, 2001). Through these amendments, the Commission removed the requirement of Rule 3.51(c)(3) that the initial decision of an Administrative Law Judge ("ALJ") be supported by "substantial" evidence. 66 Fed. Reg. at 17,626. The Administrative Procedure Act, however, requires that an ALJ may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable,

probative, and substantial evidence." Administrative Procedure

reasonably under the circumstances, in a material respect." Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992); see also Pantron, 33 F.3d at 1095; In re Thompson Medical, 104 F.T.C 648, 788 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986). "In implementing this standard, the Commission examines the overall net impression of an ad and engages in a three-part inquiry: (1) what claims are conveyed in the ad; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers." Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000); accord Kraft, 970 F.2d at 314.

The Complaint alleges that the Ab Force advertisements made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise; that these claims are false and misleading; and that these claims are material to consumers. Complaint PP 19-23.

1. Whether the Claims at Issue Are Conveyed in the Ad

To prove its case, Complaint Counsel must establish that consumers, acting reasonably under the circumstances, would likely interpret the message of the advertisement to have conveyed the alleged claims. See In re Novartis Corp., 127 F.T.C. 580, 679 (1999), aff'd, 223 F.3d 783 (D.C. Cir. 2000). Claims may be either express claims or implied claims. In re Kraft, Inc., 114 F.T.C. 40, 120 (1991), aff'd, 970 F.2d 311 (7th Cir. 1992); unde F..7(und);

Moreover, evidence that consumers have actually been misled is not necessary; the likelihood of deception is the standard by which the advertising is judged. American Home Prods. Corp. v. FTC, 695 F.2d 681, 687, 687 n.9 (3d Cir. 1982); In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984).

In determining whether the asserted claims were made, the advertising, itself, is reviewed in a facial analysis. If it can be determined with confidence from the facial analysis that the claims appear in the advertising, then resort to extrinsic evidence of those claims is unnecessary. Novartis, 127 F.T.C. at 680; In re Stouffer Foods Corp., 118 F.T.C. 746, 798 (1994); Kraft, 114

ii. Implied Claims -- from Four Corners

Implied claims are any claims that are not express. Kraft, 114 F.T.C. at 120. Implied claims range on a continuum from claims that would be "'virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.'" Id. (quoting Thompson Medical, 104 F.T.C. at 789); accord Novartis, 127 F.T.C. at 680. Implied claims will only be found where it may be determined with confidence, after examining all of the constituent elements of the advertising, that the challenged implied claims are conspicuous, self-evident, or reasonably clear on the face of the ad. Kraft, 970 F.2d at 318-20; Thompson Medical, 104 F.T.C. at 320.

An advertisement will only be found to contain implied claims where the "language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances." Kraft, 114 F.T.C. at 121; Thompson Medical, 104 F.T.C. at 789. However, "if, based on [an] initial review of the evidence from the advertisement itself, we cannot conclude with confidence that an advertisement can reasonably be read to contain a particular

case, the product name, visual images, and statements all contribute to the overall net impression of the advertisements, taken as a whole.

A product name may play a role in implying a claim. E.g., Jacob Siegel Co. v. FTC, 327 U.S. 608, 609 (1946) (addressing order where name "Alpacuna" implied that the product contained vicuna); Thompson Medical, 104 F.T.C. at 793 (name "Aspercreme" implied that product contains aspirin). Upon a facial review of the challenged Ab Force advertisements, the Court determines that the name Ab Force conveys the impression that the device works on the abdominal muscles -- either because it applies force to the abs or because it makes the abs more forceful. See F. 162. As Khubani admitted, the name Ab Force was selected because "the product was designed to work primarily on the abdominal area." F. 69. That Khubani also claims he chose the name because of the play on "Air Force" does not preclude other interpretations. See Kraft, 114 F.T.C. at 120; Thompson Medical, 104 F.T.C. at 789. While the name Ab Force, alone, would not be sufficient to imply a claim, in combination with the visual images and words used, it contributes to the overall net impression that use of the Ab Force confers health, weight loss, exercise, or fitness benefits.

designed to provide health, weight loss, fitness, or exercise benefits.

Statements contained in advertisements may also be used to determine implied claims. See, e.g., Kraft, 114 F.T.C. at 322. The statements in the challenged Ab Force advertisements are both oral and written on the screen. F. 86-102. The test radio ad opened by referring to other ab belt infomercials, stating that they "promise to get our abs into great shape fast -- without exercise." F. 86. When asked whether he intended to change the meaning in the rollout radio ad (which did not include the "no exercise" language), Khubani said that he did not. F. 87-88. The test

iii. Implied Claims -- from Surrounding Circumstances

The "circumstances surrounding" advertising, including the advertiser's intent, may be considered in false advertising cases. Thompson Medical, 104 F.T.C. at 789; Novartis, 127 F.T.C. at 683. "While a respondent need not intend to make a claim in order to be held liable, evidence of intent to make a claim may support a finding that the claims were indeed made." Novartis, 127 F.T.C. at 683. In this case, Respondents' intent to make the alleged claims is demonstrated from an examination of Respondents' prior experience marketing another ab belt, the Ab Pulse, and from the process of drafting the Ab Force advertisements. In addition, although the existence of advertising for other ab belts is appropriate to consider as part of the surrounding circumstances, the impact on consumers of the advertising for other ab belts is not clear and cannot be determined on a facial analysis.

The record shows that Khubani decided to enter the ab belt market after noticing a mention of the AbTronic in industry market reports and after determining that ab belts, including AbTronic, Ab Energizer, and Fast Abs, were "one of the hottest categories to ever hit the industry." F. 63. The Ab Pulse was a "massaging ab belt" marketed by Telebrands. F. 110. The Ab Pulse was similar in appearance to the Ab Force and the advertisements for the Ab Pulse were strikingly similar to the advertisements for the Ab Force in making claims of cost savings. F. 111. The Ab Pulse television commercial differed from the Ab Force commercials by distinguishing it from other ab belts by: stating "don't confuse the Ab Pulse with an electronic ab belt that you've seen on infomercials;" by showing a graphic of a red X superimposed on an ab belt displayed alongside the on-screen legend "infomercial ab belts;" and by making a soothing or comfort claim. F. 112. The Ab Pulse was offered for sale for about a month, did not receive high call volume, and, based on sales results, was considered by Khubani to be a marketing failure. F. 113. Thus, Respondents' first attempt to enter the market by selling a "massaging ab belt" and differentiating it from other electronic ab belts proved unsuccessful. The Ab Pulse campaign, however, provided Respondents with valuable

experience in the ab belt market and affected the development of its subsequent advertising.

Khubani wrote the scripts for the radio and print ads for the Ab Force on December 18, 2001. F. 54. The radio ad included an express statement that other ab belts "promise to get our abs into great shape fast without exercise." F. 86. On December 22, 2001, the day the commercials were shot, Liantonio provided Khubani with a script which began with the statements: "do you wish you could get into shape fast without exercise? Wouldn't you love to have a flatter tummy without painful sit-ups?" F. 58. Khubani rewrote Liantonio's scripts, deleting these express claims, and creating two new scripts (AB-B-60 and AB-B-120) that were used to shoot the test ads. F. 594umPars ofthe tb Force ocripts ar

those very same false and misleading claims. F. 60, 65-102, 114-36. The absence of an expressly identified purpose of using the Ab Force required consumers to rely on these implied claims. Thus, Khubani's intent seems clear. While Khubani may have removed the express health, weight loss, fitness, and exercise claims, perhaps in an effort to avoid liability, he clearly intended to ma[o3hy3ry sing cla byese licRelon.

The impact on consumers of the express reference in Ab Force ads to other ab belt infomercials is inconclusive. Complaint Counsel has not met its burden of demonstrating whether references to other ab belt infomercials effected the claims conveyed by the ads. Thus, the Court cannot conclude with confidence that references to other ab belt infomercials would lead consumers to take away the alleged claims. Where the impact of a statement is not conspicuous, self-evident, or reasonably clear on the face of the ad, and cannot be determined with confidence from the face of the ad, extrinsic evidence is required to determine the impact of that statement. See Kraft, 970 F.2d at 318; Thompson Medical, 104 F.T.C. at 320. However, as explained in Section II(B)(2)(1)(ii), supra, the extrinsic evidence also does not support the theory that claims are implied in the Ab Force ads merely by the reference to other ab belt infomercials.

Despite this conclusion, it is clear from the other evidence of the surrounding circumstances, including the Ab Pulse campaign and the development of the Ab Force campaign, when combined with the product name, visual images, and statements, that the ads make the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. Although an examination of the extrinsic evidence is not necessary for disposition of this case, that evidence likewise supports the Court's conclusions.

b. Extrinsic Evidence

When extrinsic evidence is used to determine the meaning of an ad, the evidence may consist of expert opinion, consumer testimony, copy tests, surveys, or any other reliable evidence of consumer interpretation. Cliffdale, 103 F.T.C. at 166; see also Thompson Medical, 104 F.T.C. at 790. The opinions of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted may be considered "if such opinions are adequately supported." Kraft, 114 F.T.C. at 122. However, where the opinions voiced by experts are not adequately supported, those opinions will be given little weight. Thompson Medical, 104 F.T.C. at 790. "To be adequately supported [those] opinions that describe empirical research or analyses [must be] based on

generally recognized marketing principles or other objective manifestations of professional expertise. Opinions not so supported may easily be contradicted by the contrary opinions of opposing experts and thus may be of little value in resolving the issue." Id. at 790 n.11.

Complaint Counsel's expert, Dr. Michael Mazis, is qualified in this matter to testify as an expert witness in consumer response to advertising, including a facial analysis of advertising, advertising effectiveness, consumer behavior, marketing research, including the design and implementation of surveys and analysis of surveys. F. 147-51. Mazis testified that in this case the implied claims are established through direct effects from the four corners of the advertisements; through indirect effects of prior exposure to ab belts through other advertising, word-of-mouth, or retail packaging; and as evidenced by a copy test which he conducted. F. 157-69. Respondents' expert, Dr. Jacob Jacoby, is qualified in this matter to testify as an expert witness in consumer behavior and consumer psychology, as well as consumer comprehension and miscomprehension of advertising. F. 152-56. Jacoby severely criticized Mazis's conclusions and methods. F. 152. After a review of the expert testimony, the Court concludes that Mazis's conclusions are entitled to varying degrees of weight, as explained below.

i. Direct Effects

A type of evidence that will be considered, if offered, is the opinion of expert witnesses as to how an advertisement might reasonably be interpreted. Thompson Medical, 104 F.T.C. at 790; Kraft, 114 F.T.C. at 122. Respondents argue that Mazis's analysis of the direct and indirect effects is no more than his own personal opinion and is not the proper subject of expert testimony. RB at 49. It is clear, however, that experts may testify based on their experience in their given field, including their knowledge of consumer perceptions, to claims that consumers might take away. See Thompson Medical, 104 F.T.C. at 790; see generally Fed. R. Evid. 702. Thus, Mazis's testimony regarding direct effects is valuable not as an expression of his personal opinion, but rather as expert opinion regarding his knowledge and experience of

consumer perceptions and claims that consumers would take away from the four corners of the advertising at issue.

Mazis testified that there are direct effects within the four corners of the ad that cause consumers to make inferences about the Ab Force and to take away from its ads certain implied claims. F. 158-62. Mazis stated "that even if you had never heard of an ab belt before, . . . you could see the ad and you could make inferences because there's certain implied claims in the ads." F. 158-59. Mazis identified as direct effects the appearance of trim, fit models and the depiction of the Ab Force belt itself shown visibly pulsating the abdominal muscles of the models. F. 161. According to Mazis, another influence that is within the four corners of the Ab Force ads is the name Ab Force. F. 162. Mazis testified that the name could have a double effect on consumers: "on the one hand, it applies force to your abs because of this stimulation, and you can also say it makes your abs a force. In other words it makes your abs noticeable, that they are -- really well developed." F. 162.

Mazis's testimony regarding consumer perceptions of the challenged advertising is relevant in determining the claims directly conveyed by the four corners of the ads. Mazis's expert testimony regarding consumer perceptions thus supports the conclusion that the Ab Force advertising made the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise. However, as noted earlier, Mazis's opinion is not necessary to reach that determination.

ii. Indirect Effects

Mazis uses the term "indirect effects" to refer to the effects on consumers of previous exposure to ab belts through either infomercials, word-of-mouth, or retail packaging for other ab belts. F. 163. Mazis opines that it is through these indirect effects that the Ab Force television spots make implied claims that using Ab Force will result in well-defined abs and loss of inches around the waist. F. 164. Mazis also opined that consumers may perceive claims that use of the Ab Force results in weight loss and that the

Ab Force is an effective substitute for regular exercise because consumers associate them with ab belt category beliefs. F. 164, 167.

Mazis's opinion is based on the psychological and consumer behavior theory of "categorization." F. 169. Categorization theory is generally accepted in the field of consumer behavior. F. 170. A leading proponent of the theory, Mita Sujan, asserted in a well-known peer-reviewed article that the "basic premise [of the categorization approach] is that people naturally divide the world of objects around them into categories enabling an efficient understanding and processing of the environment. . . . If a new stimulus can be categorized as an example of a previously defined category, then the effect associated with the category can be quickly retrieved and applied to the stimulus." F. 171.

Complaint Counsel argues that consumers, upon hearing the reference in the Ab Force commercials to "those other ab belt infomercials" would infer that the claims made in those other infomercials would apply to the Ab Force. CCB at 7-12. Mazis testified that four key elements in the Ab Force commercials would have an impact on consumers that would cause them to categorize the Ab Force specifically with the AbTronic, Ab Energizer, and Fast Abs products. F. 178. These four elements are: (1) references in Ab Force ads to the other ab belts, (2) the visual images of models with well-defined abs and slim bodies, (3) the physical appearance of the Ab Force product which is similar to the other ab belts, and (4) the similarity of the name Ab Force to the names of the other ab belts. F. 178.

Mazis considered only a limited number of materials and

advertisements or packaging for other EMS ab products, by word-of-mouth communication, or what other print or radio advertisements were being disseminated. F. 166, 189. Indeed, Mazis admitted that when he referred to category beliefs, he was referring only to "ab belt category beliefs relative to those three products and only those three products [AbTronic, Ab Energizer, and Fast Abs]." F. 189. Mazis provided no evidence that those Ab Force ad viewers who happened to see the ads for AbTronic, Ab Energizer, and Fast Abs would retain or even comprehend that information. F. 184-88. Despite having no reliable information regarding exactly how frequently any one advertisement at issue had aired, and no information identifying the stations, days, or times those ads aired, Mazis stood by his belief that "many consumers would have been exposed to these ads." F. 166. This is not credible testimony supported by reliable evidence.

Respondents' marketing expert, Jacoby, testified that he was familiar with the categorization theory and with Sujan's article. F. 173. Jacoby, however, did not agree with Mazis's application of the theory to this case. F. 173. In particular, Jacoby argued that categorization theory, as presented by Sujan, relies on consumers having a preexisting category of beliefs. F. 175. Respondents argue that consumers might not have an ab belt category of beliefs and that even if they have such a category, it might be formed based upon devices other than the AbTronic, Ab Energizer, or

asked; (3) the control ad, although flawed, does not adversely impact the copy test results; and (4) the failure to control for preexisting beliefs was not critical.

First, the universe for participants in the copy test was limited to people who, in the last twelve months, had purchased a product or used a service for weight loss, muscle toning, or massage, and also in the last twelve months had purchased a product by responding to a direct response television ad. F. 209-10. Age and

close-ended questions rotated the order in which the questions were read, thereby controlling for order bias, or yea-saying; and that all three possible answers to each question were read and shown to the participants before each question was asked. F. 231-54. As designed and implemented, Complaint Counsel has demonstrated that appropriate questions were asked in a manner that was proper, minimized bias, and produced reliable results. See Stouffer, 118 F.T.C. at 804-06.

Third, although a control of some kind is necessary for close-ended questions, the control may take the form of a control ad or a control question. Thompson Medical, 118 F.T.C. at 808-09. Moreover, "there is nothing in Commission precedent that requires the use of a control ad for open-ended questions." Id. at 808. The record shows that Mazis utilized both methods, a control ad and three control questions, in his copy test. F. 214-30, 239. The parties focused on the impact of the control ad.

The copy test utilized a control ad to compare to the test ad. F.

test which failed to control for preexisting beliefs that the sodium content of Lean Cuisine entrees was low where the evidence indicated that, to the extent consumers had a preexisting belief regarding the entrees, it was that the sodium content was high, not low. Id. at 810-11 ("there must be evidence of preexisting bias to find that failure to control for such bias is a critical defect.").

Complaint Counsel relies heavily on the above-quoted footnote 31 in Stouffer which cites the Simeon case. In Simeon, the Ninth Circuit stated "that the belief [that injections have been determined by a proper government agency to be safe and effective] is attributable in part to factors other than the advertisement itself does not preclude the advertisement from being deceptive." Simeon, 579 F.2d at 1146 (citing cf. Brite Mfg. Co. v. FTC, 347 F.2d 477 (D.C. Cir. 1965)). In Brite, the D.C. Circuit held that the Commission properly took official notice of specific consumer preferences where the respondents made no attempt to rebut those perceptions during the hearing, stating that the FTC was "entitled to rely on established general facts within the area of its expertise, subject, of course, to [respondent's] right to rebut." Brite, 347 F.2d at 478. Neither of these cases supports the assertion in Stouffer that "respondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs." Stouffer, 118 F.T.C. at 810 n.31.

While Kraft stands for the proposition that a copy test may be rejected for failure to control for preexisting beliefs (even where those beliefs were created by the respondent itself) and Stouffer stands for the proposition that a copy test will not be rejected for failure to control for a preexisting belief where there is no evidence that such a belief effected the results, neither case stands for the legal theory that advertisers may be found liable for capitalizing on preexisting consumer beliefs. This issue was addressed in the Lanham Act case of Johnson & Johnson * resa resv(h15pros, Smgalccen reoupp

the results of the copy test are viewed in terms of net difference, as Respondents prefer, the results support the conclusion that the ads, in fact, made the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

In so holding, the Court notes that there is no absolute minimum number of copy test respondents who must report taking away a specific message from an advertisement before that message is deemed communicated. The Commission's opinion in Thompson Medical provides a level of close-ended responses deemed sufficient to show that a claim was communicated by an advertisement. There, the Commission relied on percentages, after the control question responses had been deducted, of sixteen to eighteen percent of the respondents answering that they took the claim to conclude that the tested ad "did, in fact, cause average viewers to believe the [claim]." Thompson Medical, 104 F.T.C. at 805-06 (22.2% minus 6.3% or 4.8%). Other FTC cases suggest that the Commission would be justified in considering levels of ten percent net take away sufficient. For example, in Firestone, where Firestone's own consumer survey revealed that 15.3% perceived "Safe Tire" to mean every tire was "absolutely safe" or "absolutely free from defects," the court stated that it was "hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public." Firestone Tire &

57 (S.D.N.Y 1990) (9%); compare Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 467 n.15 (4th Cir. 1996) ("We may infer from case law that survey evidence clearly favors the defendant when it demonstrates a level of confusion much below ten percent.").

The copy test results, despite the previously noted flaws, support the conclusion that the Ab Force ads conveyed the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. To the open-ended question, "what does the Ab Force commercial say, show, or imply about Ab Force?" over twenty two percent (22.3%) of the test ad respondents and nearly twelve percent (11.9%) of the control ad respondents said that the advertisement claimed that using the Ab Force results in well-defined abdominal muscles, in loss of weight, or inches, or in an improved physique. F. 257. As discussed above, results of open-ended questions may be reliable without subtracting the results from a control ad or control question. Stouffer, 118 F.T.C. at 808.

As to a claim about weight loss, 43.0% of the test ad respondents and 28.1% of the control ad respondents agreed that the ad they saw communicated that the Ab Force "causes users to lose weight." F. 258, 263. Over half (58.1%) of the test ad respondents and over two-fifths (42.4%) of the control ad respondents perceived a claim that the Ab Force "causes users to lose inches around the waist" F. 259, 263. As to whether "using Ab Force removes fat deposits," approximately one-fifth of each group of respondents (22.9% test, 19.0% control) agreed that the commercial they saw made the claim. F. 260, 263. As to claims about fitness and exercise, nearly two-thirds (65.4%) of the test ad respondents and almost half (48.1%) of the control ad respondents agreed that the ad they saw communicated that "using the Ab Force results in well-defined abdominal muscles." F. 261, 263. Nearly forty percent (39.1%) of the test ad respondents and more than a quarter (28.6%) of the control ad respondents agreed with the claim that "using Ab Force is an effective alternative to regular exercise." F. 262, 263.

The copy test also included close-ended control questions regarding whether the ads conveyed claims regarding stomach ulcers, nausea, or lower blood pressure. F. 239. The results of these control questions showed a maximum result of five percent. F. 263, 267-69. When using a control question, the percentage of

Under either the falsity theory or the reasonable basis theory, Complaint Counsel has established that the alleged claims are false or misleading. The parties stipulated that use of the Ab Force does not cause loss of weight, inches, or fat; does not cause well-defined abdominal muscles; and is not an effective alternative to regular exercise. F. 270-72; RRPFF at 154. The parties further stipulated that Respondents did not possess and rely upon substantiation for the alleged claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise. F. 273; RRPFF at 154. Therefore, any claims that the use of the Ab Force causes consumers to lose weight, fat, and inches; causes well-defined abdominal muscles; and is a substitute for regular exercise are patently false and misleading.

3. Whether the Claims at Issue Are Material to Consumers

A "material claim is one that 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'" Novartis Corp., 223 F.3d at 786 (quoting Cliffdale Assocs., 103 F.T.C. at 165); see Kraft, 970 F.2d at 322. The Commission may apply a presumption of materiality to three types of claims: (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. Novartis, 223 F.3d at 786; Kraft, 970 F.2d at 322-23; Thompson Medical, 104 F.T.C. at 816-17. In Novartis, the D.C. Circuit affirmed the Commission's application of a presumption of materiality based on its finding that the implied claim was intentional and involved both a health matter and the product's purpose and efficacy. Novartis, 223 F.3d at 786-87.

The claims implied by the Ab Force advertising were material. Claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise directly involve the purpose and effects of using the product. F. 274-75. Such claims involve information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. If

unsubstantiated or false, these claims would likely mislead reasonable consumers considering such a purchase. Moreover, there is evidence that Respondent intended to make the implied health, weight loss, fitness, and exercise claims which further supports the finding of materiality. See Section II(B)(1)(e), supra. Therefore, based on the record as developed at trial, the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are found to be material to consumers.

C. Remedy

1. Joint and Individual Liability

Corporate respondents acting in concert to further a common enterprise are each liable for the acts and practices of the others in furtherance of the enterprise. See Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171, 1175 (1st Cir. 1973) (treating all defendants as single economic entity where there was common control); Waltham Precision Instrument Co. v. FTC, 327 F.2d 427, 431 (7th Cir. 1964) (treating all defendants as single economic entity where there was common control); Delaware Watch Co. v. FTC, 332 F.2d 745, 746 (2d Cir. 1964) (common enterprise found where individuals were transacting an integrated business through a maze of interrelated companies); Zale Corp. and Corrigan-Republic, Inc. v. FTC, 473 F.2d 1317, 1320 (5th Cir. 1973) (sharing office space and offices). Respondent Ajit Khubani is the president, chief executive officer, chairman of the board, and sole owner of Telebrands. F. 10. Khubani is also the sole member of TV Savings. F. 10. Telebrands and TV Savings share office space. F. 8. Individually or in concert with his officers and employees, Khubani formulates, directs, or controls the policies, acts, or practices of Telebrands and TV Savings. F. 14. Khubani was appointed by Telebrands as the "Program Manager" pursuant to the Service Agreement dated January 22, 2002 between Telebrands and TV Savings and was also TV Savings' representative under the Service Agreement. F. 15. Together, Respondents have operated as a common enterprise to label,

advertise, offer for sale, sell, and distribute the Ab Force device. Thus, the evidence establishes that Respondents Telebrands, TV Savings, and Khubani were acting in concert to further a common enterprise and that they jointly and collectively violated Sections 5 and l2 of the FTC Act.

To obtain a cease and desist order against an individual, Complaint Counsel must prove violations of the FTC Act by the corporation and that the individual either directly participated in the acts at issue or had some measure of control over those acts. FTC v. Standard Educ. Soc'y, 302 U.S. 112, 119-20 (1937); National Housewares, Inc., 90 F.T.C. 572, 598 (1977). As stated above, the evidence shows that individually or in concert with his officers and employees, Respondent Khubani had authority to and did control the policies, acts, or practices of Respondents Telebrands and TV Savings. F. 14. As the program manager appointed by Telebrands and as TV Savings' representative under the Service Agreement, Khubani represents both entities with regard to the responsibilities and duties of each under the Service Agreement. F. 15. Khubani was ultimately responsible for overseeing the marketing and creative design of the challenged Ab Force advertising and promotional campaign; was primarily responsible for the creation and development of the scripts for the Ab Force television and radio advertising and the text for the internet and email advertising of the Ab Force product; set the pricing strategy for the Ab Force and decided when the Ab Force would no longer be marketed or sold. F. 16. Therefore, Respondent Khubani is found to be individually and jointly liable with TV Savings and Telebrands for violations of Sections 5 and 12 of the FTC Act. Having addressed the issue of liability, the Court next considers the appropriateness of the relief proposed in the Complaint.

2. Fencing In Provisions

Included in the relief sought in the Complaint is a request to impose broad "fencing in" relief including, among other provisions, a performance bond and substantiation prior to advertising "any other EMS device, or any food, drug, dietary supplement, device, or any other product, service, or program."

Complaint at 16-17 (proposed order); CCPFF at 118. As explained below, portions of the relief contemplated by the proposed remedy are overly broad and unsupported by law. For instance, Complaint Counsel seeks the imposition of a performance bond as part of the proposed remedy. Complaint at 16-17 (proposed Order). However, Complaint Counsel has not cited, nor has the Court found, any case law which would support the imposition of such a bond as a remedy in a litigated Part III matter. The fact that the Commission has previously accepted consent orders with a performance bond in Part III matters does not provide sufficient legal foundation to impose such a bond in this case. "The circumstances surrounding . . . negotiated [consent agreements] are so different that they cannot be persuasively cited in a litigation context." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 n.12 (1961). Accordingly, no performance bond will be ordered.

Rather, the Order entered by the Court restricts Respondents from making any representations regarding the production, promotion, sale, and distribution of Ab Force and any other EMS device, or any device, product, service, or program pertaining to the efficacy of or pertaining to health, weight loss, fitness, and exercise, unless Respondents can substantiate such representations by competent and scientific evidence. Order, Section IV, infra.

In so ordering, the Court notes that "'the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.' Having been caught violating the Act, respondents 'must expect some fencing in.'" FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395 (1965) (quoting FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) and FTC v. Nat'l Lead Co., 352 U.S. 419, 431 (1957)); see also Jacob Siegel, 327 U.S. at 611-12. The Supreme Court held in Jacob Siegel that the remedy selected must have a "reasonable relation to the unlawful practices found to exist." Jacob Siegel, 327 U.S. at 613; see also Colgate-Palmolive, 380 U.S. at 394. The Supreme Court has cautioned, however, that an order must be sufficiently clear and precise to be understood by the violator and "as specific as the circumstances will permit." Colgate-Palmolive, 380 U.S. at 392-

93; see also American Home, 695 F.2d at 705. Moreover, the "propriety of a broad order depends upon the specific circumstances of the case." Colgate-Palmolive, 380 U.S. at 394.

In determining whether a broad fencing in order bears a "reasonable relationship" to a violation of the Act, factors to be considered include: the deliberateness and seriousness of the violation; the degree of transferability of the violation to other products; and any history of prior violations. Kraft, 970 F.2d at 326; Sears, Roebuck and Co. v. FTC, 676 F.2d 385, 392 (9th Cir. 1982); American Home, 695 F.2d at 706. "The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. In the final analysis, we look to the circumstances as a whole and not to the presence or absence of any single factor." Sears, 676 F.2d at 392; see also Kraft, 970 F.2d at 327.

A violation is serious and deliberate where it involves "an expensive, nationwide campaign with highly effective results." Kraft, 970 F.2d at 326. The Ab Force advertising campaign constitutes a serious violation because the deceptive claims were disseminated in numerous ads and through multiple media (television, print, radio, internet, and email). F. 47, 49-51, 61. Respondents spent over four million dollars to disseminate the challenged ads nationwide. F. 52. The Ab Force television spots appeared more than ten thousand times on cable, satellite, and broadcast television outlets in major national markets. F. 44-51. Respondents sold approximately 747,000 units of the Ab Force and gross sales, including accessories, exceeded nineteen million dollars. F. 41-42. The duration, number of executions, and multi-million dollar cost of the campaign, as well as the total sales and revenues, all constitute significant evidence of the effectiveness of the advertisements and, thus, the seriousness of the violations. Moreover, the evidence regarding Respondents' intent (see Section III(B)(1)(a)(iii), supra) as well as the fact that Khubani is a sophisticated and experienced marketer (see F. 12-13, 22) establish that the claims were made deliberately and purposefully.

A violation is transferrable where other products could be sold utilizing similar techniques. Colgate-Palmolive Co., 380 U.S. at 394-95; Sears, 676 F.2d at 392. The Ab Force advertisements failed to expressly identify the purpose or effects of using the Ab Force but rather strongly implied that use of the Ab Force product would confer health, weight loss, fitness, or exercise benefits. See F. 65-146. The health, weight loss, fitness, or exercise benefits of using a device, product, service, or program cannot readily be determined by consumers from an advertisement and therefore consumers must rely on the representations of the advertiser. Implying these unseen benefits is an advertising practice that is readily transferrable to advertising for other devices, products, services, or programs. Moreover, the fact that Respondents have the ability to provide the financing necessary to perform media management services, credit card processing, customer response services, customs clearance, accounting, and bookkeeping, and act as an importer of record (F. 6); the fact that Respondents have the financial means to spend millions of dollars on effective, nationwide advertising (F. 41-52); and the fact that Respondents have promoted and sold hundreds of products (F. 22) is sufficient for the Court to determine, under the Kraft rationale, that Respondents' advertising techniques and practices are readily transferrable to other products.

Complaint Counsel argues that Respondents have a history of prior violations based on "four previous actions" taken by the FTC against Telebrands. CCRB at 46. This argument is based upon three consent agreements between Telebrands and the FTC and an additional modification of one of the consent agreements. CCRB at 46. Complaint Counsel failed to enter any of these consent agreements into evidence. See RRPFF at 155-56. Moreover, it is the Court's understanding that none of the consent agreements involved any finding of liability on the part of any of the respondents (see RRB at 46) and therefore they cannot be utilized to form the basis for imposing a broad fencing in order in this case. However, a defendant need not have a history of prior violations in order for a broad fencing in order to be imposed. See, e.g., Kraft, 970 F.2d at 327.

Here, a broad fencing in order is appropriate under the standards in Kraft and Sears given the deliberateness and seriousness of the violations and the ease with which the unlawful conduct can be transferred to other products. Therefore, the fencing in relief in Section IV of the Order extends the prohibitions of the Order beyond the Ab Force device and other EMS devices to any device, product, service, or program promoting the efficacy of, or pertaining to health, weight loss, fitness, or exercise benefits. Courts have repeatedly approved orders that cover multiple products, despite the fact that the violations found involved only a single product. Sears, 676 F.2d at 392; see also Bristol-Myers Co. v. FTC, 738 F.2d 554, 563-64 (2d Cir. 1984); American Home, 695 F.2d at 704-05. Indeed, the Supreme Court has enforced a Commission order which applied to all products produced by the respondents. Colgate-Palmolive, 380 U.S. at 394.

The Court, looking to the circumstances as a whole, has determined that a fencing in order is required and bears a reasonable relationship to Respondents' violations of the Act found to exist. As such, it is necessary to "close all roads to the prohibited goal, so that (the FTC's) order may not be by-passed with impunity." Litton Industries, Inc. v. FTC, 676 F.2d 364, 370

"an instrument, apparatus, implement, machine, [or] contrivance . . . which is . . . intended to affect the structure or any function of the body of man." 15 U.S.C. § 55(d).

4. By engaging in a nationwide advertising campaign to offer for sale and sell the Ab Force device, Respondents were engaged in and affected commerce, as "commerce" is defined in Section 4 of the FTC Act. 15 U.S.C. § 44.

5. Pursuant to Rule 3.51(c)(3) and 5 U.S.C. § 556(d), the findings of fact and conclusions of law in this Initial Decision are supported by reliable, probative, and substantial evidence.

6. The issues in this case are adjudicated under the preponderance of evidence standard.

7. Employing a facial analysis of the Ab Force advertising, there are no express statements which support the claims that using the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

8. The overall net impression of the product name, visual images, and statements in the four corners of the Ab Force advertising in addition to the surrounding circumstances, is conspicuous, self-evident, and reasonably clear so that the Court can conclude with confidence that the advertisements convey the claims that the use of the Ab Force by consumers causes loss of weight, inches, and fat; causes well-defined abs; and is an effective alternative to regular exercise.

9. Mazis's expert testimony regarding consumer perceptions supports the conclusion that the Ab Force advertising made the claims that use of the Ab Force causes loss of inches, weight, and fat; causes well-defined abs; and is an effective alternative to regular exercise.

10. There is no empirical evidence to support what beliefs consumers would include in an ab belt category. Thus, to the extent Complaint Counsel relies upon categorization theory or indirect effects to support the allegations, such analysis fails as a matter of proof.

11. Despite flaws in the control ad methodology, the copy test conducted by Complaint Counsel's expert is otherwise valid and is sufficiently sound so as to be reasonably reliable and probative of the issues before the Court.

12. The copy test results support the conclusion that the Ab Force ads convey the claims that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise.

13. The claims asserting that use of the Ab Force causes consumers to lose weight, fat, and inches; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are false or misleading pursuant to Section 12 of the FTC Act. 15 U.S.C. § 52.

14. The claims asserting that use of the Ab Force causes loss of weight, inches, or fat; causes well-defined abdominal muscles; and is an effective alternative to regular exercise are material to consumers.

15. Corporate respondents acting in concert to further a common enterprise are each liable for the acts and practices of the others in furtherance of the enterprise.

16. Respondents Telebrands Corporation, TV Savings, L.L.C., and Ajit Khubani have operated as a common enterprise to label, advertise, offer for sale, sell, and distribute the Ab Force device. As such, they jointly and collectively violated Sections 5 and 12 of the FTC Act.

17. Respondent Ajit Khubani is individually liable for violations of Sections 5 and 12 of the FTC Act.

18. Complaint Counsel has met its burden of proof in establishing Respondents' liability for the violations of the FTC Act charged in the Complaint.

19. "Fencing in" relief is appropriate where, after examining circumstances of the case as a whole, it bears a "reasonable relationship" to a violation of the FTC Act.

20. Complaint Counsel has not demonstrated that imposition of a performance bond is an appropriate fencing in remedy in a litigated Part III matter.

21. Previous consent agreements entered into with named respondents to a proceeding do not constitute a "history of prior violations" and thus cannot form the basis for imposing broad fencing in relief, particularly where there is no evidence that any of the consent agreements involved a finding of liability against Respondents.

22. Relief designed to remedy Respondents' unlawful activities and to require Respondents to cease and desist from certain activities is appropriate.

23. The Order entered is necessary and appropriate to remedy the violations of law found to exist.

ORDER:

ORDER

I.

IT IS ORDERED that, for purposes of this Order, the following definitions shall apply:

A. "Commerce" shall mean commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

C. "Electronic muscle stimulation device" or "EMS device" shall mean any appliance or machine, or any

accessories thereof, used to stimulate the muscles of

III.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any EMS device, shall not make any misrepresentation, in any manner, including through the use of pictures, demonstrations, testimonials, or endorsements, expressly or by implication, that:

A. any such device causes or promotes loss of weight, inches, or fat;

B. any such device causes or promotes well-defined abdominal muscles;

C. use of any such device for any period of time is an effective alternative to regular exercise; or

D. any such device makes a material contribution to any system, program, or plan that produces the results referenced in Subparts A-C of this Part.

IV.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other entity, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Ab Force, any other EMS device, or any device, product, service, or program promoting the efficacy of or pertaining to health, weight loss, fitness, or exercise benefits shall not make any representation, in any manner, expressly or by implication, about weight, inch, or fat loss; muscle definition; exercise benefits; or the health benefits, safety, or efficacy of any such product, service, or program, unless, at the time the representation is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

V.

Nothing in this Order shall prohibit Respondents from making any representation for any device that is specifically permitted in labeling for that device under any premarket approval application or premarket notification approved or cleared by the Food and Drug Administration.

VI.

IT IS FURTHER ORDERED that Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani shall, for five 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 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 Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani 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, 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 days after the date of service of this Order, and to future personnel within thirty days after the person assumes such position or responsibilities.

VIII.

IT IS FURTHER ORDERED that Respondents Telebrands and TV Savings and their successors and assigns shall notify the Commission at least thirty days prior to any change in the corporation or limited liability company 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

X.

IT IS FURTHER ORDERED that Respondents Telebrands and TV Savings, and their successors and assigns, and Respondent Khubani shall, within sixty days after the date of service of this Order, and at such other times as the Federal Trade 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.

XI.

IT IS FURTHER ORDERED

IN THE MATTER OF

BJ'S WHOLESALE CLUB, INC.

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

C

C *S* *S*

This consent order, among other things, requires Respondent BJ's Wholesale Club, Inc. -- a membership club with approximately 8 million current members that operates approximately 150 warehouse stores in 16 Eastern states -- to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information it collects from or about consumers. The consent order also requires the respondent, for twenty years, to secure biennial assessments and reports to ensure that its security program provides protections that meet or exceed the protections required by the order, and is sufficiently effective to

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 operates approximately 150 warehouse clubs ("stores") in 16 eastern states. Generally, only consumers who have purchased memberships from respondent may make purchases at its stores. Approximately 8 million consumers currently have valid memberships. At its stores, respondent

respondent collects inventory information at its stores. Respondent operates wireless access points on its in-store computer networks through which scanners connect and transmit inventory information to in-store computer networks.

7. From at least November 1, 2003, until February, 2004, respondent did not employ reasonable and appropriate measures to secure personal information collected at its stores. Among other things, respondent (1) did not encrypt the information while in transit or when stored on the in-store computer networks; (2) stored the information in files that could be accessed anonymously -- that is, using a commonly known default user id and password; (3) did not use readily available security measures to limit access to its computer networks through wireless access points on the networks; (4) failed to employ sufficient measures to detect unauthorized access or conduct security investigations; and (5) created unnecessary risks to the information by storing it for up to 30 days when it no longer had a business need to keep the information, and in violation of bank rules. As a result, a hacker could have used the wireless access points on an in-store computer network to connect to the network and, without authorization, access personal information on the network.

8. Beginning in late 2003 and early 2004, banks began discovering fraudulent purchases that were made using counterfeit copies of credit and debit cards the banks had issued to customers. The customers had used their cards at respondent's stores before the fraudulent purchases were made, and personal information respondent obtained from their cards was stored on respondent's computer networks. This same information was contained on counterfeit copies of cards that were used to make several million dollars in fraudulent purchases. In response, banks and their customers cancelled and re-issued thousands of credit and debit cards that had been used at respondent's stores, and customers holding these cards were unable to use their cards to access credit and their own bank accounts.

9. As described in Paragraphs 7 and 8 above, respondent's failure to employ reasonable and appropriate security measures to protect personal information and files caused or is 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 an unfair act or practice.

10. The acts and practices of respondent as alleged in this complaint constitute unfair 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 20th day of September, 2005, has issued this complaint against respondent.

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

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. "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 that reveals an individual's email address; (d) a telephone number; (e) a Social Security number; (f) credit and/or debit card information, including credit and/or debit card number, expiration date, and data stored on the magnetic stripe of a credit or debit card; (g) 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 (h) any other information from or about an individual consumer that is combined with (a) through (g) above.

2. Unless otherwise specified, "respondent" shall mean BJ's Wholesale Club, Inc. and its successors and assigns, officers,

with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, 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:

D. 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.

II.

IT IS FURTHER ORDERED that respondent obtain an assessment and report (an "Assessment") from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biennially thereafter for twenty (20) years after service of the order that:

A. sets forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. explains 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. explains how the safeguards that have been implemented meet or exceed the protections required by Paragraph I of this order; and

D. certifies 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, for biennial reports, has so operated throughout the reporting period.

Each Assessment shall be prepared by 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. Respondent shall provide the first Assessment, as well as all: plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relied upon to prepare such 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.

III.

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, including but not limited to:

A. for a period of five (5) years: any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and

B. for a period of three (3) years after the date of preparation of each biennial Assessment required under Paragraph II of this order: all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relating to

respondent's compliance with Paragraphs I and II of this order for the compliance period covered by such biennial Assessment.

IV.

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 managerial 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.

V.

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

VI.

IT IS FURTHER ORDERED that respondent shall, within one hundred and eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission an initial report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from BJ's Wholesale Club, Inc. ("BJ's").

The 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 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.

BJ's operates about 150 warehouse clubs ("stores") in 16 eastern states. BJ's is a membership club with about 8 million current members. Members often use credit and debit cards to pay for their purchases at BJ's. In the course of seeking approval for these credit and debit card purchases, BJ's collected members' personal information, including card number and expiration date and other information, from magnetic stripes on the cards.

The Commission's proposed complaint alleges that BJ's stored members' personal information on computers at its stores and failed to employ reasonable and appropriate security measures to protect the information. The complaint alleges that this failure

points on the networks; (4) failing to employ measures sufficient to detect unauthorized access to the networks or conduct security investigations; and (5) storing information for up to 30 days when BJ's no longer had a business need to keep the information, in violation of bank security rules.

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.

- Evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that BJ's knows or has to reason to know may have a material impact on the effectiveness of its information security program.

Part II of the proposed order requires that BJ's obtain within 180 days, and on a biennial basis thereafter, an assessment and report from a qualified, objective, independent third-party professional,

nalysis

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 to modify its terms in any way.

things, is engaged in the research, development, manufacture, and sale of human pharmaceutical products in the United States through Eon.

II. THE PROPOSED ACQUISITION

5. On February 20, 2005, Novartis and Santo entered into a Purchase Agreement and Sale of Stock whereby Novartis agreed to purchase 60 million shares of Eon from Santo for approximately $1.72 billion in cash ("the Acquisition"). These shares represent approximately 67% of the outstanding stock of Eon. Further, Novartis has made a definitive agreement, approved by the Eon Board of Directors, to offer to acquire the remaining 31.9 million fully diluted shares of Eon for $31.00 per share cash. With the closing of these transactions, Novartis would become the global leader in generic pharmaceuticals with combined pro forma 2004 sales of $5.1 billion, and a portfolio of over 600 generic pharmaceutical products.

III. THE RELEVANT MARKETS

6. One of the relevant lines of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of generic desipramine hydrochloride tablets. Desipramine hydrochloride is a tricyclic antidepressant. The branded desipramine product, Norpramin, does not offer any significant price pressure in the generic desipramine market other than setting a price ceiling that is currently many times higher than the generic pricing level. The brand price is essentially irrelevant with respect to the pricing of generic desipramine tablets. In contrast, the competition between producers of generic desipramine tablets has a direct and substantial effect on generic desipramine pricing.

7. A second relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of generic orphenadrine citrate ER tablets. Orphenadrine citrate is a muscle relaxant. The branded orphenadrine citrate product, Norflex, does not impact the pricing of generic orphenadrine citrate other than

setting a price ceiling that is currently many times higher than the generic pricing level. In contrast, the competition between producers of generic orphenadrine citrate tablets has a direct and substantial effect on generic orphenadrine citrate pricing.

8. The third relevant line of commerce in which to analyze the effects of the Acquisition is the manufacture and sale of generic rifampin oral capsules. Rifampin is indicated for the treatment of tuberculosis. The branded rifampin product, Rifadin, does not offer any significant price pressure in the generic rifampin oral capsule market other than setting a price ceiling that is currently many times higher than the generic pricing level. In contrast, the competition between producers of generic rifampin capsules has a direct and substantial effect on generic rifampin pricing.

9. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in each of the relevant lines of commerce.

IV. THE STRUCTURE OF THE MARKETS

10. The market for the manufacture and sale of generic desipramine hydrochloride tablets is highly concentrated. Only Novartis and Eon market all six strengths of generic desipramine hydrochloride tablets in the United States, and the only other firm marketing generic desipramine hydrochloride tablets is Watson Pharmaceuticals, Inc., which markets three of the six strengths.

11. The market for the manufacture and sale of generic orphenadrine citrate ER tablets is highly concentrated. Only Eon, Novartis and Impax Laboratories, Inc. (through its generics division, Global Pharmaceuticals) manufacture and market generic orphenadrine citrate ER tablets in the United States.

12. The market for the manufacture and sale of generic rifampin oral capsules is highly concentrated. Only Eon, Novartis and VersaPharm, Incorporated market generic rifampin oral capsules in the United States.

16. 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-first day of September, 2005, issues its Complaint against said Respondent.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent NOVARTIS AG (hereinafter "NOVARTIS," "Respondent," or "Respondent NOVARTIS") of the interest in Eon Labs, Inc. held by Santo Holding AG ("SANTO") 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 Order ("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 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 an interested party 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 makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent NOVARTIS is a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its offices and principal place of business located at Lichtstrasse 35, CH-4002 Basel, Switzerland.

2. The Federal Trade Commission has jurisdiction over 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:

A. "NOVARTIS" means NOVARTIS AG, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries (including, but not limited to, Sandoz Inc.), divisions, groups and affiliates controlled by NOVARTIS AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition Date, the term "NOVARTIS" shall include Eon.

B. "SANTO" means Santo Holding AG, a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its registered office located at Alte Landstrasse 106, CH-8702 Zollikon/Zurich, Switzerland; and all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by SANTO, including, but not limited to, Eon.

C. "Eon" means Eon Labs, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business located at 1999 Marcus Avenue, Lake Success, New York 11042; and all joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Eon.

D. "Respondent" means NOVARTIS.

E. "Commission" means the Federal Trade Commission.

F. "Acquisition" means the acquisition contemplated by the "Agreement for Purchase and Sale of Stock" dated as of February 20, 2005, by and between NOVARTIS and SANTO, whereby NOVARTIS agreed to acquire 60,000,000 shares of Eon from SANTO for approximately Euro 1.3 billion in cash.

G. "Acquisition Date" means the date the Acquisition is consummated.

H. "Agency(ies)" means any governmental regulatory authority or authorities in the United States 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, but is not limited to, the United States Food and Drug Administration ("FDA").

I. "AMIDE" means AMIDE PHARMACEUTICAL, INC., a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its principal place of business located at 101 East Main Street, Little Falls, New Jersey 07424.

J. "AMIDE Divestiture Agreement" means the Asset Purchase Agreement, the Supply Agreement and the Quality Agreement between NOVARTIS' subsidiary, Sandoz Inc., and AMIDE, dated June 13, 2005, if such agreement has not been rejected by the Commission pursuant to Paragraph II.A., III.A. or IV.A. of this Order, and all related amendments, exhibits, attachments, agreements, and schedules, by and between Respondent

Application" ("MAA") mean 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 data necessary for the preparation thereof, and all correspondence between Respondent NOVARTIS or SANTO and the FDA or other Agency relative thereto.

L. "Closing Date" means, with respect to each of the divestitures required by Paragraphs II.A., III.A. and IV.A. of this Order, the date on which Respondent NOVARTIS or a Divestiture Trustee and a Commission-approved Acquirer consummate a transaction to divest relevant assets pursuant to this Order. (Pursuant to Paragraphs II.A., III.A. and IV.A. of this Order, the Closing Date is required to occur not later than ten (10) Days after the Acquisition Date.)

M. "Commission-approved Acquirer" means the following:

1. AMIDE, provided AMIDE has not been rejected by the Commission pursuant to Paragraph II.A., III.A. or IV.A. of this Order; or

2. an entity approved by the Commission to acquire assets that Respondent NOVARTIS is required to divest, grant, license, deliver or otherwise convey pursuant to this Order.

N. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent NOVARTIS that is not in the public domain.

O. "Contract Manufacture" means the manufacture of a Product to be supplied by Respondent NOVARTIS (or a Designee specifically identified in this Order) to the Commission-approved Acquirer.

P. "Day(s)" means the period of time prescribed under this Order as computed pursuant to 16 C.F.R. § 4.3 (a).

Q. "Designee" means any Person other than Respondent NOVARTIS designated by the Commission-approved Acquirer.

R. "Desipramine" means the chemical substance known by the international non-proprietary name desipramine and/or all pharmaceutically active derivatives thereof including, without limitation, esters, salts, hydrates, solvates, polymorphs, prodrugs, metabolites and isomers thereof and all hydrates, solvates, polymorphs, prodrugs and isomers of such salts, as manufactured, marketed and sold by SANTO under ANDA numbers 74-430, 71-601, 71-588, 71-602, and 71-766 at any time during the six months preceding the Acquisition Date.

S. "Desipramine Assets" means all of Respondent NOVARTIS' rights, title and interest in and to all assets, tangible and intangible, acquired from SANTO pursuant to the Acquisition, related to SANTO's Desipramine business in the United States to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Desipramine, including, without limitation, the following:

1. all Product Intellectual Property;

2. all Product Registrations;

3. all Product Scientific and Regulatory Material;

4. all Product Manufacturing Technology;

5. all Confidential Business Information relating to Desipramine;

6. all Rights of Reference or Use to: (a) the Drug Master Files related to SANTO's Desipramine business in the United States, including, but not limited to, the pharmacology and toxicology data contained in all Applications, NDAs, ANDAs, SNDAs, SANDAs and MAAs; and (b) information similar to such Drug Master Files submitted to any Agency other than the FDA, if such rights exist;

7. all Respondent NOVARTIS' books, records and files related to the foregoing, including, but not limited to, the following specified documents:

a. the Product Registrations;

b. all pharmacology and toxicology data contained in or related to all Applications, Drug Master Files, NDAs, ANDAs, SNDAs, SANDAs and MAAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; including, without limitation, clinical data, and quality control histories pertaining to the Product owned by, or in the possession or control of, NOVARTIS, or to which NOVARTIS has a right of access;

c. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, specifications, designs, drawings, processes and quality control data, all in a form and to an extent deemed satisfactory by the Commission-approved Acquirer;

d. all customer purchase orders, customer product specifications and requirements, records of historical customer purchases,

Z. “Governmental Entity” means any Federal, state or local

6. all Rights of Reference or Use to: (a) the Drug Master Files related to NOVARTIS' Orphenadrine Citrate ER business in the

to the Commission-approved Acquirer within two (2) Days after the Closing Date); and,

9. at the Commission-approved Acquirer's option, and subject to the approval of the Commission:

a. any Product Contracts; and,

b. all Orphenadrine Citrate ER inventories, stores, and supplies held by, or under the control of, NOVARTIS, including, but not limited to, the active pharmaceutical ingredient, goods in process, finished goods, and specific packaging and labels.

, that "Orphenadrine Citrate ER Assets" does not include: (i) any real property; (ii) any personal property; (iii) any plant or other facility; (iv) any equipment; or (v) any asset or business owned by SANTO prior to the Acquisition Date.

DD. "Patents" means all United States patents and patent "repprng ay r

HH. “Product Intellectual Property” means all of the following related to the Product(s):

1. Patents;

2. Product Copyrights;

3. Product Software, other than Product Intellectual Property;

4. Product Trademarks;

5. Product trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, Development and other information;

6. Rights to obtain and file for Patents and registrations thereof; and

7. Rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing;

physical and analytical, safety, efficacy, bioequivalency, quality assurance, quality control and clinical data, research records, compositions, annual product reviews, process validation reports, analytical method validation reports, specifications for stability trending and process controls, testing and reference standards for impurities in and degradation of products, technical data packages, chemical and physical characterizations, dissolution test methods and results, formulations for administration, clinical trial reports, regulatory communications and labeling and all other information related to the manufacturing process, and supplier lists, in each case with respect to a Product and as in existence and in the possession of Respondent NOVARTIS or SANTO on the Closing Date.

JJ. "Product Registrations" means all United States registrations, permits, licenses, consents, authorizations and other approvals, and pending applications and requests therefore, required by applicable Agencies related to the research, Development, manufacture, finishing, packaging, distribution, marketing or sale of any Product, including all NDAs and ANDAs. "Product Registrations" includes all underlying information, data, filings, reports, correspondence or other materials used to obtain or apply for any of the foregoing, including, without limitation, all data submitted to and all correspondence with the FDA and other Agencies.

KK. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and clinical trial materials and information related to the Product, and full rights to use such materials, in the United States.

LL. "Product Trademark(s)" means all United States trademarks related to the Product, including, but not limited to any trademark or trade dress covering:

1. the size, shape and color of a single dose entity of any generic version of the Product; and

2. the appearance, structure, textual or graphical content and/or color scheme of any labeling, dosing information, product inserts, storage containers and/or other materials, to the extent that the FDA or any other Agency requires the Commission-approved Acquirer to duplicate such appearance, structure, textual or graphical content and/or color scheme of any labeling, dosing information, product inserts, storage containers and/or other materials.

MM. "Proposed Acquirer" means AMIDE or an entity proposed by Respondent NOVARTIS (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be divested, granted, licensed, delivered or otherwise conveyed by Respondent NOVARTIS pursuant to this Order.

limitation, esters, salts, hydrates, solvates, polymorphs, prodrugs, metabolites and isomers thereof and all hydrates, solvates, polymorphs, prodrugs and isomers of such salts, as marketed and sold by NOVARTIS under NDA number 50-429 at any time during the six months preceding the Acquisition Date.

PP. "Rifampin Agreement" means the Manufacture and Supply Agreement, dated July 7, 1999, entered into by and between NOVARTIS and AMIDE.

QQ. "Rifampin Assets" means all of Respondent NOVARTIS' rights, title and interest in and to all assets, tangible and intangible, in existence on the day preceding the Acquisition Date, related to NOVARTIS' Rifampin business in the United States to the extent legally transferable, including the research, Development, manufacture, distribution, marketing or sale of Rifampin, including, without limitation, the following:

1. all Product Intellectual Property;

2. all Product Registrations;

3. all Product Scientific and Regulatory Material;

4. all Product Manufacturing Technology;

5. all Confidential Business Information relating to Rifampin;

6. all Rights of Reference or Use to: (a) the Drug Master Files related to NOVARTIS' Rifampin business in the United States, including, but not limited to, the pharmacology and toxicology data contained in all Applications, NDAs, ANDAs, SNDAs, SANDAs and MAAs; and (b) information similar to such Drug Master Files submitted to any Agency other than the FDA, if such rights exist;

7. all Respondent NOVARTIS' books, records and files related to the foregoing, including, but not limited to, the following specified documents:

a. the Product Registrations;

b. all pharmacology and toxicology data contained in or related to all Applications, Drug Master Files, NDAs, ANDAs, SNDAs, SANDAs and MAAs; all data submitted to and all correspondence with the FDA and other Agencies; all validation documents and data; including, without limitation, clinical data, and quality control histories pertaining to the Product owned by, or in the possession or control of, NOVARTIS, or to which NOVARTIS has a right of accesated to

, that “Rifampin Assets” does not include: (i) any real property; (ii) any personal property; (iii) any plant or

1. AMIDE is not an acceptable purchaser of the Desipramine Assets, then Respondent shall immediately rescind the transaction with AMIDE and, within six (6) months from the date the Order becomes final, shall divest the Desipramine Assets to a Commission-approved Acquirer absolutely and in good faith, at no minimum price, and only in a manner that receives the prior approval of the Commission; or

2. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent NOVARTIS, or appoint a Divestiture Trustee, pursuant to Paragraph VI. of this Order, to effect such modifications (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

B. Any Remedial Agreement that has been approved by the Commission between Respondent NOVARTIS (or a Divestiture Trustee) and a Commission-approved Acquirer of the Desipramine Assets shall be deemed incorporated into this Order,

E. Respondent NOVARTIS shall maintain manufacturing facilities for the Desipramine finished drug product that are validated, qualified and approved by the FDA, and fully capable of producing Desipramine finished drug product and shall Contract Manufacture and supply such finished drug product to the Commission-approved Acquirer until the earlier of (i) the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) obtains all FDA approvals necessary to manufacture and sell Desipramine independently of Respondent NOVARTIS; or (ii) four (4) years from the Closing Date for the Desipramine Assets;

, the Commission may eliminate, or further

manner as required by the Remedial Agreement unless Respondent NOVARTIS can demonstrate that its failure was entirely beyond the control of the Respondent NOVARTIS and in no part the result of negligence or willful misconduct by Respondent NOVARTIS.

6. During the term of the Contract Manufacture between Respondent NOVARTIS and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or Interim Monitor (if applicable), Respondent NOVARTIS shall make available to the Commission-approved Acquirer or the Interim Monitor (if applicable) all records that relate to the Contract Manufacture of Desipramine that are generated or created after the Closing Date.

7. Upon reasonable notice and request from the Commission-approved Acquirer to the Respondent NOVARTIS, Respondent NOVARTIS shall provide in a timely manner at no greater than Direct Cost the following:

a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Desipramine;

b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture Desipramine in substantially the same manner and quality employed or achieved by Respondent NOVARTIS; and

c. consultation with knowledgeable employees of Respondent NOVARTIS and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) obtains all FDA approvals necessary to manufacture and sell Desipramine independently of Respondent NOVARTIS and sufficient to

satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Desipramine.

H. Respondent NOVARTIS shall delete Desipramine from any customer contracts in effect as of the Closing Date that are not divested to the Commission-approved Acquirer.

I. Not later than ten (10) Days after the Closing Date, Respondent NOVARTIS shall begin to deliver to the Commission-approved Acquirer, at Respondent NOVARTIS' expense, copies of all Confidential Business Information relating to Desipramine. Not later than one hundred eighty (180) Days after the Closing Date, Respondent NOVARTIS shall complete delivery of all such Confidential Business Information relating to Desipramine to the Commission-approved Acquirer and certify to the Commission that such delivery has occurred in accordance with this Order. Respondent NOVARTIS shall deliver such Confidential Business Information relating to Desipramine as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of such information; and (3) in a manner that insures its completeness and accuracy and that fully preserves its usefulness. Pending complete delivery of all such Confidential Business Information relating to Desipramine to the Commission-approved Acquirer, Respondent NOVARTIS shall provide the Interim Monitor (if any has been appointed) with reasonable access to all such Confidential Business Information relating to Desipramine and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to the Desipramine Assets that contain such Confidential Business Information relating to Desipramine and facilitating the delivery in a manner consistent with this Order.

J. Respondent NOVARTIS shall take all necessary steps to maintain the confidentiality of the Confidential Business Information relating to Desipramine. , that:

1. Except as permitted under the Remedial Agreement or this Order, Respondent NOVARTIS shall not (i) provide, disclose, or otherwise make available any Confidential Business Information relating to Desipramine to any Person or (ii) use any Confidential Business Information relating to Desipramine for any reason or purpose;

2. Nothing in this Order prohibits Respondent NOVARTIS from disclosing Confidential Business Information relating to Desipramine if required by United States federal or state law, regulation, court order, or subpoena; , , that Respondent NOVARTIS shall use its reasonable best efforts to protect the confidentiality of such information, including, but not limited to, obtaining a protective order during an adjudication; and

3. If disclosure of any Confidential Business Information relating to Desipramine is permitted under this Order, Respondent NOVARTIS shall provide, disclose, or otherwise make available such information (i) only to those Persons who require such information for the permitted purposes, (ii) only to the extent that such Confidential Business Information is required, and (iii) only to those Persons who agree in writing or otherwise are required to maintain the confidentiality of such information.

K. Pending the divestiture of the Desipramine Assets, Respondent NOVARTIS shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the business associated with the Desipramine Assets, to minimize any risk of loss of competitive potential for the business associated with the Desipramine Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Desipramine Assets except for ordinary wear and tear.

L. The purpose of the divestiture of the Desipramine Assets to a Commission-approved Acquirer is to create an independent, viable and effective competitor in the relevant markets in which the Desipramine Assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of

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

III.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Days after the Acquisition Date, Respondent NOVARTIS shall divest the Orphenadrine Citrate ER Assets, absolutely and in good faith, to AMIDE pursuant to and in accordance with the AMIDE Divestiture Agreement. The AMIDE Divestiture Agreement shall not vary or contradict, or be construed to vary 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 AMIDE or to reduce any obligations of Respondent NOVARTIS under such agreement.

, , that, if Respondent NOVARTIS has divested the Orphenadrine Citrate ER Assets to AMIDE prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent NOVARTIS that:

1. AMIDE is not an acceptable purchaser of the Orphenadrine Citrate ER Assets, then Respondent shall immediately rescind the transaction with AMIDE and, within six (6) months from the date the Order becomes final, shall divest the Orphenadrine Citrate ER Assets to a Commission-approved Acquirer absolutely and in good faith, at no minimum price, and only in a manner that receives the prior approval of the Commission; or

2. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent NOVARTIS, or appoint a Divestiture Trustee, pursuant to Paragraph VI. of this Order, to effect such modifications (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

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Commission between Respondent NOVARTIS (or a Divestiture Trustee) and a Commission-approved Acquirer of the Orphenadrine Citrate ER Assets shall be deemed incorporated into this Order, and any failure by Respondent NOVARTIS to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondent NOVARTIS shall not enforce any agreement

provision should the Commission determine that the Commission-approved Acquirer is not using commercially reasonable best efforts to obtain all FDA approvals necessary to manufacture and sell Orphenadrine Citrate ER independently of Respondent NOVARTIS.

F. Upon reasonable notice and request from the Commission-approved Acquirer to the Respondent NOVARTIS, Respondent NOVARTIS shall provide (in a timely manner and at no greater than Direct Cost) to the Commission-approved Acquirer consultation with, assistance, training, and advice from, knowledgeable employees of Respondent NOVARTIS with respect to the Development and manufacture of Orphenadrine Citrate ER that the Commission-approved Acquirer might reasonably need in order to receive and use the Orphenadrine Citrate ER Assets in a manner consistent with this Order, and shall continue providing such consultation, assistance, training and advice, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) obtains all FDA approvals necessary to manufacture and sell Orphenadrine Citrate ER independently of Respondent NOVARTIS; , , Respondent NOVARTIS' obligation to provide such assistance as required by this paragraph shall not exceed six (6) years from the last Closing Date relating to Orphenadrine Citrate ER;

G. Upon request of the Commission-approved Acquirer and subject to the approval of the Commission, Respondent NOVARTIS shall include in any Remedial Agreement the following provisions:

1. Respondent NOVARTIS shall Contract Manufacture and deliver to the Commission-approved Acquirer, in a timely manner and under reasonable terms and conditions, a supply of Orphenadrine Citrate ER in Final Finished Form, at Respondent NOVARTIS' Supply Cost, EXW (Incoterms 2000) the manufacturing facility, for a period of time sufficient to allow the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all FDA approvals

necessary to manufacture and sell Orphenadrine Citrate ER independently of Respondent NOVARTIS; , , Respondent NOVARTIS' obligation to Contract Manufacture shall not exceed six (6) years from the last Closing Date relating to Orphenadrine Citrate ER; , , that commencing twenty-nine (29) months after the last Closing Date relating to Orphenadrine Citrate ER, Respondent NOVARTIS' supply of Orphenadrine Citrate ER to the Commission-approved Acquirer may be at a price that is increased by ten (10) percent per year above Respondent NOVARTIS' Supply Cost.

2. For the term of the Contract Manufacture related to Orphenadrine Citrate ER, Respondent NOVARTIS will make inventory of Orphenadrine Citrate ER available for sale or resale only to the Commission-approved Acquirer (not for use in Respondent NOVARTIS' own business after the Acquisition Date); , , nothing in this Order shall prohibit Respondent NOVARTIS from researching, developing, manufacturing, using, importing, selling, marketing or distributing products that compete with Orphenadrine Citrate ER.

3. Respondent NOVARTIS' obligation to supply Orphenadrine Citrate ER to the Commission-approved Acquirer pursuant to the terms of the Remedial Agreement shall take priority over the manufacture and supply of any product for Respondent NOVARTIS' own use or sale.

4. Respondent NOVARTIS shall make representations and warranties to the Commission-approved Acquirer that the Orphenadrine Citrate ER supplied through Contract Manufacture pursuant to the Remedial Agreement meets current good manufacturing practices of the FDA, as set forth in 21 C.F.R. Parts 210 and 211. Respondent NOVARTIS shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Orphenadrine Citrate ER supplied to the Commission-approved Acquirer pursuant to the Remedial Agreement by Respondent NOVARTIS to meet such specifications. This

obligation shall be contingent upon the Commission-approved Acquirer giving Respondent NOVARTIS prompt, adequate 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 NOVARTIS under this Order;

, , Respondent NOVARTIS may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondent NOVARTIS' responsibilities to supply Orphenadrine Citrate ER in the manner required by this Order;

, , this obligation shall not require Respondent NOVARTIS to be liable for any act or omission or misconduct whether willful or negligent of the Commission-approved Acquirer nor for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by Respondent NOVARTIS to the Commission-approved Acquirer.

5. Respondent NOVARTIS shall make representations and warranties to the Commission-approved Acquirer that Respondent NOVARTIS will hold harmless and indemnify the Commission-approved Acquirer for any liabilities including, but not limited to, indirect damages, special damages, consequential damages, lost profits, legal fees and costs resulting from the failure by Respondent NOVARTIS to deliver Orphenadrine Citrate ER in a timely manner as required by the Remedial Agreement unless Respondent NOVARTIS can demonstrate that its failure was entirely beyond the control of the Respondent NOVARTIS and in no part the result of negligence or willful misconduct by Respondent NOVARTIS.

6. During the term of the Contract Manufacture between Respondent NOVARTIS and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or Interim Monitor (if applicable), Respondent NOVARTIS shall make available to the Commission-approved Acquirer or the Interim

Monitor (if applicable) all records that relate to the Contract Manufacture of Orphenadrine Citrate ER that are generated or created after the Closing Date.

7. Upon reasonable notice and request from the Commission-approved Acquirer to the Respondent NOVARTIS, Respondent NOVARTIS shall provide in a timely manner at no greater than Direct Cost the following:

a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell Orphenadrine Citrate ER;

b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture Orphenadrine Citrate ER in substantially the same manner and quality employed or achieved by Respondent NOVARTIS; and

c. consultation with knowledgeable employees of Respondent NOVARTIS and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) obtains all FDA approvals necessary to manufacture and sell Orphenadrine Citrate ER independently of Respondent NOVARTIS and sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Orphenadrine Citrate ER.

H. Respondent NOVARTIS shall delete Orphenadrine Citrate ER from any customer contracts in effect as of the Closing Date that are not divested to the Commission-approved Acquirer.

I. Not later than ten (10) Days after the Closing Date, Respondent NOVARTIS shall begin to deliver to the Commission-approved Acquirer, at Respondent NOVARTIS'

expense, copies of all Confidential Business Information relating to Orphenadrine Citrate ER. Not later than one hundred eighty (180) Days after the Closing Date, Respondent NOVARTIS shall complete delivery of all such Confidential Business Information relating to Orphenadrine Citrate ER to the Commission-approved Acquirer and certify to the Commission that such delivery has occurred in accordance with this Order. Respondent NOVARTIS shall deliver such Confidential Business Information relating to Orphenadrine Citrate ER as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of such information; and (3) in a manner that insures its completeness and accuracy and that fully preserves its usefulness. Pending complete delivery of all such Confidential Business Information relating to Orphenadrine Citrate ER to the Commission-approved Acquirer, Respondent NOVARTIS shall provide the Interim Monitor (if any has been appointed) with reasonable access to all such Confidential Business Information relating to Orphenadrine Citrate ER and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to the Orphenadrine Citrate ER Assets that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.

J. Respondent NOVARTIS shall take all necessary steps to maintain the confidentiality of the Confidential Business Information relating to Orphenadrine Citrate ER. , , , that:

1. Except as permitted under the Remedial Agreement or this Order, Respondent NOVARTIS shall not (i) provide, disclose, or otherwise make available any Confidential Business Information relating to Orphenadrine Citrate ER to any Person or (ii) use any Confidential Business Information relating to Orphenadrine Citrate ER for any reason or purpose;

2. Nothing in this Order prohibits Respondent NOVARTIS from disclosing Confidential Business Information relating to Orphenadrine Citrate ER if required by United States federal or state law, regulation, court order, or subpoena; , ,

that Respondent NOVARTIS shall use its reasonable best efforts to protect the confidentiality of such information, including, but not limited to, obtaining a protective order during an adjudication; and

3. If disclosure of any Confidential Business Information relating to Orphenadrine Citrate ER is permitted under this Order, Respondent NOVARTIS shall provide, disclose, or otherwise make available such information (i) only to those Persons who require such information for the permitted purposes, (ii) only to the extent that such Confidential Business Information is required, and (iii) only to those Persons who agree in writing or otherwise are required to maintain the confidentiality of such information.

K. Pending the divestiture of the Orphenadrine Citrate ER Assets, Respondent NOVARTIS shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the business associated with the Orphenadrine Citrate ER Assets, to minimize any risk of loss of competitive potential for the business associated with the Orphenadrine Citrate ER Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Orphenadrine Citrate ER Assets except for ordinary wear and tear.

L. The purpose of the divestiture of the Orphenadrine Citrate ER Assets to a Commission-approved Acquirer is to create an independent, viable and effective competitor in the relevant markets in which the Orphenadrine Citrate ER Assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Days after the Acquisition Date, Respondent NOVARTIS shall divest the Rifampin Assets,

absolutely and in good faith, to AMIDE pursuant to and in accordance with the AMIDE Divestiture Agreement. The AMIDE Divestiture Agreement shall not vary or contradict, or be construed to vary 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 AMIDE or to reduce any obligations of Respondent NOVARTIS under such agreement.

, that, if Respondent NOVARTIS has divested the Rifampin Assets to AMIDE prior to the date this Order

otherwise impair the ability of the Commission-approved Acquirer to operate the Rifampin Assets as such assets were engaged at the time of the announcement of the Acquisition. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information relating to Rifampin.

D. Respondent NOVARTIS shall secure, prior to the Closing Date, all consents and waivers from all Persons that are necessary for the divestiture of the Rifampin Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, use, import, sale, marketing or distribution of Rifampin in the United States by the Commission-approved Acquirer. If Respondent NOVARTIS assigns the Rifampin Agreement, its obligations under this Paragraph IV.D. include, but are not limited to, obtaining all consents and waivers from all Persons necessary to effect the assignment of the Rifampin Agreement in a manner that provides the Commission-approved Acquirer with all of the economic and competitive benefits of the Rifampin Agreement.

E. Respondent NOVARTIS shall assign the Rifampin Agreement to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer);

F. Respondent NOVARTIS shall delete Rifampin from any customer contracts in effect as of the Closing Date that are not divested to the Commission-approved Acquirer.

G. Not later than ten (10) Days after the Closing Date, Respondent NOVARTIS shall begin to deliver to the Commission-approved Acquirer, at Respondent NOVARTIS' expense, copies of all Confidential Business Information relating to Rifampin. Not later than one hundred eighty (180) Days after the Closing Date, Respondent NOVARTIS shall complete delivery of all such Confidential Business Information relating to Rifampin to the Commission-approved Acquirer and certify to the Commission that such delivery has occurred in accordance with this Order. Respondent NOVARTIS shall deliver such

Confidential Business Information relating to Rifampin as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of such information; and (3) in a manner that insures its completeness and accuracy and that fully preserves its usefulness. Pending complete delivery of all such Confidential Business Information relating to Rifampin to the Commission-approved Acquirer, Respondent NOVARTIS shall provide the Interim Monitor (if any has been appointed) with reasonable access to all such Confidential Business Information relating to Rifampin and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to the Rifampin Assets that contain such Confidential Business Information relating to Rifampin and facilitating the delivery in a manner consistent with this Order.

H. Respondent NOVARTIS shall take all necessary steps to maintain the confidentiality of the Confidential Business Information relating to Rifampin. , , h , that:

1. Except as permitted under the Remedial Agreement or this Order, Respondent NOVARTIS shall not (i) provide, disclose, or otherwise make available any Confidential Business Information relating to Rifampin to any Person or (ii) use any Confidential Business Information relating to Rifampin for any reason or purpose;

2. Nothing in this Order prohibits Respondent NOVARTIS from disclosing Confidential Business Information relating to Rifampin if required by United States federal or state law, regulation, court order, or subpoena; , , h , that Respondent NOVARTIS shall use its reasonable best efforts to protect the confidentiality of such information, including, but not limited to, obtaining a protective order during an adjudication; and

3. If disclosure of any Confidential Business Information relating to Rifampin is permitted under this Order, Respondent NOVARTIS shall provide, disclose, or otherwise make available such information (i) only to those Persons who require such information for the permitted purposes, (ii) only to the extent that

such Confidential Business Information is required, and (iii) only to those Persons who agree in writing or otherwise are required to maintain the confidentiality of such information.

I. Pending the divestiture of the Rifampin Assets, Respondent NOVARTIS shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the business associated with the Rifampin Assets, to minimize any risk of loss of competitive potential for the business associated with the Rifampin Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Rifampin Assets except for ordinary wear and tear.

J. The purpose of the divestiture of the Rifampin Assets to a Commission-approved Acquirer is to create an independent, viable and effective competitor in the relevant markets in which the Rifampin Assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that:

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

of the identity of any proposed Interim Monitor, Respondent NOVARTIS 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 NOVARTIS 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 NOVARTIS' 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 NOVARTIS 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 NOVARTIS' compliance with the divestiture 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 earlier of:

a. the completion by Respondent NOVARTIS of the divestiture of all relevant assets required to be granted, licensed, delivered, or otherwise conveyed pursuant to this Order in a manner that fully satisfies the requirements of the Order and notification by the Commission-approved Acquirer to the Interim Monitor, or a determination by the Interim Monitor, that the Commission-approved Acquirer is fully capable of producing each Product acquired pursuant to a Remedial Agreement independently of Respondent NOVARTIS; or

b. the expiration of the last to expire of the Remedial Agreements;

, , that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent NOVARTIS' 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 Respondent NOVARTIS' compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant Product assets. Respondent NOVARTIS 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 NOVARTIS' compliance with the Order.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent NOVARTIS 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 NOVARTIS, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. The Interim Monitor shall provide an accounting, at least on a quarterly basis, to Respondent NOVARTIS for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. Respondent NOVARTIS 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

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.

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 NOVARTIS of the identity of any proposed Divestiture Trustee, Respondent NOVARTIS 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 NOVARTIS 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 the Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent NOVARTIS 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 the assets that are required by this Order to be divested.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; , , 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 NOVARTIS shall develop such financial or other information as the Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. Respondent NOVARTIS shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent NOVARTIS 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 NOVARTIS' absolute and unconditional obligation to divest expeditiously and at no minimum price. Each 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

Any

fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent NOVARTIS, 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 NOVARTIS 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. If, at the end of the term provided for in Paragraph VI.D.2. of this Order, the Divestiture Trustee determines that he or she is unable to grant, license, deliver or otherwise convey the relevant assets required to be granted, licensed, delivered or otherwise conveyed in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, Development, manufacture, import, distribution, marketing, promotion, sale, or after-sales support of the relevant Product, the Divestiture Trustee may assign, grant, license, transfer, divest, deliver or otherwise convey such additional relevant Product assets of Respondent NOVARTIS to a Commission-approved Acquirer as necessary to achieve divestitures and to satisfy the purposes and requirements of this Order.

8. The Divestiture Trustee shall have no obligation or authority to

9. The Divestiture Trustee shall report in writing to Respondent NOVARTIS and to the Commission every sixty (60) Days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

10. Respondent NOVARTIS 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; , h , 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.

G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

VII.

IT IS FURTHER ORDERED that:

A. Within five (5) Days of the Acquisition Date, Respondent NOVARTIS shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) Days after the date this Order becomes final, and every sixty (60) Days thereafter until Respondent NOVARTIS has fully complied with Paragraphs II.A. and I., III.A. and I. and IV.A. and G. (has divested all relevant assets

6. a description of all technical assistance provided to any Commission-approved Acquirer during the reporting period.

C. Respondent NOVARTIS shall file annually on the anniversary of the date this Order becomes final a verified written report with the Secretary of the Commission. Each such report shall set forth in detail the manner and form in which Respondent NOVARTIS has complied and is complying with this Order. Respondent NOVARTIS shall include in this report a full description of any claims (whether outstanding or resolved) by any Commission-approved Acquirer that Respondent NOVARTIS has breached or failed to comply fully with this Order or any Remedial Agreement. Respondent NOVARTIS shall include with this report a copy of any written communication (including e-mails) from any Commission-approved Acquirer that includes or relates to a claim that Respondent NOVARTIS has breached or failed to comply fully with this Order or a Remedial Agreement. Respondent NOVARTIS shall file its verified written report:

1. one (1) year after the date this Order becomes final;

2. annually until the earlier of (i) ten (10) years after this Order becomes final, and, (ii) the date Respondent NOVARTIS has fully satisfied all of its obligations under Paragraphs II.A., E. and F.; III.A., E. and F. and IV.A. and E. of this Order and any Remedial Agreement; and,

3. at other times as the Commission may require.

VIII.

IT IS FURTHER ORDERED that Respondent NOVARTIS shall notify the Commission at least thirty (30) Days prior to any (1) proposed dissolution of Novartis AG or Sandoz Inc., (2) proposed acquisition, merger or consolidation of Novartis AG, or (3) any other change in Novartis AG or Sandoz Inc. or other relevant affiliates that may affect compliance obligations arising out of the order, including, but not limited to, assignment, the creation or dissolution of relevant subsidiaries.

IX.

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

A. Access, during office hours of Respondent NOVARTIS and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda

APPENDIX I
NON-PUBLIC
AMIDE DIVESTITURE AGREEMENT
[Redacted From the Public Record Version But Incorporated By Reference]

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APPENDIX II
NON-PUBLIC
DESIPRAMINE AND ORPHENADRINE CITRATE ER
SUPPLY COSTS
[Redacted From the Public Record Version But Incorporated By Reference]

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$31.00 per share cash. 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 FTC Act, as amended, 15 U.S.C. § 45, in the markets for the manufacture and sale of: (1) generic desipramine hydrochloride tablets, (2) generic orphenadrine citrate ER tablets, and (3) generic rifampin oral capsules. The proposed Consent Agreement will remedy the alleged violations by replacing in each of these markets the lost competition that would result from the acquisition.

Desipramine hydrochloride is a tricyclic antidepressant. The branded desipramine product, Norpramin, does not offer any significant price pressure in the generic desipramine market other than setting a price ceiling that is currently many times higher than the generic pricing level. The brand price is essentially irrelevant with respect to the pricing of generic desipramine tablets. In contrast, the competition between producers of generic desipramine tablets has a direct and substantial effect on generic desipramine pricing. Annual U.S. sales of generic desipramine hydrochloride tablets are reported to be less than $6 million. The U.S. market for the manufacture and sale of generic desipramine hydrochloride tablets is highly concentrated. Only Novartis and Eon make all six strengths of generic desipramine hydrochloride tablets. Watson Pharmaceuticals, Inc., the only other firm supplying generic desipramine hydrochloride tablets, sells only three of the six strengths. The acquisition of Eon by Novartis would increase significantly the concentration in the generic desipramine hydrochloride market. Post-acquisition, only Novartis would supply the full line, accounting for more than 95% of U.S. generic desipramine hydrochloride sales.

Orphenadrine citrate is a muscle relaxant. The branded orphenadrine citrate product, Norflex, does not impact the pricing of generic orphenadrine citrate other than setting a price ceiling that is currently many times higher than the generic pricing level. In contrast, the competition between producers of generic

orphenadrine citrate tablets has a direct and substantial effect on generic orphenadrine citrate pricing. Annual U.S. sales of generic orphenadrine citrate ER tablets is slightly under $10 million. The U.S. market for the manufacture and sale of generic orphenadrine citrate ER tablets is highly concentrated. Only Eon, Novartis, and Impax Laboratories, Inc. (through its generic marketing division, Global Pharmaceuticals) manufacture and market generic orphenadrine citrate ER tablets in the United States. The acquisition would result in a duopoly with Novartis accounting for approximately 70% of all prescriptions of generic orphenadrine citrate. The acquisition of Eon by Novartis would increase the concentration in the market significantly.

Rifampin is one of several drugs used in a multi-drug cocktail for the treatment of tuberculosis.

sale of generic desipramine hydrochloride tablets, generic orphenadrine citrate ER tablets, and generic rifampin oral capsules takes at least two years due to substantial regulatory, technological, and intellectual property barriers.

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for generic desipramine hydrochloride tablets, generic orphenadrine citrate ER tablets, and generic rifampin oral capsules by eliminating actual, direct, and substantial competition between Novartis and Eon; by increasing the likelihood that Novartis will be able to unilaterally exercise market power; by increasing the likelihood and degree of coordinated interaction between the few remaining competitors; and by increasing the likelihood that consumers will pay higher prices.

The proposed Consent Agreement preserves competition in the generic desipramine hydrochloride tablets, generic orphenadrine citrate ER tablets, and generic rifampin oral capsules markets by requiring that Novartis divest all of the Sandoz orphenadrine citrate ER and rifampin assets and all of Eon's desipramine hydrochloride assets to Amide no later than ten days after the acquisition. Amide, a reputable generic manufacturer, is particularly well-positioned to manufacture and market generic rifampin, because Amide already currently contract manufactures generic rifampin capsules for Novartis. Amide is also well-positioned to obtain FDA approval to manufacture and market generic desipramine hydrochloride and orphenadrine citrate ER in the near future. If the Commission determines that Amide is not an acceptable purchaser, or that the manner of the divestiture is not acceptable, Novartis must rescind the transaction with Amide and divest the assets to a Commission-approved buyer not later than six months from the date the Order becomes final. If

divestitures of the desipramine hydrochloride, rifampin, and orphenadrine citrate assets. Novartis has selected Francis J. Civille to be the Interim Monitor and Amide has consented to his selection. The monitor will ensure that the Commission remains informed about the status of the proposed divestitures and asset transfers.

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

IN THE MATTER OF

PENN NATIONAL GAMING, 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

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This consent order addresses the acquisition by Respondent Penn National Gaming, Inc. – which owns and operates a number of casino facilities offering casino gaming services such as slot machines, video poker machines, and table and counter games – of Argosy Gaming Company, another casino operator. The order, among other things, requires the respondent to divest Argosy's Baton Rouge, Louisiana, casino and associated assets to Columbia Sussex

violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 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 PNG is a corporation organized, existing and doing business under and by virtue of the laws of the state of Pennsylvania, with its offices and principal place of business located at 825 Berkshire Blvd., Suite 200, Wyomissing, Pennsylvania 19610.

2. Respondent PNG is an owner and operator of casinos, as well

5. Argosy is an owner and operator of six casinos located in Illinois, Missouri, Louisiana, Indiana and Iowa.

III. THE ACQUISITION

6. PNG and Argosy entered into a stock Purchase Agreement dated as of November 3, 2004 (the "Purchase Agreement") whereby PNG agreed to acquire Argosy for approximately $2.2 billion (the "Acquisition").

of an existing Louisiana riverboat casino to the Baton Rouge, Louisiana, metropolitan area to deter or counteract the anticompetitive effects described in paragraph 11 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, parish, and city approvals.

VII. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between PNG and Argosy through a merger to monopoly in the relevant market, thereby: (i) increasing the likelihood that PNG would exercise market power in this market; (ii) reducing existing incentives to improve casino quality or pursue casino improvements; and, (iii) increasing the likelihood that customers would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

12. The Purchase Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

13. The Acquisition described in Paragraph 6, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-sixth day of July, 2005, issues its Complaint against said Respondent.

Exhibit A

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PARCEL VIII

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Penn National Gaming, Inc. ("PNG"), hereinafter referred to as "Respondent," of Argosy Gaming Company ("Argosy"), and Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, 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 Hold Separate and Maintain Assets ("Hold Separate Order" attached to this Decision and Order as Appendix I), 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 this Decision and Order in certain respects, now in further conformity

with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent PNG is a corporation organized, existing and doing business under and by virtue of the laws of the state of Pennsylvania, with its offices and principal place of business located at 825 Berkshire Blvd., Suite 200, Wyomissing, Pennsylvania 19610.

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. "PNG" or "Respondent" means Penn National Gaming, Inc., its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; and its parents, joint ventures, subsidiaries, divisions, groups and affiliates controlled by Penn National Gaming, Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

B. "Argosy" means Argosy Gaming Company 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 219 Piasa Street, Alton, Illinois 62002; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Argosy Gaming Company.

intangible, assets of the ACBR Entities, and any other assets of Respondent or Argosy, or any of their other subsidiaries used in or related to the Argosy Casino Baton Rouge, Catfish Town, and Centroplex Centre, including, but not limited to:

1. the Argosy Casino Baton Rouge;

2. Catfish Town;

3. Centroplex;

4. all owned or leased parking structures, parking garages, and parking lots used by or related to the Argosy Casino Baton Rouge, Catfish Town, or the Centroplex, including, but not limited to the Leased Properties;

5. all personal property (including, but not limited to, deck barges), fixtures, and improvements owned, placed on,

Building, Corner of Europe Street and St. Phillip Street in Baton Rouge, LA, S. Front Street in Baton Rouge, LA, and the dock and walkway in the Maritime Building;

8. all governmental approvals, consents, licenses, waivers, or other authorizations related to the Argosy Casino Baton Rouge;

9. all trademarks, trade names, or copyrights owned or used by the ACBR, Catfish Town, and Centroplex, including, but not limited to irrevocable licenses for the use of all

1. any intellectual property owned, licensed to, or used by

4. All records, data, or other information relating to visits, spending, or other activity by any patrons or customers of the Argosy Baton Rouge Assets.

U. "Divestiture Agreement" means:

1. if Respondent divests the Argosy Casino Baton Rouge Assets to Columbia Sussex, the Agreement to Execute

rights or assets to be licensed or otherwise made available to the Commission-approved Acquirer pursuant to Paragraph II of this Order, including, but not limited to, any agreement between the Respondent and the Commission-approved Acquirer required or permitted by or pursuant to Paragraph II. of this Order.

V. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.

W. "Effective Date of Divestiture" means the date on which Respondent (or a Divestiture Trustee) divests to a Commission-approved Acquirer the Argosy Baton Rouge Assets completely and as required by Paragraph II or IV of this Order.

X. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.

Y. “Hold Separate Order” means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

Z. "Hold Separate Trustee" means the person appointed pursuant to Paragraph II of the Hold Separate Order in this matter.

AA. “Land” means all real property and/or land parcels related to the operation of the Argosy Baton Rouge Assets, including, but not limited to, all buildings, hotels, parking garages, parking structures, parking lots, Catfish Town, the Sheraton Hotel, Centroplex, and any other buildings or structures located on such land.

BB. “Leased Properties” means two parking lots on South Front Street, Baton Rouge, LA leased by Catfish through

a leasing agreement dated June 27, 2002, and as extended on August 3, 2004, between Phillips Connell Witter, as landlord, and Catfish Queen Partnership In Commendam, as tenant.

CC. "Louisiana Gaming Control" ("LAGC") means the Louisiana Gaming Control Board, Louisiana Department of Public Safety - Office of State Police - Gaming Enforcement Section, Louisiana Attorney General's Office - Gaming Division, Louisiana Riverboat Gaming Commission, or any other judicial or regulatory authority responsible for granting approval(s), qualification(s), license(s), or permit(s) for any aspect of gaming in the state of Louisiana.

DD. "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.

EE. "Vessel" means the vessel known as Argosy III Riverboat, Official Number 1023758, including, but not limited to: (i) all superstructures currently constructed thereon; (ii) plans and specifications therefor; (iii) existing warranties therefor; and, (iv) all parts, spares, tools, equipment, machinery, gear, implements, broached and unbroached consumable stores, provisions for furniture, fixtures, fuel, pumps, anchors, cables, chains, apparel, rigging, tackle, fittings, accessories, appurtenances, appliances, supplies therefor, inventory parts, ramps, generators and related equipment (including, but not limited to, existing walkways), and all other appurtenances and accessories related to the vessel, whether located onboard the vessel or elsewhere;

h if any plans or specifications are not

use best efforts to obtain the consent of the owner or possessor of those plans to transfer such plans to the Commission-approved Acquirer.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall divest, absolutely and in good faith and at no minimum price, the Argosy Baton Rouge Assets to Columbia Sussex pursuant to and in accordance with the Divestiture Agreement by the earlier of: (1) three (3) days after the date upon which the LAGC grants the Application to transfer the interest of the licenses held by Catfish Town Partnership in Commendam (doing business as Argosy Casino Baton Rouge), Argosy of Louisiana, and Jazz Enterprises, Inc. to Columbia Sussex or its designee as required by the State of Louisiana to own and operate any of the Argosy Baton Rouge Assets (as determined pursuant to LAC 42:XIII.2501,2503,2505,2507); or, (2) one hundred and twenty (120) days after the date this Order becomes final.

B. Within ten (10) days after the date Respondent signs the Agreement Containing Consent Orders in this matter, Respondent shall ensure that Columbia Sussex files a completed Application with the LAGC .

C. Respondent shall cooperate fully and expeditiously with the Commission-Approved Acquirer and the LAGC in obtaining all approvals (including, but not limited to, approval of a transfer of interest in any of the Argosy Baton Rouge Assets) required by the State of Louisiana to own and operate any of the Argosy Baton Rouge Assets, including, but not limited to, providing the Commission-Approved Acquirer and the LAGC with any books, records, and information necessary to complete an Application or obtain a gaming license and any other approvals required by the

State of Louisiana to own and operate any of the Argosy Baton Rouge Assets.

, *h* , that, if Respondent has divested the Argosy Baton Rouge Assets to Columbia Sussex prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that:

1. Columbia Sussex is not an acceptable purchaser of the Argosy Baton Rouge Assets, then Respondent shall immediately rescind the transaction with Columbia Sussex and, within six (6) months from the date the Order becomes final, shall divest the Argosy Baton Rouge Assets to a Commission-approved Acquirer absolutely and in good faith, at no minimum price, and only in a manner that receives the prior approval of the Commission; or,

2. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, pursuant to Paragraph IV. of this Order, to effect within sixty (60) days such modifications (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

h that, if the LAGC has failed to issue a decision on Columbia Sussex's Application within one hundred and twenty (120) days after this Order is final, and:

1. Respondent has not violated this Order or the Hold Separate Order;

2. Respondent has not breached the Divestiture Agreement; and,

3. the sole remaining Condition to Closing (determined as if the closing were to occur one hundred and twenty (120) days after this Order is final) is the failure to obtain one or more approvals, licenses, permits, rulings or decisions by the LAGC,

Respondent shall have until six (6) months from the date this Order is final to divest the Argosy Baton Rouge Assets to Columbia Sussex in a manner that receives the prior approval of the Commission; if Respondent has not divested the Argosy Baton Rouge Assets to Columbia Sussex within six (6) months after this Order is final, the Commission may appoint a Divestiture Trustee.

h that if the LAGC has disapproved Columbia Sussex's Application less than one hundred and twenty (120) days after the date this Order becomes final, and:

1. Respondent has not violated this Order or the Hold Separate Order;

2. Respondent has not breached the Divestiture Agreement; and,

3. the sole remaining Condition to Closing (determined as if the closing were to occur on the date of such LAGC disapproval) the divestiture is the failure to obtain one or more approvals, licenses, permits, rulings or decisions by the LAGC,

Respondent shall have until six (6) months from the date of such LAGC disapproval to divest the Argosy Baton Rouge Assets to a Commission-approved Acquirer in a manner that receives the prior approval of the Commission; if Respondent has not divested the Argosy Baton Rouge

Agreement; or, (ii) for the purpose of complying with Respondent's financial, tax reporting, health, safety, and environmental obligations or any other disclosure obligations imposed by law, regulation, or judicial order (including, but not limited to, complying with laws of the state of Louisiana or requests by the LAGC).

E. At the option of the Commission-approved Acquirer, and subject to the prior approval of the Commission, Respondent may retain the real property, together with buildings or improvements thereon, listed on Exhibit A to this Order.

F. At the option of the Commission-approved Acquirer, and subject to the prior approval of the Commission, the Divestiture Agreement shall include the following provisions, terms, and agreements:

1. A transition services agreement for a term not to exceed six (6) months following the Effective Date of Divestiture pursuant to which Respondent shall provide at its Actual Cost to the Commission-approved Acquirer such administrative, human resource, accounting, and other services as are reasonably necessary to achieve the purposes of this Order;

2. Contracts, licenses, or other agreements sufficient to permit the Commission-approved Acquirer to use, for a period of one (1) year after the Effective Date of Divestiture, any tangible or intangible assets that are not included in the definition of the Argosy Baton Rouge Assets, but that have been used by the Argosy Casino Baton Rouge in some way in the twelve (12) months preceding the date this Order is accepted for public comment;

3. Contracts, licenses, or other agreements sufficient to permit the Commission-approved Acquirer to obtain the

equivalent economic and competitive benefit of any rights or obligations of the Argosy Baton Rouge Assets under any existing contract, license, or other agreement that, for any reason, Respondent did not divest to the Commission-approved Acquirer, which contract, license, or other agreement is reasonably necessary to achieve the purposes of this Order; and,

4. A license for no longer than six (6) months for the use of the Argosy name and tradenames.

G. Until the Effective Date of Divestiture of the Argosy Baton Rouge Assets, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Argosy Baton Rouge Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Argosy Baton Rouge Assets, except for ordinary wear and tear (including, but not limited to, regular repair and maintenance efforts, continuation of any planned capital expenditures, and marketing and promotional programs).

H. Respondent shall:

1. not interfere, directly or indirectly, with the hiring or employing by a Commission-approved Acquirer of the Argosy Baton Rouge Employees, and shall remove any impediments or incentives within the control of Respondent and Argosy that may deter these employees from accepting employment with a Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondent or Argosy that would affect the ability or incentive of those individuals to be employed by a Commission-approved Acquirer. In addition, Respondent shall not make any counteroffer to

duties as the position occupied by that employee immediately prior to the Effective Date of Divestiture; or,

(2) not offered that employee the same or increased monetary compensation and a substantially similar or better package of benefits and other compensation as the employee received immediately prior to the Effective Date of Divestiture;

4. No later than three (3) days after the Acquisition Date:

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K. The purpose of the divestiture of the Argosy Baton Rouge Assets is to ensure the continuing, viable, and competitive operation of the Argosy Baton Rouge Assets in the same manner and in the same business in which the Argosy Baton Rouge Assets were engaged at the time of the announcement of the proposed 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. Respondent shall:

1. Not provide, disclose, or otherwise make available any Confidential Business Information to any Person; and,

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

B. Notwithstanding Paragraph III.A. of this Order and subject

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not fully complied with the obligations to divest the Argosy Baton Rouge Assets as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the Argosy Baton Rouge

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 IV, 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 the Argosy Baton Rouge Assets.

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; *h* , 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 divested by this Order and to any other relevant information (including, but not limited to, information related to any regulation of the Argosy Baton Rouge Assets by the LAGC), 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 IV in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use commercially

by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the 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 misfeasance, 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; h that the Divestiture Trustee appointed pursuant to Paragraph IV of this Order may be the same Person appointed as Hold Separate Trustee pursuant to the relevant provisions of the Hold Separate Order 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,

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 Hold Separate Trustee, if any Hold Separate Trustee has been appointed pursuant to the Hold Separate Order in this matter. 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 description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all Persons (including, but not limited to, the LAGC) contacted. Respondent shall include in its report copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

D. One (1) year after the date this Order becomes final, annually until Respondent has complied fully with its obligations under Paragraphs II and IV of this Order, 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.

VI.

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

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 with reasonable notice, Respondent shall permit any duly authorized representative of the Commission:

A. access, during business office hours of Respondent, in the presence of counsel, and as permitted by and in accordance with the laws, rules and regulations of the LAGC, 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 this Order; and

B. upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on October 27, 2015.

Exhibit A

PARCEL IV

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[to be inserted], 2005

From: Peter M. Carlino

To: All Argosy Casino-Baton Rouge Employees

[redacted]

As you may know, on **[to be inserted]**, 2005, Penn National Gaming, Inc. ("Penn") completed its acquisition of Argosy Gaming Company ("Argosy"), and executed an agreement with Columbia Sussex Corporation ("Columbia Sussex") to divest the casino property commonly known as the Argosy Casino-Baton Rouge ("ACBR"). In our press release, we confirmed that Penn elected to divest the ACBR in order to expedite securing Federal Trade Commission ("FTC") and state gaming board approval of the Argosy merger. Penn also announced that the FTC accepted an Agreement Containing Consent Orders (the "Orders"), which incorporates a

[redacted]

I want to emphasize that during this Hold Separate Period – that is, the time period between Penn's acquisition of Argosy and its sale of the ACBR to Columbia Sussex – the ACBR should continue to operate as efficiently and as competitively as it has [redacted] and should continue to view Penn's Casino Rouge as a key [redacted]

rder

IN THE MATTER OF

PENN NATIONAL GAMING, INC.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission), having initiated an investigation of the proposed acquisition by Respondent Penn National Gaming, Inc. ("PNG") of Argosy Gaming Company ("Argosy"), and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, 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 the 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 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

C. “Commission” means the Federal Trade Commission.

D. “Respondent” means Penn National Gaming, Inc.

E. "Acquisition" means the proposed acquisition by merger of Argosy by Respondent pursuant to the “Agreement and Plan of Merger” dated November 3, 2004 (as amended), by and among Argosy, Respondent and a subsidiary of Respondent, whereby Respondent agreed to acquire Argosy.

F. “Acquisition Date” means the date the Acquisition is consummated.

G. “Argosy Baton Rouge Assets” means all of the outstanding shares of capital stock, limited liability company interest, and partnership interests, as the case may be, of any of the ACBR Entities, and all of the real and personal, tangible and intangible, assets of the ACBR Entities, and any other assets of Respondent or Argosy, or any of their other subsidiaries used in or related to the Argosy Casino Baton Rouge, Catfish Town, and Centroplex Centre, including, but not limited to:

1. the Argosy Casino Baton Rouge;

2. Catfish Town;

3. Centroplex;

4. all owned or leased parking structures, parking garages, and parking lots used by or related to the Argosy Casino Baton Rouge, Catfish Town, or the Centroplex, including, but not limited to the Leased Properties;

5. all personal property (including, but not limited to, deck barges), fixtures, and improvements owned, placed on, located at, used in connection with the operation of, or related to the ACBR;

6. all studies, surveys, research, audio and video recordings, data (including, but not limited to, the Argosy Casino Baton Rouge Database), information, and documents relating to marketing, advertising, promotion of the ACBR, Catfish Town, and Centrolplex;

7. all leases, agreements, and contracts of any kind relating to the ACBR, Catfish Town, and Centroplex, including, but not limited to:

   a. upon the consent of Sheraton, a license to use the Sheraton name in connection with the operation of the Centroplex; and,

   b. leases related to the Levee Building/Argosy Landing, Maritime I Building, Beauregard Building, Armour Building, Corner of Europe Street and St. Phillip Street in Baton Rouge, LA, S. Front Street in Baton Rouge, LA, and the dock and walkway in the Maritime Building;

8. all governmental approvals, consents, licenses, waivers, or other authorizations related to the Argosy Casino Baton Rouge;

9. all trademarks, trade names, or copyrights owned or used by the ACBR, Catfish Town, and Centroplex, including, but not limited to irrevocable licenses for the use of all trade names related to Catfish Town and Centroplex; and,

10. all books and records related to the ACBR, Catfish Town, and Centroplex, including but not limited to:
   a. documents containing information about customers or patrons of the ACBR, Catfish Town, and Centroplex;
   b. documents containing information about suppliers of any goods or services to the ACBR, Catfish Town,

and Centroplex; and,

c. documents relating to government approvals required for the construction, maintenance, operation, or licensing (including, but not limited to, regulation by the LAGC) of all or any part of the ACBR (including, but not limited to, the Vessel), Catfish Town, and Centroplex.

, that the Argosy Baton Rouge Assets do not include:

1. any intellectual property owned, licensed to, or used by Respondent or Argosy, or their other subsidiaries, other than any and all intellectual property owned exclusively by the ACBR Entities;

2. any contract or agreement for the service, sale, or lease of gaming machines or equipment used or located at any location other than the ACBR; or

3. any of the assets listed under the caption "Other Excluded Assets" in Section 2.5(a) of the Seller Disclosure Letter attached as Annex B to the Agreement to Execute Securities Purchase Agreement.

H. "Argosy Baton Rouge Employees" means:

2. all of those individuals employed by Argosy (including, but not limited to, Centroplex Centre Convention Hotel, L.L.C.) within the twelve (12) month period immediately prior to the Effective Date of Divestiture in the positions of Director of Hotel Operations, Rooms Division Manager, Revenue Manager, Sales & Catering Manager, Hotel Controller, or Executive Chef.

I. "Argosy Baton Rouge Primary Employees" means all Argosy Baton Rouge Employees:

1. Who are required to be licensed or to hold a permit from either the State of Louisiana or the United States Coast Guard as a condition of employment with one or more of the ACBR Entities; and,

2. Compensated at a base hourly rate of $8.00 or more immediately prior to the Effective Date of Divestiture.

J. “Argosy Casino Baton Rouge” or “ACBR” means the Land, Vessel, and all other rights related to and required for the operation of the Land and/or Vessel.

K. “Argosy Casino Baton Rouge Entities” or “ACBR Entities” means Argosy of Louisiana, Inc., Jazz Enterprises, Inc., Centroplex Centre Convention Hotel, L.L.C., and Catfish Queen Partnership in Commendam.

L. “Argosy Casino Baton Rouge Database” means all customer databases, customer lists, historical records of customers, and any other customer information collected and used by Argosy for marketing, promotional, or any other purposes related to the operation of ACBR, Catfish Town, and Centroplex;

h Argosy Casino Baton Rouge Database does not include any customer databases, customer lists, historical records of customers, or any other customer

information collected and used by Argosy solely for the marketing or promotion of any assets other than the Argosy Baton Rouge Assets.

M. "Commission-approved Acquirer" means any Person approved by the Commission to acquire the Argosy Baton Rouge Assets pursuant to Paragraph II of the Decision and Order.

N. "Confidential Business Information" means any information relating to the Argosy Baton Rouge Assets (before or after the divestiture required by this Order) that is not in the public domain, including, but not limited to:

1. All contracts, agreements, bids, purchase orders, or other documents or information relating to any acquisitions of goods or services related to the Argosy Baton Rouge Assets;

2. All marketing studies, marketing plans, data (including, but not limited to, the Argosy Casino Baton Rouge Database), or other documents or information relating to marketing of any of the Argosy Baton Rouge Assets;

3. All records, applications, data, reports, correspondence, and documents or information relating to any gaming license or other regulation by any political subdivision of the State of Louisiana of the business or operation of the Argosy Baton Rouge Assets; and,

4. All records, data, or other information relating to visits, spending, or other activity by any patrons or customers of the Argosy Baton Rouge Assets.

O. "Decision and Order" means:

1. until the issuance of a final Decision and Order by the Commission, the proposed Decision and Order

incorporated into and made a part of the Consent Agreement; or,

2. following the issuance of a final Decision and Order by the Commission, the Decision and Order issued by the Commission.

P. "Divestiture Agreement" means:

1. if Respondent divests the Argosy Casino Baton Rouge Assets to Columbia Sussex, the Agreement to Execute Securities Purchase Agreement (dated as of June 20, 2005) among CP Baton Rouge Casino, L.L.C., Columbia Sussex Corporation, and Penn National Gaming, Inc., and any contract, exhibit, attachment or schedule, or agreement related thereto, including, but not limited to:
   a. the Securities Purchase Agreement attached as Annex A to the Agreement to Execute Securities Purchase Agreement and all exhibits attached thereto;
   b. the Seller Disclosure Letter attached as Annex B to the Agreement to Execute Securities Purchase Agreement and all exhibits or schedules attached thereto; and,

landlord, and Catfish Queen Partnership In Commendam, as tenant.

X. "Louisiana Gaming Control" ("LAGC") means the Louisiana Gaming Control Board, Louisiana Department of Public Safety - Office of State Police - Gaming

II.

IT IS FURTHER ORDERED THAT:

A. During the Hold Separate Period, Respondent shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate Order and shall vest the Held Separate Business with all rights, powers, and authority necessary to conduct its business; Respondent shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business or any of its operations, or the Hold Separate Trustee, except to the extent that Respondent must exercise direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, and with all applicable laws (including, but not limited to, compliance with the laws of the state of Louisiana and all requests by the LAGC), including, in consultation with the Hold Separate Trustee, continued oversight of the Held Separate Business's compliance with policies and standards concerning the safety, health, and environmental aspects of its operations and the integrity of its financial controls; and Respondent shall have the right to defend any legal claims, investigations, or enforcement actions threatened or brought against any Held Separate Business.

B. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Held Separate Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

C. Until the Effective Date of Divestiture, Respondent shall take such actions as are necessary promptly to comply with any requests of the LAGC (including but not limited to any requests for reports of capital expenditures or financial

information). Respondent shall provide Commission staff with copies of all correspondence with LAGC, and shall provide Commission staff with copies of all materials provided to the LAGC.

D. The purposes of this Hold Separate Order are to: (1) preserve the Held Separate Business as a viable, competitive, and ongoing business independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Information is exchanged between Respondent and the Held Separate Business, except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Acquisition.

E. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. Frank Quigley shall serve as Hold Separate Trustee.

2. Within five (5) days of the date this Hold Separate Order becomes final, Respondent shall execute an agreement with the Hold Separate Trustee ("Trustee Agreement") that, subject to the approval of the Commission, confers at least the following rights and obligations upon the Respondent and the Hold Separate Trustee:

   a. The Trustee Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.

such expenses shall not include any expenses incurred pursuant to Paragraph II.E.5.a. of this Hold Separate Order or in the ordinary course of business.

e. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.

f. Respondent may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Confidential Business Information gained as a result of his/her role as Hold Separate Trustee to anyone other than the Commission or the LAGC.

g. The Hold Separate Trustee shall apply for, obtain, and/or maintain all licenses, findings of suitability, and other approvals required by the LAGC, under the Louisiana gaming laws, to perform his/her obligations under the Decision and Order, at the expense of the Respondent.

h. Thirty (30) days after the Hold Separate Order becomes final, and every thirty (30) days thereafter until the Hold Separate Order terminates, and as requested by the Commission or staff, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising the Held Separate Business are meeting (or exceeding) their projected goals as reflected in operating plans, budgets, projections, or any other regularly prepared financial statements. Upon Respondent's request, the Hold Separate Trustee shall

provide to the Respondent copies of all such reports, , Respondent is not entitled to receive, and the Hold Separate Trustee may redact from copies of any reports provided to the Respondent, all opinions and recommendations of the Hold Separate Trustee.

i. 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 paragraph, 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 the substitute Hold Separate Trustee within five (5) days after notice by the staff of the Commission to Respondent of the identity of any substitute Hold Separate Trustee, Respondent shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent and the substitute Hold Separate Trustee shall execute a Trustee Agreement, subject to the approval of the Commission, consistent with Paragraph II.

3. Respondent shall comply with all terms of the Trustee Agreement, and any breach by Respondent of any term of the Trustee Agreement shall constitute a violation of this Hold Separate Order. Notwithstanding any paragraph, section, or other provision of the Trustee Agreement, any modification of the Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with the Decision and Order.

4. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. To the extent that any Argosy Baton Rouge Employees leave or

have left the Held Separate Business prior to the Effective Date of Divestiture, 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.

5. In connection with support services or products not included within the Held Separate Business, Respondent shall continue to provide, or offer to provide, the same support services to the Held Separate Business as are being provided to such business interest by Respondent or Argosy as of the date the Consent Agreement is signed by Respondent. For any services or products that Respondent may provide to the Held Separate Business, Respondent may charge no more than the lesser of: (i) the same price they charge others (or subsidiaries, divisions, affiliates, or units of Respondent or Argosy) for the same services or products; or (ii) the price charged by Argosy to the Argosy Baton Rouge Assets in the past for the same services or products. Respondent's personnel providing such services or products must retain and maintain all Confidential Business Information of the Held Separate Business on a confidential basis, and, except as is permitted by this Hold Separate Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment

(12) months prior to the date this Hold Separate Order becomes final) that Respondent or Argosy has provided to their other businesses directly or through third party contracts, and that Argosy has provided directly or through third party contracts to the businesses constituting the Held Separate Business, at any time during the twelve (12) months prior to the date this Hold Separate Order becomes final. The Held Separate Business may, with the approval of the Hold Separate Trustee, obtain such services and products from Respondent. The services and products that Respondent or Argosy shall offer the Held Separate Business shall include, but shall not be limited to, the following:

(1) Human resources and administrative support services, including, but not limited to, payroll processing and employee benefits, including health benefits administration;

(2) Preparation of tax returns;

(3) Environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;

(4) Financial accounting and reporting services;

(5) Legal, licensing, and audit services;

(6) Federal and state regulatory policy compliance;

(7) Maintenance and oversight of information technology systems, which includes, but is not limited to, all computer, electronic mail, word processing, software data systems (including all information systems, which constructs, maintains,

and supports all computer systems), and all items from Exhibit D to the Securities Purchase Agreement;

(8) Processing of accounts payable and accounts receivable;

(9) Procurement of supplies, goods, and services utilized in the ordinary course of business by the Held Separate Business;

(10) Public relations and public affairs support services;

(11) Construction and development services; and,

(12) Procurement and renewal of insurance and related services.

b. the Held Separate Business shall have, with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondent or Argosy.

6. Respondent shall cause the Hold Separate Trustee and each Argosy Baton Rouge Casino Employee having access to Confidential Business Information 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 relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate Order, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves anytsdL(o of(Respoe)42.8(men’ss uy)43.8usinesnes)41L(o other the)46.8no the Hend

Separate Business. These persons shall not be involved in any way in the management, production, distribution, sale, marketing, or financial operations of the Penn National Casino Rouge, located in Baton Rouge, Louisiana.

7. No later than two (2) days after the Acquisition Date, Respondent shall establish and obtain approval of the Hold Separate Trustee of written procedures covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate Order, including but not limited to: (a) the Argosy Casino Baton Rouge Customer Database; and, (b) all Confidential Business Information.

without providing prior written notice to and an opportunity for consultation with Respondent.

10. Respondent 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Trustee.

11. Consistent with the nature and amount of past and planned financial resources furnished and planned to be furnished by Argosy to the ACBR, subject to Paragraph 9 herein, Respondent shall provide the Held Separate Business with sufficient financial resources:

    a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business as it is currently operated;

    b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business;

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reimbursement for any operating losses, capital losses, or other losses; Ò Ò , that, consistent with the purposes of the Decision and Order, the Hold Separate Trustee 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.

12. Respondent shall, during the Hold Separate Period:

c. not, for a period of eighteen (18) months following the Effective Date of Divestiture, directly or indirectly, employ or enter into a contract for the services of any Argosy Baton Rouge Primary Employees;

ǵ ǵ h , that this Paragraph II.H. shall not prohibit Respondent from entering into a contract for the services of, making offers of employment to, or employing or contracting with any Argosy Baton Rouge Primary Employees:

(1) when a Commission-approved Acquirer has notified Respondent in writing that the Commission-approved Acquirer:

of June 20, 2005) is terminated, Respondent shall offer a retention bonus to all Argosy Baton Rouge Primary Employees included in the Held Separate Business who continue their employment with the Held Separate Business until termination of the Hold Separate Period (which shall be in addition to any performance bonus that shall be based solely on the performance of the Held Separate Business, or any severance to which the employees would otherwise be entitled by virtue of their employment by Respondents during the hold separate period if such employee is not hired by the Acquirer); provided, however, that all Argosy Baton Rouge Primary Employees shall receive a retention bonus equal to the greater of: (i) the retention bonus to which such employees were entitled to, but did not receive pursuant to the Securities Purchase Agreement appended to the Agreement to Execute Purchase Agreement (dated as of June 20, 2005); or, (ii) the retention bonus pursuant to this Paragraph II.E.13 of the Hold Separate Order.

14. Except for the Argosy Baton Rouge Employees, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II, and except to the extent provided in Paragraph II, Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.

15. Respondent shall assure that Argosy Baton Rouge Employees receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would otherwise have been entitled.

16. Respondent's employees (excluding support services employees involved in providing support to the Held

Separate Business pursuant to this Hold Separate Order) shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Held Separate Business not in the public domain except:

a. as required by law;

b. to the extent that necessary information is exchanged in the course of consummating the Acquisition;

c. in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;

d. in complying with this Hold Separate Order or the Consent Agreement;

e. in complying with any request of the LAGC;

f. in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the Held Separate Business's financial controls;

g. in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or

h. in obtaining legal advice.

Nor shall the Argosy Baton Rouge Employees receive or have access to, or use or continue to use, any Confidential Business Information not in the public domain about Respondent and relating to Respondent's businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondent may

written request with reasonable notice to Respondent made to their principal United States offices, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent, in the presence of counsel, and as permitted by and in accordance with the laws, rules and regulations of the LAGC, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent relating to any matters contained in this Hold Separate Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

V.

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 Effective Date of Divestiture required by the Consent Agreement.

Analysis of Agreement Containing Consent Orders to AidPubli CommentI. IntroductionT

II. The Parties

PNG is a publicly traded company headquartered in

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IV. The Complaint

The Commission's Complaint alleges that the Proposed Acquisition would create a monopoly in the Baton Rouge, Louisiana, metropolitan area casino services market. This includes the combination of slot machine, video poker machine, and table gaming, and associated amenities such as parking, food and beverages, and entertainment. The Proposed Acquisition would combine the only two casinos – one owned by PNG, the other by Argosy – in Baton Rouge, Louisiana. Industry participants refer to the Baton Rouge, Louisiana, riverboat casinos as "locals' casinos" because the vast majority of their revenue comes from consumers who make frequent visits to the casinos and live in the Baton Rouge, Louisiana, metropolitan area.

The Complaint further alleges that new entry into the Baton Rouge, Louisiana, metropolitan area casino services market is not likely to occur in a timely manner, even if prices increased substantially after the Proposed Acquisition, because there are significant impediments to such entry. Louisiana law allows the operation of only 15 riverboat casinos, four racinos, and one non-Native American land-based casino. All those licenses have been granted, and there is no evidence that any of the licensees are planning to relocate.

V. The Consent Agreement

The Consent Agreement effectively remedies the Proposed Acquisition's likely anticompetitive effects in the Baton Rouge, Louisiana, metropolitan area casino services market by requiring PNG to divest Argosy's Baton Rouge casino and associated assets. Pursuant to the Consent Agreement, PNG is required to divest Argosy's Baton Rouge casino to Columbia Sussex Corporation within four (4) months from the date the consent order is final. This period may be extended for an additional two (2) months to allow the State of Louisiana to determine whether to grant regulatory approvals required tooiedies 0Ti he batNeMpe4rsino. If Columbia Sussex Corporation does not obtain regulatory

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approvals, the Consent Agreement provides PNG with up to ten (10) months from the date the Consent Agreement becomes final to divest the casino to a buyer approved by the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to ensure that the competitive environment that existed prior to the acquisition is maintained. A proposed acquirer of divested assets must not itself present competitive problems.

Should PNG fail to accomplish the divestiture within the time and in the manner required by the Consent Agreement, the Commission may appoint a trustee to divest these assets. If approved, the trustee would have the exclusive power and authority to accomplish the divestiture within six (6) months of being appointed, subject to any necessary extensions by the Commission. The Consent Agreement requires PNG to provide the trustee with access to information related to Argosy's Baton Rouge casino as necessary to fulfill his or her obligations.

The Commission's Hold Separate Order requires that PNG hold separate and maintain the viability of the Argosy Baton Rouge casino as a competitive operation from the date PNG acquires Argosy until the business is transferred to the Commission-approved acquirer. Furthermore, it contains measures designed to ensure that no material confidential information is exchanged between the PNG and the Argosy Baton Rouge casino (except as otherwise provided in the Consent Agreement), and provisions designed to prevent interim harm to competition in the Baton Rouge, Louisiana, metropolitan area casino services market pending divestiture. The Hold Separate Order names Frank Quigley, the present general manager of the casino, as the Hold Separate Trustee who is charged with the duty of monitoring Penn's compliance with the Consent Agreement and Hold Separate Order until the casino is divested.

In order to ensure that the Commission remains informed about the status of Argosy's Baton Rouge casino's pending divestiture,

and about the efforts being made to accomplish the divestiture, the Consent Agreement requires PNG to file periodic reports with the Commission until the divestiture is completed.

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

IN THE MATTER OF

DAVITA 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

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C *O*

This consent order addresses the acquisition by Respondent DaVita Inc. -- the second largest provider in the United States of outpatient dialysis services, which constitute a life-sustaining therapy that replaces the function of the kidneys by removing toxins and excess fluid from the blood -- of the United States dialysis services business of Gambro AB, a publicly-traded Swedish corporation with worldwide operations focused in three business fields: operating dialysis centers, manufacturing dialysis equipment, and providing technology and products to blood centers and hospital blood banks. The order, among other things, among other things, requires the respondent to divest 69 dialysis clinics in 35 markets acros*0.04(c-tIaIt7(ets160-55.7(tat.7(Rood)-75en(itAs16i)58dvt Da)-6tage, bloo)-r3(N)to(

believe that Respondent DaVita Inc. ("DaVita"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Gambro Healthcare Inc., ("Gambro"), 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 ("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. DEFINITIONS

1. "Dialysis" means filtering a person's blood, inside or outside of the body, to replicate the functions of the kidney.

2. "ESRD" means end stage renal disease, a chronic disease characterized by a near total loss of function of the kidneys, which in healthy people remove toxins and excess fluid from the blood.

3. "Outpatient dialysis services" means all procedures and services related to administering chronic dialysis treatment.

II. RESPONDENT

4. Respondent DaVita is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 601 Hawaii Street, El Segundo, CA 90245. Respondent DaVita,

transplant. However, the wait-time for donor kidneys -- during which ESRD patients must receive dialysis treatments -- can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, many ESRD patients have no alternative to ongoing dialysis treatments.

VI. THE STRUCTURE OF THE MARKET

12. The market for the provision of outpatient dialysis services is highly concentrated in each of the local areas identified in Paragraph 11, whether measured by the Herfindahl-Hirschman Index ("HHI") or two or four firm concentration ratios. The combined firm would have a market share that ranges from 47 to 100 percent in each relevant geographic market. The Acquisition would significantly increase concentration in each relevant market, leaving DaVita as the dominant provider of outpatient dialysis services.

13. DaVita and Gambro are actual and substantial competitors in each of the relevant markets.

VII. ENTRY CONDITIONS

14. The most significant barrier to entry into the relevant markets is locating a nephrologist with an established referral base to serve as the clinic's medical director. By law, each dialysis clinic must have a nephrologist medical director. The medical director is essential to the competitiveness of the clinic because he or she is the clinic's primary source of referrals. The lack of available nephrologists with an established referral stream is a significant barrier to entry into each of the relevant geographic markets identified in Paragraph 11. Additionally, an area must have certain attributes (such as a rapidly growing ESRD population, a favorable regulatory environment, average or below nursing and labor costs, and a relatively low penetration of managed care) to attract entry. The absence of these attributes is an additional barrier to entry into many of the relevant geographic markets.

15. New entry into the relevant markets sufficient to deter or counteract the anticompetitive effects described in Paragraph 16 is unlikely to occur, and would not occur in a timely manner because it would take over two years to enter and achieve significant market impact.

VIII. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, 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. eliminating actual, direct, and substantial competition between DaVita and Gambro in the market for the provision of outpatient dialysis services;

b. increasing the ability of the merged entity unilaterally to raise prices of outpatient dialysis services; and

c. reducing incentives to improve service or product quality in the relevant markets.

IX. VIOLATIONS CHARGED

17. The Purchase Agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by DaVita Inc. of Gambro Healthcare Inc., a subsidiary of Gambro AB, and DaVita Inc. (hereafter referred to as "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 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 DaVita Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of

business located at 601 Hawaii Street, El Segundo, CA 90245.

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:

A. "DaVita" means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by DaVita Inc. (including, after the Effective Date, Gambro Healthcare Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" and "Acquirers" means Renal Advantage, the Westside Clinic Acquirer, the Colton Partnership, Peninsula Nephrology, and each Person that receives the prior approval of the Commission to acquire any of the Appendix A Clinic Assets or the Owned Real Property pursuant to Paragraphs II or V of this Order.

E. "Appendix A Clinics" means Clinics listed in Appendix A to this Order.

F. "Appendix A Clinic Assets" means the Appendix A Clinics, and all Assets Associated with each of those Clinics, except for the Owned Real Property.

G. "Assets Associated" means the following assets Relating To the Operation Of A Clinic:

1. all rights under the Clinic's Physician Contracts;

2. leases for the Real Property of the Clinic;

3. consumable or disposable inventory, including, but not limited to, janitorial, office, and medical supplies, and at least ten (10) treatment days of dialysis supplies and pharmaceuticals, including, but not limited to, erythropoietin;

4. all rights, title and interest of DaVita in any tangible property (except for consumable or disposable inventory) that has been on the premises of the Clinic at any time since July 28, 2005, including, but not limited to, all equipment, furnishings, fixtures, improvements, and appurtenances;

5. any interest held by DaVita in the Real Property Of The Clinic, PROVIDED, HOWEVER, "Assets Associated" does not mean the Owned Real Property, which is being divested separately pursuant to Paragraph II.A.5. of the Order;

6. books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating To the Operation Of The Clinic located on the premises of the Clinic or in the possession of the Regional Manager responsible for such Clinic (or copies thereof where

DaVita has a legal obligation to maintain the original document), including, but not limited to:

a. documents containing information Relating To patients (to the extent transferable under applicable law), including, but not limited to, medical records,

b. financial records,

c. personnel files,

d. Physician lists and other records of the Clinic's dealings with Physicians,

e. maintenance records,

f. documents Relating To policies and procedures,

g. documents Relating To quality control,

h. documents Relating To Payors,

i. documents Relating To Suppliers,

j. documents Relating To Clinics other than the Clinic To Be Divested, O O if such documents are located other than on the premises of the Clinic To Be Divested, DaVita may submit a copy of the document with the portions not Relating To the Clinic To Be Divested redacted, and

k. copies of contracts with Payors and Suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of DaVita to make such disclosure;

7. DaVita's Medicare and Medicaid provider numbers, to the extent transferable;

8. all permits and licenses, to the extent transferable;

9. Intangible Property (other than Software) relating exclusively to the Operation Of The Clinic; and a royalty-free perpetual worldwide license for the use, without any limitation, of all other Intangible Property (other than Software) Relating To the Operation Of The Clinic (including the right to transfer or sublicense such Intangible Property, exclusively or nonexclusively, to others by any means); and

10. assets that are used in, or necessary for, the Operation Of The Clinic.

O *O* that "Assets Associated" does not include Excluded Assets.

H. "Assets To Be Divested" means the Appendix A Clinic Assets, the Westside Clinic Assets, the Colton Clinic Assets, and the Owned Real Property.

I. "Clinic" means a facility that provides hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

J. "Clinic's Physician Contracts" means all agreements to provide the services of a Physician to a Clinic, regardless of whether any of the agreements are with a Physician or with a medical group, including, but not limited to, agreements for the services of a medical director for the Clinic and "joiner" agreements with Physicians in the same medical practice as a medical director of the Clinic.

K. "Clinic To Be Divested" and "Clinics To Be Divested" means the Appendix A Clinics, the Westside Clinic, the Colton Clinic, and the South S.F. Clinic.

L. "Colton Clinic" means the Dialysis Center of Colton, located at 1275 W. "C" Street, Colton, CA 92324.

M. "Colton Clinic Assets" means the Colton Clinic and all Assets Associated with that Clinic that are owned by DaVita, except for twenty-three (23) hemodialysis machines at the Colton Clinic, which shall be leased to the Colton Partnership pursuant to the Colton Clinic Divestiture Agreement.

N. "Colton Clinic Management Agreement" means collectively:

1. the Management Services Agreement dated August 1, 1997, between Dialysis Center of Colton and Gambro Healthcare Renal Care, Inc., and

2. any other agreements between the Dialysis Center of Colton and Gambro Relating To the management of the Colton Clinic by Gambro.

O. "Colton Clinic Divestiture Agreement" means the the Asset Purchase Agreement, Termination of Management Services Agreement, and Transition Services Agreement dated September 9, 2005, by and between Dialysis Center of Colton, Dr. Gerald S. Friedman, Dr. Erlinda Uy-Concepcion, Dr. M. Feroz Alam, Dr. Jin Wang and Gambro Healthcare Renal Care, Inc. (The Colton Clinic Divestiture Agreement is attached as Non-Public Appendix F to this Order.)

P. "Colton Partnership" means Dialysis Center of Colton, a California general partnership, which has a principal place of business at 1275 W. "C" Street, Colton, CA 92324.

Q. "Contract Services" means services performed pursuant to any Clinic's Physician Contract.

R. "DaVita Employee Of A Clinic To Be Divested" and "DaVita Employee Of The Clinic To Be Divested" means an Employee Of A Clinic To Be Divested who is employed by DaVita.

S. "DaVita's Medical Protocols" means medical protocols promulgated by either DaVita or Gambro, whether in hard copy or embedded in software, that have been in effect at any time since July 28, 2005. "DaVita's Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by either DaVita or Gambro.

T. "Divestiture Agreement" and "Divestiture Agreements" mean the Westside Clinic Divestiture Agreement, the Colton Clinic Divestiture Agreement, the South S.F. Clinic Management Termination Agreement, and any agreement pursuant to which DaVita divests any Appendix A Clinic Assets pursuant to this Order and with the prior approval of the Commission.

U. "Effective Date" means the date on which DaVita acquires Gambro Healthcare Inc.

V. "Employee Of A Clinic To Be Divested" and "Employee Of The Clinic To Be Divested" mean any individual (including, but not limited to, a clinic director, manager, nurse, technician, clerk, or social worker) who is not a Regional Manager, who is employed by DaVita, by an Acquirer, or by another manager or owner of such Clinic To Be Divested, and who has worked part-time or full-time on the premises of such Clinic To Be Divested at any time since June 1, 2005, regardless of whether the individual has also worked on the premises of any other Clinic.

W. "Excluded Assets" means:

1. all cash, cash equivalents, and short term investments of cash;

2. accounts receivable;

3. income tax refunds and tax deposits due DaVita;

4. unbilled costs and fees, and Medicare bad debt recovery claims, arising before a Clinic is divested to an Acquirer;

5. DaVita's Medical Protocols (except if requested by an Acquirer pursuant to Paragraph II.B.17.b. of this Order);

6. rights to the names "DaVita" and "Gambro" and any variation of those names, and any names, phrases, marks, trade names, and trademarks to the extent they include the following, "REN," "Total Renal Care," "Renal Treatment Centers," "Vivra," "At Your Service," "At Your Service (& Design)," "Dancing Star Logo," "DaVita At Home," "DaVita At Home (& Design)", "DaVita Clinical Research," "DaVita Laboratory Services," "DaVita Nephrology Partners," "DaVitaCare," "DaVita's Key To Better Health," "He/She Gives Life," "K.T. Family Foundation (& Design)," "Kidney Education And You," "Life-Alysis," "Maxine," "Miscellaneous Design (Alligator Design)," "Miscellaneous Design (Bird Design)," "Miscellaneous Design (Star in Square)," "Open Access & Open Access (& Design)," "Our Village Pharmacy," "Our Village Pharmacy (Design)," "Reggie," "Renal Connect," "Rising Star Design," "RMS," "RMS & Design," "Snappy," "Star Rx," "Star Rx (& Design)," "Star Rx Reminder," "Star Rx Reminder (& Design)," "Star/Heart Design," "Swirling Star Logo," or "Where Quality of Life Meetings Quality of Care," "Gambro Connections," "Gambro Connections (& Design)," "Gambro Healthcare Laboratory Services," "Gambro

16. computer hardware used in the Operation Of The Clinic

DD. "Leases Of The Owned Real Property" means:

1. the Lease Agreement dated September 12, 2005, between Gambro Healthcare, Inc. and RAI Care Centers of Northern California I, LLC for space located at 218 Harding Boulevard, Roseville, California 95678;

2. the Lease Agreement dated September 12, 2005 between Gambro Healthcare, Inc. and RAI Care Centers of Virginia I, LLC for space located at 3204 Churchland Boulevard, Chesapeake, Virginia 23321;

3. the Lease Agreement dated September 12, 2005, between Gambro Healthcare, Inc., and RAI Care Centers of Virginia I, LLC for space located at 311 Goode Way, Portsmouth, Virginia 23704; and

4. the Lease Agreement dated September 12, 2005 between Gambro Healthcare, Inc. and RAI Care Centers of Florida I, LLC for space located at 1124 Lakeview Road, Clearwater, Florida 33756-3524.

(The Leases Of The Owned Real Property are included with the Renal Advantage Divestiture Agreements, which are attached as Non-Public Appendix D to this Order.)

EE. "Licensed Intangible Property" means intangible property licensed to DaVita from a third party Relating To the Operation Of A Clinic To Be Divested including, but not limited to, intellectual property, software, computer programs, patents, know-how, goodwill,, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property that are licensed to DaVita. ("Licensed Intangible Property" doive6t6A1ice mts,53.7t6AO*[(ns owigDaVw

FF. "Management Agreement" and "Management Agreements" mean the South S.F. Clinic Management Agreement and the Colton Clinic Management Agreement.

GG. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.

HH. "Monitor Agreement" means the Monitor Agreement dated September 12, 2005, between DaVita Inc., and John Strack and Mitch S. Nielson of Focal Point Medical Consulting Group. (The Monitor Agreement is attached as Appendix C to this Order.)

II. "Operation Of A Clinic" and "Operation Of The Clinic" mean all activities Relating To the business of a Clinic, including, but not limited to:

1. attracting patients to the Clinic for dialysis services, providing dialysis services to patients of the Clinic, and dealing with their Physicians, including, but not limited to, services Relating To hemodialysis and peritoneal dialysis;

2. providing medical products to patients of the Clinic;

3. maintaining the equipment on the premises of the Clinic, including, but not limited to, the equipment used in providing dialysis services to patients;

4. purchasing supplies and equipment for the Clinic;

5. negotiating leases for the premises of the Clinic;

6. providing counseling and support services to patients receiving products or services from the Clinic;

7. contracting for the services of medical directors for the Clinic;

8. dealing with Payors that pay for products or services offered by the Clinic, including but not limited to, negotiating contracts with such Payors and submitting claims to such Payors; and

9. dealing with Governmental Approvals Relating To the Clinic or that otherwise regulate the Clinic.

JJ. "Ordinary Course Of Business" means actions taken by any Person in the ordinary course of the normal day-to-day Operation Of The Clinic that is consistent with past practices of such Person in the Operation Of The Clinic, including, but not limited to past practice with respect to amount, timing, and frequency.

KK. "Other Contracts Of Each Clinic To Be Divested" means all contracts Relating To the Operation Of A Clinic, where such Clinic is a Clinic To Be Divested – including, but not limited to, contracts for goods and services provided to the Clinic and contracts with Payors – but does not mean the Clinic's Physician Contracts and the leases for the Real Property Of The Clinic.

LL. "Owned Real Property" means the Real Property Of The Clinic at the following Clinics:

1. Roseville Dialysis Center, located at 218 Harding Boulevard, Roseville, CA 95678;

2. Gambro Healthcare – Churchland, located at 3204 Churchland Boulevard, Chesapeake, VA 2332;

3. Gambro Healthcare – Portsmouth, located at 311 Goode Way, Portsmouth, VA 23704; and

4. Gambro Healthcare – Clearwater, located at 1124 Lakeview Road, Suite 1, Clearwater, FL, 33756.

MM. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

NN. "Peninsula Nephrology" means Peninsula Nephrology, Inc., a California corporation with a principal place of business at 2000 South El Camino Real, San Mateo, CA 94403-1805.

OO. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

5. the Leases Of The Owned Real Property.

(The Renal Advantage Divestiture Agreements are attached as Non-Public Appendix D to this Order.)

WW. "Renal Associates of Grand Rapids" means Renal Associates of Grand Rapids, PC and its Physicians.

XX. "Software" means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

YY. "South S.F. Clinic" means the South San Francisco Dialysis Center located at 205 Kenwood Way, South San Francisco, CA 94080.

ZZ. "South S.F. Clinic Management Agreement" means collectively:

1. the Amended and Restated Agreement to Provide Management Services to Kidney Dialysis Facilities dated August 31, 1998, between Total Renal Care Holdings, Inc., and Peninsula Nephrology, Inc., and

2. any other agreements between DaVita and Peninsula Nephrology Relating To the management of the South S.F. Clinic by DaVita.

AAA. "South S.F. Clinic Management Termination Agreement" means the Termination of Management Services Agreement and Transition Services Agreement, dated September 12, 2005, between Davita Inc. and Peninsula Nephrology, Inc. (The South S.F. Clinic Management Termination Agreement is attached as Non-Public Appendix G to this Order.)

BBB. “Supplier” means any Person that has sold to DaVita or Gambro any goods or services, other than Physician services, for use in a Clinic To Be Divested.

ii. within eight (8) months of the date DaVita receives notice of such determination from the Commission, divest the Illinois Clinic Assets absolutely and in good faith, at no minimum price, as on-going businesses, to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The Renal Advantage Divestiture Agreements are incorporated by reference into this Order and made a part hereof as Non-Public Appendix D. Any failure by DaVita to comply with the Renal Advantage Divestiture Agreements shall constitute a failure to comply with the Order. The Renal Advantage Divestiture Agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of Renal Advantage, or any obligations of DaVita, under the Renal Advantage Divestiture Agreements.

If DaVita has divested the Appendix A Clinic Assets to Renal Advantage prior to the date this Order becomes final, and if, at the time the Commission makes this Order final, the Commission determines that Renal Advantage is not an acceptable acquirer or that the Renal Advantage Divestiture Agreements are not an acceptable manner of divestiture, and so notifies DaVita, then DaVita shall within three (3) business days of receiving such

Westside Clinic Divestiture Agreement, the Westside Clinic Assets as an on-going business. The Westside Clinic Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix E. Any failure by DaVita to comply with the Westside Clinic Divestiture Agreement shall constitute a failure to comply with the Order. The Westside Clinic Divestiture Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Westside Clinic Acquirer, or any obligations of DaVita, under the Westside Clinic Divestiture Agreement.

3. Within ten (10) days after the Effective Date, pursuant to and in accordance with the Colton Clinic Divestiture Agreement, DaVita shall:

   a. terminate the Colton Clinic Management Agreement, thereby transferring management of the Colton Clinic to the Colton Partnership, and

   b. divest to the Colton Partnership, absolutely, and in good faith, the Colton Clinic Assets as an on-going business.

   The Colton Clinic Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix F. Any failure by DaVita to comply with the Colton Clinic Divestiture Agreement shall constitute a failure to comply with the Order. The Colton Clinic Divestiture Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Colton Partnership, or any obligations of DaVita, under the Colton Clinic Divestiture Agreement.

4. Within ten (10) days after the Effective Date, pursuant to and in accordance with the South S.F. Clinic Management Termination Agreement, DaVita shall terminate the South S.F. Clinic Management Agreement, thereby transferring management of the South S.F. Clinic to Peninsula Nephrology. The South S.F. Clinic Management Termination Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix G. Any failure by DaVita to comply with the South S.F. Clinic Management Termination Agreement shall constitute a failure to comply with the Order. The South S.F. Clinic Management Termination Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of Peninsula Nephrology, or any obligations of DaVita, under the South S.F. Clinic Management Termination Agreement.

5. No later than one hundred twenty (120) days after the date the Agreement Containing Consent Order is accepted for public comment by the Commission, Respondent shall divest absolutely, in good faith, and in a manner that receives the prior approval of the Commission, the Owned Real Property to an Acquirer or Acquirers that receive the prior approval of the Commission. DaVita shall place no restrictions, other than the restrictions

Ō this Paragraph II.B. does not apply to the Owned Real Property or to the Acquirers of the Owned Real Property:

1. DaVita shall place no restrictions on the use by any Acquirer of any of the Assets To Be Divested or any of the Clinics To Be Divested.

2. DaVita shall cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer, at the Time Of Divestiture of each Clinic To Be Divested, in obtaining all Government Approvals For Divestiture, and all Government Approvals For Continued Operation, for each Clinic To Be Divested; Ō Ō this Paragraph II.B.2. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.

3. DaVita shall, at the Time Of Divestiture of each Clinic To Be Divested:

   a. assign to the Acquirer all rights, title, and interest to leases for the Real Property Of The Clinic, and shall obtain all approvals necessary for such assignments; Ō Ō , that (1) if the Acquirer obtains all rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such lease and attaches it as part of the Divestiture Agreement, then DaVita shall not be required to make the assignments for such Clinic To Be Divested as required by this Paragraph; Ō Ō this Paragraph II.B.3.a. does not apply to the Colton Clinic and the South S.F. Clinic, to the Assets Associated with those Clinics, or to the Acquirers of those Clinics.; and

b. assign to the Acquirer all of the Clinic's Physician Contracts, and shall obtain all approvals necessary for such assignment; *O* *O*, that (1) if the Acquirer enters into a Clinic's Physician Contract for a Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then DaVita shall not be required to make the assignment for such Clinic To Be Divested as required by this Paragraph; *O* *O* this Paragraph II.B.3.b. does not apply to the Colton Clinic, the South S.F. Clinic, and the Westside Clinic, to the Assets Associated with those Clinics, or to the Acquirers of those Clinics.

4. With respect to all Other Contracts Of Each Clinic To Be Divested, DaVita shall, at the Acquirer's option and at the Time Of Divestiture of each Clinic To Be Divested:

   a. if such contract can be assigned without third party approval, assign its rights under the contract to the Acquirer; and

   b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining:

      (1) such third party approval and in assigning the contract to the Acquirer; or

      (2) a new contract.

5. DaVita shall:

   a. at the Time Of Divestiture of each Clinic To Be Divested, provide to the Acquirer of such Clinic

contact information about Payors and Suppliers for the Clinic, and

b. not object to the sharing of Payor and Supplier contract terms Relating To the Clinics To Be Divested: (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with DaVita not to disclose the information to any third party;

this Paragraph II.B.5. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.

6. Until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested, DaVita shall:

a. facilitate interviews between each DaVita Employee Of A Clinic To Be Divested and the Acquirer of the Clinic, and shall not discourage such employee from participating in such interviews; and

b. not interfere in employment negotiations between each DaVita Employee Of A Clinic To Be Divested and the Acquirer of the Clinic;

this Paragraph II.B.6. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.

7. With respect to each DaVita Employee Of A Clinic To Be Divested who receives, within sixty (60) days of the Time Of Divestiture of any Clinic at which he or she is employed, an offer of employment from the Acquirer of that Clinic, DaVita shall do the following:

a. DaVita shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the DaVita Employee Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic, and shall not offer any incentive to the DaVita Employee Of The Clinic To Be Divested to decline employment with the Acquirer of the Clinic;

b. if the DaVita Employee Of The Clinic To Be Divested accepts such offer of employment from the Acquirer, DaVita shall cooperate with the Acquirer of the Clinic in effecting transfer of the DaVita Employee Of The Clinic To Be Divested to the employ of the Acquirer of the Clinic;

c. DaVita shall eliminate any contractual provisions or other restrictions that would otherwise prevent the DaVita Employee Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic;

d. DaVita shall eliminate any confidentiality restrictions that would prevent the DaVita Employee Of The Clinic To Be Divested who accepts employment with the Acquirer of the Clinic from using or transferring to the Acquirer any information Relating To the Operation Of The Clinic;

e. DaVita shall pay, for the benefit of any DaVita Employee Of The Clinic To Be Divested who accepts employment with the Acquirer of the Clinic, all accrued bonuses, vested pensions and other accrued benefits; and

O *O* this Paragraph II.B.7. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.

8. For a period of two (2) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Employee Of A Clinic To Be Divested who is employed by the Acquirer to terminate his or her employment relationship with the Acquirer, unless that employment relationship has already been terminated by the Acquirer; *O O* , DaVita may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; *O O* DaVita may hire employees who apply for employment with DaVita, as long as such employees were not solicited by DaVita in violation of this Paragraph II.B.8.; *O O* DaVita may offer employment to an Employee Of A Clinic To Be Divested who is employed by the Acquirer in only a part-time capacity, if the employment offered by DaVita would not, in any way, interfere with the employee's ability to fulfill his or her employment responsibilities to the Acquirer.

9. For a period of not less than forty-five (45) days, which period may begin prior to the signing of the Consent Agreement and which shall end no earlier than ten (10) days after the Time Of Divestiture of each Clinic To Be Divested ("Forty-Five Day Hiring Period"), DaVita shall:

   a. facilitate interviews between each Regional Manager Of A Clinic To Be Divested and the Acquirer of the Clinic, and shall not discourage such Regional Manager from participating in such interviews; and

   b. not interfere in employment negotiations between each Regional Manager Of A Clinic To Be Divested and the Acquirer of the Clinic;

Ō Ō the terms of this Paragraph II.B.9. shall not apply after Acquirers have hired six (6) Regional Managers who were each previously employed by DaVita or Gambro at any time since June 1, 2005; Ō Ō the terms of this Paragraph II.B.9. shall not apply to the Westside Clinic, the Colton Clinic, and the South S.F. Clinic, to the Assets Associated with those Clinics, or to the Acquirers of those Clinics.

10. With respect to each Regional Manager Of A Clinic To Be Divested who receives, within the Forty-Five Day Hiring Period required by Paragraph II.B.9. of this Order an offer of employment from the Acquirer of that Clinic, DaVita shall do the following:

    a. DaVita shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Regional Manager Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic, and shall not offer any incentive to the Regional Manager Of The Clinic To Be Divested to decline employment with the Acquirer of the Clinic;

    b. if the Regional Manager Of The Clinic To Be Divested accepts such offer of employment from the Acquirer, DaVita shall cooperate with the Acquirer of the Clinic in effecting transfer of the Regional Manager Of The Clinic To Be Divested to the employ of the Acquirer of the Clinic;

    c. DaVita shall eliminate any contractual provisions or other restrictions that would otherwise prevent the Regional Manager Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic;

    d. DaVita shall eliminate any confidentiality restrictions that would prevent the Regional Manager Of The Clinic To Be Divested who accepts employment with

the Acquirer of the Clinic from using or transferring to the Acquirer any information Relating To the Operation Of The Clinic;

e. DaVita shall pay, for the benefit of any Regional Manager Of The Clinic To Be Divested who accepts employment with the Acquirer of the Clinic, all accrued bonuses, vested pensions and other accrued benefits;

f. for a period of two (2) years following the Time Of Divestiture of the Clinic To Be Divested, DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Regional Manager of the Acquirer who was previously a Regional Manager of A Clinic To Be Divested to terminate his or her employment relationship with the Acquirer unless the individual has been terminated by the Acquirer; *O* *O* , DaVita may make general advertisements for Regional Managers including, but not limited to, in newspapers, trade publications, websites, or other media not targeted

11. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"):

    a. DaVita shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic; *O* *O* this Paragraph II.B.11.a. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that ClinicLe ClinicLe ClinicLe3,6v8 TDiD6e4

13. At the Time Of Divestiture of each Clinic To Be Divested, DaVita shall provide the Acquirer of the Clinic with manuals, instructions, and specifications sufficient for the Acquirer to access and use any information

    a. divested to the Acquirer pursuant to this Order, or

    b. in the possession of the Acquirer, and previously used by DaVita or Gambro in the Operation Of The Clinic.

14. For two (2) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not solicit the business of any patients that received any goods or services from such Clinic between May 1, 2005, and the date of such divestiture, *O* *O* DaVita may (i) make general advertisements for the business of such patients including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any DaVita employee.

15. DaVita shall convey to each Acquirer of a Clinic To Be Divested the right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor), if such right is needed for the Operation Of The Clinic by the Acquirer and if the Acquirer is unable, using

17. With respect to DaVita's Medical Protocols:

    a. DaVita shall retain a copy of DaVita's Medical Protocols until six (6) months after all of the Assets To Be Divested have been divested, and the Colton Clinic Management Agreement has been terminated, pursuant to this Order;

    b. If any Acquirer of a Clinic To Be Divested requests in writing to DaVita, within six (6) months of the Time Of Divestiture of that Clinic to that Acquirer, that DaVita license a copy of DaVita's Medical Protocols to that Acquirer, DaVita shall within five (5) business days of such request, grant to that Acquirer a royalty-free perpetual worldwide license for the use, without any limitation, of DaVita's Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means); and

    c. DaVita shall create no disincentive for any Acquirer of a Clinic To Be Divested to make such a request for a license for DaVita's Medical Protocols, and shall not enter into any agreement or understanding with any Acquirer that the Acquirer not make such a request.

O *O*

Governmental Approvals For Divestiture prior to acquiring Gambro Healthcare Inc.;

2. all approvals for assignment of the leases for the Real

Appendix B of this Order, except to the extent that the contract relates exclusively to:

1. off-site lab services or social worker support materials; or

2. billing services, collection services, bookkeeping services, accounting services, supply purchasing and logistics services, or the preparation of financial reports and accounts receivable reports (collectively "Such Services"), where appropriate firewalls and confidentiality agreements are implemented to prevent Material Confidential Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by DaVita or any Clinic other than the Clinic to which Such Services are being provided.

Said advance written notification shall contain (i) either a detailed

the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitors to monitor DaVita's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements in a manner consistent with the purposes of this Order.

D. DaVita shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitors:

1. The Monitors shall have the power and authority to monitor DaVita's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitors in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

    a. Assuring that DaVita expeditiously complies with all of its obligations and perform all of its responsibilities as required by the this Order, the Order to Maintain Assets, and the Divestiture Agreements;

    b. Monitoring any transition services agreements;

    c. Assuring that Material Confidential Information is not received or used by DaVita or the Acquirers, except as allowed in this Order and in the Order to Maintain Assets, in this matter.

2. The Monitors shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitors shall serve for such time as is necessary to monitor DaVita's compliance with the provisions of this

Order, the Order to Maintain Assets, and the Divestiture Agreements.

4. Subject to any demonstrated legally recognized privilege, the Monitors shall have full and complete access to DaVita's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitors may reasonably request, related to DaVita's compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements. DaVita shall cooperate with any reasonable request of the Monitors and shall take no action to interfere with or impede the Monitors' ability to monitor DaVita's compliance with this Order, the Order to Maintain Assets, and the Divestiture Agreements.

5. The Monitors shall serve, without bond or other security, at the expense of DaVita on such reasonable and customary terms and conditions as the Commission may set. The Monitors shall have authority to employ, at the expense of DaVita, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitors' duties and responsibilities. The Monitors shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. DaVita shall indemnify the Monitors and hold the Monitors harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitors' 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

gross negligence, willful or wanton acts, or bad faith by the Monitors.

7. DaVita shall report to the Monitors in accordance with

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

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

H. A Monitor or Monitors appointed pursuant to this Order may be the same Person appointed as a trustee pursuant to Paragraph V of this Order and may be the same Person or Persons appointed as Monitor or Monitors under the Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that:

I. If DaVita has not divested, absolutely and in good faith and with the Commission's prior approval, all of the Assets To Be Divested pursuant to Paragraph II of this Order, the Commission may appoint a trustee to divest any of the Assets To Be Divested that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5( ) of the Federal Trade Commission Act, 15 U.S.C. § 45( ), or any other statute enforced by the

Act, or any other statute enforced by the Commission, for any failure by DaVita to comply with this Order.

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

K. Within ten (10) days after appointment of a trustee, DaVita shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.

L. If a trustee is appointed by the Commission or a court pursuant to this Order, DaVita shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the Assets To Be Divested that have not been divested pursuant to Paragraph II of this Order.

2. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan or believes that

Commission; *O* *O*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the 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 trustee may request. DaVita shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. DaVita shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by DaVita shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

4. The trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to DaVita'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 or Acquirers as required by this Order; *O* *O*, if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity selected by DaVita from among those approved by the Commission; *O* *O*, that DaVita shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The trustee shall serve, without bond or other security, at the cost and expense of DaVita, on such reasonable and customary terms and conditions as the Commission or a

court may set. The trustee shall have the authority to employ, at the cost and expense of DaVita, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of DaVita, and the trustee's power shall be terminated. The compensation of the 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. DaVita shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

7. The trustee shall have no obligation or authority to operateop6wanlpw[(8p6wanlraa trucofg)48(ligeori (expenses repcludRo(th'c nd oth)44(e

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

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

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

O. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

VI.

IT IS FURTHER ORDERED that if:

P. the Commission has determined, pursuant to the proviso to Paragraph II.A.1. of this Order, that Renal Advantage is not an acceptable acquirer of the Appendix A Clinic Assets or that the Renal Advantage Divestiture Agreements are not an acceptable manner of divestiture of the Appendix A Clinic Assets,

Q. the Commission has approved, and has not withdrawn its approval of:

1. the divestiture of any of the Appendix A Clinic Assets located in California to an acquirer other than Renal Advantage, or

2. a manner of divestiture of any of the Appendix A Clinic Assets located in California that is different from the manner of divestiture set forth in the Renal Advantage Divestiture Agreement; and

R. DaVita has certified to the Commission, prior to the expiration of the applicable six (6) month deadline under Paragraph II.A.1. of this Order for completing the divestiture of such assets, that:

1. notwithstanding timely and complete application by DaVita to the State of California for approval of the divestiture pursuant to an applicable consent decree to which the State of California and DaVita are parties, the State of California has failed to approve the divestiture of such assets, or

2. the State of California has filed a timely motion in court seeking

   a. to enjoin the proposed divestiture, or

   b. other relief under such consent decree that, if granted, would prevent the proposed divestiture from occurring or would affect the manner of the proposed divestiture; then the six (6) month deadline for completing the divestiture of such assets shall be extended (i) an additional three (3) months or (ii) if the State of California files the timely motion referenced in Paragraph VI.C.2. of this Order, until the disposition of the motion, whichever is later.

VII.

IT IS FURTHER ORDERED that if:

a. to enjoin the proposed divestiture, or

b. other relief under such consent decree that, if granted, would prevent the proposed divestiture from occurring or would affect the manner of the proposed divestiture;

then the six (6) month deadline for completing the divestiture of such assets shall be extended (i) an additional three (3) months or (ii) if the State of Michigan files the timely motion referenced in Paragraph VII.C.2. of this Order, until the disposition of the motion, whichever is later.

VIII.

IT IS FURTHER ORDERED that:

V. Beginning thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until DaVita has fully complied with Paragraphs II.A., II.B.3., II.B.5.a., II.B.6., II.B.9., II.B.13., and II.B.17. of this Order, DaVita 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 the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements. DaVita shall submit at the same time a copy of these reports to the Monitors, if any Monitors have been appointed.

W. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next four (4) years, DaVita shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Divestiture Agreements. DaVita shall submit at the same time a copy

of these reports to the Monitors, if any Monitors have been appointed.

IX.

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

X. Any proposed dissolution of DaVita,

Y. Any proposed acquisition, merger or consolidation of DaVita, or

Z. Any other change in DaVita that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in DaVita.

X.

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

AA. Access, during office hours of DaVita 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 DaVita related to compliance with this Order; and

BB. Upon five (5) days' notice to DaVita and without restraint or interference from DaVita, to interview officers, directors, or employees of DaVita, who may have counsel present, regarding such matters.

XI.

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

APPENDIX A

APPENDIX A CLINICS

	Clinic Name	Clinic Address
1	DaVita Chula Vista	1181 Broadway Suite 5 Chula Vista, CA 91911
2	DaVita Community Hemodialysis	1800 Haight Street San Francisco, CA 94117
3	Eastmont Dialysis Center	6955 Foothill Boulevard Oakland, CA 94605
4	Mission Dialysis Center of El Cajon	858 Fletcher Parkway El Cajon, CA 92020
5	Indio Dialysis Center	46767 Monroe Street Suit 101 Indio, CA 92201
6	Irvine Dialysis Center	16255 Laguna Canyon Road Irvine, CA 92618
7	Mission Dialysis Center of Oceanside	2227-B El Camino Real Oceanside, CA 92054
8	DaVita Ocean Garden	1738 Ocean Avenue San Francisco, CA 94112
9	Pacific Coast Dialysis Center	1416 Centinela Avenue Inglewood, CA 90302
10	Palm Desert Dialysis Center	41-501 Corporate Way Palm Desert, CA 92260
11	Peralta Renal Center	2757 Telegraph Avenue Oakland, CA 94612
12	Piedmont Dialysis Center	2710 TOakland, CA 94612

	Clinic Name	Clinic Address

	Clinic Name	Clinic Address

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	Clinic Name	Clinic Address
56	Gambro Healthcare – Newport News	739 Thimble Shoals Boulevard #600 Newport News, VA 23606
57	Gambro Healthcare – Oxon Hill	5410 Indian Head Highway Oxon Hill, MD 20745
58	Gambro Healthcare – Portsmouth	311 Goode Way Portsmouth, VA 23704
59	Gambro Healthcare – Richmond MCV	2521 Mechanicsville Turnpike Richmond, VA 23223
60	Gambro Healthcare – Silver Hill	5652 Silver Hill Road Penn Station Shopping Center District Heights, MD 20747
61	Gambro Healthcare – Clearwater	1124 Lakeview Road Suite 1 Clearwater, FL 33756
62	Gambro Healthcare – Fort Pierce	2501 Ohio Avenue Fort Pierce, FL 34947
63	Gambro Healthcare – Palm Harbor	30522 U.S. 19 N. Suite 100 Palm Harbor, FL 34684
64	Gambro Healthcare – Port St. Lucie	1407 SE Gold Tree Drive Port St. Lucie, Fl 34952
65	Gambro Healthcare – Punta Gorda	355 DuPont Street Punta Gorda, FL 33950
66	Gambro Healthcare – Seminole	12505 Starkey Road Suite B Largo, FL 33773
67	Gambro Fairview Heights	821 Lincoln Hwy. Fairview Heights, IL 62208
68	Gambro Breese	160 N. Main St. Breese, IL 62230

APPENDIX B

AREA DEFINITIONS

- Five digit numbers refer to zip codes.
- Geographic areas bounded by roads include all properties abutting the referenced road (i.e. properties on both sides of the road).
- Zip codes or other areas fully surrounded by areas included in the area definition shall be considered part of the area definition.
- Area definitions are based on maps submitted to the Commission staff by DaVita.

	Divested Clinics	Corresponding Area Definition
1	Fremont Dialysis Center	The area in and/or near Fremont, Nebraska, consisting of: Dodge County (Nebraska); and 68002, 68015, 68025, 68026, 68044, 68064.
2	DaVita Wayne County, DaVita Warsaw	The area in and/or near Goldsboro, North Carolina, consisting of: Wayne County (North Carolina); and 28325, 28341, 28365, 28393, 28398.
3	Gambro Healthcare – Clyde Park, Gambro Healthcare – Rockford	The area in and/or near Grand Rapids, Michigan, consisting of: Kent County (Michigan).
4	Gambro Healthcare – Zeeland	The area in and/or near Zeeland, Michigan, consisting of: Ottawa County (Michigan) and 49423, 49434.

	Divested Clinics	Corresponding Area Definition
5	Gambro Healthcare – Jackson	The area in and/or near Jackson, Michigan, consisting of: Jackson County (Michigan).
6	Gambro Healthcare – Beltsville	The area in and/or near Laurel, Maryland, consisting of: 20704, 20705, 20707, 20708, 20709, 20724, 20725, 20726, 20740, 20741, 20742, 20768, 20770; and the portion of 20723 that lies to the southeast of the line formed by: (1) the section of I-95 between the northern border of 20723 and the intersection of I-95 and State Hwy 216, and (2) the section of State Hwy 216 between the intersection of State Hwy 216 and I-95 and the western border of 20723.
7	DaVita Roosevelt Park	The area in and/or near Muskegon, Michigan, consisting of: Muskegon County (Michigan).
8	Gambro Healthcare – Punta Gorda	The area in and/or near Punta Gorda, Florida, consisting of: Charlotte County (Florida).
9	Solano Dialysis Center	The area in and/or near Fairfield, California, consisting of: 94533, 94534, 94535; and the portion of 94585 that lies to the west of the line formed by: (1) the section of Denverton Rd. between the northern border of 94535 and the intersection of Denverton Rd. and State Hwy. 12, (2) the section of State Hwy. 12 between the intersection of State Hwy. 12 and Denverton Rd. and the intersection of State Hwy. 12 and Shiloh Rd., and (3) the section of Shiloh Rd. between the intersection of Shiloh Rd. and State Hwy. 12 and the southern border of 94535.
10	East Olympic Dialysis Center	The area in and/or near Los Angeles, California, that is circumscribed by the line formed by: (1) the section of N. Lorena St. between the

	Divested Clinics	Corresponding Area Definition
		intersection of N. Lorena St. and E. Cesar E.

	Divested Clinics	Corresponding Area Definition
		(12) the section of Paramount Blvd. between the intersection of N. Montebello Blvd. and Paramount Blvd. and the intersection of Paramount Blvd. and Arroyo Dr., (13) the section of Arroyo Dr. between the intersection of Paramount Blvd. and Arroyo Dr. and the intersection of Arroyo Dr. and Ackley St., (14) the section of Ackley St. between the intersection of Arroyo Dr. and Ackley St. and the intersection of Ackley St. and Fulton Ave. (15) the section of Fulton Ave. between the intersection of Ackley St. and Fulton Ave. and the intersection of Fulton Ave. and Wilcox Ave., (16) the section of Wilcox Ave. between the intersection of Fulton Ave. and Wilcox Ave. and the intersection of Wilcox Ave. and W. El Repetto Dr., (17) the section of W. El Repetto Dr. between the intersection of Wilcox Ave. and W. El Repetto Dr. and the intersection of W. El Repetto Dr. and S. Atlantic Blvd., (18) the section of S. Atlantic Blvd. between the intersection of W. El Repetto Dr. and S. Atlantic Blvd. and the intersection of S. Atlantic Blvd. and Brightwood St. (19) the section of Brightwood St. between the intersection of S. Atlantic Blvd. and Brightwood St. and Brightwood St. and Monterey Pass Rd. (20) the section of Monterey Pass Rd. between the intersection of Brightwood St. and Monterey Pass Rd. and the intersection of Monterey Pass Rd. and E. Cesar E. Chavez Ave., and (21) the son o[(E. Cesct)(ar E. Chavez A.nd)]TJT*. between 6ersection od Ss an[(E. nt)5Cesc2 --53.r E. Cha 6vez A.n anulthe intersection oe

	Divested Clinics	Corresponding Area Definition
11	Los Angeles Dialysis Center	The area in and/or near Lynwood, California, that is circumscribed by the line formed by: (1) the section of I-110 between the intersection of I-110 and Route 42 and the intersection of I-110 and Alondra Blvd., (2) the section of Alondra Blvd. between the intersection of I-110 and Alondra Blvd. and the intersection of Alondra Blvd. and I-710, (3) the section of I-710 between the intersection of Alondra Blvd. and I-710 and the intersection of I-710 and Abbott Rd., (4) the section of Abbott Rd. between the intersection of I-710 and Abbott Rd. and the intersection of Abbott Rd. and Wright Rd., (5) the section of Wright Rd. between the intersection of Abbott Rd. and Wright Rd. and the intersection of Wright Rd. and Atlantic Ave., (6) the section of Atlantic Ave. between the intersection of Wright Rd. and Atlantic Ave. and the intersection of Atlantic Ave. and Route 42, and (7) the section of Route 42 between the intersection of I-710 and Route 42 and the intersection of Route 42 and I-110.

Divested Clinics	

Divested Clinics	Corresponding Area Definition

	Divested Clinics	Corresponding Area Definition
17	Gambro Healthcare – Churchland, Gambro Healthcare – Portsmouth, Gambro Healthcare – Airline Blvd.	The area in and/or near Norfolk, Virginia, that is circumscribed by the line formed by: (1) the section of I-664 between Hampton Roads Bay and the intersection of I-664 and I-64, (2) the section of I-64 between the intersection of I-664 and I-64 and the Hampton Roads Bay, and (3) the Hampton Roads Bay.
18	Gambro Healthcare – Newport News	The area in and/or near Newport News, Virginia, consisting of: 23601, 23602, 23604, 23605, 23606, 23607, 23608, 23609, 23612, 23628, 23630, 23631, 23651, 23653, 23661, 23662, 23663, 23665, 23666, 23667, 23668, 23669, 23670, 23681, 23692, 23693.
19	Chico Dialysis Center	The area in and/or near Chico, California, consisting of: 95926, 95927, 95928, 95929, 95938, 95943, 95951, 95967, 95969, 95973, 95976.
20	Omaha Dialysis Center, Baker Place Dialysis Center	The area in and/or near Omaha, Nebraska, consisting of: 51501, 51502, 51503, 51526; and Douglas County (Nebraska); 68022, 68064, 68069, 68068, 68007.
21	DaVita Savannah	The area in and/or near Savannah, Georgia, consisting of: the portion of Chatham County (Georgia) that lies to the east of I-95; and the portion of 29927 that lies to the south of the line

	Divested Clinics	Corresponding Area Definition
22	Palm Desert Dialysis Center, Indio Dialysis Center	The area in and/or near Palm Springs, California, consisting of: 92201, 92202, 92203, 92210, 92211, 92234, 92235, 92236, 92247, 92248, 92253, 92260, 92261, 92270, 92276; and the portion of 92262 that lies to the east of the line formed by: (1) the portion of Route 111 between the northern border of 92262 and the intersection of Route 111 and Tramway Rd. and (2) the portion of Tramway Rd. between the intersection of Route 111 and Tramway Rd. and the southern border of 92262.
23	Gambro Healthcare – Fort Pierce, Gambro Healthcare – Port St. Lucie	The area in and/or near Port St. Lucie, Florida, consisting of: St. Lucie County (Florida) and 34945, 34946, 34949, 34951, 34957, 34958, 34990, 34991, 34994, 34995, and 34996.
24	DaVita Mecklenberg, DaVita University	The area in and/or near Charlotte, North Carolina, consisting of: Mecklenburg County (North Carolina).
25	DaVita Garey	The area in and/or near Pomona, California, consisting of: 91701, 91708, 91710, 91711, 91729, 91730, 91743, 91750, 91758, 91761, 91762, 91763, 91764, 91766, 91767, 91768, 91769, 91784, 91785, 91786, 91798; and the portion of 91773 that lies to the southeast of the line formed by: (1) the section of Arrow Hwy. between the eastern border o0134 Tw, 3 8o7640.046 Tc-0- 111 n of Rou]TJTt lies tADiaD -1SJ8-63.3(b)-Ho9178

	Divested Clinics	Corresponding Area Definition
26	Redlands Dialysis Center, San Bernardino Dialysis Center, Dialysis Center of Colton, Rialto Dialysis Center	The area in and/or near San Bernardino, California, consisting of: 92313, 92316, 92318, 92324, 92334, 92335, 92336, 92346, 92350, 92354, 92357, 92369, 92374, 92375, 92376, 92377, 92401, 92403, 92404, 92405, 92406, 92407, 92408, 92410, 92411, 92412, 92413, 92415, 92418, 92423, 92424, 92427; the portion of 92373 that lies to the west of the line formed by: (1) the section of Alessandro Rd. between the southern border of 92373 and the intersection of Allesandro Rd. and W. Sunset Dr., (2) the section of W. Sunset Drive. between the intersection of Allesandro Rd. and W. Sunset Dr.

	Divested Clinics	Corresponding Area Definition
27	Gambro Healthcare – Richmond MCV, Gambro Healthcare – Richmond MCV Downtown	

	Divested Clinics	Corresponding Area Definition
29	Tustin Dialysis Center, Westminister North, Gambro Healthcare – Fountain Valley, Harbor Boulevard Dialysis Center, Garden Grove Dialysis Center, Irvine Dialysis Center,	The area in and/or near Irvine, California,

	Divested Clinics	Corresponding Area Definition
31	Gambro Healthcare – Oxon Hill, Gambro Healthcare – Silver Hill	The area in and/or near Oxon Hill, Maryland, consisting of: 20019, 20020, 20026, 20029, 20032, 20233, 20340, 20373, 20375, 20389, 20395, 20409, 20599, 20752, 20731, 20743, 20746, 20747, 20745, 20748, 20750, 20753, 20757, 20791, 20799; and the portion of 20744 that lies to the north of the line formed by: (1) the section of W. Riverview Rd. between the western border of 20744 and the intersection of W. Riverview Rd. and Riverview Rd., (2) the section of Riverview Rd. between the intersection of W. Riverview Rd. and Riverview Rd. and the intersection of Riverview Rd. and Fort Washington Rd., (3) the section of Fort Washington Rd. between the intersection of Riverview Rd. and Fort Washington Rd. and the intersection of Fort Washington Rd. and Route 210, (4) the section of Route 210 between the intersection of Fort Washington Rd. and Route 210 and the northern intersection of Route 210 and Old Fort Rd., (5) the section of Old Fort Rd. between the northern intersection of Route 210 and Old Fort Rd. and the intersection of Old Fort Rd. and Allentown Rd., (6) the section of Allentown Rd. between the intersection of Old Fort Rd. and Allentown Rd. and the intersection of Allentown Rd. and Steed Rd., and (7) the section of Steed Rd. between the intersection of Allentown Rd. and Steed Rd. and the eastern border of 20744.
32	Elk Grove Dialysis Center, Roseville Dialysis Center, Placer Dialysis Center	The area in and/or near Sacramento, California, consisting of: 95650, 95661, 95677, 95678, 95746, 95747, 95765; and Sacramento County (California); 94571, 95615, 95632, 95638, 95641, 95680, 95683, 95686, 95690, 95693, 95837.

APPENDIX C

MONITOR AGREEMENT

[PUBLIC RECORD VERSION]

Maintenance Order has been issued and the Monitor Agreement has been approved by the Commission;

WHEREAS, the parties to this Agreement intend to be legally bound, subject only to the Commission's approval of this Agreement.

DEFINITIONS

1. "Respondent "DaVita" means DaVita Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at El Segundo, CA, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, divisions, groups and affiliates controlled by DaVita, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.

2. "Other Parties" means any Person that receives approval of the Commission to acquire any of the Assets To Be Divested or is a party to the Relevant Agreements pursuant to Paragraph II and V of the Decision and Order.

3. "Acquisition Date" means the date on which the first of the Relevant Agreements pursuant to Paragraph II and V of the Decision and Order goes into effect.

4. "Relevant Agreements" means: all the divestiture agreements, management termination agreements, and transition services agreements entered into pursuant to Paragraphs II and V of the Decision and Order, including but not limited to, the Renal Advantage Divestiture Agreements, the Colton Clinic Management Termination Agreement, the South San Francisco Clinic Management Termination Agreement, and the Transition Services Agreement between Renal Advantage Inc. and DaVita.

5. All other capitalized words or phrases appearing in this Agreement that are not otherwise defined herein are deemed to

Confidential and Proprietary Information. The Monitors shall enter into a confidentiality agreement, attached hereto as Confidential Exhibit A, agreeing to be bound by the terms and conditions of the Orders. The Monitors must retain and maintain all Material Confidential Information it receives from either Respondent or Relevant Parties on a confidential basis except as is permitted by the Orders. The Monitors may disclose confidential information only to persons employed by or working with the Monitors under this Agreement, to persons employed at the Commission, and as permitted by Respondent or Relevant Parties with respect to information they provided the Monitor. The Monitors shall require any person retained by the Monitor to assist in carrying out the duties and responsibilities of the Monitors to execute a confidentiality agreement that requires the same standard of care and obligations of confidentiality to which the Monitors must adhere under this Agreement. The Monitors shall maintain the confidentiality, for a period of five (5) years after the termination of this Agreement, of all other aspects of the performance of his duties under this Agreement and shall not disclose any confidential information relating thereto. Monitor reports that are provided to persons employed at the Commission, the State of Michigan, and the State of California may be shared between persons employed at the Commission, the State of Michigan, and the State of California.

Restrictions. The Monitors shall not be involved in any way in the management, production, supply and trading, sales marketing, and financial operations of the competing products of the Respondent.

Reports. Monitors shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission staff.

Access to records, documents and facilities. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent' personnel, books, documents, records kept in the normal course of business,

facilities and technical information, and such other relevant information as the Monitors may reasonably request, related to Respondent' compliance with their obligations under the Orders in this matter. Respondent shall cooperate with any reasonable request of the Monitors and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent' compliance with the Orders.

ARTICLE II

Retention and payment of Counsel, Consultants, and other Assistants. The Monitors shall have the authority to employ, at the cost and expense of the Respondent, such attorneys, consultants, accountants, and other representatives and assistants as are necessary to carry out the Monitors' duties and responsibilities as allowed pursuant to the Orders.

Compensation

ARTICLE III

Monitor's liabilities and indemnification. Respondent shall indemnify the Monitors and hold the Monitors harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitors' duties, including all reasonable fees of counsel and other expenses

[Confidential Exhibit A and Confidential Exhibit B to the Monitor Agreement Have Been Redacted from this Public Version of the Decision and Order, but are

NON-PUBLIC APPENDICES

NON-PUBLIC APPENDIX D

RENAL ADVANTAGE DIVESTITURE AGREEMENTS

[REDACTED FROM PUBLIC RECORD VERSION BUT INCORPORATED BY REFERENCE]

NON-PUBLIC APPENDIX E

WESTSIDE CLINIC DIVESTITURE AGREEMENT

[REDACTED FROM PUBLIC RECORD VERSION BUT INCORPORATED BY REFERENCE]

NON-PUBLIC APPENDIX F

COLTON CLINIC DIVESTITURE AGREEMENT

[REDACTED FROM PUBLIC RECORD VERSION BUT INCORPORATED BY REFERENCE]

NON-PUBLIC APPENDIX G

SOUTH SAN FRANCISCO MANAGEMENT TERMINATION AGREEMENT

[REDACTED FROM PUBLIC RECORD VERSION BUT INCORPORATED BY REFERENCE]

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IN THE MATTER OF

DAVITA INC.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by DaVita Inc. of Gambro Healthcare Inc., a subsidiary of Gambro AB, and DaVita Inc. (hereafter referred to as "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 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 issues the following Order to Maintain Assets:

1. Respondent DaVita Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 601 Hawaii Street, El Segundo, CA 90245.

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, all capitalized terms used in this Order to Maintain Assets, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement.

II.

IT IS FURTHER ORDERED that:

A. From the date DaVita signs the Consent Agreement until the Time of Divestiture of each Clinic To Be Divested and until all Assets Associated with each Clinic To Be Divested are divested pursuant to the Consent Agreement, DaVita shall:

   1. Maintain each Clinic To Be Divested and all Assets Associated with it in substantially the same condition (except for normal wear and tear) existing at the time DaVita signs the Consent Agreement;

   2. Take such actions that are consistent with the past practices of DaVita or Gambro, respectively, in

connection with such Clinic To Be Divested and the Assets Associated with it and that are taken in the Ordinary Course Of Business and in the normal day-to-day operations of DaVita or Gambro;

3. Keep available the services of the current officers, employees, and agents of DaVita; and maintain the relations and good will with Suppliers, Payors, Physicians, landlords, patients, employees, agents, and others having business relations with the Clinic To Be Divested and the Assets Associated with it in the Ordinary Course Of Business; and

4. Preserve the Clinic To Be Divested and all Assets Associated with it as an ongoing business and not take

marketability of any Clinic To Be Divested located on or in the Owned Real Property.

C. From the date DaVita signs the Consent Agreement until the date this Order to Maintain Assets terminates pursuant to Paragraph VII, DaVita shall do the following:

1. Until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not interfere in employment negotiations between each DaVita Employee Of A Clinic To Be Divested and the Acquirer of the Clinic; *O* *O* this Paragraph II.C.1. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.

2. With respect to each DaVita Employee Of A Clinic To Be Divested who receives, within sixty (60) days of the Time Of Divestiture of any Clinic at which he or she is employed, an offer of employment from the Acquirer of that Clinic, DaVita shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the DaVita Employee Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic, and shall not offer any incentive to the DaVita Employee Of The Clinic To Be Divested to decline employment with the Acquirer of the Clinic; *O* *O* this Paragraph II.C.2. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic.

3. For a period of two (2) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Employee Of A Clinic To Be Divested who is employed by the Acquirer to terminate his or her employment relationship with the Acquirer, unless that employment relationship has already been

terminated by the Acquirer; O O ,
DaVita may make general advertisements for employees including, but not limited to, in newspapers, trade

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following the Time Of Divestiture of the Clinic To Be Divested, DaVita shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Regional Manager of the Acquirer who was previously a Regional Manager of A Clinic To Be Divested to terminate his or her employment relationship with the Acquirer unless the individual has been terminated by the Acquirer;

, DaVita may make general advertisements for Regional Managers including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's Regional Managers;

DaVita may hire Regional Managers who apply for employment with DaVita, as long as such Regional Managers were not solicited by DaVita in violation of this Paragraph II.C.5.;

after Acquirers have hired six (6) Regional Managers who were each previously employed by DaVita or Gambro at any time since June 1, 2005, the terms of this Paragraph II.C.5. shall apply only to those six (6) Regional Managers hired by the Acquirers;

the terms of this Paragraph II.C.5. shall not apply to the Westside Clinic, the Colton Clinic, and the South S.F. Clinic, to the Assets Associated with those Clinics, or to the Acquirers of those Clinics.

6. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"):

   a. DaVita shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract

Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic; Ō Ō this Paragraph II.C.6.a. does not apply to the South S.F. Clinic, to the Assets Associated with that Clinic, or to the Acquirer of that Clinic; and

b. For a period of three (3) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not contract for the services of the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group for the provision of Contract Services to be performed in any of the areas that correspond to such Clinic as listed in Appendix B to the Decision and

contractual rights DaVita has with Renal Associates of Grand Rapids that prevent or hinder, in any way, the ability of Renal Associates of Grand Rapids, to contract with, or offer services to, any Person other than DaVita.

7. With respect to Material Confidential Information relating exclusively to any of the Clinics To Be Divested, DaVita shall:

   a. not disclose such information to any Person other than the Acquirer of such Clinic;

   b. after the Time Of Divestiture of such Clinic:

      (1) not use such information for any purpose other than complying with the terms of the Consent Agreement or with any law; and

      (2) destroy all records of such information, except to the extent that: (1) DaVita is required by law to retain such information, and (2) DaVita's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of DaVita.

8. For two (2) years following the Time Of Divestiture of each Clinic To Be Divested, DaVita shall not solicit the business of any patients that received any goods or services from such Clinic between May 1, 2005, and the date of such divestiture, Ō Ō DaVita may (i) make general advertisements for the business of such patients including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any DaVita employee.

9. DaVita shall do nothing to prevent or discourage Suppliers that, prior to the Time Of Divestiture of any Clinic To Be Divested, supplied goods and services for use in any Clinic To Be Divested from continuing to supply goods and services for use in such Clinic.

D. The purpose of Paragraph II of this Order to Maintain Assets is:

1. to preserve the Clinics To Be Divested and the Assets To Be Divested as viable, competitive, and ongoing businesses, to prevent their destruction, removal, wasting, deterioration, or impairment, and to prevent interim harm to competition, pending the relevant divestitures and other relief;

2. to preserve the good will of the employees and Regional Managers of the Clinics To Be Divested and of the Physicians, Suppliers, and patients that do business with those Clinics; and

3. to prevent Material Confidential Information relating exclusively to the Clinics To Be Divested from being exchanged with DaVita's retained dialysis businesses.

III.

IT IS FURTHER ORDERED that:

A. John Strack and Mitch S. Nielson, CPA, of Focal Point Medical Consulting Group, shall be appointed Monitors to assure that DaVita expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement and by this Order to Maintain Assets.

B. No later than one (1) day after this Order to Maintain Assets is made final, DaVita shall, pursuant to the Monitor Agreement and to this Order to Maintain Assets, transfer to the Monitors all the rights, powers, and authorities necessary to permit the Monitors to perform their duties and responsibilities in a manner consistent with the purposes of the Consent Agreement and this Order to Maintain Assets.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of DaVita, which consent shall not be unreasonably withheld. If DaVita has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to DaVita of the identity of any proposed Monitor, DaVita shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, DaVita shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitors to monitor DaVita's compliance with the terms of the Consent Agreement and this Order to Maintain Assets in a manner consistent with the purposes of this Order to Maintain Assets.

D. DaVita shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitors:

1. The Monitors shall have the power and authority to monitor DaVita's compliance with the terms of the Consent Agreement and this Order to Maintain Assets, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitors in a manner consistent with the purposes of the Consent Agreement and this Order to Maintain Assets and in consultation with the Commission, including, but not limited to:

a. Assuring that DaVita expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Consent Agreement and this Order to Maintain Assets;

b. Monitoring any transition services agreements;

c. Assuring that Material Confidential Information is not received or used by DaVita or the Acquirers, except as allowed in the Consent Agreement and in this Order to Maintain Assets, in this matter.

attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitors' duties and responsibilities. The Monitors shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. DaVita shall indemnify the Monitors and hold the Monitors harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitors' 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitors.

7. DaVita shall report to the Monitors in accordance with the requirements of this Order to Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Monitors shall evaluate the reports submitted to the Monitors by DaVita, and any reports submitted by the Acquirer with respect to the performance of DaVita's obligations under the Consent Agreement and this Order to Maintain Assets.

8. Within one (1) month from the date the Monitors are appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by DaVita of its obligations under the Consent Agreement and this Order to Maintain Assets.

9. DaVita may require the Monitors and each of the Monitors' consultants, accountants, attorneys, and other representatives and assistants to sign a customary

confidentiality agreement; O O , such agreement shall not restrict the Monitors from providing any information to the Commission.

E. The Commission may, among other things, require the Monitors and each of the Monitors' consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitors' duties.

F. If the Commission determines that the Monitors have ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph III.

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

IV.

IT IS FURTHER ORDERED that, beginning fifteen (15) days after the date on which DaVita signs the Consent Agreement and every thirty (30) days thereafter until this Order to Maintain Assets terminates pursuant to Paragraph VII, DaVita 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 the terms of this Order to Maintain Assets. DaVita shall submit at the same time a copy of these reports to the Monitors, if any Monitors have been appointed.

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V.

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

A. Any proposed dissolution of DaVita,

B. Any proposed acquisition, merger or consolidation of DaVita, or

C. Any other change in DaVita that may affect compliance obligations arising out of this Order to Maintain Assets, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in DaVita.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to DaVita, DaVita shall permit any duly authorized representative of the Commission:

A. Access, during office hours of DaVita 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 DaVita related to compliance with this Order to Maintain Assets; and

B. Upon five (5) days' notice to DaVita and without restraint or interference from DaVita, to interview officers, directors, or employees of DaVita, who may have counsel present, regarding such matters.

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VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets 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. such time as (1) all Assets To Be Divested have been divested, and all Management Contracts have been terminated, pursuant to the terms of the Consent Agreement, and (2) the Decision and Order has been made final.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from DaVita Inc. ("DaVita"). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from DaVita's purchase of

stage renal disease ("ESRD") patients receive treatment. In 2003, DaVita's revenues were approximately $2.1 billion.

Gambro AB is a publicly-traded Swedish corporation with worldwide operations focused in three business fields: operating dialysis centers, manufacturing dialysis equipment, and providing technology and products to blood centers and hospital blood banks. Gambro is Gambro AB's entire U.S. dialysis services business. Gambro, headquartered in Denver, Colorado, is the third largest provider of outpatient dialysis services in the United States, with 565 outpatient dialysis clinics serving approximately 43,200 ESRD patients in 33 states and the District of Columbia. In 2003, Gambro's revenues were approximately $1.8 billion.

III. Outpatient Dialysis Services

Outpatient dialysis services is the appropriate relevant product market in which to assess the effects of the proposed transaction. For patients suffering from ESRD, dialysis treatments are a life-sustaining therapy that replaces the function of the kidneys by removing toxins and excess fluid from the blood. Most ESRD patients receive dialysis treatments three times per week in sessions lasting between three and five hours. Kidney transplantation is the only alternative to dialysis for ESRD patients. However, the wait-time for donor kidneys -- during which ESRD patients must receive dialysis treatments -- can exceed five years. Additionally, many ESRD patients are not

on traffic patterns, local geography, and the patient’s proximityonamonog dialysis clinicsccurs at

provider. As a result, the proposed combination likely would result in higher prices and diminished service and quality for outpatient dialysis services in many geographic markets.

IV. The Consent Agreement

The Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in 35 markets where both DaVita and Gambro operate dialysis clinics by requiring DaVita to divest -- prior to acquiring Gambro -- 68 outpatient dialysis clinics to Renal Advantage and one outpatient dialysis clinic to its medical directors and their partners. The Consent Agreement also requires DaVita to terminate two management services agreements pursuant to which it manages outpatient dialysis clinics on behalf of third-party owners. As with the divestitures, termination of these management services agreements will ensure that these clinics remain viable independent competitors.

As part of these divestitures, DaVita is required to obtain the agreement of the medical directors affiliated with the divested clinics to continue providing physician services after the transfer of ownership to Renal Advantage. Similarly, the Consent Agreement requires DaVita to obtain the consent of all lessors necessary to assign the leases for the real property associated with the divested clinics to Renal Advantage. These provisions ensure that Renal Advantage will have the assets necessary to operate the divested clinics in a competitive manner.

The Consent Agreement contains several additional provisions designed to ensure that the divestitures are successful. First, the Consent Agreement provides Renal Advantage with the opportunity to interview and hire employees affiliated with the divested clinics and prevents DaVita from offering these employees incentives to decline Renal Advantage's offer of employment. This will ensure that Renal Advantage has access to patient care and supervisory staff who are familiar with the clinics' patients and the local physicians. Second, the Consent Agreement prevents DaVita from contracting with the medical

directors (or their practice groups) affiliated with the divested clinics for three years. This provides Renal Advantage with sufficient time to build goodwill and a working relationship with its medical directors before DaVita can attempt to capitalize on its prior relationships in soliciting their services. Third, to ensure continuity of patient care and records as Renal Advantage implements its quality care, billing, and supply systems, the

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

[1] *S* *h* *S* Docket No. C-4142 (consent order issued June 30, 2005), http://www.ftc.gov/opa/2005/07/fyi0548.htm; *h* *O* *h* *C* Docket No. C-4140 (consent order issued June 13, 2005), http://www.ftc.gov/opa/2005/06/fyi0543.htm; *h* *h* *S* *hC* *S* *C*, Docket No. C-4130 (consent order issued Jan. 11, 2005), http://www.ftc.gov/opa/2005/01/fyi0504.htm;

When the competing physicians are not financially or clinically integrated in a manner that is likely to produce efficiencies, the Commission has consistently maintained that this type of conduct amounts to illegal price fixing.

We recognize that physicians can join together and negotiate fees in ways that do not harm competition. Health care providers (including physicians) and those who pay for their services (, payors) are increasingly developing new and innovative approaches to health care delivery in order to increase quality and contain costs. It is important not only to protect health care consumers from anticompetitive activity, but also to avoid interference with this procompetitive activity.

We therefore approach this case with full recognition that innovative approaches to health care should be encouraged. We also recognize the frustration of many physicians over their perceived lack of bargaining power in negotiations with large health care payors. The Commission has already provided extensive guidance on the ways to accommodate both of these concerns, consistent with the antitrust laws.[2]

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[2] The Commission, along with the Department of Justice, recently issued a report on competition policy and health care, which was based on 27 days of public hearings covering a broad range of health care topics, all focused on ways to promote innovative, cost effective and high quality health care services. The Fed. Trade Comm'n and the U.S. Dep't of Justice, *hC C* (July 2004), http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf [hereinafter *hC*]. In addition, Commission staff regularly issue advisory letters to physician IPAs seeking advice on proposals for financial and clinical integration. A good example is the Commission staff's advisory letter to MedSouth, Inc., where staff did not object to a clinical integration proposal by an IPA that involved joint setting of fees. Advisory Opinion Letter from Jeffrey W. Brennan, Esq., FTC, to

John J. Miles, Esq., Ober, Kaler, Grimes and Shriver 4 (Feb. 19, 2002), http://www.ftc.gov/bc/adops/medsouth.htm [hereinafter]. The Commission and the Department of Justice have also issued extensive guidelines for antitrust enforcement policy in health care. U.S. Dep't of Justice & Fed. Trade Comm'n, (1996) 4 Trade Reg. Rep. (CCH) ¶ 13,153 [hereinafter]; Thomas B. Leary,

findings of fact of the Initial Decision to the extent those findings are not inconsistent with this opinion.

We find that the activities of Respondent, taken as a whole, amount to horizontal price fixing which is unrelated to any procompetitive efficiencies. Respondent's conduct could be characterized as unlawful under the antitrust laws, and thus

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RR - Respondent's Reply Brief

References to investigational hearing or deposition transcripts included in the trial record as exhibits are made using the exhibit number with the witness' name and type of interview provided in parentheses: CX__ (Van Wagner Dep. at __).

[4] 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003), http://www.ftc.gov/os/2003/07/polygramopinion.pdf [hereinafter , or *C* *O*].

care physicians.[4] These doctors are located principally in the Tarrant County, Texas area, which includes the city of Fort Worth. IDF 31. The participant physicians have distinct economic interests reflecting their separate clinical practices. IDF 35. Many members compete with one another. IDF 36.

NTSP's main functions are to negotiate and review contract proposals for member services that are submitted by payors, including insurance companies and health plans; to review payment issues; and to act as a lobbyist for its members' interests. IDF 39. NTSP negotiates both risk-sharing contracts (risk contracts)[5] and non-risk-sharing contracts (non-risk contracts).[6] IDF 46. The former typically reimburse doctors on a dollar amount per patient basis, whereas the latter provide "fee-for-service" payment. IDF 13-15. The challenged conduct in this

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[5] Risk-sharing contracts are also known as capitation contracts.

[6] NTSP has 20 non-risk contracts. IDF 50; CX 1196 (Van Wagner IH at 14). It does not receive revenues from these contracts; it does, however, receive revenues from its one risk contract. IDF 21.

NTSP's physicians enter into a Physician Participation Agreement (PPA) with NTSP that grants NTSP the right to receive all payor offers and imposes on the physicians a duty to forward payor offers to NTSP promptly. CX 0276; CX 275 at 24. The physicians agree that they will not individually pursue a payor offer unless and until they are notified by NTSP that it has permanently discontinued negotiations with the payor. CX 0311 at 10; CX 0276; CX 1178 (Hollander Dep. at 68). Each NTSP member's PPA provides that NTSP must promptly forward (messenger) the fee reimbursement and other economic provisions of any non-risk offer to the member physicians. CX 275 at 24. If more than 50 percent of the members accept those provisions, NTSP will then proceed to negotiate the contract. IDF 67; CX 275 at 25-26. At times NTSP has gathered powers of attorney from its physicians, which give NTSP the legal authority to negotiate non-risk contracts on behalf of those physicians. CX 1173 (Deas IH at 56-57); Palmisano Tr. 1250-51.

NTSP conducts annual polls of its physicians to determine minimum reimbursement rates for use in negotiation of health maintenance organization (HMO) and preferred provider organization (PPO) product contracts with payors. CX 1195 (Van Wagner Dep. at 66-67). NTSP's polling form asks physicians individually for the minimum payments that they would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement. CX 0565; CX 1196 (Van Wagner IH at 26-29, 43-44, 62). NTSP uses the poll responses to calculate the mean, median, and mode (averages) of the minimum acceptable fees identified by its physicians, and then uses these measures to establish its minimum contract prices. IDF 93. NTSP then reports these measures back to its participating physicians. CX 0103 at 4-5; CX 1196 (Van Wagner IH at 26-29, 43-44, 62); CX 1042. NTSP's polling form explains to the participating physicians that "NTSP polls its affiliates and membership to establish Contracted Minimums. NTSP then utilizes these minimums when negotiating managed care contracts on behalf of its participants." CX 0387 at 1; CX 0633.

B. History of the Case and Summary of Initial Decision

The Commission's complaint, issued on September 16, 2003, charges NTSP with the unlawful negotiation of agreements among its physicians on price and other terms, refusal to deal with payors except on collectively agreed-upon terms, and refusal to submit payor offers to its physicians unless the terms complied with NTSP's minimum-fee standards. Administrative Law Judge D. Michael Chappell filed an Initial Decision upholding the complaint on November 8, 2004.

In the Initial Decision the ALJ found that NTSP is controlled by its participant physicians and had taken collective action to establish and extract fee concessions from payors. ID at 52-56, 64-66, 70-83. The ALJ rejected the claim that NTSP was a single entity incapable of conspiring with its members. *Id.* at 70-71. He concluded that NTSP's conduct amounted to "a horizontal price fixing agreement." *Id.* at 86. He recognized that courts have applied analysis to horizontal price fixing, and made a number of specific findings that would support this characterization. IDF 364-80. However, he did not ultimately conclude that NTSP's conduct was unlawful. Instead, he followed the Supreme Court's analysis in *C*
7 526 U.S. 756 (1999), and distinguished NTSP's conduct from the conduct of the dentists' group in that case. ID at 85-88.

The ALJ found that the PPA gives NTSP the exclusive right initially to negotiate with payors and requires physicians to submit to NTSP offers that they may individually receive. IDF 65. Physicians may negotiate individually only after NTSP discontinues its efforts. IDF 66. The ALJ also found that NTSP reinforces this negotiation exclusivity by powers of attorney or agency authorizations it receives from its members, and that it urges its members to tell payors to communicate their offers directly to NTSP. IDF 70, 76-82.

The ALJ found that, despite the requirements in the PPA, NTSP actually messengers to its members only those non-risk

contract proposals in which reimbursement fees exceed NTSP's minimum reimbursement schedule developed from the annual poll of members. IDF 68, 85, 87. This rate is expressed as some percentage of Medicare's Resource Based Relative Value System, a fee schedule used to set the reimbursement amounts Medicare will pay for thousands of different services. IDF 10-12, 89-90. Although doctors do not consult with each other about their responses to the poll, NTSP computes the responses and informs its members of the averages. IDF 92-94. The ALJ found that this information enables members to assess the benefits of collective contracts though NTSP and reduces their uncertainty about other members' price-setting intentions. IDF 99-100.

The Initial Decision described NTSP's negotiations with three health plans – United, Cigna and Aetna, in which NTSP exercised its negotiating authority through its PPA and/or agency agreements or powers of attorney, and utilized its minimum reimbursement schedule. ID at 74-82. In several instances in these negotiations NTSP terminated, or threatened to terminate, its contract with a health plan.

The ALJ rejected Respondent's claim that it was a single entity incapable of conspiring with its members, ID at 70-71, and held that evidence of direct agreements among physicians was not needed to demonstrate the conspiracy. at 68-69. The ALJ relied on *C* *S* , 457 U.S. 332, 356 (1982), where the Court found concerted action without finding that the competing physicians agreed directly with each other to set prices. The ALJ also found that NTSP had offered no plausible claim that its collective price setting was ancillary to any procompetitive activity. ID at 87. He therefore concluded that "the actions taken by NTSP to coerce health insurance payors to increase their offers of rate reimbursement or to offer more favorable economic terms to NTSP's physicians constitute an unreasonable restraint of trade." ID at 88. He also found that NTSP's actions had caused payors to increase their offers, and concluded that this fact provided sufficient evidence of anticompetitive effects, to the extent an examination of effects is

required. *Id.* at 87. The ALJ issued an order that requires NTSP to cease and desist from collective price fixing in its negotiation of non-risk contracts and to terminate any existing non-risk contracts. *Id.* at 92-97.

C. Questions Raised by the Appeal

1. Respondent's Appeal

Respondent appeals from the ALJ's determination that its conduct violated Section 5 of the FTC Act, and also maintains that the ALJ's cease and desist order is not appropriate. Respondent's supporting arguments sometimes overlap, but may be sorted out as follows:

First, Respondent argues that the Commission lacks jurisdiction over NTSP because it is a memberless non-profit organization, which is not engaged in interstate commerce.

Second, Respondent argues that the ALJ erred in finding that Complaint Counsel had shown concerted action when there was no evidence of direct collusion among NTSP's physicians. Respondent asserts that NTSP cannot and does not bind any participating physicians to its non-risk contracts, and that any non-risk contracts to which NTSP decides to become a party must be messengered to the physicians for their individual decisions on whether to join.

Third, Respondent contends that even if Complaint Counsel had shown there was concerted action, the conduct must be analyzed under the rule of reason. Respondent argues that the ALJ therefore erred when he found a violation, because Complaint Counsel did not meet their burden to show anticompetissel d1ou7(ffeactsid1ou7(n)-043(a proed)45.7rlyd)45.7l d fiedd1ou7(f rlevas)42.7nu

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III. Jurisdictional Issues

We consider this issue first, although Respondent does not give it prominence. The Commission has jurisdiction over NTSP as a corporation only if NTSP is organized to carry on business for the pecuniary benefit of its members and NTSP's conduct at issue is "in or affecting commerce." 15 U.S.C. §§ 44, 45 (1994). Respondent contends that it was error for the ALJ to find that the FTC has jurisdiction over NTSP because NTSP is incorporated under Texas law as a "memberless" non-profit organization (and therefore its physicians are not "members" of NTSP), and none of NTSP's actions were in interstate commerce. RAB at 58-59.

We find that NTSP clearly is a "corporation" within the meaning of Section 4 of the FTC Act because NTSP is "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. In the words of NTSP official Dr. John Johnson, "NTSP was going to be a group of physicians that would bring a voice to organizing physicians who often practiced in individual groups to hopefully be able to secure contracts, improve patient care, and provide a voice at the table for physicians. . . . [It was] to represent physicians . . . in obtaining contracts from businesses or insurance companies or in dealing with hospitals." CX 1182 (Johnson Dep. at 10-11).[7] NTSP's primary function – marketing its physicians to payors – satisfies the pecuniary benefit test of FTC jurisdiction. Indeed, we find that NTSP does not appear to have any purpose other than to carry on business for the profit of its members. It is not necessary for the challenged conduct to increase NTSP's members' profits, as NTSP intimates. In *C* , 526 U.S. at 767 n.6, the Supreme Court stated,

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[7] *S* CX 350 ("NTSP was started in an attempt to provide a seat at the table of medical business for the individual specialty physicians . . . . NTSP through, [sic] PPO and risk contracts, has provided a consistent premium fee-for-service reimbursement to the members when compared with any other contracting source."); CX 550.

"[i]t should go without saying that the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit."

NTSP's argument that its physicians are not "members" because of the way it is incorporated elevates form over substance.[8] NTSP's physicians possess sufficient indicia of membership to qualify as members within the meaning of Section 4:

- They come together with other members of their profession to promote their common business interests.
- They elect representatives to its governing board.
- They contribute funds to finance NTSP's activities.
- NTSP internal documents refer to its physicians as "members."

IDF 20, 21, 24, 33, 42, 44, 48, 160, 282, 326.

We further find that NTSP satisfies the interstate commerce jurisdictional requirement because NTSP's actions to maintain physician fee levels, if successful, could be expected to affect the flow of interstate payments from out-of-state payors to NTSP physicians. There is no need to prove actual effects on interstate commerce, or to quantify the effect. The Supreme Court on numerous occasions has emphasized the breadth of federal antitrust jurisdiction, even when wholly intrastate conduct of local actors is challenged.[9]

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[8] The mere form of incorporation is not controlling in matters of FTC jurisdiction. *S C h C C*, 405 F.2d 1011, 1018-19 (8th Cir. 1969).

[9] *S S h h* , 500 U.S. 322, 328-31 (1991); *O* 444 U.S. 232, 241 (1980); *C* , 425

U.S. 738, 743-45 (1976); *S*

A. Choice of Standard

The Commission's unanimous opinion was its first attempt to respond to the approach of the Supreme Court's *C* decision. These opinions describe how the analysis of horizontal restraints has evolved over the last 100 years, and establish a flexible methodology for courts to determine whether a challenged restraint is illegal. They go beyond the simple dichotomy between categories like " " or "rule of reason," and establish a continuum within which behavior can be analyzed.

At one polar extreme, there still is a category of offenses that are considered illegal, for which liability depends solely on

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[12] *S* *S* *C* 273 U.S. 392, 398-99 (1927); *S* *S* *C* 85 F. 271, 288-91 (6th Cir. 1898), 175 U.S. 211 (1899).

[13] *S* *S* *S* *O* *C* , 310 U.S. 150, 218-21, 229 (1940).

[14] Note that in one respect the conduct here is even worse than that condemned in because NTSP has set minimum prices. *S* Section V.B.1.a.

[15] *C* Soc'y, 1979 WL 1638 at *1 (D. Az. June 5, 1979), , 643 F.2d 553 (9th Cir. 1980), *h* , 457 U.S. 332 (1982).

[16] A

Department of Justice *C S* provide specific warning about the illegality of this type of conduct. *S h C S* note 2, *S* 8.

Although NTSP's activities could be characterized as illegal because they are closely analogous to conduct condemned in this and other industries, we will not apply that label here and now in this particular case. There are two reasons.

First, in the years since was decided, the Supreme Court has urged caution in the application of the label to conduct in a professional setting where "the economic impact . . . is not immediately obvious." *C* , 476 U.S. 447, 459 (1986); *C* , 526 U.S. at 770-71. Some might claim that the likely economic impact of the restraints in issue here is "immediately obvious" enough to satisfy this standard, but we do not need to reach that question because we have available in this case an extensive record on which to buttress our conclusions about the likely effects of Respondent's conduct.

Second, since , we have a better understanding of the potential integration efficiencies of physician IPAs. We would view NTSP's activities very differently if NTSP were able to demonstrate that the participating physicians were financially or clinically integrated in performing its numerous non-risk contracts, and thus driven by incentives similar to those present in its single remaining risk contract. Under the well-established law of ancillary restraints, recent precedents like , and the principles described in our *C S* and *C C* ,[17] Respondent could have prevailed if the integrated venture were likely to enhance

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[17] Fed. Trade Comm'n and U.S. Dep't of Justice, *C C* (2000), 4 Trade Reg. Rep. (CCH) ¶ 13,161 [hereinafter *C C*].

efficiencies and NTSP's conduct were reasonably related to the overall agreement and reasonably necessary for achieving those efficiencies. S discussion in Section V.C.1., . This means that some initial inquiries about whether there is integration, the likely effects of integration, and the reasonableness of the specific restraint are necessary in order to decide whether to apply a rule of reason. It is of course possible to conclude we then have a case based on a illegal restraint if these initial inquiries are decided adversely to a respondent. But, it is semantically awkward to use a label once a number of "reasonableness" issues have been addressed, sometimes at length. What does it really mean to say we have a case, once we have considered and rejected justifications for a restraint? What it means, as a practical matter, is that no further proof of market effects is required; the case is over. As will be made clear in the discussion below, however, we arrive at exactly the same result when we follow the "inherently suspect" analysis outlined in – and the framework more accurately describes the actual analysis of the case.

These considerations might not deter us when we are persuaded by experience and economic logic that the potential for harm is overwhelming and the possible justifications are attenuated and uniformly rejected by courts. We would simply apply the label. In the health care sector, however, the Commission wants to encourage providers to engage in efficiency-enhancing collaborative activity.[18] We do not want to chill consideration of this activity by use of terminology that could

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[18] S S h note 2, where Commission staff did not recommend the Commission take enforcement action against a physician IPA proposal whereby the IPA physicians would collaborate on information sharing, treatment coordination, practice protocols, and enforcement standards. S Thomas B. Leary, h C C S O S h47 ST. LOUIS U. L. J. 223 (Spring 2003).

[19] As the D.C. Circuit pointed out in , this is not a fixed category. It must evolve "as economic learning and market experience evolve." 416 F.3d at 37; Thomas B. Leary, *S O h* , http://www.ftc.gov/speeches/leary/chairsshowcase.talk.pdf at 7-10, (describing distinction between cases "that focus on the nature of the restraint" and those "that focus on the nature of the market") (emphasis in original).

showing that particular conduct meets these strictures, and the defendant makes no effort to advance any procompetitive justification for the conduct, then the case is concluded and the practices are condemned. *C O* note 4, at 29

A defendant can avoid summary condemnation, however, if it can advance a legitimate justification for the practice. As we explained in , "[s]uch justifications may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers." The defendant need only articulate a legitimate justification, and is not obliged to prove the competitive benefits. (Remember that the issue at this initial stage is simply whether the practice should be condemned summarily.) The proffered justifications, however, must be both cognizable under the antitrust laws and at least facially plausible. at 30-33. The cognizable justification requirement allows a tribunal to reject as a matter of law proffered justifications that are incompatible with the goal of antitrust law to protect competition. We described cognizable justifications in our opinion, . at 31:

> Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation. By contrast, courts since the earliest decades of the Sherman Act have identified classes of justifications that, because they contradict the procompetition aims of the antitrust laws will not save restraints from condemnation. For example, a defendant cannot defend restraints of trade on the ground that the prices the conspirators set were reasonable, that competition itself is unreasonable or leads to socially undesirable results, or that price increases resulting from a trade restraint would attract new entry.

The D.C. Circuit expressly approved the requirement that a proposed justification be both cognizable and plausible. Even though the justification offered by seemed plausible "[a]t first glance," the court rejected it as "nothing less than a frontal assault on the basic policy of the Sherman Act."
, 416 U.S. at 37-38 (quoting *S*
, 435 U.S. 679, 695 (1978)).

If the justification for a suspect restraint is cognizable – which is to say, admissible in the first place – a defendant must also show that it would plausibly create or improve competition. Again, to quote :

> A justification is plausible if it cannot be rejected without extensive factual inquiry. The defendant, however, must do more than merely assert that its purported justification benefits consumers. Although the defendant need not produce detailed evidence at this stage, it must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition.

at 31-32.[20]

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[20] The concept of ancillary restraints, which allows an agreement that would otherwise be viewed as a naked restraint of trade to be evaluated in light of the procompetitive effects of an efficiency-enhancing integration of economic activity to which it is reasonably related, is subsumed in the Commission's analysis. *S* *C* *O* note 4, at n.42 ("[t]he ancillary restraints doctrine retains its vitality in evaluating efficiency claims. . . . [w]hether or not expressed in terms of ancillarity, the link between defendant's "plausible" justification and a cognizable benefit must be clear."). As will become clear after the discussion of specific facts, NTSP's conduct is not justified under either a pre- ancillarity analysis, or

more inclusive analysis.

of Sherman Act Section 1. RAB at 12. Respondent's discussion of has confused the requirement of "collective action" with the separate requirement of an "unreasonable restraint of trade." merely states that a trade association is not by its nature a "walking conspiracy" even though it inherently involves collective action by competitors – there must also be an unreasonable restraint of trade. , 314 F.3d at 764. We do not disagree.

Respondent also argues that because NTSP cannot and does not bind any of its physicians to non-risk contracts, there cannot be any collusion among physicians (and therefore no agreement). RAB at 8. Respondent cites ALJ findings that the doctors did not discuss among themselves or directly enter into price agreements with one another, and points out that the ALJ's finding that there was no collusion among NTSP's physicians was based on this evidence. RAB at 11. This argument, as presented, conflates what really are two separate issues.

The first issue raised by this particular argument is whether parties can enter into an agreement absent direct communication with each other. It has long been settled that they can. In the Supreme Court found an agreement among physicians without finding that the competing physicians agreed directly with each other. 457 U.S. at 356; ID at 68.

[27] For example, NTSP would inform physicians who had not yet granted it contract negotiation authority but were considering it, the number of other member physicians who had already given NTSP that authority. CX 1066 at 1; CX 0548 at 1.

[28] *S* , ,

our ultimate conclusions in this case do not stand or fall on our assessment of separate actions; the ultimate conclusions are rather predicated on the likely effects of the actions taken together.[29]

After discussion of the restraints separately, we then address in Section V.C. below the justifications advanced for each of them. We also describe the conduct that the Commission does not find to be price fixing in Section V.D., in order to give guidance to the health care community.

1. Challenged Restraints

a. NTSP's Use of a Poll

NTSP conducts annual polls of its physicians to determine minimum reimbursement rates
for use in negotiation of HMO and PPO product contracts with payors. CX 1195 (Van Wagner Dep. at 66-67). NTSP's polling form asks the physicians individually for the minimum price that they would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement. CX 0565; CX 1196 (Van Wagner IH at 26-29, 43-44, 62). NTSP uses these poll responses to calculate the mean, median, and mode of the minimum acceptable fees identified by its physicians, and then uses these averages to establish its minimum contract prices. NTSP then reports these measures back to its participating physicians. CX 0103 at 4-5; CX 1196 (Van Wagner IH at 26-29, 43-44, 62); CX 1042. NTSP's polling form explains to the participating physicians that "NTSP polls its affiliates and membership to establish Contracted Minimums. NTSP then utilizes these minimums when negotiating managed care contracts on behalf of its participants." CX 0387 at 1; CX 0633.

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[29] The decision to view the conduct as a whole in this case should not be understood to mean that any one of the actions is necessarily benign standing alone.

decision on a payor's offer, it is not binding on the physicians. *Id.* at 22-23.

Respondent further argues that Complaint Counsel's expert (Dr. Frech) was unable to find any evidence of collusion among physicians, and admitted that physicians chose not to contract through NTSP on more than two-thirds of the contract offers NTSP messengered. RAB at 8-10. According to Respondent, Dr. Frech also determined that physicians frequently enter individually into payor contracts at rates both above and below the threshold rate levels. RAB at 10-11, 23.

Respondent's argument that NTSP does not divulge to any physician or board member whether or how any particular physician responds to the poll is of no consequence because liability in this case is not predicated on individual discussions among physicians themselves. It is predicated on an improper delegation of individual pricing authority to a common agent. The fact that NTSP's decisions on payor offers were not binding, and often ignored, does not absolve NTSP from liability because the law is clear that agreements can be illegal even though all the price terms are not specified or adhered to. *C* *S* ., 446 U.S. 643, 647-48 (1980); *S* *O* , 310 U.S. at 218-24; and

We find that the PPA in effect renders NTSP as the sole bargaining agent of NTSP competing physicians and thus facilitates price fixing among NTSP physicians. The terms of the PPA and the manner in which NTSP has utilized them hinder the ability of payors to assemble a marketable physician network in the Fort Worth area without submitting to the collective bargaining of NTSP. Frech Tr. 1313-16.

Respondent argues that NTSP's PPA gives NTSP no authority to bind physicians, and that any non-risk contracts in which NTSP decides to join as a party must be messengered to the physicians for their own individual decisions on whether to join. RAB at 8, 19. In addition, Respondent argues that the PPA's terms do not prevent a physician from negotiating with a payor directly or through another entity. *Id.* at 19.

We find that although the PPA requires NTSP to deliver contracts to its physicians, the evidence shows that NTSP rejects and does not deliver any contract that falls below its minimum reimbursement schedule. CX 1196 (Van Wagner IH at 68-69). Other terms of the PPA are inconsistent with Respondent's assertion that any non-risk contracts must be messengered. For example, the PPA contains provisions whereby 50 percent of NTSP's membership must approve the reimbursement proposal of a payor before an offer is "messengered" by NTSP to the physicians for actual opt-in/out of the proposed contracts.[32] CX 0276 at 1-2. This conduct has the potential to raise the level at which variability occurs, just as the use of polling data does.

We also find that each NTSP physician's ability to opt in or out of a contract – NTSP's inability to "bind" its members to a contract – does not eliminate the existence of a price-fixing agreement when providers collectively negotiate with payors over

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[32] The PPA contains another provision allowing for NTSP counter offers to payor rate proposals based on direction from at least 50 percent of NTSP's physicians. CX 0275 at 26.

[33] *S* *h* *h* *C* ., Docket No. 9309, 2005 WL 1541548 at *11 (FTC June 21, 2005), , No. 05-4042 (6th Cir. Aug. 18, 2005); , 906 F.2d 432, 445-50 (9th Cir.1990) (circulation of current price lists

For example, when NTSP was dissatisfied at one point during negotiations with United Healthcare Services, Inc., it terminated the United contracts of 101 physicians. IDF 147-54. On another occasion, after CIGNA sent contract assignment letters to Fort Worth physicians, in an attempt to contract with them independent of NTSP, NTSP provided its members with a sample letter refusing the contract assignment and directing CIGNA to negotiate with NTSP as their agent. IDF 205. NTSP advised its physicians not to consent to the assignment, and also sent them an agency agreement authorizing NTSP to negotiate on their behalf. IDF 205. Thereafter CIGNA received 40 letters on behalf of 52 physicians that were virtually identical to the sample letter provided by NTSP. IDF 206. On two other occasions, NTSP threatened to terminate its contract with CIGNA and then later actually terminated its contract, when terms were not satisfactory to NTSP. CIGNA was then forced to capitulate to NTSP's demands. *S* IDF 221-48. We find that NTSP illegally utilized refusals to deal and termination of contracts to enhance the bargaining power of the participating physicians and command higher prices. Frech Tr. 1309-12; 1325.

Respondent argues, first, that NTSP's refusals to deal with payors are protected by the *C* doctrine. RAB at 14-15, *S C C* 250 U.S. 300 (1919). This doctrine holds that a firm, acting unilaterally, may lawfully decide with whom it will, or will not, deal. *C* , 250 U.S. at 307. Respondent views NTSP's refusals of payor offers as the lawful unilateral act of NTSP, and not the act of a group of horizontal competitors acting collectively through its agent, NTSP. RAB at 14-17. It reiterates for this purpose the familiar refrain that (1)

can injure competition and innovation. Respondent argues that this admonition should apply to NTSP's refusals to deal. RAB at 15.

Second, Respondent argues as a policy matter that NTSP needs the ability to refuse contracts because it faces potential liability when it becomes a party to a payor contract. RAB at 16. Respondent explains that failure to perform obligations under a contract, involvement in illegal payor conduct, and involvement in deficient medical care can all subject NTSP to liability. *id.* Further, Respondent states that NTSP has a reputation to protect and involvement in a contract with poor performance can damage NTSP's reputation. *id.* at 16-17.

We hold that *C* is inapplicable in this case because

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[35] *S id.*, 476 U.S. at 465 ("That a particular practice may be unlawful is not, in itself, sufficient justification for collusion among competitors to prevent it . . . .") (*h O id. C*, 312 U.S. 457, 468 (1941)).

[36] involved conduct by a single firm charged with monopolization under Section 2 of the Sherman Act, not with "contract, combination or conspiracy" under Section 1 of the Sherman Act. , 540 U.S. at 407. Unlike this case, there

that its actions were lawful. RR at 16; CX 387 at 1; CX 393 at 1; CX 186; CX 1075 at 2; CX 1122. After review of the evidence as a whole, we find that Respondent has deviated from the accepted parameters of a lawful messenger model in a manner that amounts to horizontal price fixing.

There is a wealth of guidance available on this subject. In addition to the discussion in the hC S , at least ten past Commission consents describe conduct that deviated from a lawful messenger model.[38]

Properly used, a messenger model is an arrangement designed to reduce transaction costs associated with negotiation of contracts between providers and payors; it is not a device for facilitating horizontal agreements among providers on prices or price-related terms. In a messenger model, a physician network uses the agent to convey to payors information obtained individually from the providers about the prices or price-related terms that the providers are willing to accept, but the agent does not negotiate on behalf of

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[38] S , h h , Docket No. C-4149 (Analysis of Agreement Containing Consent Order, issued Aug. 5, 2005), http://www.ftc.gov/os/caselist/0410100/0410100.htm; h S , Docket No. C-4142 (Analysis of Agreement Containing Consent Order, issued May 19, 2005), http://www.ftc.gov/opa/2005/05/sanjuan.htm; h hS , Docket No. C-4134 (Analysis of Agreement Containing Consent Order, issued Mar. 2, 2005), http://www.ftc.gov/opa/2005/03/scdoctors.htm; h h S hC S C Docket No. C-4130 (Analysis of Agreement Containing Consent Order, issued Sep. 28, 2004), http://www.ftc.gov/os/caselist/0310135/0310135.htm; h S h h , Docket No. C-4113 (Analysis of Agreement Containing Consent Order, issued June 7, 2004), http://www.ftc.gov/os/caselist/0310134/0310134.htm.

the providers. The agent may convey to the providers all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers. Alternatively, the agent may receive authority from individual providers to accept contract offers that meet certain criteria as long as the agent does not negotiate on their behalf. The agent can also assist providers to understand the contracts offered, by supplying objective or empirical information about the terms of an offer. For example, the agent may provide a comparison of the offered terms with other contracts agreed to by network participants. On the other hand, it would be dangerous for the agent to express an opinion on the terms offered. *S*
hC *S* note 2, *S* 9C.

If a messenger model is used improperly, it can facilitate an unlawful price-fixing agreement. In a legal messenger model, the agent only facilitates independent, unilateral decisions of the network providers. It is illegal to use the messenger model in a way that creates or facilitates collective decisions on prices or price-related terms.

It is necessary to look at specific facts on a case-by-case basis, because there is not necessarily any single feature that determines the outcome. Some examples of activities that can tip the balance toward illegality are: agent coordination of provider responses to a particular proposal, dissemination to network providers of the views or intentions of other network providers about the proposal, expression of an opinion on the adequacy of price terms offered, collective negotiation of price terms for the providers, or decisions not to convey an offer if the agent believes the price terms are inadequate. A fundamental question is whether the actions of the messenger are designed to facilitate communications or, instead, to enhance the bargaining power of the providers.[39]

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[39] There are other widely available materials describing the proper use of a messenger model. For example, in 1997, the American Medical Association's Associate General Counsel

legitimate messenger activities when it expressed its opinion both to its physician and to the payors themselves on the adequacy of price terms in contract proposals. *S* *hC* *S* note 2, *S* 9C.

2. The Inherently Suspect Legal Analysis

The restraints described above, as a whole, are what we describe as inherently suspect under . The conduct itself can be said to have a likely tendency to suppress competition because the likelihood of anticompetitive effects from NTSP's restraints is sufficiently grounded in economic theory and supported in case law. Complaint Counsel's expert, Professor Frech, explained the economic rationale for the legal concerns about NTSP's conduct. Frech Tr. 1315-24. Through the mechanisms described above, NTSP was able to collectively set prices and present its physicians as a unified and strong force within Fort Worth. These practices reduce the risk that payors would be able to contract around NTSP, and thereby enhance NTSP's bargaining power over price. Frech Tr. 1325-27; Grizzle Tr. 730, 746-47, 750-51. Because NTSP physicians comprise a large percentage of physicians in Fort Worth, their threat to withhold services severely damages the perceived adequacy of a payor's physician network, and makes it more difficult for a payor to obtain or maintain business. Grizzle Tr. 730-31; Jagmin Tr. 1091-92; Mosely Tr. 139-40. Payors are therefore more willing to pay the NTSP physicians' consensus price because of the threat to

considered in another context. Respondent says that because there was no direct collusion among physicians,[41] NTSP's conduct meets *C* 's threshold test for determining that a "quick look" rule of reason analysis is not appropriate.[42] RAB at 28-29. Respondent adds that a quick look rule of reason analysis is appropriate only in limited circumstances, when it can be shown that "the great likelihood of anticompetitive effects can be easily ascertained." at 29 (*C* , 526 U.S. at 771). Because there was no direct collusion among NTSP physicians,

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[41] As pointed out in Section V.A. above, the fact that the doctors did not communicate among themselves, but rather acted through a common agent, does not affect liability.

[42] We have used "inherently suspect" in and in this opinion to refer to conduct that may be justified in some circumstances but, absent these circumstances, can be condemned without an extensive demonstration of adverse market effects in the case at hand. We believe this level of inquiry is what the Supreme Court means by a "quick look."

discount advertising." *C* , 526 U.S. at 773. The

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[43] Our analysis here deviates somewhat from Complaint Counsel's proffered analysis. Complaint Counsel's arguments against Respondent's proffered justifications are couched in terms of whether NTSP's price fixing was ancillary to any significant productive collaboration among its participating physicians. As we mentioned above in Section IV.A., the doctrine of ancillary restraints is subsumed in the analysis. (The methodology can also be used more broadly to deal with justifications of a different kind. It could be applied, for example, in a case like 441 U.S. at 20-25, where the argument was that the system could not function at all without

1. Teamwork and Spillover Efficiencies

Respondent argues that its risk panel physicians "use financial and clinical integration techniques to develop team-oriented improvements in cost and quality." RAB at 49. Respondent

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collective agreement on price terms, or *S* , 5 F.3d 658, 677 (3d Cir. 1993), where agreements on student aid could be characterized as pro-competitive overall.) When we use the terminology of rather than the terminology of ancillary restraints, it does not mean that we disagree with Complaint Counsel's alternative analysis.

participate in non-risk contracts.[44] IDF 94-95. Although these limitations may be prudent, they undercut an argument that the minimum reimbursement schedule could help NTSP determine when spillover efficiencies would occur. As discussed above, it is evident that the poll and limitations were designed for another purpose. *S* discussion in Section V.B.1.a.

Respondent has thus failed to articulate a logical nexus between these activities that facilitate price fixing and the claimed efficiencies. As we stated in , a defendant

> must do more than merely assert that its purported justification benefits consumers. Although the defendant need not produce detailed evidence at this stage, it must articulate the specific link between the challenged restraint and the purported justification to merit more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition.
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> *C* *O* note 4, at 31-32.

This conclusion is reinforced by the statement of NTSP's executive director, Karen Van Wagner. During an investigational hearing when she was asked the question whether reimbursement rates at or above NTSP's contracting minimums were necessary in order for NTSP to achieve clinical integration, she testified:

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[44] Respondent even emphasized in its appeal brief that "it is impossible for [anyone] to determine the response of any specific physician or speciality, or even to determine whether they responded." RAB at 24.

[45] Respondent argues instead that the concept of clinical integration does not encompass the full scope of conduct that is justifiable under the rule of reason, and that NTSP's "teamwork" yields sufficient cost and quality benefits. RAB at 51. We do not

2. The PPA, Powers of Attorney, Refusals to Deal and Refusals to Messenger Contracts

Respondent also argues that NTSP's PPA notice provision, its use of powers of attorney, its communications with physicians and payors, and its refusal to messenger contracts have plausible procompetitive effects on their own. RAB at 45-57. The PPA ostensibly increases NTSP's contracting opportunities in the marketplace by informing NTSP of new contract opportunities. at 30. The powers of attorney ostensibly were gathered by NTSP to inform it of which and how many physicians were willing to be messengered an offer through NTSP. RAB at 31. Respondent also argues that disclosure to physicians that NTSP will not be involved in a particular payor offer will alert physicians that they need to look to other contracting avenues with payors in those situations. RAB at 33.

In addition, Respondent claims that when it informs physicians about a payor's conduct or the status of a payor offer, it is merely collecting and disseminating market information.[46] at 34, 53. Respondent states that the procompetitive effects of information sharing in the health care industry, even among competing physicians, is recognized by Complaint Counsel's economic expert and the Commission's advisory opinions. Respondent also states that its refusal to convey payor contract offers with prices that NTSP believes are not sufficiently high to attract a majority of its participating physicians is efficient because a physician network has a plausibly valid concern about resources wasted if it were to transmit a payor's offer that is of interest to less than 50 percent of the physicians. at 32.

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[46] Respondent also states that NTSP's comments to a payor about the terms that physicians might find attractive or reasonable can help to educate the payor and expedite contract negotiations. RAB at 34. For reasons discussed in Section V.D. , this kind of activity is not necessarily suspect.

The problem with these arguments is that most efforts by competitors to collectively agree on prices could be said to save costs in negotiations with customers. (Similarly, an agreement to allocate markets is likely to reduce selling expenses.) Arguments of this kind ultimately are based on the idea that competition itself is inefficient, and are thus not cognizable under the antitrust laws.[47] We explained in that "[c]ognizable justelocatd5 0 0e 1750d1 T,TTn) Ar voga"[c]og

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[47] *S* , 457 U.S. at 346; *S* 435 U.S. at 689-90; *ɛ* , 421 U.S. at 786-87.

[48] *S* CX 0380 at 2 (informing its members that through "direct" negotiation or affiliation with other IPAs, NTSP obtained prices "5 to 15% over Tarrant County rates"); CX 0550 (stating to members that it "has provided a consistent premium fee-for-service reimbursement to the members when compared with any

physicians to delay or forgo direct contracting during NTSP's negotiations with payors.[49] These actions are designed to enhance bargaining clout, not to increase efficiency from spillover effects, or to conserve resources, or to spread procompetitive benefits of information sharing.

3. Denial of Discovery Request in Support of Purported Justification

Respondent argues that the ALJ erroneously denied NTSP's discovery request for the payors' "flat file" data that would show how NTSP and other physicians performed on non-risk contracts. RAB at 45-46. Respondent claims that, without these files, it has limited capability to show how NTSP's performance compares to other physician providers. ✓ . Respondent also states hich slgc.72 -1.18 TD(PactifC are and Cigr
n.190g.

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other contracting source").

[49] *S* , CX 0310 (Dr. Deas advising NTSP physicians that "discussions are ongoing with Aetna U.S. Healthcare, Cigna, and other major players which should lead to contracts that are more favorable than we would be able to achieve individually or though other contracting entities"); NTSP regularly sent "fax alerts" to its members and held "General Membership Meetings" to continually provide contracting updates for specific payor negotiations and share NTSP's poll results with the membership. CX 1178 at 21-23 (Hollander Dep. at 21-23); CX 0173 – CX 0180; CX 0182 – CX 0188; CX 0615; CX 0945; CX 0903; CX 0617; CX 0628; Frech Tr. 1326-27.

[50] *S* 441 U.S. at 23-24 (declining to find blanket license fee plan

[54] We warn, however, that the distinction between lawful and unlawful use of powers of attorney or agency arrangements and the messenger model may require careful counseling. As evidenced by NTSP's conduct in this case, there are many different ways that a power of attorney or agency arrangement and

As made clear in the discussion above, we find that proof of market definition and market power is

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[56] In fact, even in a full blown rule of reason case, it may not be necessary to calculate shares in a relevant market if more direct evidence of market effects is available. *S* , 476 U.S. at 460-61; *h* *S* *h* *h* *C* , Docket No. 9297, 2003 WL 22989651, at *9,11,13 (F.T.C. Dec. 8, 2003) (citations omitted), *h* *S* *h* *C* , 402 F.3d 1056 (11th Cir. 2005), (U.S. Aug. 29, 2005) (No. 05-273).

to prove that NTSP's conduct caused an anticompetitive effect in any market. RAB at 35- 44. Respondent asserts that NTSP does not have market power and that the numerous avenues through which physicians could and did contract undermine the possibility that any market power existed. *Id.* at 40-41. The ALJ found that NTSP did not receive higher rates than those that other physicians and physician groups were already receiving. ID at 82. The ALJ found only that NTSP obtained higher rates or more beneficial economic terms than the health care payors initially offered to NTSP. *Id.* at 82-83. Respondent states that this has no antitrust significance in the absence of a showing that physicians entered into a boycott conspiracy, because NTSP as an entity can choose to participate or not in a payor offer. RAB at 42-43. Furthermore,

that are broader in scope than the conduct that is declared unlawful. Fencing-in relief is deemed necessary in some cases in order to prevent future unlawful conduct.[57] The Commission's remedy, however, must be reasonably related to the violation. *C C .*, 343 U.S. 470, 473 (1952); *S* , 327 U.S. at 613.

In this case, we have the benefit of the Commission's extensive experience in crafting appropriate remedies for physician IPAs that have engaged in conduct similar to that of NTSP. Over the years the Commission has fine tuned the relief necessary to prevent future illegal conduct in these cases. To the extent order provisions in these cases have proved ineffective or unnecessary, the Commission has appropriately modified them. The order we impose in this case – which was proposed by Complaint Counsel and is somewhat different than the ALJ's order – is consistent with recent past relief accepted in settlement in similar cases, and is based on the Commission's extensive experience. We are therefore confident that the relief will effectively remedy NTSP's illegal conduct and is neither too narrow nor too broad. Our order is designed to protect the public against any further violations by NTSP, but also to allow NTSP to pursue arrangements that may produce efficiencies without significant risk of anticompetitive consequences.

As usual, Paragraph I of the order defines terms that will be used, and Paragraph II contains general prohibitions against participation in or facilitation of a conspiracy among any physicians. It specifically prohibits agreements to "negotiate"[58]

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[57] *S C C C* , 380 U.S. 374, 395 (1965); *C*, 970 F.2d 311, 326-27 (7th Cir. 1992).

[58] Although our order does not define the term "negotiate," we intend it to incorporate the distinctions described in *hC S* 4 and 5 between the lawful provision of factual information and views to payors (as in a true messenger model)

and efforts to enhance the collective bargaining power of the participating physicians.

nature, or relate to NTSP's requirement to notify affected persons of the existence of the order. They impose little burden on NTSP. The order terminates after twenty years.

Respondent argues that the ALJ's order is not narrowly tailored to any antitrust violation properly found. Respondent first asserts that because there was no collusion among physicians, the ALJ's order is not supported in the record. It claims, for example, that because NTSP has the right to negotiate its own contracts, the remedy cannot prohibit NTSP from negotiating contracts. And because there was no collusion among the physicians, it says termination of NTSP's existing physician contracts is not warranted. RAB at 60-62. Respondent also argues that, as worded, prohibitions on NTSP's role in payor negotiations with physicians (particularly on information exchanges among physicians) would apply to non-price as well as price terms and thus conflict with *C S* and applicable law. *Id.* at 62.

Respondent's arguments essentially restate their rejected claim that there have been no violations. We find that the prohibitions on collective negotiation and the need to terminate existing contracts are both "reasonably related" to NTSP's unlawful conduct. We also find that the ban on collective bargaining through the use of non-price terms as well as price terms is necessary to ensure that NTSP does not seek to perpetuate its unlawful conduct by orchestrating agreements through non-price or non-economic terms. We also find that it is necessary to terminate NTSP's contracts, so that NTSP's physicians do not continue to reap the benefits of their unlawful price fixing. Even though the contracts are already terminable at will, mandatory termination is necessary to avoid the risk that payors might fear retaliation or suffer short-term competitive disadvantage if they

[59] *S* *h* *h* , Docket No. C-4149 (consent order, issued Aug. 5, 2005), http://www.ftc.gov/os/caselist/0410100/0410100.htm, (order requires prior notice for three years before Partners Health Network, Inc. can participate in a qualified risk-sharing joint

contracts.[60] Complaint Counsel have proposed the addition of the phrase "with respect to their provision of physician services" and a new definition of "physician services" in order to further clarify this point. CCAB at 64-65. We have incorporated Complaint Counsel's proposed clarification.

Paragraph II of the ALJ's order failed to include language proposed by Complaint Counsel that would have prohibited agreements that physicians not deal individually with payors or through entities other than NTSP. We find that this is an important provision to include in this case because NTSP facilitated a price-fixing agreement through its physicians' agreement not to deal individually with payors while NTSP was conducting its own negotiations on their behalf. See Section V.B.1.b. above.

The ALJ's order also contains two unwarranted provisos to Paragraph II of the order that could enable NTSP to continue its illegal conduct: (1) a statement that nothing in the order bars NTSP from "communicating purely factual information" about a payor offer or "expressing views relevant to various health plans,"[61] and (2) a provision stating that nothing in the order

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[60] As noted above, NTSP even has the ability to act as a "messenger" under the order. If Respondent complies with the standards for this activity, described in Section V.B.1.e. above, there would not be an order violation.

[61] The ALJ also limited the scope of a provision barring information exchanges. Paragraph II.B. of the ALJ's order prohibits the exchange of information about the terms on which physicians are willing to deal with a payor, but does not include a prohibition on exchange of information about a physician's willingness to deal with a payor. We have included this prohibition in past physician price-fixing Commission orders and believe it should be included in this order. NTSP was able to orchestrate its unlawful price-fixing scheme in part by

would "require respondent to violate state or federal law." ID at 94. We find that neither of the provisos is necessary to protect legitimate conduct by NTSP.[62] The communication of "purely factual information" is already covered by Paragraph III, which allows NTSP to act as a messenger and, given Respondent's history, we believe that advance notification is necessary for a period of time. In addition, because we have found that there is no basis for a claim that NTSP's refusals to deal were prompted by concerns over violations of law, we do not believe it is prudent to leave the door open for similar unfounded claims in the future. There is nothing in the order we enter that will require Respondent to engage in illegal activity.

Respondent finally argues that Complaint Counsel's proposed changes to the ALJ's order raise serious policy questions about the Commission's agenda on physician teamwork efforts. RR at 24. Respondent states that Complaint Counsel's order will chill

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communicating that its physicians were unwilling to deal with payors in certain situations.

[62] Nearly anything could be termed providing "information" and "views." For example, NTSP's announcement that its physicians will not contract with payors at prices below a certain level could be characterized as conveying factual "information" or as an "expression of views."

Respondent's arguments here misunderstand the Commission's role in this industry. We have a responsibility to prosecute antitrust offenses, but, as stated at the outset, we also should foster pro-competitive, innovative delivery mechanisms for health care in this country. NTSP's illegal conduct has not helped it achieve any efficiencies. Our order, which proscribes only conduct used to carry out NTSP's unlawful price-fixing activities, will not inhibit any efforts to achieve efficiency and innovation though the teamwork or other integration of physicians. We describe in Section V.D. above the many constructive activities that an IPA can undertake, consist with the antitrust laws. And as noted above, Paragraph II of our order allows NTSP to engage in legitimate joint arrangements and even set prices for its physicians' services, but only when doing so is reasonably necessary to achieve the efficiencies of the joint arrangement.

VII. Conclusion

For all of the reasons outlined above, we conclude that NTSP's contracting activities with payors amount to unlawful horizontal price fixing. Through the various mechanisms described above, NTSP was able to orchestrate price agreements among its physicians. In physician IPA cases like this one, the focus is not necessarily on any single price-fixing mechanism, but rather on the conduct as a whole. Here the evidence shows not only negotiation activity in atn7c/l ofae cillc(tive (gree(en(on y)42(miniumt)]TJT*[fee0 shedulem, bu

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to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

C. "Payor" means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.

D. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

E. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

F. "Physician services" means professional services provided to patients by physicians.

G. "Preexisting contract" means a contract for the provision of physician services, other than the contract identified in Appendix B to this Order, that was in effect on the date of receipt by a payor that is a party to such contract of notice sent by Respondent, pursuant to Paragraph V.A.3 of this Order, of such payor's right to terminate such contract.

H. "Principal address" means either]TJT* r

high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

J. "Qualified risk-sharing joint arrangement" means an arrangement to provide physician services in which:

1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

a. the provision of physician services for a capitated rate;

b. the provision of physician services for a predetermined percentage of premium or revenue from payors;

c. the use of significant financial incentives (, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or

d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the arrangement.

II.

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

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services:

1. to negotiate on behalf of any physician with any payor;

2. to deal, refuse to deal, or threaten to refuse to deal with any payor;

3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or

4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;

B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order and the Complaint to:

1. each physician who participates, or has participated, in Respondent since January 1, 2000;

2. each officer, director, manager, and employee of Respondent; and

3. the chief executive officer of each payor with which Respondent has a record of having been in contact, since January 1, 2001, regarding contracting for the provision of physician services, and include in such mailing the notice specified in Appendix A to this Order;

B. Terminate, without penalty or charge, and in compliance with

date no later than one (1) year after the date this Order becomes final, and (b) Respondent has determined not to exercise any right to terminate;

PROVIDED FURTHER, that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph IV.B of this Order, to terminate the contract at any time;

C. Within ten (10) days after receiving a written request from a payor, pursuant to Paragraph IV.B(1) of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician participating in Respondent as of the date Respondent receives such request.

D. For a period of three (3) years after the date this Order becomes final:

1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:

2. annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all physicians who participate in Respondent, with such prominence as is given to regularly featured articles;

E. File a verified written report within sixty (60) days after the date this Order becomes final, and annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:

1. a detailed description of the manner and form in which Respondent has complied and is complying with this Order;

2. copies of the return receipts required by Paragraphs IV.A, IV.C, and IV.D of this Order; and

F. Notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor company or corporation, the creation or dissolution of subsidiaries, or any other change in Respondent that may affect compliance obligations arising out of this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession, or under its control, relating to any matter contained in this Order; and

B. Upon five (5) days' notice to Respondent, and in the presence

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APPENDIX A

Letter to payors with whom NTSP has a contract at the time the Order becomes final, other than a contract listed in Appendix B to the Order – to be sent within thirty (30) days after the Order becomes final

[letterhead of Respondent NTSP]

[name of payor's CEO]
[address]

Dear _____:

Enclosed is a copy of a complaint and a decision and order ("Order") issued by the Federal Trade Commission against North Texas Specialty Physicians ("NTSP").

Pursuant to Paragraph IV.B of the Order, NTSP must allow you to terminate, upon your written request, without any penalty or charge, any contracts with NTSP that are in effect at the time of your receipt of this letter.

Paragraph IV.B of the Order also provides that, if you do not terminate a contract currently in effect with NTSP, the contract will terminate on its termination or renewal date (including any automatic renewal date). However, if the contract terminates on a date prior to **[appropriate date one (1) year after Order became final],** the contract may be extended at your written request to a date no later than **[appropriate date one (1) year after Order became final]**. The Order became final on **[appropriate date to be filled in]**. If you choose to extend the term of the contract, you may later terminate the contract at any time prior to **[appropriate date one (1) year after Order became final]**.

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Any request either to terminate or to extend the contract should be made in writing, and sent to me at the following address: **[NTSP's address]**.

Sincerely,

APPENDIX B

Pacificare of Texas ANHC/IPA Services Agreement (Professional Capitation/Approved Nonprofit Heatlh (sic) Corporation (dated July 1, 2000), as amended September 1, 2001 and January 1, 2003 [identified as RX 18, including pages RX0018_001 through RX0018_087; also identified by Bates numbers PCT 000924 through PCT 000986 and PCT 000895 through PCT 000918; and Bates numbers FTC-NTSP-PCFC 000327 through FTC-NTSP-PCFC 000389 and FTC-NTSP-PCFC 000298 through FTC-NTSP-PCFC 000321].

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission

used in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH 4: The general business practices of NTSP, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

PARAGRAPH 5: NTSP has approximately 600 participating physicians licensed to practice medicine in the State of Texas who are engaged in the business of providing professional services to patients in the Dallas-Fort Worth metropolitan area, mostly in Fort Worth and the "Mid Cities" (collectively, the "Fort Worth area").

PARAGRAPH 6: Physicians often contract with payors to establish the terms and conditions, including price terms, under which such physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs, enable them to lower the price of insurance, and reduce out-of-pocket medical expenditures by subscribers to the payors' health insurance plans.

PARAGRAPH 7: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by payors, competing physicians decide individually whether to enter into contracts with payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH 8: Medicare's Resource Based Relative Value Scale ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to

pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for

A. facilitating, negotiating, entering into, and implementing agreements among its participating physicians on price and other competitively significant terms;

B. refusing or threatening to refuse to deal with payors except on collectively agreed-upon terms; and

C. negotiating fees and other competitively significant terms in payor contracts for NTSP's participating physicians, and refusing to submit payor offers to participating physicians unless and until price and other competitively significant terms conforming to NTSP's contract standards have been negotiated.

FORMATION AND OPERATION OF NTSP

PARAGRAPH 13: NTSP was organized in November 1995 as a nonprofit corporation. Its initial Board of Directors, composed of three participating physicians, was established in NTSP's Certificate of Incorporation. Pursuant to NTSP's By-Laws, successor Board members are elected from among the participating physicians for three-year terms by the members of each of NTSP's sections, which are organized by medical specialty. NTSP is funded through fees paid by physicians on first becoming participating physicians and through its receipt, pursuant to its physician participation agreements, of a stated percentage of the fees paid by payors to participating physicians pursuant to certain NTSP-payor contracts. NTSP presently is composed of approximately 600 physicians, some 130 of whom are primary care physicians.

PARAGRAPH 14: Pursuant to a few of NTSP's contracts with payors, some of the NTSP physicians who participate in the arrangement share financial risk, for example, through the provision of services at an agreed capitated rate. However, pursuant to the great majority of NTSP's contracts with payors, those NTSP physicians who participate in the arrangement do not share any financial risk, each physician typically receiving a specified fee for each service provided. Whereas only about one-half of NTSP's participating physicians–and few if any primary care providers–participate in any risk-sharing arrangements, substantially all of NTSP's participating physicians participate in some non-risk contracts. With respect to these non-risk contracts, NTSP often has sought to negotiate for, and often has obtained, higher fees and other more advantageous terms than its individual physicians could obtain by negotiating individually with payors.

PARAGRAPH 15: Physicians seeking to participate in NTSP-payor contracts apply for participating physicianship. A physician becomes a participating physician by entering into a "North Texas Specialty Physicians Physician Participation Agreement" with NTSP, granting to NTSP authority to arrange for his or her

services to be provided to persons covered by payors pursuant to agreements between NTSP and the payors. Each physician

services by NTSP's participating physicians, NTSP informs the payor that its physicians have established fee minimums for NTSP-payor agreements, identifies those fee minimums (the poll averages referred to in the preceding Paragraph), and states that NTSP will not enter into or otherwise forward to its participating physicians any payor offer that does not satisfy those fee minimums.

PARAGRAPH 19: In other instances, payors have proposed to NTSP agreements, or amendments to existing agreements, for the services of its participating physicians that included proposed fee schedules that did not satisfy the NTSP physicians' fee minimums. NTSP has then advised the payors of NTSP's

were above any given physicians' stated minimum acceptable fees. Following refusals by NTSP to forward the proposed contract to its participating physicians and several communications between NTSP and its participating physicians attacking the payor's fee proposal as "below market," the payor increased its proposed fees to the NTSP fee minimums. Only then did NTSP enter into a contract with the payor and forward the agreement to its participating physicians, affording them the option to participate (or not) in the payor's offer.

PARAGRAPH 21: In addition, while seeking to negotiate fees on behalf of its participating physicians, NTSP has discouraged and prevented payors and participating physicians from negotiating directly with one another. In at least one instance, after NTSP fee negotiations with a payor broke down, NTSP orchestrated the simultaneous withdrawal of NTSP physicians from an arrangement pursuant to which numerous NTSP participating physicians had provided medical services to the payor's subscribers through another physician organization with which NTSP had contracted. This increased the pressure on the payor to contract for the services of NTSP's participating

ANTICOMPETITIVE EFFECTS

PARAGRAPH 23: NTSP's acts and practices as described herein have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Fort Worth area in the following ways, among others:

A. price and other forms of competition among NTSP's participating physicians were unreasonably restrained;

B. prices for physician services were increased; and

C. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

PARAGRAPH 24: The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act,
15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

NOTICE

Notice is hereby given to the Respondent that the sixteenth day of January, 2004, at
10:00 a.m. o'clock, or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D. C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this Complaint, at which time and place you will have the right under the Federal Trade Commission Act

to appear and show cause why an Order should not be entered requiring you to cease and desist from the violations of law charged in this Complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this Complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the Complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Complaint, and together with the Complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate Order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions under Section 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under Section 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and Order.

The Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by the Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D. C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in ce after th

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a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.

3. An Order to cease and desist from attempting to engage in any action prohibited by Paragraphs 1 or 2, above.

4. An Order to cease and desist from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs 1-3, above.

5. A requirement that, for a period of five (5) years, NTSP notify the Commission prior to entering into any arrangement with any physicians under which NTSP would act as a messenger, or as an agent, on behalf of those physicians.

6. An Order requiring NTSP to terminate, without penalty or charge, and in compliance with any applicable laws, any contract that it has entered into with any payor since January 1, 1998.

7. An Order to cease and desist from engaging in, attempting to engage in, or encouraging others to engage in illegal horizontal agreements with competitors.

8. Any other provision appropriate to correct or remedy the anticompetitive practices engaged in by NTSP.

9. A requirement that NTSP distribute a copy of the Order and Complaint, within thirty (30) days after the Order becomes final, to: (a) each physician who is participating, or has participated, in NTSP since January 1, 1998; (b) each officer,

10. A requirement that for five (5) years after the Order becomes final, NTSP distribute a copy of the Order and Complaint, within thirty (30) days of the event triggering this requirement, to: (a) each newly participating physician in NTSP; (b) each person who becomes an officer, director, or manager, or an employee who has any responsibility regarding NTSP's physician networks; and (c) each payor that NTSP contacts, or is contacted by, regarding contracting for the provision of physician services.

11. A requirement that for five (5) years after the Order becomes final, NTSP annually publish a copy of the Order and the Complaint in an official report or newsletter sent to all physicians who participate in NTSP, and on any website maintained by or for NTSP, with such prominence as is given to regularly featured articles.

12. Requirements that NTSP file periodic compliance reports with the Commission, notify the Commission of any changes that may affect compliance obligations, and permit Commission representatives prompt access to NTSP documents and personnel for the purpose of determining or securing compliance with this Order.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this sixteenth day of September, 2003, issues its Complaint against NTSP.

INITIAL DECISION

By D. Michael Chappell, Administrative Law Judge

I. INTRODUCTION

A. Summary of Decision

This is a horizontal price fixing case. The Federal Trade Commission ("FTC") charges that Respondent North Texas Specialty Physicians ("NTSP"), on behalf of its participating physicians, collectively bargained with health insurance plans in order to obtain higher prices or more favorable economic terms in contracts for physician services.

Respondent NTSP is an independent practice association ("IPA") of approximately 500 physicians, the vast majority of whom are specialists who practice in Fort Worth, Texas. NTSP physicians are a significant presence and make up a large percentage of practitioners in many specialities in the Fort Worth area. One the functions of NTSP is to receive offers from health insurance plans of Health Maintenance Organization ("HMO") or Preferred Provider Organization ("PPO") contracts ("non-risk contracts") to provide physician services in the Fort Worth, Texas area. Upon receipt of a payor offer of a non-risk contract, Respondent evaluates the offer and determines whether to send it -- messenger it -- to its participating physicians. Respondent docs not messenger to its physician members any offers on non-risk contracts that fall below minimum rates established by the NTSP Board ("Board minimums"). NTSP establishes Board minimums by conducting polls among its physician members that ask each physician to disclose the minimum price that he or she would accept to provide medical services pursuant to a non-risk contract.

In its defense, Respondent asserts that it did not negotiate economic terms of non-risk contracts. Respondent further asserts that it is entirely proper for Respondent to determine whether or not to send contract offers it receives from health care members to the physicians who participate in NTSP.

The government proved its case. As explained in detail in the findings of fact and analysis below, the evidence establishes that physicians participating in NTSP, who arc otherwise competitors of each other, communicated to NTSP the minimum prices that they were willing to accept for physician services and that NTSP used this information to negotiate higher rates and more favorable terms for non-risk contracts than those initially offered by various health insurance plans. Through the use of price information collected from its physician members to leverage increased offers or better terms from health insurance payors, NTSP has engaged in a combination, contract, or conspiracy that has unreasonably

Commission Act, as amended, 5 U. § 45. Complaint P 24.

In its Answer, filed on October 7 2003, Respondent denied the material allegations of the Complaint and asserted the following defenses: that it is a memberless non-profit corporation and therefore is not subject to the jurisdiction of the Federal Trade Commission; that NTSP' conduct does not constitute commerce as defined in the Federal Trade Commission Act; that NTSP has the right as an entity under United States v. Colgate Co., 250 U. S. 300, 307 (1919) to refuse to become a party to another's contract or transaction; and that NTSP's conduct has been fair, reasonable, and justified. Answer p. 3.

C. Procedural Background

On March 2, 2004, Complaint Counsel filed a Motion for Partial Summary Decision. Also on March 2, 2004, Respondent filed a Motion for Summary Decision. Respondent's motion was denied by Order dated April 9, 2004. Complaint Counsel's motion was denied by Order dated April 14, 2004. Both motions were denied on the ground that genuine issues of material fact raised by the pleadings could only be properly determined after an evidentiary hearing.

The final prehearing conference was held in Fort Worth, Texas on April 27, 2004. Trial commenced immediately following the prehearing conference. Nearly 1 500 exhibits were admitted and 17 witnesses testified, either live or by videotape. Trial concluded on May 25 2004.

On June 16 2004, both parties filed proposed findings of fact, post trial briefs, and conclusions of law. Complaint Counsel filed its response to Respondent's brief and proposed findings of fact on June 30, 2004, and filed a corrected response to Respondent's proposed findings of fact on July 1, 2004. Respondent filed its response to Complaint Counsel's brief and proposed findings of fact on June 30, 2004. Closing arguments were heard on July 21 2004.

Commission's Rules of Practice states that an Initial Decision shall be filed "within ninety (90) days after closing the hearing record pursuant to § 3.44(c) . . . or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge." 16 C.F.R. § 3.51(a). Ninety days from the close of the record was September 7, 2004. By Certification for Extension of Time to File Initial Decision dated August 25, 2004, the Commission was requested to extend the time for filing this Initial Decision by sixty days, until November 8, 2004. By Order dated September 17 2004, the Commission granted this request and extended the date for filing the Initial Decision until November 8, 2004.

Rule 3.51(a) also states that an Initial Decision shall be filed within one year "after the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days." 16 C.F.R. § 3.51 (a). The Complaint in this matter was issued on September 16 2003. One year from the issuance of the Complaint was September 16, 2004. By Order dated September 14, 2004, extraordinary circumstances were found to extend the one-year deadline for a period of up to sixty days, until November 15 2004.

D. Evidence

This Initial Decision is based on the exhibits properly admitted in evidence, the transcript of trial testimony, and the briefs, proposed findings of fact and conclusions of law, and replies thereto submitted by the parties. Citations to specific numbered Findings of Fact in this Initial Decision arc designated by "F."

Under the Commission's Rules of Practice, a party or a non-pary may file a motion seeking in camera treatment for material, or portions thereof; offered into evidence. 16 C. § 3.45(b). The Administrative Law Judge may order that such material be placed in camera only after finding that its public disclosure will likely result in a clearly defined, serious injury to the entity requesting in camera treatment. 16 C.F.R. § 3.45(b). Pursuant to

Commission Rule 3.45(b), several orders were issued granting in camera treatment to material that met the Commission's strict standard. In addition, when the paries sought to elicit testimony at trial that revealed information that had been granted in camera treatment, the hearing went into an in camera session.

In instances where a doeument or certain trial testimony has been given in camera treatment, but the portion of the material cited to in this Initial Decision does not rise to the level necessary for in camera treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the AU "may disclose such in camera material to the extent necessary for the proper disposition of the proceeding"). In camera material that is used in this Initial Decision is indicated in bold font and braces ("[Redacted]") in the in camera version; it is redacted from the public version of the Initial Decision, in accordance with 16 C.F.R. § 3.45(f).

This Initial Decision addresses only material issues of fact and law. Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges arc not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. In re Amrep Corp., 102 F.T.C. 1362, 1670 (1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" Minneapolis St. Louis Ry. Co. v. United States, 361 U.S. 173, 193-94 (1959).

II. FINDINGS OF FACT

A. Background

1. Organization of and contracting by physician practices

1. Physicians often organize their practices into medical

groups, which operate as single integrated entities having a single CEO, accountant, office manager, and staff. (Casalino, Tr. 2795-96).

2. Physicians and medical groups often contract with health plans in order to increase the volume of patients available to them. (Frech, Tr. 1288-89).

3. Competing physicians and medical groups sometimes enter into arrangements with others to form independent practice associations, known as IP As. IP As are looser combinations of medical groups formed for the purpose of negotiating contracts with managed care health plans. (Casalino, Tr. 2796; Frech, Tr. 1292).

4. IP As generally lack direct authority to control the practices of their member physicians. (Casalino, Tr. 2799-2800).

2. Health care insurance and managed care

5. Historically, most health care insurance coverage was indemnity insurance. The prevalence of indemnity insurance skewed incentives in such a way that consumers often neither sought to reduce price by seeking lower-priced providers, nor quantity by seeking to avoid over-utilization. (Frech, Tr. 1282-83).

6. Managed care was introduced to address these deficiencies and control the cost of health care services through health plan contracting with physicians, control of utilization, and management of care. (Frech, Tr. 1282-84, 1289).

7. One form of managed care is the Health Maintenance Organization ("HMO"). HMOs generally feature small provider panels, low co-payments for patients, and broad administrative controls to limit utilization, with no coverage for patients who choose providers outside the network. (Frech, Tr. 1283-84).

8. HMO contracts can involve a variety of physician compensation structures. In some instances, participating physicians are paid a stated fee for each service rendered. This compensation structure is referred to as fee- for-service. (Mosley, Tr. 131-32).

9. A less tightly controlled form of managed care is the Preferred Provider Organization ("PPO"). Relative to HMOs, PPOs generally involve fewer administrative controls and higher patient co-payments to limit utilization, but larger physician panels and greater access to out-of-network physicians, albeit at a reduced rate of reimbursement. (Frech, Tr. 1283- 84).

10. The Medicare RBRVS fee schedule is Medicare's Resource Based Relative Value System ("RBRVS"), a system developed by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for each service rendered to Medicare patients. (Frech, Tr. 1286; Wilensky, Tr. 2144).

11. Health plans that contract with physicians on a fee- for-service basis often do so based on a stated percentage of the Medicare RBRVS fee schedule, which provides reimbursement rates for a large number of specific procedures. (Frech, Tr. 1286; Mosley, Tr. 137; Grizzle, Tr. 692-93).

12. The Medicare RBRVS establishes weighted values for each medical procedure, such that the application of a percentage multiplier (such as 100% for Medicare itself), enables one to determine the fees for thousands of different services simultaneously. (Frech, Tr. 1286).

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15. In a non-risk sharing agreement ("non-risk contract"), physicians are paid under a fee-for-service reimbursement arrangement. (CX 1177 (Grant, Dep. at 78); CX 1198 (Vance Dep. at 36)). In fee-for-service arrangements, physicians do not bear the risk of overutilization of physician services because payments are made for the services provided. (Frech, Tr. 1346-47).

16. PPOs generally utilize non-risk sharing agreements where the insurance company contracts to reimburse providers at a predetermined level for services performed by the physicians. (Mosley, Tr. 134).

B. North Texas Specialty Physicians

1. Organization and composition

17. NTSP is an IPA located in Fort Worth, Texas. (CX 311 at I; CX 1196 (Van Wagner 08. 29. 02 IHT at 8)). It is a nonprofit

"substantially improved" by NTSP; noting NTSP's discussions with payors" should lead to contracts that are more favorable than we would be able to achieve individually or through other contracting entities"); CX 159 at 2 (noting contractual issues addressed by NTSP include "maintaining minimal reimbursement standards for its member physicians")).

21. NTSP, as an organization, receives its revenue from risk contracts and a one time fee of $ 1,000 from each physician. (Van Wagner, 'Ir. 1552).

22. From January 1 1999 to December 22, 2003, NTSP purchased $ 1,047,819.86 from vendors with billing addresses outside of Texas. (CX 1203; CX 1195 (Van Wagner, 01.20. Dep. at 77)). For example, NTSP purchased $ 457,373.09 of stop loss insurance from McPhee & Associates, a California insurance broker. (CX 1203; CX 1195 (Van Wagner, 01.20. 04 Dep. at 81)).

23. NTSP's Board of Directors ("Board") is made up of eight physicians. Under NTSP' organizational documents and under Texas law, NTSP's directors, other than an "Officer Director" must be physicians who are actively engaged in the practice of medicine. (CX 275 at 7; Van Wagner, Tr. 1493-94; see also TEX. OCC. CODE ANN. § 162. 001 (Vernon 2004)).

24. The Board of Directors is elected from among NTSP's member physicians and meets once a week. (Van Wagner, Tr. 1493-94).

25. NTSP has a salaried, core administrative staff of eight people, including executive director Karen Van Wagner, provider relations staff, provider sponsored network ("PSN" development and contracting staff, data processing staff, credentialing staff; and clerical support staff. (Van Wagner, Tr. 1494-95; RX 1674).

26. NTSP's Medical Executive Committee includes the chairs of each of NTSP's specialty divisions who are elected by the member physicians within each specialty. (Deas, Tr. 2559-60; CX 275 at 5).

27. Karen Van Wagner, Ph.D. is NTSP's executive director. Van Wagner joined NTSP in 1997, roughly a year after the organization was established. (Van Wagner, Tr. 1461-62).

28. Dr. Thomas Deas is the current president and chairman of the Board of NTSP. addition to heading the Medical Executive Committee, Deas is a medical director of NTSP. (Deas, Tr. 2524, 2556).

29. Dr. William Vance was one of the founding members of NTSP, serving as its president from 1996 until 2001. Vance was a member of the Medical Management Committee from its inception through 2002. In addition, he was the chairman of NTSP's cardiology section. His role within NTSP ceased when his practice group, Consultants in Cardiology, withdrew from NTSP in April 2002. (CX 1198 (Vance, Dep. at 9, 48, 49)).

30. Dr. John Johnson, II is a medical physician and a current member of NTSP's Board of Directors. (CX 1182 (Johnson, Dep. at 6, 13)).

2. Member physicians

31. NTSP has member physicians in eight counties in and around the Dallas/Fort Worth Metroplex. (Van Wagner, Tr. 1468-69). Approximately 85-88% of NTSP's member physicians are located in Tarrant County, with the majority located in Fort Worth. (Van Wagner, Tr. 1471; CX 1196 (Van Wagner, 08.29. 02 IHT at 15- 16)).

32. At the time of trial (April 2004), NTSP had approximately 480 participating physicians. (Vac*[phy 154(ns.)-61((Va)-5,(iRWagoa)-mber of NTSP's Board o.15a

33. NTSP member physicians attend general membership meetings, pay dues, and elect NTSP's Board. (CX 1178 (Hollander, Dep. at 21- 34)).

34. NTSP member physicians are organized into specialty divisions, based on field of practice. (Van Wagner, Tr. 1510).

35. NTSP's member physicians have distinct economic interests, reflecting their separate c1inical practices. (CX 1182

payment issues, and lobby government agencies for physician issues. NTSP has evolved into a forum for its member physicians to cooperate and discuss the general and specific business of medicine and receive advice and information. (CX 350).

40. NTSP's Medical Executive Committee transmits information and feedback including the status of fee-for-service contract discussions, between NTSP's staff and Board and the membership. (CX 1174 (Deas, Dep. at 20-21); Deas, Tr. 2560).

41. NTSP communicates with its member physicians by sending faxes called "Fax Alerts" which keep its member physicians informed of the activities of NTSP, including contractual issues. (CX 1178 (Hollander, Dep. at 48); CX 1198 (Vance, Dep. at 54)).

42. NTSP holds "general membership meetings" to provide contracting updates for specific payor negotiations and to discuss and share NTSP's poll results with the membership. (CX 1178 (Hollander, Dep. at 21-23); CX 182; CX 183; CX 184; CX 186; CX 187).

4. Contracts with health insurance providers

43. NTSP "is in the business of' contracting with health maintenance organizations health care networks and other payors to provide health care services through physicians and physician groups who have contracted with NTSP to provide health care services. (CX 311 at 1 (WHEREAS Recital of NTSP PPA)).

44. One of NTSP's functions is to negotiate reimbursement terms in contracts with health plans on behalf of NTSP's member physicians. (CX 159 at 2 ("Contracting issues addressed by NTSP this past year included . . . maintaining minimal reimbursement standards for its physicians."); CX 350 ("NTSP was stared in an attempt to provide a seat at the table of medical business for the individual specialty physicians. . . . NTSP, through PPO and risk contracts, has provided a consistent premium fee-for-service reimbursement to the members when compared with any other contracting source."); CX 1182 (Johnson, Dep. at 10- 11) ("NTSP was going to be a group of physicians that would bring a voice to

organizing physicians who often practiced in individual groups to hopefully be able to secure contracts, improve patient care, and provide a voice at the table for physicians. . . . [It was] to represent physicians . . . in obtaining contracts from businesses or insurance companies or in dealing with hospitals.")).

45. NTSP analyzes contract language from both operational and legal perspectives communicating with payors about the terms of the contract, determining the payor's payment policies and timing, mailing contracts to participating physicians, determining when physicians accept a given contract, and establishing and updating systems to track physician and plan member participation in a given contract. (Van Wagner, Tr. 1648-

50. NTSP has approximately twenty fee-for-service contracts, covering many more lives. (CX 1196 (Van Wagner, 08. 29. 02 IHT at 14); see also CX 265 in camera (listing, by health plan, lives covered under NTSP's non-risk contracts)).

51. Sixty percent of NTSP's physicians participate in fee-for-service contracts. Roughly half of those physicians participate in risk-sharing contracts. Some of these physicians participate in NTSP through a participation agreement under which they can gain access to NTSP's non-risk contracts, but are not eligible to participate in NTSP's risk contract. (CX 616 at 12; CX 1197 (Van Wagner, 08. 30. 02 IHT at 182, 228-29); Van Wagner, Tr. 1830; CX 1194 (Van Wagner, 11.9. 03 Dep. at 37-38)).

C. Relevant Market

52. In contracting for health plan services, Fort Worth employers demand significant coverage by physicians who practice in the Fort Worth area and who admit patients to Fort Worth hospitals. (Grizzle, Tr. 688-89, 722; Frech, TL 1304-05; Mosley, Tr. 141-42; Quirk, Tr. 276- 280; Jagmin, Tr. 1104-07).

53. To be competitively marketable to Fort Worth area employers, health plans must include many physicians who practice in a variety of fields in the Fort Worth area. (Grizzle, Tr. 688-89, 720, 722; Jagmin, Tr. 1104-07).

54. When buying health coverage, employers look for networks that include all of the tertiary care hospitals in an area, most of the other hospitals within the area, and a broad selection of physicians in the locale, including a wide selection of specialists within each specialty. (Jagmin, Tr. 971- 1102-03; Quirk, Tr. 270-72, 275-76).

55. Health plans try to assemble and market a panel of physicians that will satisfy employers ' preferences for greater access to a wide array of conveniently located physicians without compromising the overall cost of care. (Quirk, Tr. 270-72; Jagmin, Tr. 972).

56. Fort Worth employers typically would consider a network

Fort Worth and several surrounding cities. (Quirk, Tr. 420; Maness, Tr. 1992).

62. A loss of NTSP's physicians from a health plan's network would have "a very deleterious affect" on the health plan's ability to market its product in Tarrant County. (Jagmin Tr. 1091). One health insurance plan's representative testified that, without NTSP's physicians it would suffer from significant holes in coverage for a number of specialties in Fort Worth. ([Redacted], in camera).

63. NTSP has stated that a health plan attempting to serve the employees of the City of Fort Worth "would not be able to satisfy employer/employee match or network access standards without

> such counter-proposal shall be treated as a new payor offer and will be submitted to Participating Physicians in accordance with the preceding provisions.

(CX 275 at 25-26).

68. Although under the PP A, NTSP is obligated to deliver to each physician the fee schedule and other economic provisions of a non-risk payor offer (CX 275), NTSP delivered only those offers which were approved by NTSP and which met minimum levels established by the Board, as determined by the results of a poll. (Van Wagner, Tr. 1706; CX 1196 (Van Wagner, 08. 29. 02 II-IT at 29-30) (the Board does not send to physicians offers below the minimal acceptable level as determined by the results of a poll.)).

2 (NTSP warning its member physicians that without their support "it is likely NTSP will not be around the next time Aetna, Cigna, or United come to town" with unsatisfactory rate proposals.)).

71. NTSP cannot and does not bind any member physician or physician group to non-risk contracts. (Frech, Tr. 1362-64; Van Wagner, Tr. 1637, 1777).

72. NTSP's member physicians can and do contract with health plans outside of NTSP cither directly, through financially integrated physician groups, or through other IP As. (Quirk Tr. 288- 89; Van Wagner, Tr. 1564, 1637; Deas, Tr. 2432).

73. There are no agreements between one or more NTSP member physicians to not participate in or to reject a non-risk payor offer. (Frech, Tr. 1365; Maness, Tr. 2048).

74. NTSP's member physicians and physician groups do not consult with each other when making decisions on non-risk payor contracts. (Maness, Tr. 2049-50).

75. NTSP's member physicians and physician groups do not know what any other physician or physician group will do in response to a non-risk payor offer. (Frech, Tr. 1436-37; Maness,

> attorney-in- fact to act for me in any lawful way with respect to all contracts and agreements (including without limitation all prospective contracts or agreements) with and/or involving the undersigned and . . . [United Health Care / Aetna].
>
> This power of attorney grants to the agent the authority to act on the undersigned's behalf regarding the foregoing described agreements in all respects, including the authority to negotiate the terms of, enter into, execute, amend, modify, extend or terminate any such agreements.

(CX 1061-1103 (United); CX 347-404 (Aetna)).

78. In distributing the power of attorney forms to its member physicians, NTSP has instructed its physicians to inform health care payors' representatives that NTSP is his or her contracting agent and to instruct the health care payor to contact NTSP with respect to contracting activity. (CX 1066 (United); CX 548 (Aetna)).

79. NTSP also includes in power of attorney solicitations information about the number of physicians who already have executed the power of attorney forms. (CX 1066 ("Thus far, NTSP has received 107 signed documents from NTSP member physicians assigning NTSP power of attorney to act on their behalf in regard to all contracting activity between themselves and United Healthcare."); CX 548 (NTSP sent 180 power of attorney authorizations in regard to Aetna HMO and PPO commercial products)).

80. With respect to negotiating with Cigna Healthcare ("Cigna"), NTSP requested its member physicians to sign an "authorization form" to allow NTSP to serve as its physicians' agent. (CX 332).

81. NTSP physicians have referred health plans that sought to contract directly with them back to NTSP, at times noting that the deferral was based on agency or power of attorney held by NTSP. (Beaty, Tr. 454-60; Grizzle, Tr. 696-98, 701, 709; CX 760

(exhibit admitted as an exception to the hearsay rule for verbal acts and not for the truth of the matter asserted therein ["limited admission"]). See also CX 1178 (Hollander, Dep. at 116) ("If an NTSP physician had signed an agency agreement specifying that NTSP was to be their exclusive agent in connection with these contracts, then my understanding was that [the payor] had to deal with NTSP and not with the individual physician himself.").

82. NTSP has advised health plans during rate negotiations for fee-for-service contracts and at other times that it represented NTSP member physicians, through power of attorney forms, (Roberts, Tr. 540-41), or otherwise (CX 760 (limited admission) (letters from NTSP physicians to Cigna citing NTSP as their contracting "agent"); Beaty, Tr. 454-60).

3. Board minimums

83. "Board minimums" are the minimal acceptable rates for NTSP to enter into non-risk contracts with health plans. (Van Wagner, Tr. 1921; Frech, Tr. 1324). Payor offers falling below

86. Board minimums may have been utilized as early as 1997. (CX 1042 (2001 Fax Alert from NTSP to its member physicians stating "NTSP board minimums have remained constant for four years.")). NTSP conducted its first poll in either 1998 or 1999. (CX 1194 (Van Wagner, 11.19.03 Dep. at 86-87)).

87. NTSP conducts polls to determine minimum reimbursement rates for use in negotiation of non-risk contracts with health plans. (Van Wagner, Tr. 1639 ("We contact our physicians and we ask them to respond to a . . . survey on . . . what they believe are acceptable fees that they want to see in the nonrisk contracts."); CX 1196 (Van Wagner, 8.29.02 IHT at 27 ("Every year the Board asks the members to tell them what they consider to be appropriate reimbursement. . . . Once a year we poll the members and get that information from them.")); e.g., CX 565).

88. NTSP's polling form explains to the member physicians that each year, "NTSP polls its affiliates and membership to establish Contracted Minimums. NTSP then utilizes these minimums when negotiating managed care contracts on behalf of its participants." (CX 387 at 1; CX 633).

89. NTSP's polling form asks each physician to disclose the minimum price that he or she would accept for the provision of medical services pursuant to a fee-for-service HMO or PPO agreement. (CX 565; CX 1196 (Van Wagner, 08.29.02 IHT at 27)).

90. NTSP's member physicians are asked to indicate their price selection by placing a check mark next to one of several pre-printed Medicare RBRVS ranges. (CX 274; CX 565; CX 633).

91. By quoting a particular percentage of RBRVS, one can establish the prices for thousands of different services simultaneously. By using the Medicare index and a percentage of Medicare as a conversion factor, voluminous price information is reduced to a single dimension. (Frech, Tr. 1287).

92. NTSP's member physicians and physician groups do not consult with each other when responding to the poll. (Maness, Tr. 2049-50; Lonergan, Tr. 2718).

93. After receiving the poll responses, NTSP calculates the mean, median, and mode ("averages") of the minimum acceptable fees identified by its physicians and establishes its minimum contract prices. (Van Wagner, Tr. 1640; CX 103; CX 387).

94. NTSP informs its physicians of the average poll results and NTSP's minimum contract prices based thereon. (Van Wagner, Tr. 1644. E.g., CX 393, CX 430, CX 1042).

95. NTSP physicians are informed only of the mean, median, and mode of the poll responses. They do not know how any other specific physician or physician group responded to the polls. (Van Wagner, Tr. 1641-44; Frech, Tr. 1436-37; Maness, Tr. 2044-46; Deas, Tr. 2423).

96. On October 15, 2001, the NTSP Board received annual poll results. Based on the poll results, NTSP established minimum prices of 125% of 2001 Medicare RBRVS for HMO products and 140% of 2001 Medicare RBRVS for PPO products as minimally acceptable fee schedules for health plan contracts. (CX 103 at 4; CX 389).

97. On November 11, 2002, NTSP conducted another annual poll to determine minimum reimbursement rates for use in negotiation of HMO and PPO products and anesthesia contracts with health plans. On its polling form sent to physicians, NTSP included the prior year's poll results, reported by mean, median, and mode. (CX 430).

98. The results of the 2002 annual poll by mean, median, and mode, for HMO were 131%, 135%, and 135%; for PPO, 146%, 145%, and 145%. NTSP reported these figures to its member physicians and stated that the "poll's objective is to identify what reimbursement levels NTSP members deem acceptable." (CX 432).

99. By providing this pricing information to its member physicians, NTSP effectively informs the physicians of the potential reward for entering into a contract with health plans through NTSP, as opposed to entering into a contract with a health plan by directly negotiating with the health plan. (Frech, Tr. 1326).

100. Such price information sharing reduces each physician's uncertainty as to the conduct of its competitors in the aggregate. (Frech, Tr. 1327; see also CX 1170 (Blue, Dep. at 33) (poll results provide "a guideline where we saw the numbers, we would like to have these rates, if possible, and it kind of gave you an idea of where the market was. So if I got other communications independently and some . . . [were] paying 80 percent of Medicare, but it looked like a lot of plans were paying 110 percent, then 80 percent of Medicare sounded pretty low.")).

E. NTSP's Dealings with Several Health Plans

1. United Healthcare Services, Inc.

a. Corporate structure

101. United Healthcare Services, Inc., is a wholly owned subsidiary of United Healthcare through which United Healthcare offers its PPO and other non-HMO products in Texas. (Quirk, Tr. 234-35, 239, 241, 247-48). United Healthcare of Texas is a wholly owned subsidiary of United Healthcare through which United Healthcare offers its HMO products in Texas. (Quirk, Tr. 235, 247-48). [United Healthcare Services and United Healthcare of Texas are collectively referred to as "United."]

102. United Healthcare is a subsidiary of United Health Group, a publicly traded company. (Quirk, Tr. 248; Wilensky, Tr. 2156). The success or failure of United's Texas entities are reflected in the stock price of United Healthcare. (Quirk, Tr. 248).

103. United contracts with multi-state employers, some of whom are domiciled outside of Texas but have employees in Texas, such as Raytheon and Home Depot. (Quirk, Tr. 253-54).

104. If health care costs rise in the Ft. Worth area, the pricing of the overall package to Raytheon or other national companies would be affected. (Quirk, Tr. 254-55).

105. Since 1999, Thomas J. Quirk has been the CEO for the North Texas and Oklahoma Region of United Healthcare Services, Inc., and the President, Chairman of the Board and the CEO of United Healthcare of Texas. (Quirk, Tr. 234-36).

106. Quirk oversees all of United's operations for the North Texas and Oklahoma regions, which include sales for commercial employers, municipalities and school districts; account management for United's existing customers and network operations, which encompass contracting with physicians,

135% of 1997 Medicare RBRVS for United's HMO product and 147% for United's PPO product); Deas, Tr. 2573-77).

112. On August 20, 1998, NTSP requested, and United granted, an extension on the time line for the assignment of contracts. (CX 1008). NTSP informed its member physicians of the extension and instructed them that they did not need to sign or return any documents or contracts to United. (CX 1008).

113. In September 1998, NTSP proposed to United that the Dallas Medicare RBRVS be used in calculating the rates for its HMO and PPO products for NTSP physicians, and informed its member physicians of this proposal in Fax Alert # 94. (CX 1010).

114. NTSP also informed its member physicians in Fax Alert # 94 that "for many specialists, Dallas rates are approximately three to five percent higher than PPO rates applied to Tarrant County." (CX 1010 at 2).

115. On October 27, 1998, in Fax Alert # 101, NTSP informed its member physicians that discussions with United had been productive, that the parties agreed to extend the deadline, and that member physicians need not take any action with regard to standardizing their United contract until this extension expired. (CX 1011).

116. United made an offer to NTSP on a non-risk contract that was below the rates available to NTSP participating physicians through another IPA, Health Texas Provider Network ("HTPN"). (Van Wagner, Tr. 1726-27).

117. HTPN, which is an affiliate IPA of Baylor Health Care System, is an organization of employed as well as independent contracted physicians in Dallas. NTSP and HTPN had an arrangement whereby NTSP member physicians would be allowed to access HTPN's payor offers. NTSP did not participate in discussions with payors regarding economic terms of HTPN contracts. (Van Wagner, Tr. 1559-60; Quirk, Tr. 311-12; RX 1947).

118. On December 2, 1998, in Fax Alert # 112, NTSP informed its member physicians that NTSP proposed to United that NTSP's physicians contract with United through HTPN. (CX 1012).

119. On March 9, 1999, in Fax Alert # 12, NTSP recommended to its member physicians that they transition their existing contracts into a standard United contract, and assured them that this would have no effect on the reimbursement rates that they were receiving under their current contract. NTSP further informed its member physicians that "we [NTSP] continue our discussions with United Healthcare on proposed fee schedules for these products." (CX 1014).

120. Ultimately, a significant number of NTSP physicians accessed United through the NTSP-HTPN arrangement. (CX 1015).

c. NTSP's negotiations with United in 2001

121. Beginning in March 2001, NTSP member physicians contacted NTSP, asking that NTSP seek and obtain a contract with United. (CX 1117 at 1). On March 14, 2001, NTSP expressed to United its "desire for a group contract reflecting today's market." (CX 1117 at 2; Quirk, Tr. 284-89).

122. NTSP targeted United because NTSP believed that United's rates were below market rates. (CX 211 at 3 (NTSP informing its Primary Care Physician Council that they had identified United as a re-negotiating target, noting that United was becoming a significant player in the Fort Worth market and that United's rates were well below market)).

123. NTSP's discussions with United involved fee-for-service contracts. (Quirk, Tr. 291, 293-94).

124. As of March 2001, United had contracts with approximately two-thirds of the NTSP physicians, either directly or through other organizations, such as HTPN. (Quirk, Tr. 288-89). Therefore, United concluded that there was no need to enter into an agreement with NTSP. (Quirk, Tr. 289-90).

125. On April 12, 2001, NTSP reported at its Primary Care Council Meeting that the reimbursement rates under the United-HTPN contract - 130% of 1997 St. Anthony RBRVS (145% Radiology) for HMO, 145% of 1997 St. Anthony RBRVS for POS, and 145% of 1997 St. Anthony RBRVS for PPO - were

bidders against PacifiCare was United. (Mosley, Tr. 203-05; Van Wagner, Tr. 1743).

132. NTSP learned, in the spring of 2001, that United was negotiating with the City of Fort Worth to provide health care coverage to city employees and their dependents. (CX 89 at 3).

133. NTSP believed that United was threatening to displace an NTSP risk contract. (Mosley, Tr. 206-07; Quirk, Tr. 363-65). If the City of Fort Worth selected United, the effect would be to remove this major employer's patients from NTSP's risk network (PacificCare) and substitute in its place a four-year-old non-risk contract that NTSP had with United through HTPN. (Van Wagner, Tr. 1728-29; CX 1042).

134. NTSP also had concerns about the adequacy of United's network and utilization management for the City's patient population and about United's ability to provide care to the City. (Van Wagner, Tr. 1729-35; Deas, Tr. 2424-25, 2429-30; Mosley, Tr. 185-87; Vance, Tr. 856-57; CX 1031).

135. During its negotiations with United, beginning in June 2001, NTSP encouraged its Board members to contact "any city council members they know to let them know that United's panel is not adequate." (CX 89 at 3).

136. NTSP also urged its primary care physicians to contact the Mayor and city council members to educate them about the situation with United and ask for help. (CX 211 at 3).

137. NTSP, on July 13, 2001, provided to its member physicians model letters for the purpose of contacting city Tc0.03 Ttlosepanel

> I look forward for your assistance in communicating to United that they offer a reasonable solution to this situation so I/we can continue to see City Employees and their dependants without disruption. . .
>
> In the best interest of my/our current City of Ft. Worth patients, I/we ask for your assistance in resolving this dispute before the City transitions to United Health Care.

(CX 1042 at 4).

138. On July 2, 2001, NTSP member physicians Blue, Vance, Deas, and Grant signed a letter addressed to the Mayor of Fort Worth bearing NTSP's letterhead. The letter asserted that United's rates were "well below market benchmarks" and that "NTSP simply has not and will not accept United's request for our participation in their provider network for your employees." The letter also asserted that "the City may experience significant network disruption once United officially begins their duties (up to 588 doctors no longer available)." (CX 1029 at 3-4; see also CX 1031 (July 9, 2001, letter from Vance to the Mayor of Fort Worth, stating that the City's recent switch to United placed the relationship between the City employees and their physicians "in serious jeopardy," that the United offer was "significantly below market," and stating that unless "this contractual issue is resolved," there was the "likelihood that NTSP members will no longer be available to city employees.")).

139. Other NTSP physicians wrote letters to the Mayor of Fort Worth reflecting the points discussed by NTSP in Fax Alert # 44. (CX 1036; CX 1037; CX 1041; CX 1046).

140. NTSP, as an existing provider for the City of Fort Worth, arranged a meeting with the City and communicated to the City NTSP's concerns about the adequacy of United's panel and the cost impact on the City if the City were to change from the PacifiCare risk contract to the United non-risk contract. (Mosley, Tr. 186-87, 192-93; Van Wagner, Tr. 1744; Deas, Tr. 2424-25, 2429-31).

141. At the September 13, 2001 meeting with the City, NTSP representatives also told the City that United had offered rates on a non-risk contract with NTSP that were unacceptable to NTSP and that NTSP was going to reject the United offer. NTSP told the City that they may have a significantly different network on October 1, 2001, when the City would transition from PacifiCare to United. (Mosley, Tr. 186-87; CX 1042).

142. The NTSP Board informed its member physicians in Fax Alert # 44, dated July 13, 2001, that NTSP Board members met with the Mayor of Fort Worth regarding the "possible inadequacy of the United network" and stated that although they "got the attention of the Mayor, our work is not done." (CX 1042).

143. Jim C. Mosley, a health care consultant to the City of Fort Worth, contacted a representative of United and shared with United the City's concerns regarding the continuation, maintenance, and preservation of the then existing United network. The possibility that City employees might lose access to NTSP physicians was a matter of concern to the City. United was requested to maintain the network without compromising costs.

movement," United's overall rates "may still prove inadequate" and this "may affect the overall size of United's physician network")).

146. NTSP's September 13, 2001 letter to the City of Fort Worth also reported that several physician's offices refused to contract with United unless a group contract through NTSP was negotiated on their behalf and noted that NTSP's termination notice to HTPN would take effect October 21, 2001. Notification letters to patients could be sent as soon as October 1, 2001, the same day as the City was supposed to transition to United. (CX 1075).

e. Continued negotiations and termination of HTPN contract

147. On July 9, 2001, NTSP informed United that United's current offer of 110% RBRVS (Dallas conversion factors) for all products was below the Board minimums that NTSP could accept. NTSP told United that the Board minimums were 125% RBRVS for HMO and 140% RBRVS for PPO (Tarrant County conversion factors). (CX 1034 at 1; Quirk, Tr. 299-01).

148. On July 13, 2001, in Fax Alert # 44, the NTSP Board informed all NTSP member physicians that NTSP and United were in agreement as to basic fundamental language terms but "far apart in agreeing to a market reimbursement fee schedule." (CX 1042 at 1).

149. The NTSP Board also noted in Fax Alert # 44 that many NTSP physicians were contracted with United through HTPN. The rates under the United-HTPN contract were indexed to 114% of 2001 Tarrant County RBRVS for HMO and 127% of 2001 Tarrant County RBRVS for PPO and were reported to be below or little above Medicare for many NTSP specialties. (CX 1042). The NTSP Board contrasted the NTSP minimums of 125% of 2001 Tarrant Medicare RBRVS for HMO and 140% of Tarrant Medicare RBRVS for PPO with United's direct offer to NTSP of 110% 2001 Dallas Medicare RBRVS for all products. (CX 1042).

150. The NTSP Board, in Fax Alert # 44, also informed the member physicians that "the NTSP Board has authorized

termination [of] the United Health Care contract. However, notice has not yet been sent to United as NTSP must attempt one last strategy." (CX 1042).

151. On July 23, 2001, the NTSP Board approved the termination of its participation in the United-HTPN contract. (CX 91; CX 1051B). At that time, 101 of NTSP's physicians contracted with United through the United-HTPN contract. The rest of NTSP physicians contracted with United were through direct contracts (77) or through another IP A or other organizations. (CX 1055; CX 1057; Quirk, Tr. 302-04).

152. The effective date of termination was to be October 20, 2001, less than three weeks after the City of Fort Worth had planned to transition its employee health plans from PacifiCare to United. (CX 1051B; CX 1042 at 1).

153. On July 23, 2001 NTSP sent a letter to United, submitting its ninety day notice of its termination of participation in all United products offered through HTPN ("termination letter"). NTSP sent a copy of the July 23, 2001 termination letter to the Mayor of the City of Fort Worth. (CX 1118; Quirk, Tr. 312-13).

154. NTSP explained to its member physicians, by Fax Alert # 52 dated August 9, 2001, that the United contract through HTPN was terminated because United offered rates below Board approved minimums and because of United's proposal of a single fee schedule for both HMO and PPO. (CX 1062).

f. Poll results used to establish Board minimums

155. United's May 2001 offer to NTSP of 110% of current Dallas Medicare RBRVS fee schedule fell below NTSP's Board minimums that had been determined by the Board based on the result of polling. (CX 1042).

156. Subsequent to the May 2001 offer, NTSP completed its annual reimbursement poll. As NTSP informed its member physicians, "this poll's objective is to identify what reimbursement levels NTSP members deem acceptable." (CX 393).

157. On October 29, 2001, in Fax Alert # 83, NTSP communicated to its member physicians the results of NTSP's annual reimbursement poll of NTSP member physicians' acceptable rates on both HMO and PPO levels. (CX 393).

158. The results of the 2001 annual poll for HMO were 128.46% (mean), 127% (median), and 127% (mode). The results for PPO were 142.07% (mean), 144.5% (median), and 144.5% (mode). "All percentages index to current Medicare rates and represent[] the percentage of Medicare that the 'average NTSP physician' would find acceptable for the next twelve months on HMO and PPO products." (CX 393).

159. On October 29, 2001, NTSP held a general membership meeting in which the offer from United was detailed along with the latest poll results which reflected a higher minimum for PPO than United's fee proposal. The PPO rate was listed as an "open issue." (CX 186 at 1).

g. Power of attorney forms

160. On August 9, 2001, in Fax Alert # 52, NTSP solicited power of attorney forms from NTSP member physicians because, "as with previous contracts, several members have requested that NTSP act on their behalf in regards to all contracting activity between themselves and United Health Care." (CX 1062).

169. United obtained a copy of Fax Alert # 56 and learned that NTSP had gathered 107 power of attorney forms from physicians and that NTSP was continuing to solicit additional power of attorney forms to be used in collective bargaining with United. (Quirk, Tr. 326-27, 330-31; CX 1051A).

h. United offers increased rates

170. In the summer of 2001, United increased its offer to Allms from physicians1Sinis oInteg

QX 1658;]TJT*(see also X 10119).

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176. On September 13, 2001, in Fax Alert # 60, NTSP reported to its member physicians that United had increased reimbursement levels "via a contract amendment with ASIA, as well as individual direct offers to several NTSP physicians." (CX 1076).

177. As a result of the increased offers, NTSP deferred activation of the power of attorney forms for two weeks, subject to NTSP's reconsideration. (CX 1076).

178. On September 19, 2001, NTSP informed its member physicians that in order to allow NTSP to consider the increased United offer available through ASIA or directly, NTSP would defer any further action until September 27, 2001. NTSP would then contact each member who previously gave a power of attorney to determine if those member physicians desired additional action by NTSP on their behalf. Member physicians who considered individual contracts with United were invited to review the proposed negotiated group contract. (CX 1079).

179. In a September 20, 2001 letter, United accepted NTSP's invitation to meet with the NTSP Board. (CX 1080; Quirk, Tr. 338-39).

180. On September 21, 2001, Van Wagner updated NTSP's Medical Executive Committee on contract negotiations with United. (CX 198 at 2).

181. On September 24, 2001, United representatives met with NTSP's Board. NTSP stated that it opposed United's offer of one rate for all products because the offer was below BoardA Tc0odu51-397Mum(fgnil.2(Fax Aler)4

184. On September 24, 2001, NTSP sent a letter to its member physicians with a summary of terms to be included in any direct contract with United. The summary discussed price related terms, including: (1) United's reimbursement methodologies should not translate into less than what Medicare would have paid; and (2) a fee maximum change from 80% of usual and customary to 100% of usual and customary. (CX 1064).

185. On or about October 10, 2001, United sent NTSP a new

success in these United negotiations to his medical group, in an effort to convince the group to continue their membership with NTSP:

> United Health Care came to town six months ago and offered a straight 110% of Medicare contract. . . . Through the efforts of NTSP lobbying the City [of Fort Worth] and [terminating] a group contract with Health Texas, United blinked. United was so eager to dilute our effectiveness that they refused to negotiate with NTSP but offered an improved contract thru ASIA. The fees in the [ASIA] contract are very close to the numbers that NTSP presented as market rates for [Fort Worth] and were rejected out of hand by United officials. United has now returned to the table with NTSP at the direct request of the Commissioner of the Dept[.] of Insurance. This United negotiation is a template for other efforts that will need to occur in the near future and would best be coordinated by NTSP.

(CX 256; see also CX 1199 (Vance, Dep. at 310-11)).

191. The level of acceptance of the NTSP/United contract by NTSP member physicians was low. (CX 1100). Fax Alert # 95, dated November 19, 2001, indicates that 258 NTSP member physicians responded. (CX 1100). For HMO, 24% accepted and 76% rejected the contract. For PPO, 23% accepted and 77% rejected the contract, (CX 1001 at 2).

i. NTSP reported United to Texas Department of Insurance

192. NTSP reported United to the Texas Department of Insurance in 2000 and 2001 for prompt pay violations, noncompliance with contracts, and predatory pricing concerns. (Van Wagner, Tr. 1772).

193. NTSP's Board Minutes of September 24, 2001, reported that Deas met with the Texas Commissioner of Insurance to discuss predatory pricing by health plans. The Commissioner

stated that he would send letters to CEOs of major plans cautioning them against predatory pricing activities. Deas also discussed with the Commissioner the impact of HMO and PPO contracting revisions on Tarrant County physicians. (CX 100 at 3-4).

194. In August 2001, the Texas Department of Insurance fined United $ 1.25 million and ordered it to pay restitution to providers for failing to follow Texas laws on prompt payment and clean claims. (RX 3103).

2. Cigna Healthcare

a. Corporate structure

195. Cigna of Texas is a subsidiary of Cigna Healthcare ("Cigna") which has its corporate headquarters in Philadelphia, Pennsylvania. (Grizzle, Tr. 669). Cigna Corporation reports consolidated earnings for the entire corporation, including Cigna of Texas. (Grizzle, Tr. 669-70).

196. A change in revenue and earnings for Cigna of Texas would affect the revenues and earnings for the entire corporation. (Grizzle, Tr. 670).

197. When Cigna contracts with multi-state employers, a single contract is signed. (Grizzle, Tr. 682). A change in costs for Cigna of Texas could affect the health insurance costs of an employer with multi-state coverage. (Grizzle, Tr. 683).

198. An increase in Cigna's costs would increase premiums which could affect Cigna's competitiveness in other states. (Grizzle, Tr. 683-85).

199. Mr. Rick Grizzle is the vice president of network development for Cigna Healthcare, with responsibilities for contracting and managing provider services in Texas, Oklahoma, and Louisiana. (Grizzle, Tr. 666-67).

b. Cigna's acquisition of Healthsource and initial contacts with NTSP

200. In late 1997, Cigna purchased Healthsource, a company which offered both HMO and PPO products, covering approximately one million lives nationally. Many NTSP member physicians had direct contracts with Healthsource. (Grizzle, Tr. 695, 767-70).

201. For physicians with agreements with both Cigna and Healthsource, Cigna, in July 1998, informed physicians that their contracts under Healthsource would be terminated and assigned to Cigna. (CX 332; Van Wagner, Tr. 1752-53).

202. For physicians with agreements with only Healthsource, Cigna, in July 1998, requested that physicians assign their contracts from Healthsource to Cigna and informed physicians that if they did not wish to assign their contracts to Cigna, they could continue under their Healthsource agreements, as long as Healthsource products were being offered in the marketplace. (CX 332; Van Wagner, Tr. 1752-53).

203. Healthsource subsequently went out of business. (Grizzle, Tr. 770).

204. Some NTSP physicians went to NTSP regarding the change in their Healthsource contracts and requested that NTSP contact Cigna. (Van Wagner, Tr. 1752). NTSP did contact Cigna regarding these issues. (Van Wagner, Tr. 1753-54).

205. NTSP sent to its member physicians a sample letter refusing the contract assignment from Healthsource to Cigna and directing Cigna to negotiate with NTSP as their agent. NTSP also sent its member physicians an agency agreement that authorized NTSP to negotiate on the behalf of consenting member physicians. NTSP informed its physicians that "if 50% or more of NTSP member physicians concur that agency is appropriate, NTSP will contact CIGNA and Healthsource directly in regards to this matter." NTSP advised "its members not to consent to the assignment of your Healthsource provider agreements to CIGNA." (CX 332 (emphasis omitted)).

213. Under the LOA, Cigna agreed to reimburse NTSP specialists, with the exception of cardiologists/cardiovascular surgeons, gastroenterologists, urologists, oncologists, and podiatrists, on a fee schedule equal to 125% of the 1998 Dallas County RBRVS. (Grizzle, Tr. 710-14; CX 782A, in camera; CX 764 at 1, in camera).

214. Cigna entered into this agreement with NTSP because Cigna believed that the core group of NTSP, the specialists in Fort Worth, were critical for Cigna. (Grizzle, Tr. 719-20).

215. The LOA was entered into by NTSP and Cigna in anticipation of a risk contract and specifically called for the establishment of a risk contract within a short time. (Van Wagner, Tr. 1757-58; CX 784, in camera; CX 782A, in camera).

216. The 1999 LOA was amended in January 2000 (First Amendment) to add PPO coverage for NTSP specialists at a reimbursement rate of 135% of Dallas County 1998 RBRVS. (CX 769; Grizzle, Tr. 714).

217. Cigna's representative, Grizzle, testified that the reimbursement rate of 125% of RBRVS on HMO and 130% of RBRVS on PPO was somewhere between 15 and 20 percent higher than Cigna's standard rates. Grizzle also testified that the rates Cigna paid to NTSP were in the "general ballpark" of the rates Cigna paid to other IP As [redacted]. (Grizzle, Tr. 716, 958-59, in camera).

(ii) Conflicts between NTSP and Cigna

218. NTSP believed that Cigna had breached its contract with respect to how fee schedules were loaded into Cigna's system. There were instances of a change in the fee schedule as called for by the contract where NTSP would later find that Cigna had failed to load the changes. NTSP complained to Cigna regarding Cigna's failure to pay in accordance with the agreed upon schedule and informed Cigna that NTSP considered the failure a material breach. (Grizzle, Tr. 797; Van Wagner, Tr. 1769; CX 792, in camera; RX 497; RX 960, in camera; RX 1486, in camera).

(iii) Second Amendment

219. NTSP also believed that Cigna breached the LOA and First Amendment by not adjusting the fee schedule to current year RBRVS. (Grizzle, Tr. 799-800; Van Wagner, Tr. 1979-80).

220. The 1999 LOA was amended in May 2000 (Second Amendment) to clarify the proper year of RBRVS reimbursement. While the First Amendment to the LOA did not require that the fee schedule be adjusted annually, the Second Amendment explicitly called for an annual adjustment of the HMO and PPO schedule to current year [redacted] RBRVS. (CX 769; CX 770, in camera; CX 771, in camera; CX 800 at 2; Grizzle, Tr. 715, 740-41).

(iv) Cardiologists

221. Under the LOA, Cigna agreed to reimbursement of "NTSP specialists, with the exception of NTSP cardiologists/CV [cardiovascular] surgeons, gastroenterologists, urologists, oncologists and podiatrists." (Grizzle, Tr. 710-14; CX 782A, in camera).

222. NTSP's cardiologists were carved out of the LOA. (Grizzle, Tr. 927, in camera; Van Wagner, Tr. 1764-66).

223. In a carve out arrangement, certain specialists or services are outside of a capitation plan and are paid in some other manner. (Frech, Tr. 1434).

224. Although NTSP's cardiologists were initially carved out of the LOA, an addendum to the LOA gave a right of first refusal for NTSP's cardiologists to participate with Cigna if Cigna's carve out agreements with cardiologists were terminated. (Grizzle, Tr. 927, in camera; Van Wagner, Tr. 1764-66; CX 770, in camera).

225. Regarding Cigna's need for cardiologists, Cigna had contracted with American Physician Network ("APN") for cardiology services. (Grizzle, Tr. 726-27, 929-30, in camera).

226. In July 2000, Cigna informed NTSP that the carve out arrangment that Cigna had with NTSP had been assigned to APN and told NTSP to work out an agreement with APN. (Grizzle, Tr. 929-30, in camera; Van Wagner, Tr. 1768; CX 775).

227. Cigna viewed its action as an assignment of the contract and believed that the LOA did not allow NTSP's cardiologists to join the Cigna fee-for-service contract if the carve out had been assigned. (Grizzle, Tr. 725).

228. NTSP viewed Cigna's action as Cigna's termination of the cardiologists' carve out agreement. NTSP believed that Cigna had breached the LOA by refusing to give NTSP's cardiologists a right of first refusal to participate in the NTSP agreement. (Grizzle, Tr. 929-30, in camera; Van Wagner, Tr. 1766-68; CX 775; CX 776; CX 784; CX 785, in camera).

229. NTSP sent Cigna a letter, dated August 2, 2000, stating that NTSP was exercising its option under the terms of the present Cigna arrangement for NTSP cardiologists to participate under the terms of the HMO arrangement. (CX 776).

230. APN subsequently submitted a fee-for-service offer to NTSP's cardiologists. (Grizzle, Tr. 726-27).

231. NTSP rejected APN's offer, in a letter dated October 6, 2000, which stated that the offer "was shared with affected members of NTSP's Cardiology Division and NTSP's board. At this point, we must decline your proposal as it does not meet our minimum reimbursement levels." (CX 777A; Grizzle, Tr. 726-27).

232. In an October 16, 2000 letter from NTSP to Cigna, NTSP stated that NTSP's Cardiology Division and Board found Cigna's proposal to be "woefully inadequate. The financial arrangements proposed were well below the agreed upon fee schedule contained in the NTSP/Cigna agreement. As a result, [APN] was notified on October 6, 2000 that [their] proposal was declined, as it did not meet minimum reimbursement levels." (CX 777).

233. The October 16, 2000 letter from NTSP to Cigna also states that "obviously Cigna's failure to resolve this issue may affect current NTSP participation and future dialogue with Cigna regarding a PSN [provider sponsored network] type risk arrangement." (CX 777; Grizzle, Tr. 730).

234. NTSP believed that it had the right to terminate its contract with Cigna if what NTSP believed to be Cigna's breaches of contract were not cured. (Grizzle, Tr. 797; Van Wagner, Tr. 1769-71; RX 497; RX 960, in camera; RX 1486, in camera).

235. Cigna performed an analysis of the impact of the potential loss of NTSP's physicians from its network. Cigna determined that NTSP's termination would leave it with gaps in specialty coverage in the Fort Worth area. (Grizzle Tr. 730-31 (stating that Cigna took the threat seriously because NTSP presents "a fairly unified force, well-represented and looked like a strong entity . . . working in Fort Worth"); CX 779, in camera

was that, "Cigna immediately allow all of NTSP's sub-contracted Primary Care Physicians the option to participate under the terms of our HMO and PPO agreements." (CX 786, in camera; Grizzle, Tr. 732).

239. Cigna had already contracted with a sufficient number of primary care physicians at lower rates than those under the NTSP agreement. Allowing NTSP's primary care physicians to opt in to the NTSP/Cigna specialist contract would increase Cigna's costs with no additional benefit to Cigna. (Grizzle, Tr. 718-19, 733-34).

240. In order to maintain the relationship with NTSP and despite increasing its costs, Cigna offered NTSP's primary care physicians a tiered reimbursement fee schedule in which the primary care physicians would initially receive NTSP's specialist rates and would, over time, return back to a "market level." (Grizzle Tr. 735-36).

241. In December 2000, NTSP rejected Cigna's offer on behalf of its primary care physicians. (Grizzle, Tr. 736; CX 791 ("NTSPs Board absolutely cannot and will not negotiate or offer an agreement in which our PCP partners are paid less than our specialists . . . . The 125% of the then current Dallas (not Tarrant County) RBRVS must stand as per our current agreement.")).

242. On June 7, 2001, NTSP sent an email to Cigna requesting that Cigna bring NTSP primary care physicians into the NTSP/Cigna agreement on the PPO product. (CX 800 at 1).

243. By return email that same day, June 7, 2001, Cigna reiterated its resistance to NTSP's demands to include NTSP's primary care physicians at NTSP's specialist rates. (CX 800 at 2; Grizzle, Tr. 740-41).

244. NTSP subsequently, on June 12, 2001, sent a notice of termination letter to Cigna, providing Cigna with 60 days notice. NTSP's letter stated, NTSP "look[s] forward to utilizing the next 60 days in resolving the issue of Cigna not allowing our affiliated Primary Care Physicians to participate under the terms of our PPO agreement." (CX 802).

245. In response to NTSP's notice of termination letter, Cigna and NTSP negotiated a third amendment to the NTSP/Cigna

contract. (Grizzle, Tr. 749-51; Van Wagner, Tr. 1771; CX 810, in camera).

246. The 1999 LOA was amended in August 2001 (Third Amendment) [redacted] (Grizzle, Tr. 749-51, 755, 942-43, in camera; Van Wagner, Tr. 1771-72; CX 809, in camera; CX 810, in camera).

247. The Third Amendment is the current contract under

255. [redacted] (Grizzle, Tr. 881-82, in camera).

d. NTSP reported Cigna to Texas Department of Insurance

256. NTSP reported Cigna in 2000 and 2001 to the Texas Department of Insurance for prompt pay violations, noncompliance with contracts, and predatory pricing concerns. (Van Wagner, Tr. 1772).

257. In August 2001, the Texas Department of Insurance took action against Cigna for violations of Texas claims payment laws. Cigna was fined $ 1.25 million and ordered to pay restitution to providers as a result of Cigna's failure to comply with clean claims laws. (RX 3103).

258. In September 2001, the Texas Attorney General investigated Cigna's payment methodology. (CX 108 (Board minutes reporting Office of Attorney General's letter); RX 1290; RX 1651).

3. Aetna Health, Inc.

a. Corporate structure

259. Aetna Health, Inc., ("Aetna") is a wholly owned subsidiary of Aetna, Inc., which has its headquarters in Hartford, Connecticut. (Roberts, Tr. 474).

260. Aetna provides health insurance coverage in the North Texas area. In the Fort Worth area, Aetna currently has approximately 40,000 to 50,000 HMO members and 100,000 PPO members. (Roberts, Tr. 474; Jagmin, Tr. 981).

261. Aetna's network has about 7,200 physicians in the Dallas-Fort Worth Metroplex. (Jagmin, Tr. 1121).

262. Aetna's clients in the Fort Worth area include national companies such as Bell Helicopter and Lockheed Martin. (Roberts, Tr. 476).

263. When Aetna pays a claim in Texas, it is paid from premiums which may have come from states outside of Texas. (Roberts, Tr. 476).

264. Aetna's performance in the Fort Worth area affects Aetna's national performance because any profits or losses roll up and appear on the financial statements of the publicly traded parent company. (Roberts, Tr. 474, 477).

265. Dr. Christopher Jagmin is currently the medical director for medical policy. (Jagmin, Tr. 969). Jagmin works for Aetna, Inc., based out of Blue Bell, Pennsylvania, and he consults and advises for the North Texas area. (Jagmin, Tr. 972, 974).

266. Mr. David Roberts is employed by Aetna Health, Inc., as a network vice-president. He has worked for Aetna Health, Inc., (or another subsidiary of the national company) since 1999, when Aetna acquired Prudential. Prior to 1999, Roberts worked for Prudential. In May 2001, Roberts assumed responsibility for contracting with physicians in the North Texas area. (Roberts, Tr. 468-70).

b. NTSP's relations with Aetna through HMS and MSM

267. In 1994, many physicians signed an HMO risk contract and a PPO non-risk contract to treat Aetna patients through another IPA, Harris Methodist Select ("HMS"). (Van Wagner, Tr. 1692; RX 832).

268. The 1994 HMS contracts with Aetna were exclusive and were not terminable until June 30, 1999. (RX 3146).

269. Many of the physicians who had contracts with HMS signed participating physician agreements with NTSP. (RX 832).

270. In 1997, NTSP believed that HMS had breached the 1994

272. In 1999, during the time of the contract dispute between NTSP and HMS, HMS became Medical Select Management ("MSM"). Contracts between physicians and HMS were assigned to MSM. (RX 832).

273. The contract between MSM and Aetna, which served about 115,000 patients, was primarily a "global risk deal," through which Aetna delegated almost all the medical risk to

279. Subsequent to the June 2000 meeting between NTSP and Aetna, Aetna discussed internally the possible contracting scenarios with NTSP and concluded that the most favorable scenario was keeping NTSP's physicians within Aetna's current contract through MSM, rather than signing a separate contract with NTSP. This conclusion was based on Aetna's belief that a separate contract would duplicate administrative costs. (CX 525 at 1-2).

280. The internal Aetna discussion considered a scenario in which Aetna would lose most of NTSP's member physicians. This turn of events was envisioned by Aetna as a realistic possibility if NTSP's member physicians were to pull out of the MSM contract, Aetna were to fail to reach an agreement with NTSP, and only a few of NTSP's member physicians were to contract with Aetna directly. Aetna's conclusion was that this scenario would create undesirable holes in particular specialities and perhaps service areas. Under the same scenario, Aetna was also "very concerned" with the fact that many of its health plan members, especially "given their national client base," would complain that their doctor was no longer in the network. (CX 525; Jagmin, Tr. 1000-02).

281. In these internal Aetna discussions, NTSP was perceived as representing the "majority of the preferred SPECs [specialists] in [Fort] Worth," and as specialist-dominated. (CX 525 at 2).

282. In Fax Alert # 55, dated August 7, 2000, Van Wagner informed NTSP member physicians that "NTSP has started negotiations with Aetna in regards to a risk and non-risk contract. As of this date, a term sheet has been received and is being reviewed. It is the goal of both parties to implement a new contract effective January 1, 2001. Given the stages of our negotiation, NTSP will know in approximately thirty days whether or not a direct contract with Aetna will be in the best interest of its members." NTSP asked its member physicians to

283. An October 5, 2000 Fax Alert informed NTSP physicians that NTSP had filed suit against MSM on behalf of its member physicians and that NTSP had begun discussions with Aetna on a direct contract for Aetna HMO patients. The Fax Alert sought physicians to sign a power of attorney to authorize NTSP to represent them:

> In order to pursue these initiatives to their maximum outcome, having NTSP act as the members' agent and attorney in fact in negotiations, amendments, extensions and/or terminations of Aetna contracts was suggested.
>
> A Motion was made and passed that 66% of all affected NTSP physicians should agree to NTSP's

d. Continued negotiations on a non-risk contract

(i) Initial proposals

286. In October 2000, after NTSP and Aetna determined that they could not agree on a risk contract, NTSP and Aetna continued to negotiate for a non-risk contract only. (Jagmin, Tr. 1004-05; CX 717 at 4; CX 544 at 3).

287. With respect to rates for anesthesiologists, Aetna's initial offer to NTSP, in October 2000, was $ 40 per unit. NTSP told Aetna that anesthesia unit rates for a PPO product were between $ 46 and $ 48 in the market. (Jagmin, Tr. 1017, 1034-35, 1045; CX 544 at 2, 3). In an October 20, 2000 letter, Aetna informed NTSP that an anesthesia rate of $ 46 to $ 48 was too high. (CX 540 at 4; Jagmin, Tr. 1017).

288. With respect to HMO and PPO products, Aetna's initial offer to NTSP, in October 2000, was based on a reference schedule that uses the same relative value units from the RBRVS schedule, but places a different multiplier on different specialties' services, based on supply and demand. (Jagmin, Tr. 1012-13). Aetna's initial offer aggregated to about 111% to 112% RBRVS for HMO and about 123% to 125% RBRVS for PPO, with some specialities being offered more or less than the aggregate, based on the scarcity or abundance of the particular specialty of the physician. (Jagmin, Tr. 1015-16, 1022-24).

289. In October 2000, NTSP sought from Aetna a non-risk contract with uniform rates of 125% RBRVS for HMO and 140% RBRVS for PPO. (Jagmin, Tr. 1023, 1033-34, 1040-41; CX 543 at 3-4).

290. NTSP's proposed rates of 125% of RBRVS for HMO and 140% of RBRVS for PPO were the same rates that physicians had been receiving for providing services to Aetna patients through the MSM contract. (Jagmin, Tr. 1023; Van Wagner, Tr. 1697; CX 538). (Compare RX 968, in camera, with RX 24 at 21).

291. NTSP's proposal for both HMO and PPO was a uniform rate for all physicians, instead of the different rates to each speciality that Aetna initially had offered. (CX 543 at 3-4; Jagmin, Tr. 1023).

292. Aetna expressed concern to NTSP that a uniform rate based off of Medicare RBRVS would impose overpayment to some NTSP specialties, while other NTSP physicians might choose not to participate on the basis of underpayment, which might require Aetna to have to contract with those physicians individually at a higher rate. (Jagmin, Tr. 1031-32).

293. NTSP informed Aetna that it would not be involved in any non-risk contract that proposed different rates for different member physicians. (Roberts, Tr. 523-24; Jagmin, Tr. 1165).

294. Aetna's representative talked to physician groups to try to contract with them directly. Some of those physicians referred Aetna back to NTSP. (Jagmin, Tr. 1042-44).

295. Aetna, at the time of these negotiations, was concerned about losing physicians because it was late in the enrollment period, the time when employees choose their health plans or change their prior selections. (Jagmin, Tr. 990-91; 1060-61).

296. On November 7, 2000,tCna/3.9TSP renta le7
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> Aetna's PPO lives will be served directly by NTSP physicians. In addition, approximately 15,000 of the 100,000 Aetna HMO covered lives will have direct access to NTSP doctors. The remaining approximately 85,000 Aetna HMO covered citizens are contracted through Medical Select Management's Aetna contract. As of today, NTSP has notified Medical Select Management that under current contractual conditions, NTSP physicians can no longer participate.

(CX 559).

298. By November 20, 2000, Aetna made a new offer of a uniform rate based on RBRVS and increased its offer to 116%

(ii) Power of attorney forms

302. At the same time that NTSP and Aetna were discussing the non-risk contract, Van Wagner sent Aetna a list of the physicians to whom NTSP had sent power of attorney forms seeking delegation of NTSP as the organization that would conduct negotiations for them. (Jagmin, Tr. 1029; CX 534).

303. Jagmin asked both physicians and NTSP staff about the power of attorney forms and was told that the power of attorney forms assigned to NTSP direct contracting efforts between Aetna and the physicians. (Jagmin, Tr. 1029).

304. On November 10, 2000, Van Wagner informed Jagmin that NTSP had sent approximately 180 power of attorney forms from NTSP member physicians to MSM, and told Jagmin that the powers of attorney cover any direct contracting with Aetna. (CX 558 at 2).

305. Aetna believed that, with these power of attorney forms, NTSP would be representing individual physicians in negotiating with Aetna if Aetna did not enter into a contract with NTSP. (Jagmin, Tr. 1051; CX 558).

306. Because Aetna believed that NTSP was going to represent each one of the individual physicians or physician groups in a direct contract negotiation, Aetna believed that there was pressure for Aetna to enter into a contract with NTSP. (Jagmin, Tr. 1058-60).

307. In a November 2001 NTSP Board meeting that was attended by an Aetna representative, the power of attorney forms that NTSP had collected from its member physicians were referenced during the discussions between NTSP and Aetna on the proposed rates for a non-risk contract. (Roberts, Tr. 537-39).

(iii) Re-polling of NTSP member physicians

308. By November 21, 2000, Aetna and NTSP had reached an agreement on 140% of current Medicare RBRVS for PPO, but had not reached an agreement on HMO rates, with NTSP seeking across the board 125% of Medicare RBRVS and Aetna seeking across the board 116% of Medicare RBRVS. The parties also had

not reached an agreement on anesthesia rates. (CX 561; Jagmin, Tr. 1071-72).

309. NTSP discussed its negotiations with Aetna at an NTSP general membership meeting on November 21, 2000. (CX 180).

310. By Fax Alert # 81, dated November 29, 2000, NTSP informed its member physicians that Aetna's then current offer was an across the board fee schedule of 140% of current Medicare RBRVS for its PPO product, an across the board fee schedule of 116% of current Medicare RBRVS for its HMO produc310. By FapaC-1.5 X 561; JtagmducTJ-1a

313. As reported at NTSP's December 4, 2000 Board meeting, sixty-one responses had been received, with the majority choosing the 121%-130% range. At that meeting, it was also noted that the termination of the contract with Aetna through MSM would be carried out in thirteen days. (CX 74 at 4).

314. On December 8, 20005l8NSE thae poll respults to]TJ-1.5 -1.15 TD0 Tc0 Tw[(setna : "hae

stated to NTSP that "the physician expectations for the HMO contracts are not acceptable to Aetna and are rejected." (CX 580 at 1; see also CX 582 at 1; Jagmin, Tr. 1082-83).

319. On December 15, 2000, NTSP received Aetna's final proposed IPA agreement which repeated Aetna's position: "Per your discussion with Chris Jagmin, MD, non HMO based products to be paid at 140% of then current RBRVS per the Fort Worth, TX geographic locality. Anything with no established rate is paid at Company's then current Reasonable Equitable Fee Schedule (REF). Anesthesia services at $ 40 per unit." (CX 660).

320. The conflict between NTSP and Aetna received publicity in the marketplace. (Jagmin, Tr. 1005-06, 1081-92). Aetna received calls from large employers in Tarrant County such as the Arlington independent school district and other employers and brokers. (Jagmin, Tr. 1083, 1094).

321. On December 18, 2000, Van Wagner reported to the NTSP Board that the PPO arrangement had been completed. Van Wagner referred the Board to a letter from Commissioner Montemayor concerning complaints that the Texas Department of Insurance had recently received from physicians. Van Wagner further "reported that NTSP will continue to negotiate with Celina Burns [General Manager] of Aetna on an HMO contract. There was a lengthy discussion on an acceptable fee schedule. The membership's response when polled was 125%. The Board instructed NTSP to present 125% on a direct contract." (CX 76 at 2-3).

322. Later on December 18, 2000, Van Wagner wrote to Aetna with a status update that reflected that NTSP's proposal was: for PPO, 140% of current Medicare RBRVS, anesthesia at $ 45.00; for HMO, 125% of current Medicare RBRVS, anesthesia at $ 43.00. (CX 585).

323. Ultimately, Aetna agreed to NTSP's terms. On December 19, 2000, Aetna wrote to NTSP and proposed: for PPO, 140% of current Medicare RBRVS, anesthesia at $ 45.00; for HMO, 125% of current Medicare RBRVS, anesthesia at $ 43.00. (CX 585 at 1).

324. NTSP responded to Aetna on December 19, 2000, stating that NTSP would send out a notice to its member physicians notifying them that the PPO and HMO offers are within the messenger minimums. NTSP further informed Aetna that it would tell its member physicians that they could choose whether or not to participate in the offerings. (CX 589).

325. In Fax Alert # 85, sent to NTSP member physicians on December 19, 2000, NTSP notified its member physicians of the agreed upon rates and stated, "the rates agreed upon for the direct HMO reimbursement and the PPO reimbursement meet NTSP minimum messenger model standards as shared by our members. Because of this, the Board has accepted these reimbursement levels as appropriate in completing contractual discussions in regards to these products." (CX 586 at 10).

326. NTSP forwarded the NTSP-Aetna contract to its member physicians. (CX 597; CX 615 at 1; CX 611 at 2 ("NTSP is pleased to present two new NTSP contract offerings to all NTSP Members . . .")). Ultimately, 188 NTSP member physicians signed the NTSP-Aetna contract. (Jagmin, Tr. 1088).

327. The rates of the NTSP-Aetna contract are increased from Aetna's initial proposal. Compare Jagmin, Tr. 1015-16, 1022-24; CX 544 at 2, 3 (for HMO, aggregated to about 111% to 112% RBRVS, and anesthesia at $ 40 per unit; for PPO, aggregated to about 123% to 125% RBRVS, and anesthesia at $ 40 per unit) with CX 585 (for HMO, 125% RBRVS, and anesthesia at $ 43 per unit; for PPO, 140% RBRVS, anesthesia at $ 45 per unit).

328. The rates in the 2000 Aetna-NTSP contract were identical to the Aetna-MSM rates, a contract Aetna had with another IPA. (Jagmin, Tr. 1132-33; Van Wagner, Tr. 1697, 1701-02, 1708-09).

329. Aetna's representative, Roberts, testified that Aetna's reimbursement rates to NTSP were higher than rates for other IPAs for similar services. Roberts also testifed that a straight comparison could not be easily made because it depends on the total package of services that an IPA or a physician group might bring to the discussions. (Roberts, Tr. 472-73).

on February 1, 2002. Aetna's letter terminated Aetna's existing agreement with NTSP, effective January 31, 2002. (CX 644, in camera; Roberts, Tr. 489-90).

333. The renegotiation between Aetna and NTSP involved only non-risk components. (Roberts, Tr. 487).

334. On October 8, 2001, the NTSP Board reviewed Aetna's termination letter and decided to continue negotiations with Aetna. (CX 102 at 1-3).

335. Van Wagner informed the Board that Aetna's new proposed rates would be lower and that negotiations would be arduous. (CX 102 at 1-3).

336. On October 15, 2001, the NTSP Board received and accepted the results of the 2001 annual poll. The acceptable contract minimums as estabished by the annual poll were 125% of current Medicare RBRVS for HMO and 140% of current Medicare RBRVS for PPO. The Board meeting minutes further reported: "this year's polling of NTSP members as per a messenger model indicates these levels have not changed. The Board accepted this information and instructed staff to use these levels as minimally acceptable fee schedules for HMO and PPO contract offers." (CX 103 at 4-5).

337. On October 29, 2001, NTSP shared the poll results with its member physicians at a general membership meeting at which member physicians also received an update on the ongoing Aetna negotiations. (CX 186).

338. On October 30, 2001, Aetna proposed to NTSP an "Aetna Market Based Fee Schedule. For PCPs and Specialists this is 85% / 115% for the HMO Based Plans and 95% / 129% for the Non-HMO Based Plans." Aetna's "market-based fee schedule" refers to a fee schedule that Aetna uses primarily for individual physicians, but is also used with some IPAs and some groups. (CX 629; Roberts, Tr. 492-93, 568).

339. The rates Aetna offered NTSP on October 30, 2001 were based off of then current Dallas RBRVS. The proposal also included a "steering incentive," a 10% increase to those rates, for physicians in certain speciality areas that steered outpatient

procedures to one of Aetna's preferred outpatient surgery centers. (CX 629; Roberts, Tr. 492-93, 568).

340. NTSP rejected Aetna's proposal of a 10% steering fee for some specialties because the reimbursement methodology would not be applied to all of NTSP's physicians. (Roberts, Tr. 523-24; Van Wagner, Tr. 1771).

341. NTSP never distributed Aetna's October 30, 2001 offer to its membership, lacking Board authority to do so. (Van Wagner, Tr. 1713-14; Roberts, Tr. 495).

(i) NTSP's claims of efficiencies

342. On November 1, 2001, NTSP sent utilization data to Aetna and in an attached letter advocated against a decrease in NTSP's then current fee schedule. NTSP stated: "although NTSP's current fee schedule is higher than that proposed by Aetna at the unit cost level, budget to actual PMPM [per member, per month] historical figures indicate that significant savings will accrue to Aetna given historical utilization patterns of NTSP physicians." (CX 553).

343. Aetna believed that it was "critical to [their] organization" to determine if NTSP's efficiency claims were valid. Aetna believed that, "if, in fact, there were efficiencies and we couldn't come to terms [with NTSP], then when those services went to other physicians in the marketplace, then the costs would actually go up . . . so it was critical to us [Aetna] that we do an in-depth review of this data and try to determine if there were efficiencies and, if there were, to make sure this contract continued." (Roberts, Tr. 497).

344. NTSP provided to Aetna data derived from NTSP's risk contract with PacifiCare, though NTSP did not provide the underlying data. (Van Wagner, Tr. 1911-14; Roberts, Tr. 506-07, 520-21, 578-79).

345. Aetna was not able to run an analysis of NTSP physicians compared to other physicians due to problems with Aetna's own data. (Roberts, Tr. 560-61).

346. Due to the limited data provided by NTSP and deficiencies in Aetna's own internal data, Aetna could neither validate or invalidate NTSP's claims of clinical efficiencies. (Roberts, Tr. 504-05).

(ii) No agreement on non-risk contract

347. On November 6, 2001, Aetna informed NTSP that its analysis of Aetna's own data did not support NTSP's efficiencies claims. "In light of this review of our data, we can not identify significant management objectives that would require any adjustment to [the] proposed fee schedule." (CX 501; Roberts, Tr. 502-03, 524-27).

348. On November 7, 2001, NTSP replied that although negotiations would proceed, "to ask high performing physicians to take pay cuts because others have not done as well will be a difficult sell." NTSP also noted that Aetna would meet with the NTSP Board. (CX 502).

353. On December 3, 2001, Aetna wrote to NTSP informing it that Aetna believed that NTSP's current level of reimbursement was not competitive and that termination of the Aetna-NTSP agreement would be effective on January 31, 2002. (CX 640).

354. On December 7, 2001, NTSP informed its member physicians that Aetna's proposal fell "below payment rates our members have messengered to NTSP as acceptable to continue negotiations." NTSP informed its members that they may contract directly with Aetna or request that Aetna re-open negotiations with NTSP. (CX 643).

355. There is no current contract between NTSP and Aetna. (Roberts, Tr. 549; Van Wagner, Tr. 1718-19).

356. After terminating the contract, Aetna sent direct offers to NTSP's member physicians. NTSP's member physicians were not prevented from dealing directly with Aetna, and Aetna was able to contract directly with many of the physicians who had been part of the NTSP-Aetna contract. (Roberts, Tr. 544-46; RX 1076; RX 9).

f. Aetna investigated by Department of Justice, Texas Attorney General, and Texas Department of Insurance

357. In June 1999, the Department of Justice sued Aetna over its acquisition of Prudential Insurance Company of America as an attempt to gain improper market power over doctors. (RX 451; RX 3099). NTSP assisted the Department of Justice in that investigation. (RX 451). In December 1999, Aetna signed a consent order. (RX 3100).

358. In May 2000, the Department of Justice investigated Aetna's use of an all-product requirement in its contracts. NTSP was asked to and did assist in this investigation. (CX 57).

359. The Texas Commissioner of Insurance issued admonishment letters to Aetna in December 2000 and October 2001 questioning misrepresentations Aetna and MSM were making in contract discussions and questioning the adequacy of

Aetna's provider network. (CX 586; RX 3105 (Aetna ordered to pay restitution and fines for violations through October of 2001); CX 508 (Aetna's response referencing Commissioner's letter)).

360. The Texas Attorney General issued an Assurance of Voluntary Compliance ("AVC") to Aetna in April 2000. (RX 1302; CX 505). Chris Jagmin, an Aetna medical director, was disciplined in August 2001 for violating the AVC by making false representations. (RX 339). NTSP was notified of the Assurance of Voluntary Compliance with Aetna and of Jagmin's disciplinary notice. (CX 103).

361. NTSP reported several payors, including Aetna, to the Texas Department of Insurance in 2000 and 2001 for prompt pay violations, noncompliance with contracts, and predatory pricing concerns. (Van Wagner, Tr. 1772).

362. In November 2001, the Texas Department of Insurance fined Aetna $ 1.15 million and ordered it to pay restitution to providers for failing to follow Texas laws on prompt payment and clean claims. (RX 1660; RX 1666; RX 3105).

363. In 2002, NTSP made complaints about Aetna's contracting practices to the Texas Department of Insurance. NTSP also sent a complaint letter to Aetna, with a copy to the Texas Department of Insurance. (CX 507; CX 509; CX 512; CX 513; RX 2325).

F. No Valid Procompetitive Justifications

1. No meaningful efficiencies

364. NTSP is not clinically integrated for patients covered under NTSP's non-risk contracts. (Van Wagner, Tr. 1878; Casalino, Tr. 2877; Frech, Tr. 1351-52).

365. NTSP does not engage in case management for PPO patients covered under NTSP's non-risk contracts. (Van Wagner, Tr. 1878).

366. NTSP's medical director has no responsibility for controlling costs for patients covered under NTSP's non-risk contracts. (Deas, Tr. 2552-53).

367. NTSP's medical management committee does not

374. NTSP's goal of enhanced teamwork among its physicians is hindered by the lack of pediatricians, obstetricians, and cardiologists in NTSP, forcing NTSP patients needing the services of these core specialists to seek physicians outside of NTSP. (Casalino, Tr. 2854-56).

375. NTSP does not engage in meaningful patient education. The patient education features of its web site were created in 2004, after this Complaint was issued, and are largely limited to

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Jurisdiction

The Complaint charges Respondent North Texas Specialty Physicians ("NTSP") with violating Section 5 of the Federal Trade Commission Act, as amended ("FTC Act"). 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(2); Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981). See also McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241-42 (1980); Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 745-46 (1976). The FTC Act defines "corporation" to include "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members. . . ." 15 U.S.C. § 44. See also Community Blood Bank v. FTC, 405 F.2d 1011, 1015-16 (8th Cir. 1969). The FTC Act definition of commerce includes "commerce among the several States." 15 U.S.C. § 44.

The "Commission has only such jurisdiction as Congress has conferred upon it by the Federal Trade Commission Act." Community Blood Bank, 405 F.2d at 1015. When the jurisdiction of the Commission is challenged, the Commission bears the burden of establishing its jurisdiction. Id. Respondent has challenged jurisdiction in this case. Respondent's Post Trial Brief ("RPTB") at 33. To establish jurisdiction, Complaint Counsel must demonstrate that NTSP is an association organized to carry on business for its own profit or that of its members. California Dental Ass'n v. FTC, 526 U.S. 756, 767 (1999). Complaint Counsel must also demonstrate that the acts of NTSP are in or affect commerce. McLain, 444 U.S. at 242.

1. Actions on behalf of members

NTSP is an independent practice association ("IPA") that was formed in 1995 for the purpose of allowing a group of specialist

physicians to accept economic risk on medical contracts. F. 17, 37. NTSP subsequently broadened its membership to include primary care physicians ("PCPs") and broadened its functions to include entering into non-risk contracts with health insurance plans. F. 37. Physicians establish their relationship with NTSP by entering into a Physician Participation Agreement ("PPA") with NTSP and by paying a one time fee of $ 1,000 to NTSP. F. 21, 64. Under the PPA, NTSP negotiates non-risk contracts on behalf of its participants. F. 65-67.

NTSP is incorporated under Texas law as a non-profit entity with no members. F. 17, 19; TEX. Occ. CODE ANN. § 162.001 (Vernon 2004). Respondent asserts, that as a matter of Texas corporation law, the participating physicians of NTSP are not "members." Thus, Respondent argues, because NTSP is a memberless organization, it falls outside the definition of a "corporation" under the FTC Act and outside the jurisdiction of the Federal Trade Commission. RPTB at 33.

However, courts and the Commission look to the substance, rather than the form of incorporation, in determining jurisdiction under the FTC Act. See California Dental, 526 U.S. at 767; American Med. Ass'n v. FTC, 638 F.2d 443, 448 (2nd Cir. 1980), aff'd by an equally divided court, without op., 455 U.S. 676 (1982). "The mere form of incorporation does not put [an entity] outside the jurisdiction of the Commission." Community Blood Bank, 405 F.2d at 1019.

The substance here, as shown by the evidence, is that NTSP's participating physicians are "members," as that word is used in the FTC Act's definition of corporation. The physicians pay dues, participate in association activities, and elect the Board of Directors. F. 21, 24, 33. They meet periodically in "general membership meetings" to discuss matters in the common interest of all physicians, which sometimes includes the negotiation of health plan contracts. F. 33, 42. NTSP refers to its physicians as "members" in its internal communications. For example, the Board or administrative staff of NTSP routinely sends communications to its member physicians called "Fax Alerts," which report on matters, including matters relating to the

Further illustrating pecuniary benefits, in communications to its member physicians, NTSP has expressed satisfaction about its success in negotiating the fees to be paid to its member physicians. For example, an October 9, 2000 "Open Letter to the Membership" from Dr. Vance (then President of NTSP) notes that NTSP "started in an attempt to provide a seat at the table of medical business for the individual specialty physicians in Fort Worth," and reports that "NTSP has provided a consistent premium fee-for-service reimbursement to the members." F. 44.

The evidence shows that NTSP has negotiated fees on behalf

Fed'n of Dentists, 101 F.T.C. 57, 161 (1983), rev'd on other grounds, 745 F.2d 1124 (7th Cir. 1984), rev'd, 476 U.S. 447 (1986).

The jurisdictional reach of the Sherman Act (and, thus, the FTC Act), "is coextensive with the broad-ranging power of Congress under the Commerce Clause." Chatham Condo. Ass'n v. Century Village, Inc., 597 F.2d 1002, 1007 (5th Cir. 1979) (citing

Mary Elizabeth within Raleigh, North Carolina. The Court found an effect on interstate commerce based upon the allegations in the complaint that the blocked expansion of Mary Elizabeth would cause the following reverberations in commerce: a reduction in the amount of medicine and supplies purchased from out-of-state sellers; diminished revenues from out-of-state insurance companies or the federal government; a decrease in the management service fee paid to its parent company, an out-of-state corporation; and lost revenues to out-of-state lenders who were expected to finance the planned expansion. 425 U.S. at 744.

In McLain, the Supreme Court considered the effects on commerce of an alleged conspiracy by real estate brokers to fix brokerage rates in New Orleans. The Supreme Court held that the jurisdictional requirement was satisfied by allegations that the conspiracy affected both the sale of real estate to interstate buyers and the financing of those sales by interstate lenders. 444 U.S. at 245. Although noting that such a conspiracy would probably have an effect on "the frequency and terms of residential sales transactions," id. at 246, the Supreme Court did not require the plaintiff to demonstrate or allege any particular effect on the overall flow of realty-related commerce into the state. Instead, the Supreme Court explained that jurisdiction would not be defeated "by plaintiff's failure to quantify the adverse impact of defendant's conduct." Id. at 243. See also Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975) ("once an effect is shown, no specific magnitude need be proved").

Furthermore, "in cases involving horizontal agreements to fix prices or allocate territories within a single State, [the Supreme Court has] based jurisdiction on a general conclusion that the defendants' agreement 'almost surely' had a marketwide impact and therefore an effect on interstate commerce." Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 331 (1991) (quoting Burke, 389 U.S. at 322). In Summit Health, the market that was impacted was "the Los Angeles market." Id. "In Burke, the Supreme Court was willing to assume an effect on interstate commerce where the conduct in question, horizontal market divisions, typically has an anticompetitive effect on interstate commerce." Chatham Condo., 597 F.2d at 1007 (citation omitted).

In addition, the government "need not allege, or prove an actual effect on interstate commerce to support federal jurisdiction." Summit Health, 500 U.S. at 331. Though not required to prove an actual effect on interstate commerce to support federal jurisdiction, in this case, as summarized in Section III.D.2., infra, Complaint Counsel has demonstrated that NTSP negotiated economic terms of non-risk contracts with health insurance payors. These health insurance payors, United Healthcare ("United"), Cigna Healthcare ("Cigna"), and Aetna Health, Inc. ("Aetna"), are all national health plans, headquartered outside of Texas, that sell health care products throughout the United States. F. 101-03, 195, 197, 259, 262. As such, the health insurance providers' businesses are in interstate commerce. Indiana Fed'n of Dentists, 101 F.T.C. at 161. n1 Any increase in fees for physician services paid to physicians, on whose behalf NTSP negotiated increased rates, affects these multi-state companies. F. 102, 104, 196-98, 263-64.

> n1 The Commission's holding that the respondent's anticompetitive activity had a substantial effect upon interstate commerce and, thus, that the Commission had jurisdiction over the complaint was not appealed by the respondent. Indiana Federation of Dentists v. FTC, 745 F.2d 1124, 1132 (7th Cir. 1984).

"When determining whether interstate commerce is affected by an alleged violation courts will often examine both the defendant's relationship with interstate markets and the plaintiff's." Construction Aggregate Transport, Inc. v. Florida Rock Indus., Inc., 710 F.2d 752 (11th Cir. 1983) (citing Rex Hosp., 425 U.S. at 741 (local actions by defendants to block relocation of hospital adversely affects interstate commerce with regard to medicines and supplies purchased by plaintiff hospital)); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 34-35 (5th Cir. 1972) (demise of plaintiffs business had impact on interstate flow of goods he would have sold) (alternative holding); Heille v. City of St. Paul, 671 F.2d 1134, 1137 (8th Cir. 1982) (examining both plaintiff's and defendant's use of goods manufactured out-of-state) (other citations omitted)).

The Complaint in this case was brought by the Federal Trade Commission, and not by the insurance companies. However, the allegations of the Complaint focused on, and the evidence demonstrated, higher rates paid by the insurance cow86ep0 0 0 scn0 Tc0Highabl.9(antract terms

Under the broad jurisdictional scope of "a substantial effect on interstate commerce," the activities of Respondent are in or affect commerce. Thus, the Commission has jurisdiction over NTSP, and the conduct challenged in the Complaint, under Sections 4 and 5 of the FTC Act. 15 U.S.C. § § 44, 45.

B. Burden of Proof

Under Commission Rule of Practice 3.51(c)(1), "an initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1). The Commission amended its Rules of Practice, effective May 18, 2001. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622 (April 3, 2001). Through the amendments, the Commission removed the requirement of Rule 3.51(c)(3) that the initial decision of an Administrative Law Judge ("ALJ") be supported by "substantial" evidence. 66 Fed. Reg. at 17,626. The Administrative Procedure Act, however, requires that an ALJ may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Administrative Procedure Act ("APA") 5 U.S.C. § 556(d). According to Black's Law Dictionary, "probative evidence" means having the effect of proof; tending to prove, or actually proving an issue. "Substantial evidence" is defined in Black's Law Dictionary as such evidence that a reasonable mind might accept as adequate to support a conclusion. At the adjudicative level of these proceedings, any difference between "probative" evidence and "substantial" evidence is not dispositive under these standards. Therefore, all findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence.

The parties' burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the APA, and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17,626 (April 3, 2001). Pursuant to Commission Rule 3.43(a), "counsel representing the Commission . . . shall have the burden of proof, but the proponent of any

factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). See also Steadman v. SEC, 450 U.S. 91, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings).

The government bears the burden of establishing a violation of antitrust law. United States v. E.I. duPont de Nemours & Co., 366 U.S. 316, 334 (1961). "The antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [an anticompetitive] agreement." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984). Accordingly, Complaint Counsel bears the burden of demonstrating that Respondent's actions in this case are anticompetitive.

C. Relevant Market

The relevant market has two components, a geographic market and a product market. H.J., Inc. v. Int'l Tel. & Tel., 867 F.2d 1531, 1537 (8th Cir. 1989). Even in a horizontal price fixing case analyzed under the per se rule, the relevant market must be defined. Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999) ("It is an element of a per se case to describe the relevant market in which we may presume the anticompetitive effect would occur."); Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558-59 (8th Cir. 1998) ("[A] plaintiff alleging a horizontal restraint must at least define the market and its participants.").

The relevant geographic market is the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). The relevant product or service market is "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered." United States v. E.I. du Pont de Nemours & Co., 351

U.S. 377, 404 (1956); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481-82 (1992) (relevant market determined by the choices of products or services available to consumers).

Complaint Counsel argues "that it is unnecessary to define markets or assess market power when conduct is clearly anticompetitive, especially if (as here) there is direct evidence of actual anticompetitive effects (higher prices) as a result of the conduct." Complaint Counsel's Post Trial Reply Brief ("CCPTRB") at 13-14. Cases relied upon by Complaint Counsel hold that market power need not be demonstrated or that anticompetitive effects in the market need not be proved. However, these cases do not hold that the market need not be defined. E.g., Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001) (finding first that plaintiff has adequately defined the market before holding that "actual adverse effect on competition . . . arguably is more direct evidence of market power than calculations of elusive market share figures") (emphasis added); Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1018 (6th Cir. 1999) ("an antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition") (emphasis added). As Complaint Counsel stated in its brief, "in Polygram Holding, the Commission held that it was not necessary to examine evidence of respondent's market power, such as a high market share within a defined market, where there is direct evidence of price-fixing among competitors." CCPTRB at 14 (citing In re Polygram Holding, Inc., 2003 FTC LEXIS 120, at *45 n.26 (July 24, 2003) (emphasis added). Market definition and market power are different issues. No one can dispute, with any credibility, that the necessity to first define a market is the same thing as a requirement to demonstrate power within that already defined market.

Complaint Counsel's expert, Dr. Harry Edward Frech, did not attempt to prove a relevant market. Dr. Frech's testimony on this point could not be more clear:

Q. And by the way, you're not positing any relevant market in this case, isn't that correct?

A. That's correct.

Frech, Tr. 1393-94. Fortuitously for Complaint Counsel, despite its misguided belief that the market need not be defined, evidence introduced at trial demonstrates that the relevant market in this case is physician services available to patients in Fort Worth, Texas (the "Fort Worth area"). See F. 52-63.

The evidence shows that primary care physicians and specialists from the Fort Worth area are important to health insurers, employers, and consumers. F. 52-62. In contracting for health plan services, Fort Worth employers demand significant coverage by physicians who practice in Fort Worth and who admit patients to Fort Worth hospitals. F. 52, 54.

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Tarrant County, Texas. F. 31. NTSP physicians are a significant presence in the Fort Worth area. F. 61. NTSP physicians make up a large percentage of Tarrant County practitioners in many medical specialties: pulmonary disease (80 percent); cardiovascular disease (59 percent); and urology (69 percent). F. 61. NTSP has stated that a health plan attempting to serve the employees of the City of Forth Worth "would not be able to satisfy employer/employee match or network access standards without NTSP physicians participating in the network." F. 63.

Accordingly, the evidence establishes that the relevant market is physician services available to patients in the Fort Worth area.

D. Horizontal Agreement

The FTC Act's prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act, which prohibits agreements in restraint of trade. California Dental, 526 U.S. at 762 n.3. The Commission relies on Sherman Act law in adjudicating cases alleging unfair competition. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 451-52 (1986); In re California Dental Ass'n, 121 F.T.C. 190, 292 n.5 (1996).

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 1. The ban on contracts in restraint of trade extends only to unreasonable restraints of trade, i.e., restraints that impair competition. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

To determine whether Complaint Counsel has established that Respondent's actions violate Section 5 of the FTC Act or Section 1 of the Sherman Act, the critical questions are: (1) whether there was a contract, combination, or conspiracy; and, if so, (2) whether the contract, combination, or conspiracy unreasonably restrained trade.

1. Whether there was a contract, combination, or conspiracy

a. Summary of facts

One of NTSP's functions is to messenger to its member physicians the offers that NTSP receives from health insurance providers of fee-for-service, non-risk contracts ("non-risk contracts"). F. 44. NTSP enters into a Physician Participation Agreement ("PPA") with its member physicians. F. 64. The PPA grants NTSP the right to receive all payor offers and imposes on

managed care contracts on behalf of its participants"). If a non-risk contract offer falls below the minimally acceptable fee schedule, NTSP, on behalf of its member physicians, rejects the offer by determining to not messenger the offer to its member physicians. F. 68, 83.

NTSP cannot and does not bind any member physician to non-risk contracts. F. 71. The PPA gives NTSP no authority to bind physicians. F. 67. Any non-risk contracts which NTSP has decided to accept are messengered by NTSP to NTSP's physicians for their individual decisions on whether or not to join. See F. 71, 72. E.g., F. 189, 326-27.

In the process of negotiations for the provision of physician services under health plans with United Healthcare ("United") and with Aetna Health, Inc. ("Aetna"), NTSP has solicited and obtained powers of attorney from its member physicians, giving NTSP the legal authority to negotiate non-risk contracts with those health plans on behalf of NTSP's member physicians. F. 76-77, 160-61, 302-04. In the process of negotiations with Cigna Healthcare ("Cigna"), NTSP requested that its member physicians sign an authorization form to allow NTSP to serve as its physicians' agent. F. 80, 205.

NTSP has encouraged its physicians to abstain from negotiating direct contracts with health plans and to refer any health plans' offers to NTSP staff in accordance with their participation agreements. F. 78, 168. NTSP's physicians have referred health plans attempting to contract directly with them back to NTSP, with the knowledge that NTSP would reject offers below Board minimum rates. F. 81. Cigna, for example, received forty virtually identical letters from physicians directing Cigna to contact NTSP, rather than the physicians, because NTSP was acting as the physicians' agent in negotiating the non-risk sharing contract in question. F. 206. When United approached individual physicians to offer direct contracts, United was also referred to NTSP. F. 173.

b. Summary of parties' positions

Complaint Counsel argues that the mere existence of NTSP is a combination that satisfies the combination requirement of Section 1 of the Sherman Act. Complaint Counsel's Post Trial Brief ("CCPTB") at 51 (citing Alvord-Polk, Inc. v. Schumacher & Co., 37 F.3d 996, 1009 n.11 (3d Cir. 1994) ("There is . . . authority for the proposition that a trade association, in and of itself, is a unit of joint action sufficient to constitute a section 1 combination."). Complaint Counsel further asserts that the evidence - that NTSP polled and disseminated averaged data on future prices; that NTSP set minimum rates for contracting with health plans based on this data; and that NTSP collected powers of attorney from member physicians - demonstrates that NTSP entered into a "contract, combination or conspiracy" to implement and enforce price and related agreements. CCPTB at 59-60.

Respondent argues that NTSP, as a single entity, is incapable of colluding with itself. Respondent's Post Trial Reply Brief ("RPTRB") at 7-8. Respondent further asserts that, under the Colgate doctrine, NTSP has the legal right to refuse to sign and messenger to its member physicians contractual offers that are

Consolidated Metal Prod., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988)). Simply because NTSP is an organization of otherwise competing physicians does not mean that the concerted action requirement of Section 1 of the Sherman Act has automatically been satisfied. Indeed, in Alvord-Polk, the case relied upon by Complaint Counsel, the Court of Appeals for the Third Circuit held, "concerted action does not exist every time a trade association member speaks or acts. Instead, in assessing

foundation-approved plans are free to set the prices they charge their patients." Arizona v. Maricopa Co. Med. Soc'y, 1979 U.S. Dist. LEXIS 11918, at *2 (D. Az. 1979), aff'd, 643 F.2d 553 (9th Cir. 1980), rev'd on other grounds, 457 U.S. 332 (1982). As described by the Courts of Appeals for the Fourth Circuit and for the Ninth Circuit, the illegal agreements in Maricopa were the agreements by the participating physicians to accept set amounts that had been determined by the foundations as fees in payment for physician services to policyholders. Ratino v. Med. Serv., 718 F.2d 1260, 1270 (4th Cir. 1983); Hahn v. Oregon Physicians' Serv., 868 F.2d 1022, 1027 (9th Cir. 1988).

The Supreme Court in Maricopa found these agreements to be a "combination . . . [that] permitted [the physicians] to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care." 457 U.S. at 356. Thus, the Supreme Court found concerted action without finding that the competing physicians agreed directly with each other to set prices and even where the participating physicians were free to set their own prices. See id. In so holding, the Supreme Court noted that the rule against price fixing "is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases." Id. at 348.

In this case, there is no evidence that one or more of the member physicians agreed with each other to reject a non-risk payor offer; there is no evidence that one or more of the member physicians consulted with each other when responding to polls or making decisions on non-risk payor contracts; and, there is no evidence that any member physician knew what another physician was going to do in response to a non-risk payor offer. F. 73-75. However, Maricopa does not require such evidence.

The evidence in this case does establish that Respondent entered into agreements with physicians to negotiate non-risk contracts on behalf of those physicians and that physicians agreed to accept the rates of the non-risk contracts entered into between NTSP and health care payors. F. 44, 51, 64, 191, 326. Respondent

argues that NTSP physicians at times signed contracts with certain health plans, individually or through other physician groups, at rates different than those agreed to by NTSP. RPTB at 19. However, a price fixing conspiracy need not be perfect or complete in order to be unlawful. In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656 (7th Cir. 2002) ("An

operate. Id. at 681-82. The court concluded that, where the association and the board of directors which set the fees were made up of physicians or osteopaths, health care providers set the fee reimbursement and that, under Maricopa, there was an agreement between competitors. Id. at 687.

If, as in Maricopa, it is unlawful for competing physicians to set maximum prices, then, for even stronger reason, it is unlawful for competing physicians to set, through NTSP, minimum prices. See United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

(iii) Actions on behalf of members

Respondent asserts that NTSP is a single entity, incapable of colluding with itself. RPTRB at 7-8. "It is not sufficient to assert, as defendants do, that a corporation cannot conspire with itself. We must look at substance rather than form." Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476, 480, 481 (4th Cir. 1980) (finding action in concert where "in a real and legal sense, [defendants] are agents of their member physicians"). The substance here is that NTSP, in negotiating economic terms of non-risk contracts, did so for the pecuniary benefit of its member physicians. Supra III.A.1. E.g., F. 84 (NTSP utilizes these minimums determined by polls "when negotiating managed care contracts on behalf of its participants.") (emphasis added).

Respondent is an association of individual competing physicians who have not integrated their medical practices and who have separate and distinct economic interests. F. 18, 35. Where "each doctor practices medicine in his or her own

Colgate, not to sell its products to dealers who would resell them at prices below the suggested prices set by Colgate. Id. at 302-03. As a single corporation, in fact and in form - unlike NTSP - Colgate could not conspire with itself. But here, where NTSP is not an entity with unity of purpose, Colgate is inapplicable. See St. Bernard General Hosp., Inc. v. Hosp. Serv. Ass'n, Inc., 712 F.2d 978, 986-87 (5th Cir. 1983) (Colgate doctrine inapplicable to an association comprised of nine local hospitals).

Trinko is likewise inapplicable to the facts of this case. In Trinko, the Supreme Court addressed conduct by a single firm charged with monopolization under § 2 of the Sherman Act, not with "contract, combination or conspiracy" under § 1 of the Sherman Act. Trinko, 124 S. Ct. at 878. There was no allegation that the defendant had agreed with any other person on prices or on a refusal to deal. See id. The Court in Trinko held that the defendant was not required to make its communication network available to competitors. Id. at 880. The Court's holding reflects the reluctance of courts to use the antitrust laws to force competitors to cooperate with one another, recognizing that such cooperation may instead lead to collusion or reduce incentives to innovate. Id. at 879. Thus, Trinko is inapposite to a case such as this, involving an agreement on prices and concerted action.

Viazis also does not compel a conclusion that NTSP has a fight to refuse to sign and messenger contractual offers that fall outside NTSP's business model. In Viazis, the Fifth Circuit held that a plaintiff cannot show competitive harm "merely by demonstrating that the defendant 'refused without justification to promote, approve, or buy the plaintiff's product.'" 314 F.3d at 766 (quoting Consolidated Metal Products, 846 F.2d at 297). Respondent asserts that this case is similar to Viazis in that NTSP is making a decision on whether or not it wants to be involved in (i.e., "approve") a payor's offer. RPTB at 22. What makes this case different, however, is that the court in Viazis found that there was no evidence that the association had influence over its members' purchasing decisions or that it coerced them into rejecting plaintiff's product. 314 F.3d at 766. Here, there is evidence that NTSP influenced its member physicians to allow NTSP to negotiate economic terms of non-risk contracts on their

behalf and that NTSP rejected offers that fell below Board minimum rates which NTSP had set based upon polling the member physicians. E.g., F. 65-67, 70, 83-89, 127, 155-57, 300, 311-16.

(v) Summary

Complaint Counsel has presented evidence "that tends to exclude the possibility that the alleged conspirators acted independently." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (quotation omitted). The evidence, as detailed in the Findings of Fact and summarized above, establishes that NTSP and its member physicians entered into agreements to allow NTSP to negotiate on behalf of its member physicians; that NTSP established Board minimum rates by polling its member physicians to determine the minimally acceptable rate that its member physicians would accept for physician services; that NTSP used these Board minimum rates in negotiating the economic terms of non-risk contracts with health insurance plans; and that NTSP obtained for its member physicians more favorable rates or contract terms from health insurance payors than the payors initially offered. Accordingly, Complaint Counsel has demonstrated concerted action. The next required inquiry is whether Respondent's actions unreasonably restrained trade.

2. Whether there was an unreasonable restraint of trade

a. Summary of facts

A review of the actions NTSP took in its negotiation of economic terms of non-risk contracts with three health insurance payors - United, Cigna, and Aetna - demonstrates that the concerted action taken by NTSP was an unreasonable restraint of trade. As detailed in the Findings of Fact and summarized below, NTSP, on behalf of its member physicians, negotiated economic terms on non-risk contracts and entered into agreements with health care payors through which NTSP obtained higher rates or more beneficial economic terms than the health care payors initially offered to NTSP. NTSP has not demonstrated valid

procompetitive justifications for this conduct. Thus, as set forth below, Complaint Counsel has demonstrated an unreasonable restraint of trade.

(i) Negotiations of economic terms with health plans

The Medicare RBRVS fee schedule is Medicare's Resource Based Relative Value System ("RBRVS"), a system developed by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for each service rendered to Medicare patients. F. 10. Health plans that contract with physicians on a fee-for-service basis often do so based on a stated percentage of the Medicare RBRVS fee schedule, which provides reimbursement rates for a large number of specific procedures. F. 11. The Medicare RBRVS establishes weighted values for each medical procedure, such that the application of a percentage multiplier enables one to determine the fees for thousands of different services simultaneously. F. 12.

NTSP's polling form, which asks each physician to disclose the minimum price that he or she would accept for the provision of medical services pursuant to a fee-for-0.0049 u.for Tc-0.0049 Twhe minimumminpursuage 6g NT Boardce ceati9(d nu6(alollce simunts. F96. BSe)4 based or ted)]TJT(lollce simun,h[(NT S es

. **United**

In June 1998, NTSP sought to negotiate a non-risk contract with United, a health care payor that had been identified by NTSP as a potential major player in the market place. F. 107-08. To that end, NTSP solicited powers of attorney from its member physicians and recommended that the physicians "refrain from responding to United Healthcare while NTSP's request for agency status is being tabulated." F. 108, 110. In the course of its negotiations with United, NTSP made fee proposals to United and instructed its member physicians not to take any actions with respect to a United contract because NTSP was engaged in negotiations with United on behalf of NTSP's member physicians. F. 112-13. In the fall of 1998, United made an offer to NTSP on a non-risk contract containing rates that were below the rates available to physicians through another IPA, Health Texas Provider Network ("HTPN"). F. 116. NTSP and HTPN had an arrangement whereby NTSP physicians would be allowed to access HTPN's payor offers. F. 117. NTSP proposed to United that NTSP's member physicians contract with United through HTPN, which allowed higher rates than those offered to NTSP by United. F. 118-19. A significant number of NTSP physicians did access United through HTPN. F. 120.

In March 2001, NTSP approached United to negotiate a direct NTSP-United non-risk contract. F. 121. At that time, United already had contracts with approximately two-thirds of NTSP's member physicians, either directly or through other physician organizations such as HTPN. F. 124. Therefore, United concluded that there was no real need to enter into a contract with the remainder of NTSP physicians through an NTSP group contract.

termination of NTSP's participation in the United-HTPN contract, effective October 20, 2001. F. 151.

In addition, NTSP solicited powers of attorney from its member physicians to enable NTSP to negotiate contracts between the physicians and United on the physicians' behalf. F. 160. Under the broad language of the power of attorney, NTSP was authorized to negotiate price terms on behalf of the member physicians: "this power of attorney grants the authority to the agent to act on the undersigned's behalf regarding the foregoing described agreements in all respects, including the authority to negotiate the terms of, enter into, execute, amend, modify, extend or terminate any such agreements." F. 161.

United learned about NTSP's efforts to solicit powers of attorney from NTSP's member physicians. F. 162. This effort, in conjunction with NTSP's termination of 108 physicians participating in United via HTPN and the concerns expressed by the City of Fort Worth to United about losing NTSP physicians from United's provider network, induced United to change its network strategy for Tarrant County. F. 162. Initially, United tried to recruit the terminated NTSP member physicians individually. F. 163. United directly offered those physicians the opportunity to return to a United contract at the same reimbursement rates that they had received under the HTPN-United agreement prior to their termination by NTSP. F. 164.

NTSP sent another Fax Alert to its member physicians in August 2001. In it, NTSP explained that it had been receiving calls from member physicians regarding direct offers that they had received from United; repeated NTSP's assessment that the United offer fell below Board minimums; noted that NTSP had already received 107 executed powers of attorney from its member physicians "to act on their behalf in regard to all contracting activity between themselves and United Healthcare"; invited the submission of executed powers of attorney by other member physicians; and advised member physicians who had already signed powers of attorney to inform United representatives that NTSP was their contracting agent and to instruct United "to contact NTSP directly." F. 165-68. NTSP

promised its member physicians that it would continue to pursue a direct contract with United that "meets or exceeds" the fee schedule minimum rates set by NTSP membership. F. 166.

United was not successful in signing contracts directly with NTSP physicians. United's initial direct contract invitation attracted only a few physicians, even though the physicians were offered the same rates that they previously received through HTPN. F. 171-72. Some of these physicians who rejected United's offer explicitly referred United back to NTSP as their negotiating agent. F. 173.

After receiving little interest in its initial direct offer to the terminated NTSP physicians, United tried to work through other Fort Worth IPAs or large medical groups. United offered 125% of 2001 Tarrant County RBRVS for HMO and 130% of 2001 Tarrant County RBRVS for PPO to two other IPAs, All Saints Affiliates and Medical Clinic of North Texas. F. 170. Next, United offered NTSP a rate of 125% of 2001 Tarrant RBRVS for HMO and 130% Tarrant RBRVS for PPO. F. 185.

NTSP and United signed a contract for 125% of 2001 Tarrant County RBRVS for HMO and 130% of 2001 Tarrant County RBRVS for PPO, effective November 1, 2001. F. 186. On November 1, 2001, NTSP sent the contract to its member physicians to opt in or opt out, indicating that the contract was a result of negotiations and that the 125% of the 2001 Tarrant County RBRVS for the HMO was "at the average level of acceptable reimbursement," but that the PPO rate of 130% was below the acceptable average reimbursement levels determined by the NTSP Board based on the poll results. F. 189. Of NTSP's member physicians, for HMO, 24% accepted, and for PPO, 23% accepted the NTSP-United contract. F. 191.

. **Cigna**

Cigna purchased Healthsource, Inc. ("Healthsource") in late 1997 and informed physicians in Healthsource's network that their contracts with Healthsource would be assigned to Cigna. F. 201-02. NTSP physicians who had contracts with Healthsource, at

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representing fifty-two doctors in separate practice groups, refusing assignment and stating that NTSP would be their representative and agent in negotiations with Cigna. F. 204-06.

Cigna and NTSP entered into a Letter of Agreement ("LOA") in October 1999, through which Cigna agreed to reimburse NTSP specialists, with the exception of cardiologists/CV [cardiovascular] surgeons, gastroenterologists, urologists, oncologists, and podiatrists, on a fee schedule equal to 125% of

NTSP's physicians would only contract through NTSP and would not agree to contract individually with Cigna. F. 206, 208.

Under the contract between Cigna and NTSP that was current at the time of trial, April 2004, PPO reimbursement is at a rate of [redacted] and HMO reimbursement is at a rate of [redacted]. F. 250 (in camera). Cigna agreed to allow NTSP's primary care physicians to opt in to the contract on a fixed amount per patient basis and to provide for the future inclusion of specialists who had previously been carved out of the Cigna HMO contract. F. 246. There is insufficient evidence to determine if NTSP's demand of these rates was based on Board minimums or poll results.

. **Aetna**

Prior to 2000, many NTSP physicians served Aetna patients in the Fort Worth area through contracts that NTSP's physicians had with Medical Select Management ("MSM"), an IPA to which Aetna had delegated almost all medical risk for HMO care. F. 267, 269, 273-74. In 1999 and again in 2000, NTSP approached Aetna to obtain a direct NTSP-Aetna contract that would not involve MSM. F. 276-77. Initially, NTSP and Aetna tried to negotiate a risk contract, but after those negotiations reached a dead end, in October 2000, their negotiations shifted to non-risk, fee-for-service HMO and PPO products. F. 286.

In their negotiations on the terms of a non-risk contract, Aetna initially offered to NTSP rates that were based on a reference

In the midst of negotiating the HMO rates with Aetna, NTSP decided to re-poll its member physicians "on the acceptability of the present Aetna offering." F. 311. Shortly thereafter, NTSP informed its member physicians that "the membership's message that a 125% of current Medicare HMO fee schedule is required has been transmitted to Aetna and a response on this final contractual item is expected within the next 24 to 36 hours." F. 316. NTSP further informed its member physicians that NTSP continued to act as their agent and instructed its member physicians to refer all contacts and materials received from Aetna to NTSP directly. F. 316.

During these negotiations, Aetna was subjected to pressure to reach an agreement with NTSP. In June 2000, NTSP threatened that its member physicians might immediately end their participation in the Aetna-MSM arrangement. F. 278. NTSP also sought and received approximately 180 powers of attorney from its member physicians, authorizing NTSP to act for those physicians in all transactions relating to MSM and to represent its member physicians in any negotiations with Aetna, regarding any term. F. 304. Using the authority provided by the powers of attorney, in November 2000, as previously threatened, NTSP terminated its member physicians' participation in the Aetna-MSM arrangement, citing breach of contract by MSM. F. 297. Based on the language of the powers of attorney and other NTSP statements to Aetna, Aetna believed that it could not negotiate directly with NTSP physicians. F. 306.

Ultimately, Aetna agreed to NTSP's terms. On December 19, 2000, Aetna wrote to NTSP and proposed for PPO, 140% of current Medicare RBRVS, anesthesia at $ 45.00; for HMO, 125% of current Medicare RBRVS, anesthesia at $ 43.00. F. 323. NTSP responded, stating that NTSP would send out a notice to its member physicians notifying them that the PPO and HMO offers were within the messenger minimums. F. 324. NTSP forwarded the NTSP-Aetna agreement to its member physicians. F. 326. One hundred and eighty-eight member physicians agreed to the NTSP-Aetna contract. F. 326.

c. Analysis

Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Despite its broad language, Section 1 has long been interpreted to outlaw only those restraints that are "unreasonable." Maricopa, 457 U.S. at 343. The Supreme Court has set forth three methods for analyzing the reasonableness of a restraint on trade: (1) per se analysis, for obviously anticompetitive restraints; (2) quick look analysis, for those with some procompetitive justification; and (3) the full "rule of reason," analysis for restraints whose net impact on competition is particularly difficult to determine. Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508-09 (4th Cir. 2002). In California Dental, the Supreme Court held, as demonstrated by the circumstances before it, "there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." Id. at 780-81. Instead, what is required is to look to "the circumstances, details, and logic of a restraint." Id. at 781. The three methods are best viewed as a continuum, on which the "amount and range of information needed" to evaluate a restraint varies, depending on how "highly suspicious" and how "unique" the restraint is. Continental Airlines, 277 F.3d at 509 (citing 11 Herbert Hovenkamp, Antitrust Law P 1911a (1998); California Dental, 526 U.S. at 779-81).

In California Dental, the challenged restraint of trade -- restrictions on both discount and nondiscount advertising -- "fail[ed] to present a situation in which the likelihood of anticompetitive effects [was] comparably obvious." Id. at 771. The Supreme Court held that, where competing claims about the effects of the professional advertising restrictions were plausible, the obvious anticompetitive effect that triggers abbreviated analysis had not been shown. Id. at 778. Thus, the Supreme Court remanded the case for a more thorough inquiry into the consequence of the challenged restraints. Id. at 759, 781.

However, where the effects of an agreement are "intuitively obvious" and "easily ascertained," California Dental, 526 U.S. at 759, 770, no elaborate study of the industry is needed to establish the illegality of the agreement. Dagher v. Saudi Refining Inc., 369 F.3d 1108, 1116 (9th Cir. 2004).

Agreements among competitors to fix or set prices have been historically condemned as per se illegal. Socony-Vacuum, 310 U.S. at 218; Maricopa, 457 U.S. at 344 ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) ("It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable.") (citations omitted); Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978) (noting that "price is the 'central nervous system of the economy'" and holding that "an agreement that 'interferes with the setting of price by free market forces' is illegal on its face") (citation and alteration omitted).

Courts, after California Dental, have applied the per se analysis to horizontal price fixing. E.g., Dagher, 369 F.3d at 1116 n.7 ("Because we hold that the plaintiffs have made a sufficient showing with respect to the illegality of the alliance's price fixing system under the per se rule, we need not decide whether that scheme would survive 'quick look' review."); Freedom Holdings Inc. v. Spitzer, 357 F.3d 205, 226 (2nd Cir. 2004); Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1150-54 (9th Cir. 2003). "Traditional 'hard-core' price fixing remains per se unlawful under the seminal case United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-24 (1940), and its progeny." Todd, 275 F.3d at 198.

Courts employ the quick look approach when a restraint of trade is not illegal per se, but nevertheless has such obvious anticompetitive effects that a "full scale" rule of reason analysis is not necessary. California Dental, 526 U.S. at 770. "When there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the

anticompetitive character of such an agreement.'" NCAA v. Bd. of Regents, 468 U.S. 85, 109 (1984).

Regardless of what method of analysis is used, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." NCAA, 468 U.S. at 104. "'Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition.'" California Dental (quoting NCAA, 468 U.S. at 104). The analytical focus is on what conclusions regarding the competitive impact of a challenged restraint can confidently be drawn from the facts demonstrated by the parties. See California Dental, 526 U.S. at 779-81; NCAA, 468 U.S. at 103-04.

In California Dental, the complaint alleged that an association of dentists had unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising

Also, in California Dental, the restrictions on advertising, at least on their face, were designed to avoid false or deceptive advertising and thus "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." 526 U.S. at 771. Respondent asserts that NTSP's conduct might plausibly be thought to have a net procompetitive effect because NTSP's conduct and business model have strong procompetitive effects and efficiencies. RPTB at 1. Where a defendant asserts that the challenged conduct has procompetitive effects, the defendant bears the burden of establishing those procompetitive effects. California Dental, 526 U.S. 775 n.12. Courts evaluate whether claimed efficiencies are plausible, NCAA, 468 U.S. at 114; Maricopa, 457 U.S. at 353, and whether the challenged conduct is reasonably necessary to achieve the legitimate objective identified by a defendant. Broadcast Music, Inc. v. CBS,

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E. Remedy

1. Standards

Pursuant to Section 5 of the Federal Trade Commission Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such . . . corporation to cease and desist from using such-method of competition or such act or practice." 15 U.S.C. § 45(b); FTC v. Nat'l Lead Co., 352 U.S. 419, 428 (1957) (Commission is authorized "to enter an order requiring the offender to 'cease and desist' from using such unfair method."). The remedy selected must have a "reasonable relation to the unlawful practices found to exist." Nat'l Lead Co., 352 U.S. at 428.

In this case, Complaint Counsel has proven that Respondent engaged in horizontal price fixing through its negotiation, on behalf of its member physicians, of economic terms of non-risk contracts with health plan payors for the provision of physician services. The remedy necessary to bring an end to this unfair method of competition is an order requiring Respondent to cease and desist from collective price fixing in its negotiation of non-risk contracts. In addition, to the extent that there are any existing, current non-risk contracts between NTSP, negotiated on behalf of its member physicians, and any health care payor, Respondent must take actions, as set forth in the Order, to allow termination of any such existing contracts.

2. Provisions

Complaint Counsel's proposed order seeks a provision requiring Respondent to cease and desist from entering into an agreement among physicians "to deal, refuse to deal, or threaten to refuse to deal with any payor" and "not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent." Complaint Counsel's Proposed Order, Sections II.A.2, 4. Complaint Counsel explains that this provision is "intentionally broad so as to preclude respondents from engaging both in the precise conduct found

unlawful in this action and 'like and related' conduct." CCPTB at 77. See also Complaint Counsel's Opening Statement, Tr. at 60 (Complaint Counsel seeks an order "broadly requiring NTSP to messenger contracts.").

This broad request could have the effect of compelling Respondent to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to Respondent, its member physicians, and its patients. A mandatory injunction, which compels a party to act, is an extraordinary remedy that should be granted only in compelling circumstances. Citizens Concerned for Separation of Church and State v. City and County of Denver, 628 F.2d 1289, 1299 (10th Cir. 1980); Justin Indus., Inc. v. Choctaw Sec., L.P., 747 F. Supp. 1218, 1220 (N.D. Tex. 1990), aff'd, 920 F.2d 262 (5th Cir. 1990). Sufficient compelling circumstances have not been demonstrated in this case.

Moreover, Complaint Counsel's authority cited in support of its proposed relief is based only on consent decrees. CCPTB at 76. "The circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context." United States v. E.I. du Pont de Nemours, 366 U.S. 316, 330 n.12 (1961). Sections II.A.2 and 4 of Complaint Counsel's Proposed Order, which are not narrowly tailored to remedy the violation of law found to exist, are broader than required to remedy the unlawful conduct. A provision that could require Respondent to messenger all contracts or become a party to contracts sent to it by payors will not be ordered. Such overreaching is unnecessary. Accordingly, Sections II.A.2, 4 of Complaint Counsel's proposed order are not ordered.

In addition, any remedy must not contravene Texas health care laws, other Texas law, or federal law. E.g., 28 TEX. ADMIN. CODE § 3.3703 (laying out contracting requirements for PPOs concerning exclusivity, savings inducements, hold-harmless clauses, prompt payment, continuity of care, disclosure of opinions to patients, disclosure of economic profiling criteria, disclosure of quality assessment criteria, and termination); 29 TEX. ADMIN. CODE § 21.2817 (relating to clean claims and prompt payment); TEX. INS. CODE art. 3.70-3C (same issues as

TEX. ADMIN. CODE § 3.3703). The Supre3.8(ocnfurt rec)46cnently2).

6. The Federal Trade Commission has jurisdiction over Respondent and over the subject matter of this proceeding,

F. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

G. "Preexisting contract" means a contract that was in effect on the date of receipt by a payor that is a party to such contract of notice sent by Respondent, pursuant to Paragraph IV.A.3 of this Order, of such payor's right to terminate such contract.

H. "Principal address" means either (1) primary business address, if there is a business address, or (2) primary residential address, if there is no business address.

I. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which:

1. all physicians that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangemen52((8viui6Eh*0.2 (acsdl (stsinterensu0.0a)42

incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:

a. the provision of physician services for a fixed amount per patient, per month paid by payors;

b. the provision of physician services for a predetermined percentage of premium or revenue from payors;

c. the use of significant financial incentives for physicians who participate to achieve, as a group, specified cost-containment goals; or

d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and

2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

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

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians to negotiate on behalf of any physician with any payor, regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms;

B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning the terms or conditions, including price terms, on which any physician is willing to deal with a payor;

C. Attempting to engage in any action prohibited by Paragraph II.A or II.B, above; and

D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that nothing in this Order shall prohibit any agreement involving or conduct by Respondent that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement.

PROVIDED, FURTHER, that nothing contained in this Order shall prohibit Respondent from communicating purely factual information describing the terms and conditions of any payor offer, including objective comparisons with terms offered by other payors, or from expressing views relevant to various health plans. "Objective information" or "objective comparison"

1. each physician who participates, or has participated, in Respondent since January 1, 2000;

2. each officer, director, manager, and employee of Respondent; and

3. the chief executive officer of each payor with which Respondent has a record of having been in contact since January 1, 2000, regarding contracting for the provision of physician services.

B. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, pursuant to a fee-for-service agreement at the earlier of:

1. receipt by Respondent of a written request from a payor to terminate such contract; or

2. the earliest termination or renewal date (including any automatic renewal date) of such contract.

Provided, however, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year after the date on which the Order becomes final, if prior to such termination or renewal date, (a) the payor submits to Respondent a written request to extend such contract to a specific date no later than one (1) year after the date this Order becomes final, and (b) Respondent has determined not to exercise any right to terminate; provided further, that any payor making such request to extend a contract retains the right, pursuant to Paragraph IV.B. 1 of this Order, to terminate the contract at any time.

C. Within ten (10) days after receiving a written request from a payor, pursuant to Paragraph IV.B.1 of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician participating in Respondent as of the date

D. For a period of three (3) years after the date this Order becomes final:

1. distribute by first-class mail, return receipt requested, a copy of this Order to:

a. each physician who begins participating in Respondent, and who did not previously receive a copy of this Order from Respondent, within thirty (30) days of the time that such participation begins;

b. each payor who contracts with Respondent for the provision of physician services, and who did not previously receive a copy of this Order from Respondent, within thirty (30) days of the time that such payor enters into such contract;

c. each person who becomes an officer, director, manager, or employee of Respondent and who did not previously receive a copy of this Order from Respondent, within thirty (30) days of the time that he or she assumes such responsibility with Respondent;

2. annually publish a copy of this Order in an official annual report or newsletter sent to all physicians who participate in Respondent, with such prominence as is given to regularly featured articles.

E. File a verified written report within sixty (60) days after the date this Order becomes final, and annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:

1. a detailed description of the manner and form in which Respondent has complied and is complying with this Order; and

2. copies of the return receipts required by

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VII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

Complaint

IN THE MATTER OF

SUPERIOR MORTGAGE CORP.

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

C

C

This consent order, among other things, prohibits Respondent Superior Mortgage Corp., a New Jersey mortgage lender, from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers, and from violating the Safeguards Rule. The consent order also requires the respondent, for ten years, to secure biennial assessments and reports to ensure that its security program complies with the Safeguards Rule and is sufficiently effective to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected.

For the Commission: *C*
h and *S*
For the Respondent: *h* *S* *h* *h*
h *h*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Superior Mortgage Corp. has violated the provisions of the Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title V of the Gramm-Leach-Bliley Act ("GLB Act"), 15 U.S.C. § 6801 ., and 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 Superior Mortgage Corp. ("Superior Mortgage") is a New Jersey corporation with its principal office or place of business at 1395 Route 539, Tuckerton, New Jersey 08087. In

addition to conducting business from its headquarters location in Tuckerton, Superior Mortgage conducts business through forty (40) branch offices located in ten different states, as well as through six separate websites.

2. Respondent is a direct lender that specializes in residential mortgage loans. As such, it is a "financial institution," as that term is defined in Section 509(3)(A) of the GLB Act, and is therefore subject to the requirements of the Safeguards Rule.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. ' 44.

SAFEGUARDS RULE

4. The Safeguards Rule, which implements Section 501(b) of the GLB Act, was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including:

   A. Designating one or more employees to coordinate the information security program;

   B. Identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks;

   C. Designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures;

D. Overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and

E. Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

VIOLATIONS OF THE SAFEGUARDS RULE

5. Through its offices and websites, respondent has collected sensitive customer information in connection with the mortgage application process, including customer names, Social Security numbers, credit histories, and bank and credit card account numbers. Since the Rule's effective date until at least May 2005, respondent failed to implement reasonable policies and procedures to protect the security and confidentiality of the information it collects.

6. For example, respondent failed to (a) assess risks to its customer information until more than a year after the Rule's effective date; (b) institute appropriate password policies to control access to company systems and documents containing sensitive customer information; and (c) encrypt or otherwise protect sensitive customer information before sending it by email. Respondent also failed to take reasonable steps to ensure that its service providers were providing appropriate security for customer information and addressing known security risks in a timely fashion.

7. By failing to implement reasonable security policies and procedures, respondent engaged in violations of the Safeguards Rule, including but not limited to:

A. Failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information;

12. Through the means described in paragraph 11, respondent has represented, expressly or by implication, that the personal information it obtained from consumers through www.supmort.com was encrypted using SSL from the time of submission until receipt by respondent.

13. In truth and in fact, the personal information obtained from consumers through www.supmort.com was not encrypted using SSL from the time of submission until it was received by respondent. Instead, respondent encrypted sensitive personal information only while it was being transmitted between a visitor's web browser and the website's server (using SSL); once the information reached the server, it was decrypted and emailed to respondent's headquarters and branch offices in clear, readable text. Therefore, the representation set forth in paragraph 12 was false or misleading.

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

THEREFORE, the Federal Trade Commission this 14th day of December, 2005, has issued this complaint against respondent.

EXHIBIT A

Gross Monthly Income $

Total Liquid Assets (include cash, bank accounts, etc) $

Fax 1-609-294-0717

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 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 Respondent with violations of the Federal Trade Commission Act, 15 U.S.C. § 45 and the Federal Trade Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, (a) the extent to which personal information submitted by consumers through respondent's websites is protected by SSL encryption, or (b) the extent to which respondent maintains and protects the privacy, confidentiality, or security of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondent shall not, directly or through any corporation, subsidiary, division, website, or other device, violate any provision of the Gramm-Leach-Bliley Act's ("GLB Act") Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314.

In the event the Safeguards Rule is hereafter amended or modified, respondent's compliance with this Rule as so amended or modified shall not be a violation of this order.

III.

IT IS FURTHER ORDERED that, in connection with its compliance with the Safeguards Rule, respondent shall obtain an assessment and report (an "Assessment") from a qualified, objective, independent third-party professional, using procedures and standards generally accepted in the profession, within one hundred and eighty (180) days after service of the order, and biennially thereafter for ten (10) years after service of the order, that:

A. sets forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;

B. explains 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. explains how such safeguards meet or exceed the protections required by the Safeguards Rule; and

D. certifies that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of nonpublic personal information is protected and, for biennial reports, has so operated throughout the reporting period.

Each Assessment shall be prepared by a person qualified as a Certified Information System Security Professional (CISSP); a person qualified as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security Institute (SANS); or by a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondent shall provide the first Assessment, as well as all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, whether prepared by or on behalf of respondent, relied upon to prepare such 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. Respondent shall retain all subsequent biennial Assessments until the order is terminated and shall retain all materials relied upon in preparing each such Assessment, as listed above, for a period of three (3) years after the date of preparation of such Assessment.

Respondent shall provide such subsequent Assessments and related materials to the Associate Director of Enforcement within ten (10) days of request.

IV.

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 supervisory responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notEnto all cs1.48sT62[iy chriange thin eel

VI.

IT IS FURTHER ORDERED that respondent shall within one hundred eighty (180) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order. This report shall include a copy of the initial biennial Assessment required by Part III of this order.

VII.

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 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

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted a consent agreement, subject to final approval, from Superior Mortgage Corp. ("Superior Mortgage"). Superior Mortgage is a mortgage lender specializing in residential mortgaMortortg6*0.00cessa

safeguards' key controls, systems, and procedures;
- Overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and
- Evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

The Commission's complaint alleges that Superior Mortgage failed to implement the protections required by the Safeguards Rule and, specifically, that it failed to: (1) assess risks to its customer information until more than a year after the Safeguard Rule's effective date; (2) institute appropriate password policies to control access to company systems and documents containing sensitive customer information; (3) encrypt or otherwise protect sensitive customer information before sending it by email; and (4)

Mortgage from violating the Safeguards Rule. Part III of the proposed order requires that Superior Mortgage obtain, within 180 days after being served with the final order approved by the Commission, and on a biennial basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that: (1) Superior Mortgage has in place a security program that provides protections that meet or exceed the protections required by the Safeguards Rule, and (2) Superior Mortgage's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of nonpublic personal information has been protected. This provision is substantially similar to comparable provisions obtained in prior Commission orders under the Safeguards Rule and Section 5 of the FTC Act. *S*

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY, AND THE GILLETTE COMPANY

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

C

C *S*

This consent order addresses the acquisition by Respondent The Procter & Gamble Company – one of the largest and most diversified suppliers of consumer products in the world – of Respondent The Gillette Company, another large supplier of consumer products. The order, among other things, requires the respondents to divest Gillette's Rembrandt® at-home teeth whitening business to a Commission-approved acquirer, within three months.

II. RESPONDENT GILLETTE

5. Respondent Gillette is a corporation organized, existing, and doing business under the laws of Delaware with its office and principal place of business located at the Prudential Tower Building, Suite 4800, Boston, Massachusetts, 02199.

6. Respondent Gillette, among other things, is engaged in the research, development, manufacture, distribution, and sale of consumer products, including at-home teeth whitening products, adult battery-powered toothbrushes, rechargeable toothbrushes, and antiperspirants/deodorants.

7. Respondent Gillette had worldwide net sales of approximately $10.5 billion in its 2004 fiscal year.

8. Respondent Gillette is, and at all times 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.

antiperspirants/deodorants.

11. At-home teeth whitening products whiten teeth by bleaching them with either hydrogen or carbamide peroxide. These products are typically sold over-the-counter through food, drug, club, and mass merchandise channels and are marketed to be used by consumers at home. There are several different types of at-home teeth whitening products, including whitestrips, gels, pens and sticks. Whitestrips and gel products account for the vast majority of sales of at-home teeth whitening products in the United States.

12. Adult battery-powered toothbrushes are usually powered by AA or AAA batteries and either have oscillating or pulsating brush heads. The majority of adult battery-powered toothbrushes are sold for between $5 and $8, and the batteries and brush heads can be replaced on some, but not all, products. Adult battery-powered toothbrushes are typically marketed as upgrades over manual toothbrushes, while at the same time more affordable than sophisticated rechargeable toothbrushes.

13. Rechargeable toothbrushes contain a rechargeable battery that powers high-speed oscillating, pulsating, or vibrating brush heads. They have a separate recharging unit that needs to be plugged into an electrical outlet to recharge the battery contained in the toothbrush. Brush heads for these products are almost always replaceable. Rechargeable toothbrushes typically range in price from $20 to $150, and are marketed as the premium brushing option for consumers.

14. Antiperspirants/deodorants are applied under the arms to enhance personal hygiene, and are typically combined together for complete under-arm protection. Antiperspirants/deodorants are sold to specific gender-based segments in various forms, including roll-ons, traditional solids, invisible solids, gels, and aerosols.

15. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in each of the relevant lines of commerce.

V. THE STRUCTURE OF THE RELEVANT MARKETS

16. The relevant market for the manufacture, distribution, and sale of at-home teeth whitening products in the United States is highly concentrated whether measured by the Herfindahl-Hirschman Index ("HHI") or two- or four-firm concentration ratios. Respondents Procter & Gamble and Gillette are the two largest suppliers of at-home teeth whitening products in the United States and are the only significant suppliers of branded at-home teeth whitening strips. Procter & Gamble is the market leader with its Crest Whitestrips® and Crest Night Effects® products, while Gillette is the second leading supplier with its Oral-B® Rembrandt® and Rembrandt® products. Together, they account for over 80% of the sales in this highly concentrated market. Accordingly, the Acquisition would significantly increase the concentration level in the United States market for at-home teeth whitening products, leaving Procter & Gamble as the dominant supplier. Respondents are actual competitors in this relevant market.

17. The relevant market for the research, development, manufacture, distribution, and sale of adult battery-powered toothbrushes in the United States is highly concentrated whether measured by HHI or two- or four-firm concentration ratios. Respondents Procter & Gamble and Gillette are the two largest suppliers of adult battery-powered toothbrushes in the United States. Procter & Gamble markets its adult battery-powered products under the Crest® SpinBrush™ brand name, while Gillette sells its adult battery-powered products under the Oral-B® brand name. Together, Respondents account for over 85% of this highly concentrated market. Accordingly, the Acquisition would significantly increase the concentration level in the United

States market for adult battery-powered toothbrushes, leaving Procter & Gamble as the dominant supplier. Respondents are actual competitors in this relevant market.

18. The relevant market for the research, development, manufacture, distribution, and sale of rechargeable toothbrushes in the United States is highly concentrated whether measured by HHI or two- or four-firm concentration ratios. Respondent Gillette and Philips Oral Health Care, Inc. ("Philips") are the only significant suppliers of rechargeable toothbrushes in the United States. Gillette markets a full line of rechargeable toothbrush products (, low-end to high-end) under the Oral-B® Braun® brand name, while Philips sells mostly mid to high-end products under the Philips® Sonicare® brand name. Respondent Procter & Gamble and Philips are joint venture partners in the development and marketing of the Crest® Sonicare® IntelliClean System ("IntelliClean"), the first integrated toothbrush/dentifrice product (, toothbrush that self dispenses toothpaste) sold in the United States. Pursuant to the Acquisition, Respondent Procter & Gamble would acquire the only significant competitor to its joint venture partner, Philips.

19. The relevant market for the research, development, manufacture, distribution, and sale of men's antiperspirants/deodorants in the United States is highly concentrated whether measured by the HHI or two- or four-firm concentration ratios. Respondents are the two largest suppliers of men's antiperspirants/deodorants in the United States. Procter & Gamble markets its men's antiperspirants/deodorants under the Old Spice® brand name, while Gillette sells its products under the Right Guard® and Gillette Series® brand names. Together, Respondents account for over 50% of the sales in this highly concentrated market. Accordingly, the Acquisition would significantly increase the concentration level in the United States market for men's antiperspirants/deodorants, leaving Procter & Gamble as the dominant supplier. Respondents are actual competitors in this relevant market.

VI. ENTRY CONDITIONS

20. Entry into any relevant line of commerce would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition set forth in Paragraph 21 below. Entry into any of these markets would require the investment of extremely high sunk costs to, among other things, develop products, establish a brand name, and provide promotional funding and advertising to support the product(s), which would be difficult to justify given the market structure in the affected markets. Additionally, patents and other intellectual property create significant barriers to entry in the at-home teeth whitening, adult battery-powered, and rechargeable toothbrush markets. Even if a new entrant were willing to take on such investments, it would also face the difficult task of convincing retailers to carry its products. As a result, new entry into any of these markets sufficient to achieve a significant market impact within two years is unlikely.

VII. EFFECTS OF THE ACQUISITION

21. 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, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Respondents Procter & Gamble and Gillette for the research, development, manufacture, distribution, and sale of at-home teeth whitening products, adult battery-powered toothbrushes, and men's antiperspirants/deodorants in the United States;

b. by reducing the merged entity's incentives to adequately support and promote the IntelliClean product and joint venture;

c. by increasing the ability of the merged entity to unilaterally raise prices of at-home teeth whitening products, adult battery-powered toothbrushes, and men's antiperspirants/deodorants in the United States; and

d. by reducing the merged entity's incentives to improve service or product quality for at-home teeth whitening products, adult battery-powered toothbrushes, rechargeable toothbrushes, and men's antiperspirants/deodorants in the United States.

VII. VIOLATIONS CHARGED

22. The Acquisition described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

23. The Acquisition described in Paragraph 9, 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-ninth day of September, 2005, issues its Complaint against said Respondent.

1. Respondent P&G is a corporation organized, existing and doing business under and by virtue of the laws of the state of Ohio, with its offices and principal place of business located at One Procter & Gamble Plaza, Cincinnati, Ohio 45202.

2. Respondent Gillette 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 Prudential Tower, Boston, Massachusetts 02199.

3. 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. "P&G" means The Procter & Gamble Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by P&G, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, P&G shall include Gillette.

B. "Gillette" means The Gillette Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Gillette, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

C. “Respondents” means P&G and Gillette, individually and collectively.

D. “Church & Dwight” means Church & Dwight Co., Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, having its principal place of business located at 469 North Harrison Street, Princeton, NJ 08543.

E. “Philips” means Philips Oral Healthcare, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its offices and principal place of business located at 35301 Center Street, Snoqualmie, Washington 98065, together with its affiliates.

F. "Acquisition" means the acquisition contemplated by the “Agreement and Plan of Merger” dated as of January 27,

Divestiture Products or the IntelliClean Products, respectively.

J. "APDO Assets" means all of Respondent Gillette's rights, title and interest in and to all assets related to Respondent Gillette's worldwide business related to the APDO Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the APDO Products including, without limitation, the following:

Trademarks Soft&Dri® and Dry Idea® or any variations or derivatives of such Product Trademarks; *h*, that, pending Commission approval of the divestiture of the APDO Assets, "APDO Products" includes Products using the Product Trademarks Soft&Dri® and Dry Idea® for the purposes of any requirements under this Order or the Order to Maintain Assets to maintain assets; *h*, that "APDO Products" does not include Products Developed, in Development, manufactured, distributed, marketed or sold by Respondent Gillette prior to the Acquisition that were marketed or sold or to be marketed or sold as Products using the Product Trademark Gillette Series® or any variations or derivatives of such Product Trademark.

N. "APDO Releasees" means the Commission-approved Acquirer for the APDO Products or any entity controlled by or under common control with such Commission-approved Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Commission-approved Acquirer, or of such Commission-approved Acquirer-affiliated entities.

O. "Closing Date" means as to each Divestiture Product the date on which Respondent (or a Divestiture Trustee) closes on the divestiture of the assets relevant to such Divestiture Product pursuant to this Order.

P. "Commission-approved Acquirer" means the following: (1) an entity that is specifically identified in this Order to acquire particular assets that the Respondents are 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; or (2) an entity approved by the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest,

7. information that does not relate to the Divestiture Product(s) or the IntelliClean Products.

R. “Contract Manufacture” means the manufacture of a Divestiture Product or the IntelliClean Products to be supplied by Respondent or a Designee.

S. “Designee” means any entity other than Respondents that will manufacture a Divestiture Product for a Commission-approved Acquirer.

T. “Development” means formulation, design (including packaging design), process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, Product approval and registration. “Develop” means to engage in Development.

U. “Direct Cost” means a cost not to exceed the cost of direct labor and direct material used to provide the relevant assistance or service. “Direct Cost” to the Commission-approved Acquirer’s for its use of any of the Respondents’ employees shall not exceed the average hourly wage rate for such employee.

V. “Divestiture Product” means a Product that is the subject of a divestiture under this Order, the APDO Products, the Rembrandt Products, or the SpinBrush Products, individually and collectively.

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

X. “Domain Name” means the domain name(s) (universal resource locators) and registration(s) thereof, issued by any entity 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 related to the Divestiture Products.

Y. "Governmental Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, governmental agency, or governmental commission, or any judicial or regulatory authority of any government.

Z. "High Volume Retail Account" means any retailer or distributor whose annual and/or projected aggregate annual sales in units or in dollars of a Divestiture Product in the United States on a company-wide level was or is among the top twenty highest of such sales within the United States 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; or 3) the end of the last quarter that immediately preceded the Closing Date for the relevant assets.

AA. "IntelliClean Products" means all Products Developed, in Development, manufactured, distributed, marketed or sold pursuant to the IntelliClean Agreement. This includes those toothbrushes marketed using the Sonicare® trademark and any variations or derivatives of such trademark and the dentifrice Product used in connection with the rechargeable toothbrush(es) that are a part of the IntelliClean Products.

BB. "IntelliClean Agreementevelo Agreement (ONYX Advanced)" between Philips Oral Healthcare, Inc. and The Procter & Gamble Company dated as of August 1, 2003 including all amendments, exhibits, attachments, agreements, and schedules thereto entered into prior to the public announcement of the Acquisition, including, but not limited to, the "P&G/Philips Joint Evaluation Agreement Project

ONYX" dated October 23, 2001. The IntelliClean Agreement is attached to this Order and contained in non-public Appendix III.

CC. "IntelliClean Amended Agreement" means the "Agreement to Amend Commercialization Agreement (ONYX Advanced)" between Philips Oral Healthcare, Inc. and The Procter & Gamble Company dated September 21, 2005, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Product IntelliClean, that have been approved by the Commission to accomplish the requirements of this Order. The IntelliClean Amended Agreement is attached to this Order and contained in non-public Appendix III. Upon amendment of the IntelliClean Agreement in accordance with the above-described agreement to amend, the "IntelliClean Amended Agreement" shall mean the "IntelliClean Agreement" as so amended.

DD. "Interim Monitor" means any monitor appointed pursuant to Paragraph VI of this Order or Paragraph III of

thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to any Product of or owned by Respondent(s) as of the Closing Date.

HH. "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.

II. "Product" means a retail consumer good Developed, made, distributed, marketed or sold by Respondent(s).

JJ. "Product Assumed Contracts" means all of the following contracts or agreements:

1. pursuant to which any Third Party purchases the Divestiture Product(s) from the Respondent(s);

2. pursuant to which the Respondent(s) purchases any materials from any Third Party for use in connection with the manufacture of the Divestiture Product(s);

3. relating to any quality control trials involving the Divestiture Product(s);

4. relating to the marketing of the Divestiture Product(s) or educational matters relating to the Divestiture Product(s) including, but not limited to, the slotting and/or shelf spacing assignments of the Divestiture Product with the High Volume Retail Accounts;

5. relating to the manufacture of the Divestiture Product(s);

6. constituting confidentiality agreements involving the Divestiture Product(s);

7. involving any royalty, licensing, or similar arrangement involving the Divestiture Product(s);

8. pursuant to which any services are provided with respect to the Divestiture Product(s) or the Divestiture Product(s) business, including consultation arrangements; and/or

9. pursuant to which any Third Party collaborates with the Respondent(s) in the performance of research, Development, marketing or selling of the Divestiture Product(s) or the Divestiture Product(s) business;

h, that where any such contract or agreement also relates to a Retained Product(s), Respondent(s) shall assign the Commission-approved Acquirer all such rights under the contract or agreement as are related to the Divestiture Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

KK. "Product Copyrights" means rights to all original works of authorship of any kind related to the Divestiture Product(s) or the IntelliClean Products and any registrations and applications for registrations thereof, including, but not limited to, the following: all promotional materials for retailers; all promotional materials for customers; copyrights in Development data and reports relating to the research and Development of the Divestiture Product(s) or the IntelliClean Products or of any materials used in the research, Development, manufacture, marketing or sale of the Divestiture Product(s) or the IntelliClean Products, including all raw data relating to quality trials of the Product(s), customer information, promotional and marketing materials, the Divestiture Product(s) or the IntelliClean Products sales forecasting models, Website content and advertising and display materials; all records relating to employees who accept employment with the Commission-approved Acquirer (excluding any personnel records the transfer of

which is prohibited by applicable Law); all records, including customer lists, sales force call activity reports, vendor lists, sales data, slotting allowance data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all data contained in laboratory notebooks relating to the Divestiture Product(s) or the IntelliClean Products.

LL. "Product Employee Information" means the following, as and to the extent permitted by the Law:

1. a complete and accurate list containing the name of each relevant employee (including former employees who were employed by Respondent(s) 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 Divestiture Product; , in lieu of this description, Respondent(s) 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 Respondent's last fiscal year and current target or guaranteed bonus, if any;

   f. employment status (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 Commission-approved Acquirer's option or the

NN. "Product Licensed Intellectual Property" means the following:

1. Patents that are related to a Divestiture Product or the IntelliClean Products that Respondent(s) can demonstrate have been routinely used, prior to the Acquisition Date, by either Respondent P&G or Respondent Gillette (as applicable) for a Retained Product(s) that: 1) have been marketed or sold on a extensive basis by the relevant Respondent within the two-year period immediately preceding the Acquisition; or 2) for which, prior to the announcement of the Acquisition, there was an approved brand or marketing plan to market or sell such a Retained Product on an extensive basis by the Respondents; 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 any jurisdiction to limit the use or disclosure thereof, that are related to a Divestiture Product or the IntelliClean Products and that Respondent(s) can demonstrate have been routinely used, prior to the Acquisition Date, by either Respondent P&G or Respondent Gillette (as applicable) for Retained Product(s) that: 1) have been marketed or sold on a extensive basis by the relevant Respondent within the two-year period immediately preceding the Acquisition; or 2) for which, prior to the announcement of the Acquisition, there was an approved brand or marketing plan to market or sell such a Retained Product on an extensive basis by the Respondents;

h , that, in cases where the aggregate retail sales in dollars within the two-year period immediately preceding the Acquisition of the Retained Product(s) collectively are less than the aggregate retail sales in dollars within the same period of the Divestiture Product(s) collectively, the above-described intellectual property shall be

considered, at the Commission-approved Acquirer's option,

QQ. “Product Marketing Employees” means salaried management level employees of Respondent(s) who directly have participated (irrespective of the portion of working time involved, unless such participation was a part of a broad executive management portfolio above the brand manager level, or of oversight of legal, accounting, tax or financial compliance) in the marketing, contracting, or promotion of the Divestiture Product(s) in the United States within the eighteen (18) month period immediately prior to the Closing Date. These employees include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, but excluding administrative assistants.

level at Respondent P&G or above the level of associate director at Respondent Gillette (for the APDO Products) or above the level of director at Respondent Gillette (for the Rembrandt Products), or of oversight of legal, accounting, tax or financial compliance) in the research, Development, or quality control approval process of the Divestiture Product(s) within the eighteen (18) month period immediately prior to the Closing Date.

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(s) pursuant to this Order.

XX. "Rembrandt Assets" means all Respondent Gillette's rights, title and interest in and to all assets related to Respondent Gillette's worldwide business related to the Rembrandt Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Rembrandt Products, including, without limitation, the following:

1. all Product Intellectual Property related to the Rembrandt Products;

2. perpetual, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import, export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported the Rembrandt Products worldwide;

3. all Product Manufacturing Technology related to the Rembrandt Products;

4. all Product Marketing Materials related to the Rembrandt Products;

5. all Website(s) related to the Rembrandt Products;

6. at the Commission-approved Acquirer's option, all Product Assumed Contracts related to the Rembrandt Products (copies to be provided to the Commission-approved Acquirer on or before the Closing Date);

such orders is to be provided to the Commission-approved Acquirer within two (2) days after the Closing Date).

YY. "Rembrandt Core Employee(s)" means the Product Marketing Employees, the Product Sales Employees, and the Product Research and Development Employees related to the Rembrandt Products.

ZZ. "Rembrandt Key Employee(s)" means those employees of Respondents specifically identified in Appendix IV of this Order.

AAA. "Rembrandt IP Protected Products" means all Rembrandt Products any Rembrandt Product that, as of the Closing Date, is in an earlier stage of research or Development than Stage 3 of Respondent Gillette's SPEED (New Development Process) Program (as such program was applied to Products and in effect within the one (1) year period prior to the Acquisition Date); , "Rembrandt IP Protected Products" also includes all Rembrandt Products specifically identified in Appendix V attached to this Order.

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distributors, and customers of such Commission-approved Acquirer, or of such Commission-approved Acquirer-affiliated entities.

DDD. "Remedial Agreement" means the following: (1) any agreement between Respondent(s) and a Commission-approved Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets 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/or (2) any agreement between the Respondent(s) and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved 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 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.

EEE. "Retained Product" means any Product(s) other than a Divestiture Product.

FFF. "SpinBrush Assets" means all Respondent P&G's rights, title and interest in and to all assets related to Respondent P&G's worldwide business related to the SpinBrush Products, to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the SpinBrush Products including, without limitation, the following:

1. all Product Intellectual Property related to the SpinBrush Products;

2. perpetual, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property to use, make, distribute, offer for sale, promote, advertise, sell, import, export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported the SpinBrush Products anywhere in the world; *provided, however,* such license for the Product Licensed Intellectual Property shall also include the rights to use Respondent P&G's Crest® trademark in connection with the marketing of the SpinBrush Products for a limited period as is approved by the Commission in the Remedial Agreements related to the SpinBrush Assets;

3. all Product Manufacturing Technology related to the SpinBrush Products;

4. all Product Marketing Materials related to the SpinBrush Products;

5. all Website(s) related to the Spinbrush Products;

6. at the Commission-approved Acquirer's option, all Product Assumed Contracts related to the SpinBrush Products (copies to be provided to the Commission-approved Acquirer on or before the Closing Date);

7. all Respondent P&G's books, records, files related to the foregoing or to SpinBrush Products; *provided, however,* that in cases in which documents or other materials included in the SpinBrush Assets contain information: (1) that relates both to the SpinBrush Products and to other Products or businesses of Respondent P&G and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the

SpinBrush Products; or (2) for which Respondent P&G has a legal obligation to retain the original copies, Respondent P&G 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 Commission-approved Acquirer, Respondent P&G shall provide the Commission-approved 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 P&G provides the Commission-approved Acquirer with the above-described information without requiring Respondent P&G completely to divest itself of information that, in content, also relates to Products and businesses other than the SpinBrush Products;

8. list of all customers and/or targeted customers for the SpinBrush Products and the pricing and/or planned or proposed pricing of the SpinBrush Products for such customers;

9. at the Commission-approved Acquirer's option, all inventory, including raw materials, packaging materials, work-in-process and finished goods related to the SpinBrush Products; and

10. all unfilled customer orders for finished goods related to the SpinBrush Products as of the Closing Date (a list of such orders is to be provided to the Commission-approved Acquirer within two (2) days after the Closing Date).

GGG. "SpinBrush Asset Purchase Agreement" means the "Asset Sale and Purchase Agreement" among The Procter & Gamble Company, certain of its affiliates and Church & Dwight Co., Inc. dated September 23, 2005, and all amendments, exhibits, attachments,

agreements, and schedules thereto, related to the SpinBrush Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order. The SpinBrush Asset Purchase Agreement is attached to this Order and contained in non-public Appendix II.

HHH. "SpinBrush Core Employee(s)" means the Product Marketing Employees, Product Sales Employees, and Product Research and Development Employees related to the SpinBrush Products.

III. "SpinBrush Products" means all Products Developed, in Development, manufactured, distributed, marketed or sold by Respondent P&G prior to the Acquisition that were marketed or sold or to be marketed or sold as non-rechargeable battery-powered toothbrushes and/or as Products using the Product Trademark SpinBrush® or any variation or derivative on or prior to the Closing Date. "SpinBrush Products" includes, but is not limited to, those rechargeable battery-powered toothbrush Products Developed or in Development under Respondent P&G "Project Franklin" designation.

LLL. "Third Party(ies)" means any private entity other than the following: (1) the Respondents; or (2) the Commission-approved Acquirer.

MMM. "Website(s)" means the content of the Website(s) located at the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondents; ¢ ¢ h , "Website" shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondent(s) that are incorporated in such Website(s), such as stock photographs used in the Website(s), to the extent that Respondent(s) can convey its rights, if any, therein; or (2) content unrelated to the Divestiture Product(s).

II.

1. upon reasonable notice and request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner at no greater than Direct Cost the following:

    a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell the Rembrandt Products;

    b. assistance to the Commission-approved Acquirer (or

a. not join, file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer under Patents that are owned or licensed by Respondents as of the Acquisition Date, if such suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of the Rembrandt IP Protected Products; *h* , that Respondents may receive a covenant from the Commission-approved Acquirer not to assert any Patent related to the Rembrandt Products that is assigned to the Commission-approved Acquirer from the Respondents pursuant to this Order against the Respondents for Respondents' infringement of such Patent in connection with those Products marketed or sold by Respondent P&G as teeth whitening agents immediately prior to the Acquisition Date;

b. not use any Confidential Business Information related to the Rembrandt Products obtained by Respondents from any person who was an employee of Respondent Gillette within the two (2) year period immediately prior to the Acquisition in any suit against the Commission-approved Acquirer under Patents that are owned or licensed by Respondents as of the Acquisition Date, if such suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of the Rembrandt Products; and

4. Respondents shall covenant to the Commission-approved Acquirer that: (1) as a condition of any assignment, transfer or license to a Third Party of the Patents described in Paragraph II.C.3.a., the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Rembrandt Releasees under such

Patents, if the suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of the Rembrandt IP Protected Products; and (2) with respect to any Third Party rights licensed to Respondents as of or after the Acquisition Date, and as to which Respondents do not control the right of prosecution of any legal action, Respondents shall not actively induce, assist or participate in any legal action or proceeding relating to Rembrandt IP Protected Products against the Rembrandt Releasees, unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order).

D. Respondents shall:

1. submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to the Rembrandt Products;

2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective information; and (3) 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 Commission-approved Acquirer, provide the Commission-approved Acquirer

Order;

4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Rembrandt Products (other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the Rembrandt Assets; or (3) applicable Law); and

5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer;

6. shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Rembrandt Assets to the employees associated with business related to the teeth whitening Products marketed and sold by Respondent P&G prior to the Acquisition (including, but not limited to, those employees with work responsibilities related to the Crest® trademark and any variations or derivatives of such trademark).

E. Respondents shall not enforce any agreement against a Third Party or the Commission-approved Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Commission-approved Acquirer to acquire the Product Manufacturing Technology related to the Rembrandt Products or related equipment 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.

F. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.E. that allows the Third Party to provide the relevant Product

Key Employees, and remove any impediments within the

b. hire any Rembrandt Employee; , Respondents may hire any former Rembrandt Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

, , Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Rembrandt Employees; or (2) hire a Rembrandt Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents;

4. for a period of two (2) years from the Closing Date, use any Rembrandt Key Employee for work specifically related to Products for use as teeth whitening agents.

I. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the Rembrandt Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of the Rembrandt Products by the Commission-approved Acquirer; provided, however, Respondents may satisfy this requirement by certifying that the Commission-approved Acquirer has executed all such agreements directly with each of the relevant Third Parties.

J. Respondents shall require, as a condition of continued employment post-divestiture of the Rembrandt Assets, that each Rembrandt Core Employee retained by Respondents, the direct supervisor(s) of any such employee, and any other employee retained by Respondents and designated by the Interim Monitor sign a confidentiality agreement pursuant to

which such employee shall be required to maintain all Confidential Business Information related to the Rembrandt Products strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

K. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Rembrandt Products by Respondents' personnel to all of Respondents' employees who:

1. are or were involved in the research, Development, manufacturing, distribution, sale or marketing of the Rembrandt Products;

2. are involved in the research, Development, manufacturing, distribution, sale or marketing of Products for use as teeth whitening agents for Respondent P&G; and/or

3. may have Confidential Business Information related to the Rembrandt Products.

Respondents 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. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements 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.

L. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Rembrandt Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer the Rembrandt Assets are completely transferred to the Commission-approved Acquirer or its Designee in a manner that fully preserves their usefulness.

M. Pending divestiture of the Rembrandt Assets, Respondents shall take such actions as are necessary to maintain the full economic viability and marketability of the business associated with the Rembrandt Assets, to minimize any risk of loss of competitive potential for such business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Rembrandt Assets except for ordinary wear and tear.

N. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials

proceeding relating to the divestiture or any other aspect of the Rembrandt Assets or Rembrandt business;

, , that Respondents may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

, , that pursuant to this Paragraph II.N., Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer (but shall not be deemed to have violated this requirement if the Commission-approved Acquirer withholds such agreement unreasonably); and (2) use their best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

O. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer or the Rembrandt Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Rembrandt IP Protected Products in connection with the Commission-approved Acquirer's research, Development, manufacture, use, import, export, distribution, or sale of the Rembrandt IP Protected Products under the following:

1. any Patents owned or licensed by Respondents as of the Acquisition Date that claim the use of the Rembrandt IP Protected Products;

2. any Patents owned or licensed at any time after the Acquisition Date by Respondents that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Rembrandt IP Protected Products, other than such Patents that claim inventions conceived by and reduced to practice after the Acquisition Date.

P. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer or the Rembrandt Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Rembrandt Products in connection with the Commission-approved Acquirer's research, Development, manufacture, use, import, export, distribution, or sale of the Rembrandt Products using any Confidential Business Information related to the Rembrandt Products obtained by Respondents from any person who was an employee of Respondent Gillette within the two (2) year period immediately prior to the Acquisition.

Q. Respondents shall not, in any jurisdiction throughout the world: (1) use the Product Trademarks related to the Rembrandt Products or any mark confusingly similar to such Product Trademarks, as a trademark, tradename, 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 Commission-approved Acquirer's use and registration of such Product Trademarks; or (5) challenge or interfere with the Commission-approved Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties; *d d h* , that nothing in this Order shall preclude Respondents from continuing to use those trademarks, tradenames, or service marks related to the Retained Products as of the Acquisition Date.

R. The purpose of the divestiture of the Rembrandt Assets is to ensure the continued use of the Rembrandt Assets in the same business, independent of Respondents, in which the Rembrandt Assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the SpinBrush Assets, absolutely and in good faith, to Church & Dwight pursuant to and in accordance with the SpinBrush Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary 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 Church & Dwight or to reduce any obligations of the Respondents under such agreement), and such agreement, if it becomes the Remedial Agreement related to the SpinBrush Assets, is incorporated by reference into this Order and made a part hereof;

, that if Respondents have divested the SpinBrush Assets to Church & Dwight prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Church & Dwight is not an acceptable purchaser of the SpinBrush Assets, then Respondents shall immediately rescind the transaction with Church & Dwight and shall divest the SpinBrush Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission;

that if the Respondents have divested the SpinBrush Assets to Church & Dwight prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies the Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the

Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the SpinBrush Assets to Church & Dwight (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.

h h , the Respondents requirement as to the timing to divest the Spinbrush Assets shall be tolled pending any required approvals for such divestiture from the Commission of the European Communities but, in any event, shall not be later than ten (10) days of the Respondents' receipt of such approval.

B. Any Remedial Agreement related to the SpinBrush Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement related to the SpinBrush Assets shall constitute a failure to comply with this Order.

C. Respondents shall include in any Remedial Agreement related to the SpinBrush Assets the following provisions:

1. upon reasonable notice and request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner at no greater than Direct Cost the following:

   a. assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary permits and approvals from any Agency or Governmental Entity to manufacture and sell the SpinBrush Products;

   b. assistance to the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to manufacture the SpinBrush Products in

substantially the same manner and quality employed or achieved by or on behalf of Respondent P&G; and

c. consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the SpinBrush Products;

2. upon reasonable notice and request from the

4. Respondents shall covenant to the Commission-approved Acquirer that: (1) as a condition of any assignment,

employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to the SpinBrush 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 SpinBrush Products (other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the SpinBrush Assets; or (3) applicable Law);

5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer; and

6. shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the SpinBrush Assets to the employees associated with business related to the non-rechargeable battery operated toothbrush Products marketed and sold by Respondent Gillette prior to the Acquisition (including, but not limited to, those employees with work responsibilities related to the Oral-B® trademark and any variations or derivatives of such trademark).

E. Respondents shall not enforce any agreement against a Third Party or the Commission-approved Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Commission-approved Acquirer to acquire the Product Manufacturing Technology related to the SpinBrush Products or related equipment 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.

F. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph III.E. that allows the Third Party to provide the relevant Product Manufacturing Technology or related equipment to the Commission-approved Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Commission-approved Acquirer.

G. Respondents shall:

1. for a period of at least six (6) months from the Closing Date, provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the SpinBrush Core Employees. This period is hereinafter referred to as the "SpinBrush Access Period"; and

2. not later than the earlier of the following dates: (1) ten (10) Days after notice by staff of the Commission to the Respondents to provide the Product Employee Information; or (2) ten (10) Days after the Closing Date, provide the Commission-approved Acquirer or the Proposed Acquirer with the Product Employee Information related to the SpinBrush Core Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the SpinBrush Access Period with respect to that employee in an amount equal to the delay.

H. Respondents shall:

1. during the SpinBrush Access Period, not interfere with the hiring or employing by the Commission-approved Acquirer of SpinBrush Core Employees, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any noncompete or nondisclosure provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to an SpinBrush Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

h that this Paragraph III.H.1 shall not prohibit the Respondents from making offers of employment to or employing any SpinBrush Core Employee during the SpinBrush Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

h that if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular SpinBrush Core Employee and the Commission-approved Acquirer does not make an offer of employment to that employee within twenty (20) Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee;

2. until the Closing Date, provide all SpinBrush Core Employees with reasonable financial incentives to continue in their positions and to market and promote the

SpinBrush Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the SpinBrush Products and to ensure successful execution of the pre-Acquisition marketing plans to relaunch certain SpinBrush Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date for the divestiture of the SpinBrush Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

h that nothing in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee or prevents the Respondents from continuing the employment of the SpinBrush Core Employees (other than those conditions contained in this Order) in connection with the Acquisition; and

3. 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 Commission-approved Acquirer with any amount of responsibility related to SpinBrush ("SpinBrush Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; or

   b. hire any SpinBrush Employee; *h* , Respondents may hire any former SpinBrush Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

, , h , Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the SpinBrush

K. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the SpinBrush Products by Respondents' personnel to all of Respondents' employees who:

1. are or were involved in the research, Development, manufacturing, distribution, sale or marketing of the SpinBrush Products;

2. are involved in the research, Development, manufacturing, distribution, sale or marketing of Products for use as battery operated toothbrushes for Respondent Gillette prior to the Acquisition; and/or

3. may have Confidential Business Information related to the SpinBrush Products.

Respondents 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. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements 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.

L. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost (or, if the SpinBrush Asset Purchase Agreement is the Remedial Agreement for the SpinBrush Assets, then at such cost as may be provided therein), such personnel, assistance and training as the Commission-approved Acquirer might

agreement or arrangement;

, that pursuant to this Paragraph III.N., Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Commission-approved Acquirer (but shall not be deemed to have violated this requirement if the Commission-approved Acquirer withholds

the Commission-approved Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties; *h* , that nothing in this Order shall preclude Respondents from continuing to use those trademarks, tradenames, or service marks related to the Retained Products as of the Acquisition Date.

Q. The purpose of the divestiture of the SpinBrush Assets is to ensure the continued use of the SpinBrush Assets in the same business, independent of Respondents, in Date.to nothinjnd

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer, in a timely manner and under reasonable terms and conditions, a supply of finished APDO Product(s) at Respondent Gillette's Supply Cost, for a period of time sufficient to allow the Commission-approved Acquirer (or the Designee

c. consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the APDO Products;

4. upon reasonable notice and request from the Commission-approved Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondents to assist the Commission-approved Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property;

5. Respondents shall covenant to the Commission-approved Acquirer that Respondents shall not join, file, prosecute or m e fissioy suita timlawTJ t fTJT67 no

whereby the Third Party covenants not to sue the APDO Releasees under such Patents, if the suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the research, Development, manufacture, use, import, export, distribution or sale of the APDO Products; and (2) with respect to any Third Party rights licensed to Respondents as of or after the Acquisition Date, and as to which Respondents do not control the right of prosecution of any legal action, Respondents shall not actively induce, assist or participate in any legal action or proceeding relating to the APDO Products against the APDO Releasees, unless required by Law or contract (such contract not to be solicited or entered into for the purpose of circumventing any of the requirements of this Order).

D. Respondents shall:

1. submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information related to the APDO Products;

2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective information; and (3) 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 Commission-approved Acquirer, provide the Commission-approved 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 related to the APDO 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 APDO Products (other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the APDO Assets; or (3) applicable Law;

h, Respondents may use such Confidential Business Information that also relates to those Retained Products that have been marketed and sold as antiperspirants or deodorants under the Gillette Series® trademarks prior to the Acquisition to the extent necessary for Respondents to continue to manufacture, market, and sell such Retained Products; *h*, Respondents shall take such actions, as may be practicable, to prevent the exploitation or use of the most recent brand plan(s) related to the APDO Products by Respondents' employees with responsibilities relating to the Retained Products to be marketed or sold as antiperspirants or deodorants;

5. not disclose or convey any such Confidential Business Information (other than as otherwise permitted under this Order), directly or indirectly, to any person except the Commission-approved Acquirer; and

6. shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information (other than as otherwise permitted under this Order) related to the marketing or sales of the APDO Assets to the employees associated with business related to Retained Products that are marketed and sold as antiperspirants or deodorants prior to the Acquisition (including, but not limited to, such employees with work

responsibilities related to the Retained Products that have been marketed and sold as antiperspirants or deodorants under the Old Spice® trademark and any variations or derivatives of such trademark prior to the Acquisition).

E. Respondents shall not enforce any agreement against a Third Party or the Commission-approved Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Commission-approved Acquirer to acquire the Product Manufacturing Technology related to the APDO Products or related equipment 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.

F. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph IV.E. that allows the Third Party to provide the relevant Product Manufacturing Technology or related equipment to the Commission-approved Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Commission-approved Acquirer.

G. Respondents shall:

1. for a period of at least six (6) months from the Closing Date, provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the APDO Core Employees. This period is hereinafter referred to as the "APDO Access Period"; and

2. not later than the earlier of the following dates: (1) ten (10) Days after notice by staff of the Commission to the Respondents to provide the Product Employee Information; or (2) ten (10) Days after the Closing Date,

provide the Commission-approved Acquirer or the Proposed Acquirer with the Product Employee Information related to the APDO Core Employees. Failure by Respondents to provide the Product Employee Information for any relevant employee within the time provided herein shall extend the APDO Access Period with respect to that employee in an amount equal to the delay.

H. Respondents shall:

1. during the APDO Access Period, not interfere with the hiring or employing by the Commission-approved Acquirer of the APDO Core Employees, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any noncompete or nondisclosure provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to an APDO Core Employee who receives a written offer

make an offer of employment to that employee within twenty (20) days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee;

2. until the Closing Date, provide all APDO Core Employees with reasonable financial incentives to continue in their positions and to market and promote the APDO Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the APDO Products and to ensure successful execution of the pre-Acquisition marketing plans related to the APDO Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date for the divestiture of the APDO Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

h , that nothing in this Order requires or shall be construed to require the Respondents to terminate the employment of any employee or prevents the Respondents from continuing the employment of the APDO Core Employees (other than those conditions contained in this Order) in connection with the Acquisition; and

3. 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 Commission-approved Acquirer with any amount of responsibility related to APDO ("APDO Employee") to terminate his or her employment relationship with the Commission-approved Acquirer; or

   b. hire any APDO Employee; *provided, however,* Respondents may hire any former APDO Employee whose employment has been terminated by the Commission-approved Acquirer or who independently applies for employment with the Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided, however, Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the APDO Employees; or (2) hire an APDO Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from the Respondents.

I. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for the divestiture of the APDO Assets to the Commission-approved Acquirer, or for the continued research, Development, manufacture, sale, marketing or distribution of the APDO Products by the Commission-approved Acquirer;

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

J. Respondents shall require, as a condition of continued employment post-divestiture of the APDO Assets, that each APDO Core Employee retained by Respondents, the direct supervisor(s) of any such employee, and any other employee retained by Respondents and designated by the Interim Monitor sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the APDO Products strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

K. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the APDO Products by Respondents' personnel to all of Respondents' employees who:

1. are or were involved in the research, Development, manufacturing, distribution, sale or marketing of the APDO Products;

2. are involved in the research, Development, manufacturing, distribution, sale or marketing of Respondent P&G's antiperspirant or deodorant Products;

3. are involved in the research, Development, manufacturing, distribution, sale or marketing of Respondent Gillette's antiperspirant or deodorant Retained Products; and/or

4. may have Confidential Business Information related to APDO.

Respondents 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.

Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such agreements 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.

L. Upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the APDO Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully able to manufacture APDO Products independently of the Respondents;

N. Counsel for Respondents (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents (under circumstances

Commission-approved Acquirer) is otherwise fully able to manufacture the APDO Products in a facility that is independent of Respondents; or 2) the Respondents have provided to the Commission-approved Acquirer inventory of finished APDO Products sufficient to cover at least all demand anticipated by the Commission-approved Acquirer for the APDO Products during the period of time estimated for the removal, transfer, and reassembly, in a

Q. Respondents shall not, in any jurisdiction throughout the world: (1) use the Product Trademarks related to APDO

in the IntelliClean Agreement) or to reduce any obligations of Respondents (other than with respect to any noncompete provisions contained in the IntelliClean Agreement) under the IntelliClean Amended Agreement).

B. The IntelliClean Agreement as amended in accordance with the IntelliClean Amended Agreement shall be deemed incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with any term of the IntelliClean Amended Agreement, if such agreement is approved by the Commission in connection with the Commission's determination to make this Order final shall constitute a failure to comply with this Order. Any other Remedial Agreement related to the IntelliClean Products shall also be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement related to the IntelliClean Products shall constitute a failure to comply with this Order.

C. Respondents shall:

1. grant a perpetual, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Intellectual Property, Product Licensed Intellectual Property, and the Product Manufacturing Technology to use, make, distribute, offer for sale, promote, advertise, sell, import, export, or have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported the IntelliClean Products anywhere in the world; *h* such license for the Product Intellectual Property shall also include the rights to use Respondent P&G's Crest® trademark in the United States and Canada in connection with the marketing of the IntelliClean Products for a limited period as is approved by the Commission in the Remedial Agreements related to the IntelliClean Products;

2. as reflected in the IntelliClean Amended Agreement, Contract Manufacture and deliver to Philip or its Designee, in a timely manner and under reasonable terms and conditions (such terms and conditions to be in a manner that preserves the full economic viability and competitiveness of the IntelliClean Products) a supply of the finished dentifrice Product used in connection with the rechargeable toothbrush(es) that are a part of the IntelliClean Products;

3. upon reasonable notice and request from Philips to the Respondents, provide in a te

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D. Respondents shall:

1. submit to Philips, at Respondents' expense, copies of all Confidential Business Information related to the research, Development, manufacture, distribution, marketing or sale of IntelliClean Products;

2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective information; and (3) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness; and

3. pending complete delivery of all such Confidential Business Information to Philips, provide Philips 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 related to the IntelliClean Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.

E. Respondents shall not enforce any agreement against a Third Party or Philips to the extent that such agreement may limit or otherwise impair the ability of Philips to acquire the Product Manufacturing Technology related to the IntelliClean Products or related equipment 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.

F. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph V.E. that

allows the Third Party to provide the relevant Product Manufacturing Technology or related equipment to Philips. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to Philips.

G. For a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, terminate the IntelliClean Amended Agreement. 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 the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to terminating the IntelliClean Amended Agreement (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 terminate

the Order in a manner consistent with the purposes of the Order.

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 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 later of:

    a. the completion by Respondents of the divestiture of

ǵ ǵ h that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order.

4. 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 Order, 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 Order.

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willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order 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 Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement. 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 Respondents of their obligations under the Order.

8. 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; *h* 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.

VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5( ) of the Federal Trade Commission Act, 15 U.S.C. § 45( ), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey 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( ) 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 Respondent P&G, which consent shall not be unreasonably withheld. The Divestiture Trustee

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

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from

among those approved by the Commission; and, , that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.

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

VIII.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondents have fully complied with, the following:

1. Paragraphs II.A, Paragraphs III.A. and IV.A. (, has

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 date this Order becomes final, annually for the next nine years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

IX.

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

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 with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representative of the Commission:

A. access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of

PUBLIC
APPENDIX I
ORDER TO MAINTAIN ASSETS

NON-PUBLIC APPENDIX II
AGREEMENTS RELATED TO
THE SPINBRUSH ASSETS
[Redacted From the Public Record Version But Incorporated By Reference]

NON-PUBLIC
APPENDIX III
AGREEMENTS RELATED TO
THE INTELLICLEAN PRODUCTS
[Redacted From the Public Record Version But Incorporated By Reference]

NON-PUBLIC
APPENDIX IV
REMBRANDT KEY EMPLOYEES
[Redacted From the Public Record Version But Incorporated By Reference]

NON-PUBLIC
APPENDIX V
RELATED TO THE DEFINITION OF
REMBRANDT IP PROTECTED PRODUCTS
[Redacted From the Public Record Version But Incorporated By Reference]

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent The Procter & Gamble Company ("P&G") of Respondent The Gillette Company ("Gillette"), hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for

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1. Respondent P&G is a corporation organized, existing and doing business under and by virtue of the laws of the state of Ohio, with its offices and principal place of business located at One Procter & Gamble Plaza, Cincinnati, Ohio 45202.

2. Respondent Gillette 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 Prudential Tower, Boston, Massachusetts 02199.

3. 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 attached hereto as Appendix A and incorporated herein by reference and made a part of hereof, shall apply:

A. "P&G" means The Procter & Gamble Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by P&G, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition P&G, shall include Gillette.

B. "Gillette" means The Gillette Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Gillette, and

the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

C. “Respondents” means P&G and Gillette, individually and collectively.

D. "Acquisition" means the acquisition contemplated by the “Agreement and Plan of Merger” dated as of January 27, 2005, among The Proctor & Gamble Company, Aquarium Acquisition Corp. and The Gillette Company.

E. "Acquisition Date" means the earlier of the following dates:

1. the date the Respondents close on the Acquisition pursuant to the Acquisition Agreement; or

2. the date the merger contemplated by the Acquisition Agreement becomes effective by filing the certificate of

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7. information that does not relate to the Divestiture Product(s) or the IntelliClean Products.

J. “Divestiture Assets” means the APDO Assets, the Rembrandt Assets and the SpinBrush Assets, individually and collectively, as defined in the Decision and Order.

Divestiture Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the full economic viability, marketability or competitiveness of the Divestiture Assets.

B. Respondents shall maintain the operations of the Divestiture Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the Divestiture Assets) and/or as may be necessary to preserve the marketability, viability, and competitiveness of each of the Products associated with the Divestiture Assets and shall use their best efforts to preserve the existing relationships with, the following: suppliers; vendors including, but not limited to, the High Volume Retail Account; distributors; customers; Agencies; employees; and, others having business relations with the Divestiture Assets. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing the Divestiture Assets with sufficient working capital to operate the Divestiture Assets at least at current rates of operation, to meet all capital calls with respect to the Divestiture Assets and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Divestiture Assets(including, but not limited to, such capital related to the slotting and/or shelf spacing assignments of the Divestiture Product with the High Volume Retail Accounts);

2. continuing, at least at their scheduled pace, any additional expenditures for the Divestiture Assets authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, and marketing expenditures (including, but not limited to, expenditures related to the relaunch of the Spinbrush Products);

3. provide such resources as may be necessary to respond to competition against the Products associated with the Divestiture Assets and/or to prevent any diminution in retail sales of such Products during and after the Acquisition process and prior to divestiture;

4. provide such resources as may be necessary to maintain the competitive strength and positioning of the Products associated with the Divestiture Assets at the High Volume Retail Accounts;

5. making available for use by the Divestiture Assets funds

pending divestiture and to ensure successful execution of the Pre-Acquisition Marketing Plans related to the relevant Products. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the respective 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 Product's competitiveness.

E. Respondents shall:

1. during the Spinbrush Access Period, not interfere with the hiring or employing by the Commission-approved Acquirer of Spinbrush Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to an Spinbrush Core Employee who receives a written offer of employment from the Commission-approved Acquirer;

h that this Paragraph II.E.1 shall not prohibit the Respondents from making offers of employment to or employing any Spinbrush Core Employee during the Spinbrush Access Period where the Commission-approved Acquirer has notified the Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee;

h that, if the Respondents notify the Commission-approved Acquirer in writing of their desire to make an offer of employment to a particular Spinbrush Core Employee and the Commission-approved Acquirer does not

make an offer of employment to that employee within twenty (20) Days of the date the Commission-approved Acquirer receives such notice, the Respondents may make an offer of employment to that employee.

F. Pending divestiture of the relevant Divestiture Assets, Respondents shall:

1. shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the APDO Assets to the employees associated with business related to the antiperspirant and/or deodorant Products marketed and sold by Respondent P&G prior to the Acquisition (including, but not limited to, such employees with work responsibilities related to the Old Spice® trademark and any variations or derivatives of such trademark);

2. shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Rembrandt Assets to the employees associated with business related to the teeth whitening Products marketed and sold by Respondent P&G prior to the Acquisition (including, but not limited to, those employees with work responsibilities related to the Crest® trademark and any variations or derivatives of such trademark);

3. shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Spinbrush Assets to the employees associated with business related to the non-rechargeable battery operated toothbrush Products marketed and sold by Respondent Gillette prior to the Acquisition (including, but not

limited to, those employees with work responsibilities related to the Oral-B® trademark and any variations or derivatives of such trademark);

4. shall institute procedures and requirements to ensure that employees identified above

    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 under this Order to Maintain Assets from receiving for any

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. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.

H. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.

I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the business(es) associated with the Divestiture Assets, to minimize any risk of loss of competitive potential for the business associated with the Divestiture Assets, 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 Respondents sign the Consent Agreement in this matter, the Commission may appoint an 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. The

Commission may appoint one or more Interim Monitors to assure Respondents' compliance with the requirements of the Orders, and the related Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondent P&G 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 Respondents 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, Respondents 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 one or more Interim Monitors are appointed pursuant to this Paragraph or pursuant to the relevant provisions of the Decision and Order in this matter, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each 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;

3. The Interim Monitor shall serve until the later of:

    a. the completion by Respondents of the divestiture of all relevant assets required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order to Maintain Assets in a manner that fully satisfies the requirements of this Order to Maintain Assets and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing the relevant Product(s) acquired pursuant to a Remedial Agreement independently of Respondents; and fulfillment of the Respondents obligations under the Decision and Order with respect to the IntelliClean Products; or

    b. the completion by Respondents of the last obligation under the Order pertaining to the Interim Monitor's service;

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 Respondents 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 Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

G. Respondents 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 misfeasance, 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 this Order to Maintain Assets 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 Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.

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IV.

IT IS FURTHER ORDERED that within thirty (30) Days after the date this Order to Maintain Assets becomes final, and every thirty (30) Days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A., III.A, IV.A. and V.A. of the related Decision and Order in this matter, Respondents 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; *h* , 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 VIII of the Decision and Order.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) Days prior to any proposed (1) dissolution of the Respondents, (2) acquisition, merger or consolidation of Respondents, or (3) any other change in the Respondents that may affect compliance obligations arising out of the order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

VI.

IT IS FURTHER ORDERED that, for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon

written request with reasonable notice to Respondents made to their principal United States Office, Respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and

B. Upon five (5) Days notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, 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 day after the divestiture of all of the Divestiture Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor, in consultation with Commission staff and the Commission-approved Acquirer(s), notifies the Commission that all related assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated.

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PUBLIC
APPENDIX A
TO THE ORDER TO MAINTAIN ASSETS

AGREEMENT CONTAINING CONSENT ORDER
AND
PROPOSED DECISION AND ORDER

Analysis of Agreement Containing Consent Orders to Aid Public Comment

15 U.S.C. § 45, by lessening competition in the United States markets for the research, development, manufacture, distribution, and sale of at-home teeth whitening products, adult battery-powered toothbrushes, rechargeable toothbrushes, and men's AP/DOs.

Consistent with the well-established approach to merger analysis, we have determined the appropriate product markets in which to analyze the likely competitive effects of the proposed merger. Staff initially examined whether the combination of the two companies' broad array of consumer products would be likely to have anticompetitive effects, including not only increased prices in the short term but also the creation of entry barriers that could affect price and innovation in the long term. In particular, staff investigated whether the combined entity would have an increased ability to exploit its position as a so-called "category manager" or "category captain," in order to obtain premium retailer shelf space and potentially exclude or disadvantage competitors in various broad categories, like oral care or AP/DO.

The investigation has disclosed, however, that most retailers do not look at broad categories, like oral care and AP/DO, when they decide which products to stock and sell. They generally make decisions on individual products (e.g., men's AP/DO), that are perceived to be close substitutes within these broad categories. One supplier may be preferred for an individual product even though another supplier is preferred for other products in the broad category. Moreover, most retailers are likely to employ different category captains to assist them on a product-by-product basis within the broad categories. We have therefore concluded that the loss of competition between the merging parties in broad categories is unlikely to cause competitive harm. We have instead focused on individual products within the broad categories. These individual product markets include at-home teeth whitening, battery-powered toothbrushes, and men's AP/DO. The Commission has sought and obtained relief in these relevant markets.

II. The Parties

Headquartered in Cincinnati, Ohio, P&G is one of the largest and most diversified suppliers of consumer products in the world. In 2004, P&G had worldwide net sales of approximately $51.4 billion. With its Crest® line of products, P&G is one of the leading suppliers of oral care products in the United States. The Crest family of products includes the Crest® Whitestrips™ and Crest® Night Effects™ lines of at-home teeth whitening products and the Crest® SpinBrush™ line of battery-powered toothbrushes. P&G is also a leading supplier of men's AP/DOs under its Old Spice® brand.

Gillette, based in Boston, Massachusetts, is also one of the world's leading suppliers of consumer products. Gillette had total worldwide net sales of approximately $10.5 billion in its 2004 fiscal year. Like P&G, Gillette is one of the leading suppliers of oral care products in the United States with its Oral-B® and Oral-B® Braun® line of manual, battery-powered, and rechargeable toothbrushes, and its Oral-B® Rembrandt® and Rembrandt® line of at-home teeth whitening products. Gillette is also a leading supplier of men's AP/DOs under its Right Guard® and Gillette®05 Tc-0(s ors)Trand. s

The United States market for at-home teeth whitening products is highly concentrated, with P&G and Gillette as the two largest suppliers in this market and the only two significant suppliers of branded strips. P&G is the market leader with its Crest Whitestrips® and Crest Night Effects® products, while Gillette is the second leading supplier with its Oral-B® Rembrandt® and Rembrandt® products. Together, the parties account for over 80% of the sales in this market.

The Proposed Acquisition would significantly increase concentration in the United States market for at-home teeth whitening products, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the

which are the segments most likely to capture any switching away from adult battery-powered toothbrushes in the face of a price

P&G's incentives to support the IntelliClean product. The agreement between Philips and P&G also contains non-compete provisions that, if the Proposed Acquisition were consummated, could harm consumers.

The Proposed Acquisition would eliminate P&G's incentive to fully support and promote the IntelliClean product and create a situation where the only two suppliers in the market are subject to non-compete provisions. Accordingly, the Proposed Acquisition would likely result in higher prices, reduced innovation, and fewer product choices for consumers in this market.

VI. Men's AP/DOs

A fourth relevant product market in which to assess the competitive effects of the Proposed Acquisition is the United States market for men's AP/DOs. An antiperspirant is a substance that is used to prevent or reduce underarm sweating. A deodorant is a substance that is used to suppress underarm odor. These ingredients are typically combined together for complete underarm protection. AP/DOs are typically gender-specific and sold in various forms, including roll-ons, traditional solids, invisible solids, gels, and aerosols. Men's AP/DOs are unique in, among other things, their packaging, fragrances, marketing, formulations, and location on the shelf.

The United States market for men's AP/DOs is highly concentrated. P&G and Gillette are the two largest suppliers of men's AP/DOs in the United States. P&G markets its men's AP/DOs under the Old Spice® brand name, while Gillette sells its products under the Right Guard® and Gillette Series® brand names. Combined, the Respondents account for well over 50% of the sales in this highly concentrated market.

Accordingly, the Proposed Acquisition would significantly increase concentration in the United States market for men's AP/DOs, leaving P&G as the dominant supplier. By eliminating competition between the two leading suppliers, the Proposed

Acquisition would likely result in higher prices and fewer product choices for consumers in this market.

VII. Entry

Entry into the United States at-home teeth whitening, adult

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[1] The Rembrandt business that will be divested includes all of Gillette's existing and future teeth whitening products. For viability reasons, the purchaser of the Right Guard business will have the option of acquiring certain manufacturing assets and/or Gillette's Soft & Dri® and Dry Idea® assets.

property. Second, P&G will provide Church & Dwight with a license to the Crest trademark, subject to minimum protections under trademark law, for use with the SpinBrush brand name that will be acquired outright by Church & Dwight. These provisions are designed to ensure that Church & Dwight can successfully transition the Crest SpinBrush family of products to a brand name of its choosing. Third, the Consent Agreement allows, and provides incentives for, P&G to render transitional services to Church & Dwight and retailers for a period of time to ensure the continuity and competitive viability of the products.

The Commission is satisfied that Church & Dwight is a well-qualified acquirer of the Crest SpinBrush business. Church & Dwight sells a variety of consumer products throughout the world, including oral care, personal care, and household products, and had total worldwide net sales of approximately $1.5 billion in 2004. The company owns several well-known oral care brands, such as Arm & Hammer®, Aim®, and Mentadent™, and currently sells a variety of oral care products, including toothpaste and manual toothbrushes. Because of its existing business, Church & Dwight already has an experienced sales force that has

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IN THE MATTER OF

JOHNSON & JOHNSON

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 Johnson & Johnson ("J&J"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Guidant Corporation ("Guidant"), 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 ("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:

5. “Endoscopic Vessel Harvesting Device” or “EVH Device” means a medical device consisting of various components to allow for the minimally-invasive removal of the saphenous vein, the radial artery, or other conduit for use in coronary artery bypass

defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. ACQUIRED COMPANY

11. Guidant is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 111 Monument Circle, Indianapolis, Indiana 46204. Guidant, among other things, is engaged in the research, development, marketing, and sale of interventional cardiology products, including the research and development of Drug Eluting Stents, and cardiac surgery devices, including Endoscopic Vessel Harvesting Devices and Proximal Anastomotic Assist Devices.

12. Guidant 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.

IV. PROPOSED ACQUISITION

13. On December 15, 2004, J&J and Guidant entered into an agreement and plan of merger (the "Purchase Agreement") whereby J&J agreed to acquire Guidant in a transaction valued at approximately $25.4 billion (the "Acquisition").

V. RELEVANT MARKET

14. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the research, development, manufacture, and/or sale of the following products:

a. Drug Eluting Stents;

b. Endoscopic Vessel Harvesting Devices; and

c. Proximal Anastomotic Assist Devices.

15. 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.

VI. STRUCTURE OF THE MARKETS

16. J&J is one of only two companies (the other is Boston Scientific Corporation) currently selling DESs in the United States. At least three other companies, including Guidant, are involved in the research and development of DESs and are poised to receive FDA approval to sell DESs in the United States in the next two to three years.

leader in this market, and together with J&J, accounts for over 95 percent of unit sales of Proximal AADs in the U.S. market.

VII. ENTRY CONDITIONS

20. Developing a Drug Eluting Stent, Endoscopic Vessel Harvesting Device, or Proximal Anastomotic Assist Device, working around and/or acquiring licenses to critical intellectual property related to those devices, obtaining FDA approval for those devices, and marketing those devices, takes significantly longer than two years. Therefore, entry into the relevant lines of commerce described in Paragraph 14 would not be timely, likely, or sufficient in magnitude, character and scope to deter or counteract the anti-competitive effects of the Acquisition.

VIII. EFFECTS OF THE ACQUISITION

21. 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, in the following ways, among others:

a. eliminating potential competition between two of only three suppliers of Drug Eluting Stents with access to a Rapid Exchange delivery system;

IX. VIOLATIONS CHARGED

22. The Purchase Agreement described in Paragraph 13 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

23. The Acquisition described in Paragraph 13, 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 21st day of December, 2005, issues its Complaint against said Respondent.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Johnson & Johnson ("J&J" or "Respondent") of Guidant Corporation ("Guidant"), 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

1. Respondent J&J is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at One Johnson & Johnson Plaza, New Brunswick, NJ 08933.

2. Guidant is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its offices and principal place of business located at 111 Monument Circle, Indianapolis, IN 46204.

3. The Federal Trade Commission has jurisdiction over 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:

A. "J&J" or "Respondent" means Johnson & Johnson, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Johnson & Johnson, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Effective Date, the term "J&J" shall include Guidant.

B. "Guidant" means Guidant Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Guidant Corporation, and the respective directors, officers,

employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Abbott" means Abbott Laboratories, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, having its principal place of business located at 100 Abbott Park Road, Abbott Park, IL 60064.

E. "Abbott Agreement" means the "License Agreement" by and between J&J and Abbott dated August 12, 2005, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Drug Eluting Stent Patents to be licensed, that have been approved by the Commission to accomplish the requirements of this Order. The Abbott Agreement is attached to this Order as non-public Appendix I.

F. "Abbott Combination Stent" means the first Stent product designated and commercialized by Abbott (or Abbott's assignee of the entire Abbott Agreement) for the treatment of coronary artery disease that includes ABT-578 in combination with one of the agents identified in non-public Appendix II.

G. "Abbott Drug Eluting Stent" means a Stent that elutes or otherwise delivers ABT-578 alone for the treatment of coronary artery disease.

H. "ABT-578" means the agent disclosed in U.S.

Abbott is currently using in its clinical trial of the ZoMaxx™ stent.

I. "Acquisition" means the acquisition contemplated by the "Agreement and Plan of Merger" dated as of December 15, 2004, by and among J&J and Guidant ("Acquisition Agreement"), whereby J&J agreed to acquire Guidant.

J. "Actual Cost" means the cost of direct labor and direct material used to provide the relevant assistance or service, plus an allocation of overhead that is in the same proportion that was used by the Respondent on July 2, 2005.

K. "Additional Drug Eluting Stent Patents" means all U.S. and foreign Patents of Respondent listed in Appendix III.

L. "Agency(ies)" means any governmental 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 Drug Eluting Stents or EVH Products.

M. "Anastomotic Assist Distribution Agreement" means the September 12, 2003, Distribution Agreement by and between Ethicon, Inc., a subsidiary of Respondent, and Novare, as amended by letter dated November 30, 2004.

N. "Business Day(s)" means any day other than a Saturday, Sunday, or federal holiday.

O. "Closing Date" means the date on which Respondent (or a Divestiture Trustee) and a

Commission-approved Acquirer consummate a transaction to grant, license, deliver or otherwise convey relevant assets pursuant to this Order.

P. "Commission-approved Acquirer" means the following:

1. as to the Drug Eluting Stent Patents, Abbott, if Abbott has not been rejected by the Commission pursuant to Paragraph II.A. of this Order;

2. as to the EVH Business, Datascope, if Datascope has not been rejected by the Commission pursuant to Paragraph III.A. of this Order; or

3. an entity that receives the prior approval of the Commission to receive particular assets that the Respondent is required to grant, license, deliver or otherwise convey pursuant to this Order.

Q. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is related to the research, Development, manufacture, marketing, importation, exportation, supply, sales, sales support, or use of a Product; *h* that "Confidential Business Information" shall not include (1) information that subsequently falls within the public domain through no violation of this Order or of any confidentiality agreement with respect to such information by Respondent or (2) information that Guidant can demonstrate it obtained without the assistance of Respondent prior to the Acquisition.

R. "Datascope" means Datascope Corp., a corporation organized, existing, and doing business under and

by virtue of the laws of the State of Delaware, having its principal place of business located at 14 Philips Parkway, Montvale, NJ 08933.

S. "Datascope Agreement" means the "Purchase Agreement" by and between Ethicon, Inc., a subsidiary of J&J, and Datascope dated as of September 27, 2005, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the EVH Business, that have been approved by the Commission to accomplish the requirements of this Order. The Datascope Agreement is attached to this Order as non-public Appendix IV.

T. "Designee" means any entity that will manufacture a J&J EVH Product or a Licensed EVH Product for a Commission-approved Acquirer.

U. "Development" means all preclinical and clinical drug and/or device development activities, including test method development and stability testing, toxicology, bioequivalency, 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 governmental price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

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

W. "Drug Eluting Stent" means a Stent that elutes or otherwise delivers one or more drugs or pharmaceutical compositions for the treatment of coronary artery disease.

X. "Drug Eluting Stent Patents" means all U.S. and foreign Patents of Respondent, other than Excluded Drug Eluting Stent Patents, that claim (1) drugs, pharmaceutical compositions, coatings or polymers used on Stents or otherwise in combination with

Z. "EVH Business" means all of Respondent's assets, tangible and intangible, businesses and goodwill, related to the research, Development, manufacture, distribution, marketing or sale of J&J EVH Products, including, without limitation, the following:

1. all EVH Intellectual Property;

are intended for use in the manufacture of, J&J EVH Products;

9. all rights under warranties and guarantees, express or implied, with respect to J&J EVH Products; and

10. all items of prepaid expenses, to the extent related to J&J EVH Products;

h that "EVH Business" does not include any portion of any of the foregoing assets, businesses and goodwill that does not relate to J&J EVH Products;

h h , that "EVH Business" does not include any of the following: (a) (i) the name "Johnson & Johnson", "Ethicon", "CardioVations", or the names of any other divisions, businesses, corporations or companies owned by Respondent or (ii) any trademarks, trade names or logos used on other of Respondent's Products; (b) any interest in real property; (c) any plant or other facilities; (d) any personal property; (e) any equipment or contracts for the sterilization, labeling or packaging of any Products; or (f) any assets, tangible and intangible, businesses or goodwill that were owned by Guidant immediately prior to the Effective Date;

h h that with respect to documents or other materials included in the EVH Business that contain information (a) that relates both to the J&J EVH Products and to other products or businesses of Respondent or (b) for which Respondent has a legal obligation to retain the original copies, Respondent shall be required to provide only copies or, at its option, relevant excerpts of such documents and materials, but Respondent shall provide the Commission-approved Acquirer access to the originals of such documents as necessary, it being a purpose of this proviso to ensure that Respondent not be required to divest itself completely of

records or information that relates to products or businesses other than the J&J EVH Products;

h h that with respect to any contract or agreement included in the EVH Business that relates both to the J&J EVH Products and to any other product, Respondent may, concurrently with assigning such contract or agreement to the extent it relates to the J&J EVH Products, retain its rights under such contract or agreement for purposes of such other product(s).

AA. "EVH Employee Information" means the following, as and to the extent permitted by Law:

1. with respect to each EVH 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 EVH Business;

   d. for sales representatives, the sales ranking as of September 30, 2005, and for other employees, the most recent performance rating;

   e. the base salary range of all EVH Employees having the same title or position;

   f. the aggregate annual compensation for the Respondent's last fiscal year and as targeted for the current fiscal year;

   g. employment status (, active or on leave or disability; full-time or part-time); and

h. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees.

2. at the Commission-approved Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the EVH Employees.

BB. "EVH Employees" means all those employees listed in non-public Appendix V to this Decision and Order.

CC. "EVH Intellectual Property" means all of the following that are owned by Respondent, to the extent related to the J&J EVH Products:

1. Patents;

2. trademarks, trade names, trade dress, trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, Development and other information;

3. rights to obtain and file for Patents and registrations thereof; and

4. rights under any license to any of the foregoing;

d d h , "EVH Intellectual Property" does not include (i) the name "Johnson & Johnson", "Ethicon", "CardioVations", or the names of any other corporations, divisions or companies owned by Respondent or (ii) any trademarks, trade names or logos used on other of Respondent's Products.

DD. "EVH Kits" means procedural kits for endoscopic vessel harvesting, including those currently marketed by

Respondent under the trademarks CLEARGLIDE® or WATCHBAND INCISION™.

EE. "EVH Manufacturing Equipment" means all equipment of Respondent utilized in the manufacture of J&J EVH Products, but does not include (i) any sterilization, labeling or packaging equipment or (ii) any assets utilized by Guidant in the manufacture of EVH Products immediately prior to the Effective Date.

FF. "EVH Manufacturing Technology" means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture (including that relating to all equipment used to manufacture a J&J EVH Product in final finished form), validation, packaging, release testing, stability and shelf life of J&J EVH Products, including all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering and other manuals and drawings, standard operating procedures, flow diagrams, chemical, pharmacological, toxicological, pharmaceutical, physical and analytical, safety, efficacy, bioequivalency, quality assurance, quality control and clinical data, research records, compositions, annual product reviews, process validation reports, analytical method validation reports, specifications for stability trending and process controls, testing and reference standards for impurities in and degradation of products, technical data packages, chemical and physical characterizations, dissolution test methods and results, formulations for administration, clinical trial reports, regulatory communications and labeling of, for or with respect to the J&J EVH Products, and all other information related to the manufacturing process, supplier lists, and supplier contracts for the J&J EVH Products.

GG. “EVH Products” means endoscopic vessel harvesting

Storz, and sold by Respondent under the Storz name; (4) any endoscopes manufactured by Third Parties (including but not limited to Storz and Olympus) and previously marketed, sold or distributed by Respondent; (5) the DERMABOND® Topical Skin Adhesive; and (6) any EVH Products researched, Developed, manufactured or sold by Guidant immediately prior to the Effective Date.

KK. "Field" means the prevention, treatment, diagnosis, or control of a particular medical condition.

LL. "Governmental Entity" means any Federal, state, local or non-U.S. government or any court, legislature, governmental agency or governmental commission or any judicial or regulatory authority of any government.

MM. "Interim Monitor" means a monitor appointed by the Commission pursuant to Paragraph V of this Order.

NN. "J&J Anastomotic Assist Products" mean those anastomotic assist Products distributed and sold by J&J immediately prior to the Effective Date.

OO. "J&J EVH Products" mean those EVH Products, other than Excluded EVH Products or Licensed EVH Products, researched, Developed, manufactured and sold by J&J immediately prior to the Effective Date, and including all such EVH Products that are introduced by Respondent on or before the Closing Date.

PP. "Law" means all laws, statutes, rules, regulations, ordinances and other pronouncements having the effect of law by any Governmental Entity.

QQ. "Licensed EVH Products" means the following devices, the product code numbers for which are listed in non-public Appendix VI.: (1) the device currently marketed in EVH Kits by Respondent as the ENDOPATH® Vessel

Scissors; (2) the atraumatic blunt dissector (sometimes referred to as the "cherry dissector" or "Kittner dissector") that is currently marketed in EVH Kits by Respondent; and (3) the ENDOLOOP® One Tie Vessel Ligator that is currently marketed by Respondent in the Field of endoscopic vessel harvesting (but excluding any suture that is a component of any such vessel ligator).

RR. "Novare" means Novare Surgical Systems, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, having its principal place of business located at 10231 Bubb Road, Cupertino, California 95014.

SS. "Patents" means all patents, patent applications and statutory invention registrations in which Respondent holds rights, either through assignment or license, as of the Effective Date (except where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, to the extent the claims of such continuations-in-part are fully supported pursuant to 35 U.S.C. § 112 by such patents and/or applications owned or licensed by Respondent as of the Effective Date, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto, related to a Product.

TT. "PC Coating" shall mean polymerized phosphorylcholine coating.

UU. "Product" means any medical device or pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically or genetically active ingredient.

VV. "Remedial Agreement" means the following:

1. the Abbott Agreement, if such agreement has not been rejected by the Commission pursuant to Paragraph II.A. of this Order;

2. the Datascope Agreement, if such agreement has not been rejected by the Commission pursuant to Paragraph III.A. of this Order; and

3. any agreement between Respondent and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.

WW. "Stent" means stents that provide intralumenal support through the use of metal members to form a stent scaffold, which is principally responsible for intralumenal support in the treatment of coronary artery disease. "Stent" excludes stents that are bioabsorbable or comprise scaffolds principally composed of non-metallic materials, such as ceramic.

XX. "Termination Agreement" means the "Termination and Release Agreement" by and between Ethicon, Inc., a subsidiary of J&J, and Novare dated September 28, 2005, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the J&J Anastomotic Assist Products, that have been approved by the Commission to accomplish the requirements of this Order. The Termination Agreement is attached to this Order as non-public Appendix VII.

YY. "Third Party(ies)" means any private entity other than the following: (1) the Respondent, or (2) the Commission-approved Acquirer.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Effective Date, Respondent shall grant an irrevocable, perpetual, fully paid-up and royalty-free non-exclusive license worldwide to the Drug Eluting Stent Patents to Abbott for the research, Development, manufacture, use, import, distribution, marketing or sale of Abbott Drug Eluting Stents and Abbott Combination Stents pursuant to and in accordance with the Abbott Agreement (which agreement shall not vary or contradict, or be construed to vary 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 Abbott or to reduce any obligations of Respondent under such agreement);

, that, if Respondent has licensed the Drug Eluting Stent Patents to Abbott prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Abbott is not an acceptable licensee of the Drug Eluting Stent Patents, then Respondent shall (1) grant an irrevocable,

manner that receives the prior approval of the Commission; and (2) at Respondent's option, immediately rescind the transaction with Abbott;

h, *h* that if Respondent has licensed the

not, whether the underpayment was by more than five (5) percent;

h h, that Respondent shall not be required to license to Abbott: (1) any Patents licensed under the June 2001 License Agreement between Abbott and Cordis Corporation; and (2) any portion of the Drug Eluting Stent Patents, or rights under those patents, if Abbott does not require such patent rights in order to sell Abbott Drug Eluting Stents or Abbott Combination Stents without fear of infringement of any Patents of Respondent.

B. Any Remedial Agreement that has been approved by the Commission between Respondent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Drug Eluting Stent Patents (and, if relevant, the Additional Drug Eluting Stent Patents) shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Remedial Agreement related to the Drug Eluting Stent Patents (and, if relevant, the Additional Drug Eluting Stent Patents) shall constitute a failure to comply with this Order.

C. In the event that Respondent licenses the Drug Eluting Stent Patents to Abbott, Respondent shall include in the Remedial Agreement related to the Drug Eluting Stent Patents, and Respondent shall observe, a covenant that Respondent shall not join, or file, prosecute or maintain any suit, in Law or equity, against Abbott (or Abbott's assignee of the entire Abbott Agreement) for the research, Development, manufacture, use, import, distribution, marketing or sale of the Drug Eluting Stent Products currently being used in Abbott's ZoMaxx™ and ZoMaxx™ II clinical trials, and variations of concentrations of ABT-578, stent sizes, PC Coating, catheters and/or delivery systems (excluding their balloon materials) as Abbott (or such assignee) may choose to employ under any Patents licensed to Abbott under the Abbott Agreement.

D. In the event that Respondent licenses the Drug Eluting Stent Patents and the Additional Drug Eluting Stent Patents to a Commission-approved Acquirer other than Abbott pursuant to Section II.A of this Decision and Order, Respondent shall include in any Remedial Agreement related to the Drug Eluting Stent Patents and the Additional Drug Eluting Stent Patents, and Respondent shall observe, a covenant that Respondent shall not join, or file, prosecute or maintain any suit, in Law or equity, against the Commission-approved Acquirer (or the

G. The purpose of the grant, license, delivery and conveyance of the Drug Eluting Stent Patents (and, if relevant, the Additional Drug Eluting Stent Patents) to a Commission-approved Acquirer is to create an independent, viable and effective competitor in the Drug Eluting Stent market, 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. Not later than fifteen (15) Business Days after the Effective Date, Respondent shall divest the EVH Business to Datascope pursuant to and in accordance with the Datascope Agreement (which agreement shall not vary or contradict, or be construed to varyss

Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee, pursuant to Paragraph VI of this Order, to effect such modifications to the manner of divesting the EVH Business to Datascope (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order;

h h, that Respondent shall not be required to divest to the Commission-approved Acquirer any portion of the EVH Business if the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) does not require such portion of the EVH Business for the continued research, Development, manufacture, use, import, distribution, marketing or sale of the J&J EVH products.

B. Any Remedial Agreement that has been approved by the Commission between Respondent (or a Divestiture Trustee) and a Commission-approved Acquirer of the EVH Business shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Remedial Agreement related to the EVH Business shall constitute a failure to comply with this Order.

C. Until the Closing Date of the EVH Business, Respondent shall take such actions as are necessary to maintain the viability and marketability of the EVH Business and to prevent the destruction, removal, wasting, deterioration, or impairment of the EVH Business, except for ordinary wear and tear and the disposition of inventory and other assets in the ordinary course of business.

D. At the option of the Commission-approved Acquirer (to be exercised no later than 30 days after the date the Commission-approved Acquirer signs a Remedial Agreement with Respondent to effect the acquisition of the

EVH Business), Respondent shall include in any Remedial Agreement the following provisions, and Respondent shall commit to satisfy the following:

1. Respondent shall (a) grant an irrevocable, perpetual, fully paid-up and royalty free (except for pass-through royalties), non-exclusive license worldwide to Patents owned or exclusively licensed by Respondent and necessary to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to research, Develop, manufacture, use, import, distribute, market and sell Licensed EVH Products in the Field of endoscopic vessel harvesting; and (b) in furtherance of the foregoing, provide the Commission-approved Acquirer with copies of the following documents, to the extent they are owned by, or in the possession, custody or control of, Respondent and related to the Licensed EVH Products: (i) design history files, technical files, drawings, product specifications, manufacturing process descriptions, validation documentation, packaging specifications, quality control standards and regulatory records, and (ii) specifications, drawings, manufacturing process descriptions and validation documentation for molds and other tooling used in manufacturing Licensed EVH Products; *ꝺ ꝺ h* , that any portions of the documents described in this clause (b) that do not relate to the Licensed EVH Products or the J&J EVH Products may be excluded from such copies; *ꝺ ꝺ h h* that as regards to any documents described in this clause (b) that are not owned by Respondent and which Respondent is prohibited by contract or Law from providing to the Commission-approved Acquirer, Respondent shall not be retherom providingide the Commissial

2. Respondent shall, for a period of up to one (1) year after the Closing Date at no more than Respondent's Actual Cost, provide transition services necessary for the continued research, Development, manufacture, use, import, distribution, marketing or sale of J&J EVH Products and Licensed EVH Products by the Commission-approved Acquirer.

3. Respondent shall enter into an agreement to supply J&J EVH Products, Licensed EVH Products, HARMONIC SCALPEL® devices and ALLPORT® Clip Appliers to the Commission-approved Acquirer at no more than Respondent's Actual Cost for a period not longer than

E. Respondent shall:

1. not later than fifteen (15) days after signing the Remedial Agreement, (a) provide to the Commission-approved Acquirer a list of all EVH Employees; (b) allow the Commission-approved Acquirer to interview any EVH Employees; and (c) in compliance with all Laws, allow the Commission-approved Acquirer to inspect the EVH Employee Information;

2. not later than fifteen (15) days after signing the Remedial Agreement, provide an opportunity for the Commission-approved Acquirer: (a) to meet personally, and outside the presence or hearing of any employee or agent of Respondent, with any one or more of the EVH Employees; and (b) to make offers of employment to any one or more of the EVH Employees; *provided, however*, that the Respondent may include in any Remedial Agreement related to the EVH Business a requirement that the Commission-approved Acquirer may not make offers of employment to more than three of the sales representatives listed on non-public Appendix V. for each of the Northeast and Southeast regions, or to more than one of the sales representatives listed on non-public Appendix V. for each of the Midwest and West regions;

other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an EVH Employee who receives a written offer of employment from the Commission-approved Acquirer; *h*, that nothing in this Order shall be construed to require Respondent to terminate the employment of any employee or prevent Respondent from continuing the employment of any employee;

4. provide all EVH 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 regularly scheduled raises, bonuses and vesting of pension benefits (as permitted by law and for those EVH Employees covered by a pension plan), offered by Respondent;

5. provide to each EVH Employee that is offered employment by the Commission-approved Acquirer financial incentives to accept employment with the Commission-approved Acquirer on or about the Closing Date, or reimburse the Commission-approved Acquirer for its provision of such incentive. Such incentives shall include a bonus for each such employee, equal to 15% of the sum of the employee's annual base salary and total commissions (if any) for the twelve (12) months prior to the date of the Remedial Agreement, who accepts an offer of employment from the Commission-approved Acquirer within one month of the Closing Date and remains employed by the Commission-approved Acquirer for a period of six (6) months, payable by Respondent in equal installments at three (3) months and six (6) months after the commencement of the employee's employment by the Commission-approved Acquirer; and

6. not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the EVH Employees to terminate their employment with the Commission-approved Acquirer; *h*, that Respondent may:

   a. advertise for employees in newspapers, trade

worldwide EVH Kit sales for the period January 1, 2005 to June 30, 2005.

G. In the event that Respondent is unable to satisfy all conditions necessary to divest any intangible asset that is a permit, license or right granted by any domestic or foreign governmental entity, Respondent shall provide such assistance as the Commission-approved Acquirer may reasonably request in the Commission-approved Acquirer's efforts to obtain a comparable permit, license or right.

H. Other than as necessary to comply with the requirements of this Order, Respondent shall not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacture, use, import, distribution, marketing or sale of the J&J EVH Products, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except in connection with the divestiture of the EVH Business, and to the Divestiture Trustee, if any; *h* that Respondent may continue using, outside the Field of endoscopic vessel harvesting, such Confidential Business Information as it currently uses in connection with any of the Licensed EVH Products or Excluded EVH Products.

I. Respondent shall, to the extent permissible under applicable laws and as a condition of continued employment post-divestiture, require that each employee of Respondent with access to Confidential Business Information related to the EVH Business sign a confidentiality agreement pursuant to which such employee shall be required to maintain all such Confidential Business Information 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); *h* that:

1. Respondent may use such information only to the extent necessary to defend or prosecute claims relating to assets or liabilities that are retained by Respondent after divestiture;

2. Respondent may also continue to use, and to share with employees of Respondent having a need to know same, such Confidential Business Information as they currently use in connection with any of the Licensed EVH Products or Excluded EVH Products outside the Field of endoscopic vessel harvesting; and

3. This Paragraph III.I. shall not apply to any Confidential Business Information related to the EVH Business that Respondent can demonstrate to the Commission that Guidant had prior to the Effective Date.

J. Counsel for Respondent (including in-house counsel under appropriate confidentiality arrangements) may retain unredacted copies of all documents or other materials provided to the Commission-approved Acquirer and may have access to original documents provided to the Commission-approved Acquirer. Respondent's use or disclosure of any documents or materials that are retained or accessed by Respondent solely by virtue of this Paragraph III.J (and not, for example, pursuant to the third proviso of Paragraph I.Z) shall be limited to the following:

1. to comply with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any data retention requirement of any applicable Governmental Entity, or any taxation requirements;

2. 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 EVH Business;

reduce any rights or benefits of Novare or to reduce any obligations of Respondent under such agreement).

B. The Termination Agreement shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Termination Agreement shall constitute a failure to comply with this Order.

C. Other than as necessary to comply with the requirements of this Order, for such period of time as provided in the Anastomotic Assist Distribution Agreement, Respondent shall not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacture, use, import, distribution, marketing or sale of the J&J Anastomotic Assist Products, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except in connection with the termination of the Anastomotic Assist Distribution Agreement, and to the Divestiture Trustee, if any; *h* that any Confidential Business Information related to J&J Anastomotic Assist Products that are the subject of a recall or other corrective action may be disclosed to those persons having a need to know such information for the purpose of carrying out such corrective action; *h h* that Respondent may continue using, in connection with products other than anastomotic assist Products, such Confidential Business Information related to J&J Anastomotic Assist Products as it (a) developed or obtained from sources other than Novare, and (b) currently uses in connection with products other than anastomotic assist Products.

D. The purpose of the termination of the Anastomotic Assist Distribution Agreement is to ensure the continuing, viable, and competitive marketing, distribution and sale of the J&J Anastomotic Assist Products to the same extent in which the J&J Anastomotic Assist Products were marketed, distributed and sold at the time of the

announcement of the proposed Acquisition and to remedy the lessening of competition alleged in the Commission's complaint.

V.

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 Paragraph III of this Order and the Remedial Agreement related to the divestiture of the EVH Business.

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 this Order in a manner consistent with the purposes of this 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 this 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 this 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 later of:

   a. the completion by Respondent of the divestiture of all relevant assets required to be granted, licensed, delivered, or otherwise conveyed pursuant to this Order in a manner that fully satisfies the requirements of this Order and notification by the Commission-approved Acquirer to the Interim Monitor that it (or its Designee(s)) is fully capable of producing the J&J EVH Products acquired pursuant to a Remedial Agreement independently of Respondent; or

   b. the completion by Respondent of the last obligation under this Order pertaining to the Interim Monitor's service;

   h that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order.

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 normal 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 this 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 this 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 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.

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 misfeasance, 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/or 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 Commission-approved Acquirer with respect to the performance of Respondent's obligations under this Order or the Remedial Agreement. 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 this Order.

8. Respondent may require the Interim Monitor and each of

VI.

IT IS FURTHER ORDERED that:

A. If Respondent has not fully complied with the obligations to grant, license, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to grant, license, deliver or otherwise convey the assets required to be granted, licensed, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5( ) of the Federal Trade Commission Act, 15 U.S.C. § 45( ), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to grant, license, deliver 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( ) 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

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. Each divestiture shall be made in the manner and to an acquirer as required by this Order; *h*, 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; *h h*, 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 the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

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

7. The Divestiture Trustee shall have no obligation or

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; h 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 a 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.

G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

VII.

IT IS FURTHER ORDERED that:

H. Within five (5) days of the Acquisition, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

I. Within thirty (30) days after the date this Order becomes final, and every sixty (60) Days thereafter until Respondent have fully complied with Paragraphs II.A., II.E., III.A., III.C., III.D., III.E., III.F., III.G., IV.A., and all its responsibilities to render transitional services to the Commission-approved Acquirer as provided in the Remedial Agreement(s), 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 have 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:

1. a full description of the efforts being made to comply with the relevant Paragraphs of this Order;

2. if Abbott is rejected by the Commission pursuant to Paragraph II.A., a description of all substantive contacts or negotiations related to the licensing of the Drug Eluting Stent Patents and the identity of all parties contacted and copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing its obligations to license the Drug Eluting Stent Patents;

3. if Datascope is rejected by the Commission pursuant to Paragraph III.A., a description of all substantive contacts or negotiations related to the divestiture of the EVH Business and the identity of all parties contacted and copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing its obligations to divest the EVH Business;

4. a detailed plan to deliver all Confidential Business Information required to be delivered to the Commission-approved Acquirer pursuant to Paragraphs III.A. and III.D., and agreed upon by the Commission-approved Acquirer and the Interim Monitor (if applicable) and any updates or changes to such plan;

5. a description of all Confidential Business Information delivered to the Commission-approved Acquirer,

including the type of information delivered, method of delivery, and date(s) of delivery;

6. a description of the Confidential Business Information currently remaining to be delivered and a projected date(s) of delivery; and

7. a description of all technical assistance provided to the Commission-approved Acquirer during the reporting period.

VII.

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

VII.

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

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date on which this Order becomes final.

APPENDIX I
NON-PUBLIC

ABBOTT AGREEMENT

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

APPENDIX II
NON-PUBLIC

AGENTS USED IN COMBINATION WITH ABT-578

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

APPENDIX III
PUBLIC

ADDITIONAL DRUG ELUTING STENT PATENTS

ISSUED US PATENTS
5,421,955
5,514,154
5,569,295
5,603,721
5,649,952
5,728,158
5,735,893
5,766,238
5,916,234
6,056,776
6,066,167
6,066,168
6,309,412
6,432,133
6,485,511
6,511,504
6,596,022
6,620,193
6,626,933
6,629,991
6,689,159
6,908,479
B1 5,421,955
Pending US Applications
10/626,083
11/112,143

APPENDIX IV
NON-PUBLIC

DATASCOPE AGREEMENT

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

APPENDIX V
NON-PUBLIC

EVH EMPLOYEES

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

APPENDIX VI
NON-PUBLIC

LICENSED PRODUCT CODE NUMBERS

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

APPENDIX VII
NON-PUBLIC

TERMINATION AGREEMENT

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

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Johnson & Johnson ("J&J"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from J&J's acquisition of Guidant Corporation ("Guidant"). Under the terms of the proposed Consent Agreement, J&J is required to (a) grant to a third party a fully paid-up, non-exclusive, irrevocable license, enabling that third party to make and sell drug-eluting stents ("DESs") with the Rapid Exchange ("RX") delivery system, (b) divest to a third party J&J's endoscopic vessel harvesting ("EVH") product line, and (c) terminate its agreement to distribute the proximal anastomotic assist device ("AAD") of Novare Surgical System, Inc. ("Novare").

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 will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the

J&J is a comprehensive and broadly-based manufacturer of products related to all aspects of human health care. In 2004, J&J generated global sales of $47.3 billion and U.S. sales of $27.7 billion. J&J is divided into three business segments: Consumer, Pharmaceutical, and Medical Devices and Diagnostics. The products impacted by the proposed transaction, DESs, EVH devices, and proximal AADs, fall within J&J's Medical Devices and Diagnostics segment.

Guidant manufactures products in three broad business units: cardiac rhythm management, vascular intervention, and cardiac surgery. In 2004, Guidant's sales were $3.8 billion globally and $2.53 billion in the United States. Guidant's DES program is part of its vascular intervention business unit, and the company's EVH

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delivery systems currently are highly preferred by physicians in the United States and are increasing in popularity. Boston Scientific Corporation and Guidant own the intellectual property rights to the RX delivery system in the United States. The companies have cross-licensed each other, and J&J has access to the RX delivery system through an agreement with Guidant. Both DESs currently on the market, J&J's Cypher® and Boston Scientific's Taxus®, are available on the RX delivery system.

The relevant geographic market in which to analyze the effects of the proposed acquisition on the DES market is the United States. DESs are medical devices that are regulated by the United States Food and Drug Administration ("FDA"). Performing the necessary clinical testing and navigating the approval process for the FDA can be burdensome and time-consuming. As such, DESs sold outside of the United States but not approved for sale in the United States do not provide viable competitive alternatives for U.S. consumers.

The U.S. market for DESs is highly concentrated; currently only two firms, J&J and Boston Scientific, have products on the market. Guidant's DES program is still in development, but it is anticipated to be one of at least three entrants, along with Medtronic, Inc. and Abbott Laboratories, likely to enter the U.S. market by the end of 2007. Guidant is the only anticipated entrant with rights to the intellectual property necessary to market a DES with the RX delivery system, the dominant delivery system in the United States.

Developing and receiving FDA approval for a DES is difficult, time-consuming and expensive. It can take hundreds of millions of dollars of research and development, significant funding for clinical trials, and an extensive amount of time to even reach the stage of seeking FDA approval. The regulatory process itself can also be time-consuming as the FDA reviews the volumes of materials and data a company submits in support of its application for approval.

Considering all these factors, entry into the manufacture and sale of DESs is impossible to achieve within two to three years.

In addition to the regulatory barriers facing firms seeking to enter the DES market, there are substantial intellectual property barriers an entrant must overcome. Firms must invent around or

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of the companies developing DES products. In particular, staff investigated potential divestiture candidates and concluded that Abbott was among the companies well-positioned to replicate the competitive impact Guidant was likely to have absent the proposed acquisition. The parties have selected Abbott as the up-front buyer for the divestiture package. Abbott is a well-known and respected pharmaceutical and diagnostics company that has a number of vascular devices on the market already or in development. It has experience with both drugs and vascular devices, a highly regarded DES design, a strong and growing vascular sales force, and the necessary manufacturing capabilities. Abbott, therefore, is poised to become a strong competitor in the DES market when it enters in the second half of 2007, approximately the same time as Guidant's anticipated date of entry. Access to the RX delivery system will allow Abbott to replace Guidant as the third entrant into the DES market with an RX delivery system.

The Commission's merger remedies are intended to maintain or to restore the competitive . The Commission does not, as a matter of course, seek to "improve" on pre-transaction competition. Based on the evidence gathered in the investigation, the Commission has determined that the license to Abbott should replicate the competitive conditions in DESs that existed prior to the proposed transaction between J&J and Guidant. As a result, a Commission order requiring licenses to additional parties is not necessary.

Given the uncertainty inherent in a development program, the RX license contemplated by the proposed Consent Agreement is transferable, so that if Abbott's DES program is not successful, it will have the incentive and ability to transfer the RX license to another firm developing a DES, ensuring that a successful third DES firm is able to enter the market with an RX delivery system in the relevant timeframe. The proposed Consent Agreement also requires the parties to enter into a covenant not to sue Abbott in relation to certain intellectual property rights regarding stent design, stent coating and the use of certain drugs on a stent.

Endoscopic Vessel Harvesting Devices

EVH devices are used in coronary artery bypass graft ("CABG") surgery to remove a patient's leg vein, arm artery, or other blood vessel that is then used as a conduit to bypass one or more blocked coronary arteries. EVH devices allow for a minimally-invasive procedure requiring only one to three small incisions. EVH has several clinical benefits over the other methods of vessel harvesting (the open method and bridging) both of which are much more invasive, leave large, unsightly scars and carry a greater risk of infection. Surgeons and physician's assistants would not switch to these other methods of vessel harvesting even if the price of using EVH devices increased by five to ten percent.

As with DESs, the United States is the relevant geographic market in which to analyze the effects of the proposed acquisition on the EVH device market. EVH devices are also medical devices subject to regulation by the FDA. Receiving FDA approval to market an EVH device in the United States can be a lengthy process, but is necessary in order to sell the devices in the Unites States. EVH devices sold outside of the United States but not approved by the FDA for sale in the United States therefore do not provide viable competitive alternatives for U.S. consumers.

The U.S. market for EVH devices is highly concentrated with J&J and Guidant as the only competitors until very recently, when Terumo Corporation entered. Guidant currently dominates the market with over eighty percent market share. Terumo received FDA approval for its device in January, 2005 and has yet to generate significant sales.

Firms seeking to enter the market for EVH devices face regulatory hurdles and significant intellectual property barriers, both of which make entry into the market for EVH devices in the next two to three years highly unlikely. In addition, while the use of EVH devices in CABG surgery is increasing, the number of overall CABG surgeries appears to be decreasing due to, among

other things, the increase in stenting procedures; this steady decline in the number of CABG procedures being performed in the United States makes it less likely that firms would choose to enter the EVH device market in response to a modest increase in the price of the devices.

The proposed acquisition would constitute a virtual merger to monopoly in the market for EVH devices and is likely to lead to increased prices and decreased innovation in the market for those devices. Until recently, Guidant and J&J were the only two firms to offer an EVH device in the United States, and while Terumo recently entered, it is likely that it will take several years before Terumo's device has a significant impact on the market for EVH devices.

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in the market for EVH devices by requiring J&J to divest its EVH product line to a Commission-approved buyer at no minimum price. J&J has reached an agreement to divest the EVH business to Datascope. Datascope, a diversified medical device company, has a line of products used in cardiac surgery, including products used in CABG procedures. Pursuant to the Consent Agreement, J&J is required to accomplish the divestiture of its EVH product line no later than fifteen (15) business days after the acquisition is consummated.

The proposed Consent Agreement permits the Commission-approved buyer of the EVH product line assets to enter into a supply agreement with J&J for a period of up to two (2) years. The supply agreement may be necessary because of the need to

developed and is manufactured by Novare; J&J and Novare have a distribution agreement making J&J the sole distributor of eNclose® in the United States.

As with the other medical devices discussed, entry into the market for proximal AADs is difficult, costly, and time-

J&J's compliance with all of its obligations and performance of its responsibilities pursuant to the Commission's Decision and Order. The interim monitor is required to file periodic reports with the Commission to ensure that the Commission remains informed about the status of the divestitures, about the efforts being made to accomplish the divestitures, and the provision of services and assistance during the transition period for the EVH divestiture.

Finally, the proposed Consent Agreement contains provisions that allow the Commission to appoint a divestiture trustee if any or all of the above remedies are not accomplished within the time frames required by the Consent Agreement. The divestiture trustee may be appointed to accomplish any and all of the remedies required by the proposed Consent Agreement that have not yet been fulfilled upon expiration of the time period allotted for each.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and

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IN THE MATTER OF

ENTERGY CORPORATION

ORDER REOPENING AND SETTING ASIDE ORDER

On March 3, 2005, Entergy Corporation ("Entergy") and Entergy-Koch, LP ("EKLP"), respondents named in the consent order issued by the Commission on January 31, 2001, in Docket No. C-3998 ("Order"), filed their Petition of Entergy and EKLP to Reopen and Set Aside Order in this matter ("Petition"). Entergy and EKLP ask the Commission to reopen and modify the Order in its entirety pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, thereby relieving them of Entergy's and EKLP's reporting and posting obligations, which comprise the only ongoing performance obligations under the Order and which otherwise will continue until January 31, 2007. Respondents contend, inter alia, that significant changed circumstances eliminate the continuing need for the Order's requirements. Petition at 2, 8-9. The Petition was placed on the public record for thirty days pursuant to Section 2.51(c) of the Commission's Rules. No comments were received. For the reasons stated below, the Commission has determined to grant the Petition.

The Complaint issued with the Order in Docket No. C-3998 states that, on May 26, 2000, Entergy and Koch Industries, Inc. ("Koch") entered into an agreement to form EKLP, a limited partnership owned equally by Entergy and Koch, and that each contributed certain assets to EKLP. (Complaint ¶ 12). Among other things, EKLP acquired Gulf South Pipeline Company LP ("Gulf South"), a major supplier of natural gas pipeline transportation in Louisiana and Mississippi, from Koch (Complaint ¶¶ 6, 12, 19). Entergy, in turn, acquired a fifty percent interest in Gulf South through EKLP, including the right to fifty percent of EKLP's profits. (Complaint ¶ 10). At the same time, Entergy also owns regulated utilities that supply electricity to

consumers in Louisiana and western Mississippi, and that distribute natural gas to consumers in New Orleans and Baton Rouge, Louisiana. (Complaint ¶¶ 2, 13-18). Further, Gulf South is capable of supplying all of Entergy's regulated utilities in those states with natural gas transportation. (Complaint ¶ 19).

The Complaint alleges that, as a result of Entergy's fifty percent ownership of Gulf South, it would "have the incentive and ability . . . to pay EKLP prices for natural gas transportation [for its regulated utilities that are subject to state regulator's rules governing the recovery of the cost for delivery of natural gas] above prevailing market prices and to purchase a level of service above what is necessary for effective operation of Entergy's facilities." (Complaint ¶ 21). Moreover, the Complaint alleges, it would be more difficult for state and local regulators in Louisiana and western Mississippi to detect whether Entergy had improperly incurred inflated costs of natural gas transportation in its purchase from its affiliates, and to challenge such costs as having been imprudently incurred, for several reasons, including that "the process by which Entergy purchases gas transportation is not

[1] *S S , ¢* 16 CFR 2.51(b), announced August 15, 2001, ("Amendment").

[2] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage);

5(b) further provides that the Commission may reopen and set aside an order when it determines that the public interest so requires. Entergy and EKLP's Petition also addresses the public interest standard, which requires that the requester make a showing of a legitimate public interest reason or reasons justifying relief. In this instance, however, we do not need to assess the sufficiency of Entergy's and EKLP's public interest showing because the Commission has determined that Entergy and EKLP have made the requisite satisfactory showing that changed conditions of fact require the Order to be reopened and set aside.

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IT IS FURTHER ORDERED THAT the Commission's Order issued on January 31, 2001, hereby is set aside, as of the date of issuance of this Order.

IN THE MATTER OF

NESTLÉ HOLDINGS, INC.

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[1] Respondents had previously sought and received an extension of this provision from one year to twenty-one months.

[2] In connection with the Request, Respondents requested that the Commission eliminate the public comment period on the Request. Respondents provided no compelling reason for the Commission to vary from its normal procedures. A press release was issued shortly after the Request was filed. The Commission has determined to deny the request to eliminate the comment period.

I. BACKGROUND

This matter arose from Nestlé's 2003 acquisition of Dreyer's, valued at approximately $2.8 billion. In order to resolve competitive concerns regarding the combination of the parties' ice cream businesses, the Consent Order required Respondents to divest assets and to enter several (confidential) arrangements with CoolBrands. In particular, the Order required the Respondents to divest: (1) all assets, businesses, and goodwill related to the manufacture, marketing, or sale of the Dreamery, Godiva ice cream and Whole Fruit brands, and (2) all assets related to Nestlé's distribution of frozen dessert products. These assets, collectively referred to as the "assets to be divested," were divested to CoolBrands on July 5, 2003. Also under the Order, Dreyer's is required to supply CoolBrands with the types and quantities of Dreamery, Godiva ice cream, and Whole Fruit products that CoolBrands requests at a price no greater than Dreyer's production costs for a period notnder5mxced tone(1) ayear.]TJT*[(DAtthe tequestsof Doc

an additional one year, until April 2006. The current agreement expired on April 1, 2005. CoolBrands explains that the loss of the Weight Watchers ice cream business, the integration of Kraft's yogurt business, and the sudden death of Mr. Richard Smith, an important member of the management team, has strained its management's time and prevented it from assuming the responsibilities covered by the Transitional Services Agreement. Affidavit of David J. Stein, President and CEO of CoolBrands ("Stein Affidavit") at ¶ 5.

III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

The 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). 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.[3] 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.[4]

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[3] *S S* , 16 CFR 2.51(b), announced August 15, 2001, ("Amendment").

[4] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *C* , Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *S S C* , 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.").

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[5] In the case of "public interest" requests, FTC Rule of Practice 2.51(b) requires an initial "satisfactory

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[5] Hart Letter at 5; 16 C.F.R. § 2.51.

[6] 16 C.F.R. § 2.51.

an order oblige the Commission to modify it,[7] and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[8] All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[9]

IV. THE ORDER WILL BE REOPENED AND MODIFIED IN THE PUBLIC INTEREST

The Commission has determined to reopen and modify the Order as requested by Respondents. CoolBrands has shown that unanticipated changes in demand for its products have stretched its management resources, and the extension will better enable it to compete in the long term. Dreyer's has already agreed to the extension.

Specifically, CoolBrands recently lost the Weight Watchers ice cream business. Stein Affidavit at ¶ 6. Management was also involved in time-consuming litigation with Weight Watchers over the cancellation of the contract. CoolBrands recently acquired Kraft's yogurt business, and has been working hard to integrate this business. Stein Affidavit at ¶ 7. Mr. Smith's death has also impacted CoolBrands' business, causing a realignment of management duties. Stein Affidavit at ¶ 8. These developments

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[7] *S S C* , 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[8] *S S* , 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[9] 16 C.F.R. § 2.51(b).

have prevented CoolBrands from taking over the services covered by the Transition Services Agreement.

Respondents seek the modification under either change of fact or public interest grounds. Although the possibility that CoolBrands might lose the Weight Watchers ice cream business and acquire the Kraft yogurt business were not anticipated at the time the Order was entered, it is not clear that these changes to CoolBrands' business are unforeseeable "changes of fact" within the meaning of Section 5(b) of the FTC Act. Nevertheless, holding CoolBrands to the twenty-one month limit on obtaining Administrative Services from Dreyer's, with the resulting disruption to its operations and ability to compete, would likely diminish CoolBrands' competitive effectiveness. It is therefore in the public interest to make the change to enable CoolBrands to continue to compete in the market without disruption of its operations. Moreover, because the extension is designed to benefit the acquirer of the divested assets, and not the respondent, it is clearer that the change is in the public interest. CoolBrands has taken steps to ensure that it will be able to take over these functions by the extended deadline, and has expressed confidence that it will be able to do so. Stein Affidavit at ¶ 13.

Although the Commission has determined that Respondents have satisfied the public interest standard, the case for modification is not overwhelming. The deadlines for transitional services contained in Commission Orders are designed to provide the acquirer of divested assets with a reasonable amount of time to prepare to compete effectively in the market, and are not intended to create a long-term relationship between the seller of the assets and the acquirer. Having now extended the transitional services deadline twice at the request of CoolBrands, it is very unlikely that the Commission would further extend the deadline.

Accordingly,

IT IS ORDERED, That this matter be, and it hereby is, reopened; and

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IT IS FURTHER ORDERED, That paragraph II.H. of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

H. At the request of the Commission Approved Acquirer, for a period not to exceed thirty- three (33) months from the date Respondents divest the Assets To Be Divested, Dreyer's shall provide Administrative Services to the Commission Approved Acquirer sufficient to enable the Commission Approved Acquirer to operate the Assets To Be Divested in a viable and competitive manner. In providing Administrative Services to the Commission Approved Acquirer, Dreyer's shall charge no more than its Service Cost of providing the Administrative Services.

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IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.

ORDER APPROVING RESPONDENTS' APPLICATION FOR APPROVAL OF MONITOR TRUSTEE AND MONITOR TRUSTEE AGREEMENT

The Commission's Final Order in this matter required Respondents to retain a Monitor Trustee within 30 days of the Commission's Order becoming final. Respondents Chicago Bridge & Iron filed an Application for Approval of Proposed Monitor Trustee and Monitor Trustee Agreement on May 26, 2005. On June 3, 2005, Complaint Counsel filed a response indicating that they do not oppose Respondents' choice of Monitor Trustee and the Monitor Trustee Agreement is acceptable. The Commission has decided to approve Respondents' Application. Accordingly,

IT IS ORDERED THAT Respondents' Application to retain Mr. Paul J. Vallero as the Monitor Trustee in this matter is **APPROVED**; and

IT IS FURTHER ORDERED THAT the Monitor Trustee Agreement executed between Mr. Vallero and Respondents CB&I is **APPROVED**.

By the Commission.

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IN THE MATTER OF

RAMBUS INCORPORATED

ORDER REOPENING THE RECORD TO ADMIT INTO EVIDENCE THE SUPPLEMENTAL EVIDENCE FILED BY THE PARTIES IN ACCORDANCE WITH THE PROVISIONS OF THE COMMISSION'S ORDER OF MAY 13, 2005, AS AMENDED, AND DIRECTING BRIEFING OF ISSUES RELATED TO SUCH SUPPLEMENTAL EVIDENCE

On June 17, 2005, Complaint Counsel and Respondent separately filed supplemental evidence in accordance with the terms of the Commission's Order of May 13, 2005, as modified by the Commission's Order of June 13, 2005 (hereinafter "the supplemental evidence"). After having first consulted with each other, Complaint Counsel and Respondent each filed a response to the filing of the other, neither of which raised any objection to the admission into evidence of the supplemental evidence. The Commission has determined that it should (1) reopen the record to admit into evidence the supplemental evidence and (2) order additional briefing and other proceedings in light of the admission of such evidence. Accordingly,

IT IS ORDERED THAT the record in this proceeding shall be, and it hereby is, **REOPENED** to admit into evidence the supplemental evidence; and

IT IS FURTHER ORDERED THAT:

1. On or before August 10, 2005, Complaint Counsel and Respondent shall each file amended proposed findings of fact and conclusions of law in light of the supplemental evidence, and provide cross-references to the earlier proposed findings of the parties and to the related provisions in the Initial Decision;

2. The amended proposed findings required by Paragraph 1. of

this Order shall also include the identification of any misstatements or misrepresentations of fact that may have been previously made by any person during the course of this

matter that can now be identified by reason of the supplemental evidence;

3. On or before August 10, 2005, Complaint Counsel or Respondent may file any motions seeking additional relief or inferences resulting from or relating to any alleged spoliation of evidence by Respondent; and

4. On or before August 17, 2005, Complaint Counsel and Respondent shall each file their responses, if any, to the filings required or permitted by Paragraphs 1. or 3. of this Order.

By the Commission.

IN THE MATTER OF

RAMBUS INCORPORATED

ORDER DENYING COMPLAINT COUNSEL'S PETITION TO MODIFY THE SCHEDULE IN THE COMMISSION'S JULY 20, 2005 ORDER

On July 20, 2005, the Commission entered an order reopening the record to admit supplemental evidence and directing a schedule for briefing and other filings related to such supplemental evidence. On July 28, 2005, Complaint Counsel filed a Petition asking the Commission to suspend that schedule, in light of Rambus's ongoing production to Complaint Counsel of documents Rambus recently found on its computer back-up devices and produced to the plaintiff in *S* , Dkt. No. CV 00-20905 RMW (N.D. Cal.). Complaint Counsel state that they expect to be ab9s m(it Com)655.9e(of thsef dm)-49.1cudmenus the ee0(ecor on)47.5fd ingbynSepute hhat t-61.5(h)(he Commisi)-54.3ion(is,)55(ga dir)55(e0(e t)-1.7tedbyn)46.5g the

iatedaino (the recor). In(isn Jui)46.8l, 98, 200 Respdm uns,e ct to suspeni(ng th Jul, 2 Or(der schedm)-38.2ls,e)]TJ0 -1.2568 TD0.0383 Tc-0.011 Tw[but lienthat o to ad(it supplem)481.8(ental evide(cefromn then)]TJ/F3 1 Tf20.74324 0 TD0.0219 Tc[(y0)-498(ix.)]T expd it654.3iobusdiftion ofmatcersespeni Cogbefs ceddertos

being produced by Rambus in discovery in the litigation,[1] there is no need to suspend the briefing of issues related to documents already admitted into the record. Accordingly,

IT IS ORDERED THAT Complaint Counsel's Petition to Modify the Schedule in the Commission's July 20, 2005 Order be, and it hereby is, **DENIED**.

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[1] This disposition of the Petition should not be construed to express any view on whether the record can or should be reopened at a later date to admit materials that are currently being produced by Rambus in discovery in the litigation.

IN THE MATTER OF

KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A STAY OF FINAL ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

On July 20, 2005, Respondent Kentucky Household Goods Carriers Association, Inc. ("Kentucky Association") moved the Commission for reconsideration of its June 21, 2005 final order in this case, in light of proceedings that have taken place before the Kentucky Transportation Cabinet ("KTC") with regard to a tariff filing by the Kentucky Association proposing a rate increase.[1] Respondent argues that these proceedings demonstrate that the KTC's current procedures for reviewing the Kentucky Association's collective rate-making satisfy the "active supervision" requirement of the state action defense. In the

[1] Respondent's motion is cited herein as "Resp. Mot."

> This standard recognizes that litigation must end at some point, and that decision makers must render their judgment based on a finite body of evidence. We thus view reconsideration of a fully-litigated opinion and order as an "extraordinary remedy which should be used sparingly."

C h C , Dkt. No. 9300, 2005 FTC LEXIS 70, at *6 (May 10, 2005) (citation omitted).

Respondent's argument – that proceedings at the KTC with respect to the Kentucky Association's most recent proposed rate increase (Special Supplement No. 86) demonstrate active supervision by the KTC – is not a new question raised by our decision and final order in this case. On the day of oral argument before the Commission, Respondent filed a motion for a stay, in which it argued that the KTC's adoption of new procedures and the KTC's actions with regard to Special Supplement No. 86 demonstrated active state supervision.[2] The Commission's opinion specifically considered and rejected this argument. The Commission concluded that, although the KTC had taken some "initial steps" to augment its level of supervision over the Kentucky Assocrs8e nmot6m]TJT that, a th2erss aespondecfad on auguldwat the KTC's ado proc

[2] *S* Respondent's Motion for a Stay of Proceedings Pending Action by Kentucky Transportation Cabinet, filed on Jan. 24, 2005 (hereinafter cited as "1/24/05 Mot. for Stay").

> that are likely to be answered satisfactorily merely by awaiting the KTC's action with regard to the Kentucky Association's most recent tariff filing. Rather, as Respondent itself has indicated, development of a new program of supervision will take some time.

Id. at 27-28.

In its present motion, Respondent asserts that proceedings at the KTC that have taken place since Respondent filed its prior motion for a stay warrant reconsideration of the Commission's decision. However, a motion that "merely seeks to provide additional factual support for a position that Respondent[] ha[s] already argued . . . does not meet the mandatory requirement of Rule 3.55 that the petition present only new questions raised by Commission decisions or orders." *Ch Id C*, 2005 FTC LEXIS 70, at *9. *S C*, Docket No. 9279, 1999 FTC LEXIS 212, at *1 (July 2, 1999) (denying a petition for reconsideration where the respondent "could have introduced the recent factual developments upon which it now relies before this late stage").

Moreover, the materials submitted here by Respondent suffer from the same shortcomings as the materials upon which Respondent based its prior motion for a stay. Although the KTC has conducted a hearing on the Kentucky Association's proposed rate increase, it apparently has yet to issue a decision on the matter. Thus, we still do not know what analysis the KTC will undertake or what criteria it will apply to assess the reasonableness of the proposed rate increase. Also, the materials submitted by Respondent do not clearly indicate what information the KTC will require to support the proposed rate increase. It is not clear, for example, whether the KTC will consider the information provided at the hearing regarding the costs of a single

hearing transcript indicates that the KTC has received some sort of financial statement from movers, no information is given

significance to the KTC's intervention in this case and views regarding the adequacy of its level of supervision over collective rates. Resp. Mot. at 5.[3] As the Commission stated in its opinion, however, "the objective facts – rather than the state's opinion – determine whether the active supervision standard is met." Op. at 22 n.20. The Commission explained that:

> the Supreme Court has made clear [that] states do not have unfettered discretion to determine the level of regulatory oversight that is adequate when competition has been displaced. Rather, protection from the federal antitrust laws will be granted only when the state has substituted a program of active supervision for the economic constraints of the competitive market.

at 22 (citing *C* , 445 U.S. 97, 106 (1980)). The Commission also noted that Respondent's argument regarding the significance of the KTC's intervention was further undercut by the Commonwealth of Kentucky's submission of an brief expressing its view that the initial decision finding no active state supervision did not conflict with state law or public policy. . at 22 n.20. Respondent offers no reason for us to question our decision on any of these points, and Respondent's renewal of its prior arguments, without more, is insufficient to justify the grant of a stay. *S* *C* , 128 F.T.C. 233, 234 (1999); 1998 FTC LEXIS 224, at *4.

Although previous Commission decisions have held that a stay may be appropriate where the case involves difficult legal

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[3] Respondent also asserts, without elaboration or explanation, that it believes the Commission wrongly interpreted the legal standards for "active supervision" contained in the Supreme Court's decisions in and . Resp. Mot. at 6.

questions or a complex factual record,[4] this is not such a case. As the Commission stated in its opinion:

> This is not a difficult case in which we are called upon to decide whether a state's implementation of certain supervisory steps but not of others satisfies the active state supervision requirement. Where, as here, the relevant state agency has not taken any of the steps that courts have identified as indicia of active supervision, it is clear that the state has not exercised "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention." 504 U.S. at 634-35. This conclusion is all the more compelling when the state agency has not taken the steps that the state legislature itself has identified as important for a determination of whether rates are reasonable.

Op. at 19. Under these circumstances, we find that Respondent's arguments on the merits do not support the grant of a stay.

B. Irreparable Harm to Respondent

Respondent bears the burden of demonstrating that denial of a stay would cause it irreparable harm. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay." *C* , 1996 FTC LEXIS 277, at *6-7. , 128 F.T.C. at 235; 1998 FTC LEXIS 224, at *7.

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[4] , 128 F.T.C. at 234-35; 1998 FTC LEXIS 224, at *5; *C* , 1996 FTC LEXIS 277, at *10.

Respondent asserts that if a stay is not granted and the Kentucky Association is prohibited from filing a collective tariff, it will go out of business because it is not in a position to file individual tariffs on behalf of its members, and its non-tariff activities are insignificant in nature. Resp. Mot. at 7. Respondent also asserts that its members will be irreparably injured because they will have to file individual tariffs – an undertaking "which few understand and fewer can perform in a professional and competent manner." . However, Respondent provides no specific factual support for these assertions. Also, Respondent's claim that the preparation of individual tariffs is necessarily a burdensome and complex undertaking would seem to be undercut by evidence in the record that movers in Kentucky who do not participate in the Kentucky Association's tariff have been allowed to file, and do file, very simple individual tariffs. CX 116 (Debord, Dep. II at 18). Accordingly, we find that Respondent has not met its burden of showing irreparable harm.

C. Harm to Others and the Public Interest

Because Complaint Counsel represents the public interest in effective law enforcement, we consider the third and the fourth factors together.

harm if a stay is not granted. Moreover, because the prohibitions against the Kentucky Association's collective rate-making contained in the Commission's final order do not take effect until 120 days after entry of the order, Final Order ¶¶ II and III, the order gives considerable time for the KTC and movers in Kentucky to prepare for the transition to individual tariff filings.[5]

Further, as we stated in our opinion, if and when the KTC implements a program to exercise greater supervision over

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[illegible]

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[5] Although there is testimony in the record that, at the KTC's existing level of staffing (, one employee), it would be difficult for the KTC to process a large number of individual tariffs, CX 116 (Debord, Dep. II at 9), materials submitted by Respondent in support of its prior motion for a stay indicate that the KTC is already taking steps to increase the number of personnel responsible for reviewing tariffs. *S* 1/24/05 Mot. for Stay, Ex. K.

[6] Unlike cases in which respondents have merely sought a stay of collateral provisions of a final order, Respondent here seeks a stay of the final order's core provisions enjoining unlawful activity. *S* ., *C* , 1996 FTC LEXIS 277, at *10 ("Respondent has not sought to stay those provisions of the order

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IT IS ORDERED THAT Respondents' Motion for Reconsideration or, in the Alternative, for a Stay of Final Order Pending Review by U.S. Court of Appeals is **DENIED**.

of this information would likely result in "clearly defined, serious injury." 16 C.F.R. § 3.45(b). *S* *S* 58 F.T.C. 1184, 1188 (1961); *C* , 90 F.T.C. 455, 456 (1977); *C* , 95 F.T.C. 352, 355 (1980). Although we recognize that Respondents have not established that Attachment B to Complaint Counsel's Response meets this standard, the Commission believes this failure may have been inadvertent, and we have therefore granted status for six months for this material. At the end of this period, CB&I may move to have the period extended or, in the absence of such a motion, the material will be unsealed. The Commission has determined to make public the material on page 7, which merely references [REDACTED]. This material is available from public sources and therefore is not eligible for status. *S* Tr. at 2957-58, 6869-73. Finally, the Commission is not persuaded that treatment should be granted for the five-year period requested by CB&I. The information for which such treatment is being granted is temporal in nature, and its competitive sensitivity is likely to diminish over time. The Commission thus believes that a two-year period is appropriate.

Accordingly,

IT IS ORDERED THAT the material on pages 13 and 14 of Complaint Counsel's Response that was redacted from the public version of the Response and portions of CB&I's Motion and Exhibit A thereto that were redacted in the public version of the Motion shall be afforded treatment for a period of two years from the date of this Order, at which time Respondents may show cause why those materials should not be made public; and

IT IS FURTHER ORDERED THAT Attachment B to Complaint Counsel's Response shall be afforded treatment for a period of one hundred and eighty days from the date of this Order, at which time Respondents may show cause why those materials should not be made public; and

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IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.

ORDER CLARIFYING RESPONDENTS' OBLIGATIONS AS TO THE PITT-DES MOINES AND CB&I CORPORATE NAMES

I. Introduction

The Commission's Final Order in this matter required, among other things, Respondents Chicago Bridge & Iron N.V. and Chicago Bridge and Iron Company (collectively, "CB&I") to divest intellectual property for the Relevant Products and other complementary products.[1] On January 31, 2005, Complaint Counsel filed a petition for reconsideration that requested the Commission to modify its Final Order to make clear that only the divested entity will have rights to the PDM corporate names and CB&I will retain its rights in the CB&I corporate names.[2] Respondents CB&I did not oppose Complaint Counsel's Petition to the extent the petition sought to ensure that CB&I would retain all rights in its corporate name.[3] However, CB&I pointed out that when it acquired PDM's Engineered Construction ("EC") and Water Divisions, it received only a "one-year, non-renewable,

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[1] Final Order, ¶¶ I.P, IV.A.

[2] Petition for Reconsideration to Clarify Respondents' Obligations as to the Pitt-Des Moines and CB&I Corporate Names, filed January 31, 2005 ("Complaint Counsel's Petition").

[3] Response to Complaint Counsel's Petition for Reconsideration to Clarify Respondents' Obligations as to the Pitt-Des Moines and CB&I Corporate Names, filed Feb. 10, 2005 ("CB&I's Response").

non-exclusive transitional license to the use of the PDM mark."[4] As a result, CB&I has no rights in PDM's corporate name to transfer. Because we had concerns that the acquirer of the divested assets might need to use the CB&I and PDM tradename and marks to compete effectively, we ordered both PDM and CB&I to submit briefs addressing the feasibility and consequences of granting a license to their respective corporate names.

II. PDM's Tradename and Marks

PDM's brief[5] states that when PDM sold its various divisions, it entered into covenants not to compete that impact the use of the PDM tradename and marks and suggests that obtaining waivers from some of those buyers might be advisable.[6] These covenants notwithstanding, however, the brief concludes that PDM likely owns the right to use the tradename "Pitt-Des Moines" and the marks "PITT-DES MOINES" and "PDM" in connection with the

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[4] . at 2.

[5] Pitt-Des Moines, Inc. Briefing on Complaint Counsel's Motion for Clarification, filed Apr. 6, 2005 ("Pitt-Des Moines Brief").

[6] For example, in connection with PDM's sale of its Oregon Calvert Co. to Contech Construction, PDM entered into a covenant not to compete with "any business, venture or activity engaged anywhere in the world in the Oregon Culvert Business under the names . . . 'Pitt-Des Moines, Inc.'" through January 31, 2006. . at 4. The brief also states that the sale of PDM's steel bridge division to Steel Bridges may impact PDM's rights to the PDM mark and concludes that consent of Steel Bridges (and the bridge lender that holds a security interest in the same property) is advisable. . at 9-12.

EC and Water Division businesses.[7] It thus states that PDM

[7] *Id.* at 13.

[8] *Id.*

having multiple competitors in the relevant markets – each of which could hold itself out as CB&I – would undoubtedly lead to market confusion. In addition, because we have required PDM to license its tradename and marks, if necessary, we have determined that a permanent license to the CB&I tradename is unnecessary to allow the acquirer to compete effectively in the relevant markets. Nonetheless, we do find that a limited, transitional license to the CB&I tradename and marks is necessary to ensure that the acquirer may immediately begin to use the divested assets. We emphasize here that the intent of this transitional license is not to allow the acquirer to hold itself out as CB&I in any way. Rather, its purpose is to allow the acquirer to immediately use the divested assets that bear CB&I tradename and marks or conduct other functions necessary to conducting the Relevant Business.

Accordingly,

IT IS ORDERED THAT the Monitor Trustee include in his final report to the Commission concerning the sale of the divested assets a recommendation with respect to whether a license of the PDM tradename or marks should be included in the divested assets in order to accomplish the purpose of the Final Order; and

IT IS FURTHER ORDERED THAT to the extent the Commission determines, based on the Monitor Trustee's recommendation, that a license to the PDM name and marks is necessary for the Commission-approved acquirer to compete effectively in the Relevant Markets, PDM shall grant to the Commission-approved acquirer a perpetual, worldwide, exclusive, royalty-free license to all rights it has in its tradename and marks for the purpose of engaging the Relevant Products; and

IT IS FURTHER ORDERED THAT CB&I is prohibited from pressing any claim of abandonment or in any way interfering with the Commission-approved acquirer using the PDM tradename or marks for those assets defined as the Relevant Products; and

IT IS FURTHER ORDERED THAT CB&I grant to the acquirer at no cost a waiver of Section 2.1.6. of the CB&I Asset Purchase Agreement as well as any other provision of that agreement that would hinder the acquirer from using the PDM tradename or marks for the Relevant Products; and

IT IS FURTHER ORDERED THAT CB&I grant to the Commission-approved acquirer a license, not to exceed one-hundred and eighty (180) days, to use the corporate names

IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' PETITION FOR RECONSIDERATION OF THE FINAL ORDER

I. Introduction

On December 21, 2004, we issued a Final Order in this matter and found that Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company (collectively "CB&I" or "Respondents") acquired certain assets from Pitt-Des Moines, Inc. ("PDM") in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18. Accordingly, we ordered CB&I to reorganize its Industrial Division (and to the extent necessary its Water Division) into two, separate stand-alone divisions and divest one of them.

On February 1, 2005, CB&I filed a Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth ("Respondents' Petition"). Among other things, Respondents' Petition argued that the definition of Relevant Business – which defines the scope of assets that CB&I must divest – is too broad and potentially encompasses every project CB&I constructs. Respondents' Petition also requested that the Commission modify the Final Order to make clear that the relief does not extend beyond CB&I's domestic business and contracts. On May 10, 2005, we ordered Respondents to file a brief identifying those assets encompassed in the Relevant Business definition that are unnecessary to compete effectively in the Relevant Markets. We also directed Respondents to identify those

assets outside of the United States the Relevant Business definition includes and explain why those assets are unnecessary for an effective divestiture.[1]

Respondents have now filed their brief,[2] in which they argue that the Relevant Business definition includes certain assets that were not part of PDM's business and are therefore not necessary for an effective divestiture. For the reasons we discuss below, we find that Respondents have not presented sufficient evidence to rebut our initial findings that such assets are necessary for an acquirer to compete effectively in the Relevant Markets. We therefore deny Respondents' motion to narrow the scope of the Order.[3]

In addition, Respondents' brief argues that the Relevant Business definition in the Order should be limited to CB&I's domestic assets, because the Commission focused on competition only in the United States and CB&I acquired almost no foreign assets from PDM. We clarify here that the Order's Relevant Business definition does not require CB&I to equally divide its

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[1] Decision and Order Partially Denying Respondents' Petition for Reconsideration and Directing Further Briefing on Specific Remedy Issues, issued May 10, 2005 ("Reconsideration Order").

[2] Respondents' Further Briefing on Specific Remedy Issues, filed June 6, 2005 ("Respondents' Brief").

[3] This Order uses the following abbreviations for citations to the record:

Tr. – Transcript of testimony before the Administrative Law Judge
CX – Complaint Counsel's Exhibit
Op. – Commission Opinion issued December 21, 2004 ( ).

foreign assets. However, because evidence suggests that some foreign assets may be necessary for an effective divestiture to the extent that they provide an acquirer with a sufficient scale of work, we have included a provision to make certain that such assets are available if necessary. Finally, we reject Respondents' alternative suggestions for redefining the scope of the Order's divestiture requirements.

II. The Scope of the Order

Respondents' chief explanation as to why the Order's divestiture requirement is too broad is that CB&I's business "has always exceeded the scope of PDM's EC [Engineered Construction] Division" and that these "other businesses were not and are not an integrated part of its U.S. tank business." Specifically, Respondents state that "CB&I's projects include not only construction of the Relevant Products and water tanks, but also hydrocarbon processing plants, offshore structures, pipelines, hydrocarbon storage tanks, and other steel structures and their associated systems."[4] According to Respondents, these complementary assets are unnecessary to compete in the Relevant Markets. Respondents thus seek the Commission to clarify that the assets subject to divestiture do not exceed those used in the Relevant Markets and water tank business.[5]

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[4] Respondents' Brief at 4.

[5] We note that this position is inconsistent with the position Respondents took at trial. Specifically, Respondents' closing argument stated that "the companies have been fully integrated at the management level, at the engineering level, at the fabrication level, at the field erection level, every level, purchasing, estimating." Tr. at 8311. Respondents also noted that CB&I and PDM prior to the acquisition each made numerous products in addition to the Relevant Products and argued that as a result if the Commission were to "spin off some personnel and assets to make products in these [relevant] markets, that company

would wilt like a rose left out too long."[6] They added that the Relevant Products did not have enough business and that the Commission would therefore need to include "all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff." Tr. at 8311-12.

[6] CX 522 at TAN 1003379.

[7] CB&I's CEO testified that the hydrocarbon industry is the oil and gas business. Tr. at 4158.

[8] CX 94 at HOU017570 -71 (analyzing the markets in which PDM participated, including "Domestic Petroleum, Petrochemical, Industrial Gas, & Chemical" and specifically discussing refinery and tank projects); *id.* at HOU017572–73 (discussing pipeline expansion and terminal projects). See also

specifically notes PDM's involvement in the petroleum and petrochemical industries and states that the PDM assets would provide CB&I with "substantial exposure to [the] upturn in [the] hydrocarbon industry."[9] This evidence suggests not only that PDM was actively engaged in the types of complementary products Respondents seek to exclude but also that CB&I specifically evaluated PDM's involvement in these areas and concluded that acquiring PDM assets would enhance their competitive position in them.

In addition, the business practices of both PDM and CB&I suggest that the Relevant Business definition should include assets related to the complementary products. As we have discussed, a single business unit of PDM constructed both the Relevant Products and the complementary products prior to the acquisition.[10] Similarly, CB&I's Industrial Division, which is responsible for designing and constructing the Relevant Products, was engaged in designing and building the types of complementary projects Respondents identify.[11] Once CB&I

3-4, (CB&I 10-K noting that PDM "specialize[d] in the design and engineering, fabrication and construction of products for the petroleum, petrochemical, cryogenic, liquified natural gas, defense and aerospace industries, as well as water storage and treatment facilities").

[9] CX 32 at 1.

[10] *S* , Tr. at 2906 (Scorscone [former head of PDM's EC division and current head of CB&I's Industrial Division] testifying that PDM's EC division "constructed facilities for the petroleum, petrochemical, natural gas, and aerospace business").

[11] Tr. at 4843-44 (Scorsone testifying that in addition to the Relevant Products, CB&I's Industrial Division and PDM's EC division "constructed virtually any type of structure out of

plate steel," including "ambient-temperature flat-bottom storage tanks, pressure spheres, field-erected pressure vessels, specialty-type plate structures, bins, hoppers, aqueducts, [and] wind tunnels"). *S* Tr. at 4807 (Scorsone testifying that CB&I's "tank-building resources are fluid throughout all of [CB&I's] organizations," including the Industrial and Water Divisions).

[12] See CX 1033 at 44 (CB&I 10-K noting that PDM's EC and Water Division assets have been integrated with CB&I's business units); Tr. at 4081 (Scorsone noting that CB&I hoped to achieve efficiencies by eliminating duplication in fabrication

We are mindful that the complementary products identified by Respondents comprise a significant component of CB&I's business.[16] However, Respondents have not convinced us that these assets are unnecessary to a divestiture of an entity that will be economically viable and a competitive force in the Relevant Markets.[17] Without such evidence, we cannot narrow the scope of assets subject to divestiture solely to those assets used in the

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in demand since the acquisition. However, Respondents have presented no evidence to suggest that this increased demand has diminished the need for an LNG supplier to have the ability to perform other types of projects to have a sufficient scale of business.

[16] CX 1033 at 41 ("Projects for the worldwide petroleum and petrochemical industry accounted for approximately 60-70% of [CB&I's] revenues in 2001, 2000, and 1999.")

[17] We recognize that the lines of business that the Order requires CB&I to divest may not precisely match those it acquired from PDM. For example, it appears that PDM did not perform turnaround work or construct refinery vessels. CX 108 at PDM-HOU00518. Similarly, it does not appear that PDM was engaged in building "offshore structures," another type of asset identified by Respondents' brief. Respondents' Brief at 4. However, the record establishes that PDM was engaged in a broad range of products and services in the same industries that CB&I identifies as problematic and that these other projects may be necessary to provide an acquirer with a viable scale of business. CB&I has not provided any evidence on the amount of CB&I's revenues that these assets represent, or any evidence as to the specific hardship that a divestiture of these assets would create for CB&I. Consequently, CB&I has not provided specific evidence to persuade us that these assets are unnecessary for an effective divestiture. We therefore have not excluded these assets from the scope of the Order.

Relevant Markets and water tank business – especially where we have found that other evidence demonstrates that the complementary assets may be necessary to allow an acquirer to compete effectively in the Relevant Markets. This Order clarifies, however, that if the acquirer already has the necessary assets to compete effectively, CB&I need not include the complementary assets.[18]

In addition to their more general objections to the Order's scope, Respondents argue that some of the Order's language must be modified because it sweeps in a whole range of products that are "unnecessary for an effective and complete divestiture."[19] Specifically, Respondents take issue with the part of the Order that requires CB&I to divest certain assets related to any "industrial process system, including but not limited to any digester, absorber, reactor, and tower."[20] According to Respondents, the term "industrial process system" must be limited to the tank business to avoid overreaching.

We find that this argument reads the Order's divestiture requirement far too broadly. The "including but not limited to" language in the Order[21] suggests CB&I need not necessarily include those assets not enumerated by the Order so long as the divestiture package allows an acquirer to compete effectively in the Relevant Markets. To the extent Respondents are arguing that the Order should not include assets beyond those used in the

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[18] ¶ IV.A. of the Final Order allows the acquirer and monitor trustee to agree to exclude any of the complementary assets if they find them unnecessary for the acquirer to compete effectively in the Relevant Markets.

[19] Respondents' Brief at 7.

[20] Final Order, ¶ I.P, Respondents' Brief at 6-7

[21] See Final Order, ¶ I.P.

[23] CX 32 at 3.

[24] Respondents also argue that the tangible assets described in the Offering Memorandum – three U.S. tool and construction equipment facilities, one fabrication plant, and related equipment – constitute the assets necessary to compete in the United States. Respondents' Brief at 4. For the reasons we discussed at length in both the Opinion and Reconsideration Order, we reject Respondents' argument. Respondents argument

definition of Relevant Business.[25] Furthermore, the remedy in this case must provide the acquirer with the mix of assets necessary to compete effectively in the Relevant Markets. Because CB&I acquired the PDM assets nearly four and a half years ago and has since integrated those assets into its own operations, we cannot be certain that [ ] will provide an acquirer with the mix of assets necessary to compete with CB&I and thus to adequately restore the competition lost from the acquisition.[26]

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[26] The Commission has recognized that assets acquired in a transaction do not necessarily form the basis for an effective divestiture. In analyzing the divestiture in MSC.Software, for example, the Commission reasoned that "[d]ivestiture of the acquired assets alone would not restore the competitive conditions that existed before the acquisitions (the status quo ante), because the 3-year old UAI and CSAR codes are no longer as commercially viable as they were when MSC acquired them. Licensing of the current version of MSC.Nastran is required to give the acquirer or acquirers what UAI and CSAR formerly had: an up-to-date product upon which to base sales and future development efforts." *SC S C* , Dkt. 9299,

CB&I in the Relevant Business need be allocated to New PDM or New CB&I only to the extent such assets are necessary to enable New PDM and New CB&I to engage fully, equally, and independently in all aspects of the Relevant Business and need ultimately be divested by CB&I only to the extent such assets are necessary to enable the acquirer of New PDM or New CB&I to compete effectively in all aspects of the Relevant Business"; and

IT IS FURTHER ORDERED THAT the monitor trustee include in his final report to the Commission concerning the sale of the divested assets a recommendation with respect to whether any foreign assets, as described in Paragraph III.A, as modified, should be included in the divested assets in order to accomplish the purpose of this Order.

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IN THE MATTER OF

WHITE SANDS HEALTH CARE SYSTEM, L.L.C.,

ORDER REOPENING AND MODIFYING ORDER

Individual respondent, James Laurenza, president of respondent Dacite, Inc. ("Dacite"), has filed, on May 31, 2005, a petition to reopen and modify the Order ("Petition"), to eliminate his obligations under Paragraph VII of the Order. Paragraph VII requires him to provide certain information, when that information is not otherwise provided by respondent White Sands Health Care System, L.L.C. ("White Sands") or respondent Alamogordo Physicians Cooperative, Inc. ("Alamogordo Physicians"). Mr. Laurenza's Petition, filed pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, asks the Commission to relieve him of the obligation to comply with Paragraphs V and VI of the Order, to the extent that White Sands and Alamogordo Physicians, respectively, fail to meet their compliance obligations. These ongoing obligations would otherwise continue until January 24, 2008, three years from the date the Order became final. Mr. Laurenza contends, inter alia, that significant changed circumstances, to wit the severance of his relationship with White Sands and Alamogordo Physicians, make him unable to continue to comply with Paragraph VII of the Order. Petition at 1. The Petition was placed on the public record for thirty days pursuant to Section 2.51(c) of the Commission's Rules. No comments were received. For the reasons stated below, the Commission has determined to grant the Petition.

The Complaint issued with the Order in Docket No. C-4130 alleges that White Sands is a for-profit physician-hospital organization that consists of a non-profit hospital; Alamogordo Physicians, an independent practice association; and other non-physician licensed health care professionals that include certified registered nurse anesthetists. (Complaint ¶ 2). According to the

Complaint, Mr. Laurenza, as general manager of White Sands, and through his company Dacite, negotiated with payors on behalf of White Sands' nurse anesthetist members and Alamogordo Physicians' physician members, although the nurse anesthetist members were otherwise in competition with each other and the physician members of Alamogordo Physicians were otherwise in competition with each other for the provision of health care services in the Alamogordo area for a fee. (Complaint ¶ 7). Further, White Sands' physician and nurse anesthetist members had agreed with each other and with White Sands not to deal individually, or through any other organization besides White Sands, with any payor with which White Sands was attempting to negotiate a contract jointly on behalf of White Sands' members. (Complaint ¶ 20).

The Complaint alleges that Respondents' actions have had, or tend to have, the effect of restraining trade unreasonably in the provision of physician and nurse anesthetist services in the Alamogordo area, and that the described combination, conspiracy, acts and practices constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. (Complaint ¶ 35). The Order was issued to prevent respondents from continuing to engage in such anticompetitive activities. (Order ¶ II). The Order further requires a three-year cooling off period during which respondents Dacite and Laurenza are prohibited from negotiating on behalf of, or advising, respondents White Sands, Alamogordo Physicians, or any provider who participates or has participated in those entities. (Order ¶ III). Paragraph IV of the Order requires specified notification from each respondent prior to entering into any messenger arrangement with any provider. Paragraphs V.A through V.E. specify White Sands' mailing, termination, notification, and compliance obligations. Although White Sands already has complied with Paragraphs V.A through V.C of the Order, its compliance obligations under Paragraph IV and Paragraphs V.D and V.E continue for three years from the date the Order becomes final, or until January 24, 2008. Paragraphs V.F. and VI specify, respectively, White Sands' and Alamogordo

Physicians' notification obligations related to corporate changes that may affect compliance obligations. These Order

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[1] *S S* , *e* 16 CFR 2.51(b), announced August 15, 2001, ("Amendment").

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IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that the Commission's Order issued on January 11, 2005, hereby is, as of the date of issuance of this Order, modified to set aside Paragraph VII.

IN THE MATTER OF

EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

ORDER GRANTING IN PART AND DENYING IN PART JOINT MOTION FOR EXTENSION OF TIME AND LENGTH OF APPEAL BRIEFS

Respondent Evanston Northwestern Healthcare Corporation and Complaint Counsel have filed a Joint Motion for Extension of Time and Length of Appeal Briefs (October 28, 2005) (hereinafter "Joint Motion") requesting that the Commission extend the time for the filing of briefs on the appeal and the cross-appeal in this matter, and enlarge the word limits to which the briefs are subject. For the reasons discussed below, the Commission grants the parties' motion for an extension of time and denies their motion for an enlargement of the word limits.

1. Enlargement of Time

Chief Administrative Law Judge McGuire filed his Initial Decision and Order in this matter on October 17, 2005. Respondent filed a timely Notice of Appeal on October 26, 2005, and Complaint Counsel filed a timely Notice of Cross-Appeal on October 28, 2005. Pursuant to Commission Rule 3.52(g), 16 C.F.R. § 3.52(g) (2005), Respondent is deemed the Appellant and Complaint Counsel are deemed the Cross-Appellants/Appellees. Because Respondent was served with the Initial Decision on October 24, 2005, Respondent must currently file its Appeal Brief on or before November 23, 2005. Commission Rule 3.52(b), 16

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[1] For purposes of this Order, Complaint Counsel's cross-appeal will be deemed to have been perfected if their initial brief contains

Complaint Counsel's Answering and Cross-Appeal Brief would be due on or before December 27, 2005; Respondent's Reply and Answering Brief would be due on or before January 26, 2006; and Complaint Counsel's Rebuttal Brief would be due on or before February 6, 2006.

The time periods prescribed by the Commission Rules of Practice ordinarily should afford parties to Commission proceedings sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. The proximity of the current briefing schedule to the Thanksgiving, Christmas, Chanukkah, and New Year's holidays, however, may interfere with that process. Accordingly, the Commission grants the portion of the Joint Motion requesting an extension of time within which to file the appellate briefs in this matter.

2. Enlargement of Word Count Limits

As the Commission has previously stated, the prescribed word limits should afford parties to Commission proceedings sufficient space to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. *S*

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their "arguments as to any issues [Complaint Counsel] is raising on cross-appeal . . ." Commission Rule 3.52(c), 16 C.F.R. § 3.52(c).

the prior pleadings and Judge McGuire's decision. Joint Motion at 3-4. These facts, offered without any elaboration as to the nature of the complexity of the issues, do not by themselves constitute the necessary strong showing to warrant extending the word count limitations. Therefore, the Commission denies the portion of the Joint Motion requesting an enlargement of the word limits prescribed by Commission Rule 3.52, 16 C.F.R. § 3.52.

Accordingly,

IT IS ORDERED THAT (1) Respondent shall file its Appeal Brief on or before December 16, 2005, and (2) the appeal of Respondent shall be deemed perfected "by the timely filing of an appeal brief," for purposes of Commission Rule 3.51(a), 16 C.F.R. § 3.51(a), if Respondent files its Appeal Brief by that date. Respondent's Appeal Brief shall not exceed 18,750 words in length.;

IT IS FURTHER ORDERED THAT (1) Complaint Counsel shall file their Answering and Cross-Appeal Brief on or before February 3, 2006, and (2) Complaint Counsel's cross-appeal shall be deemed perfected "by the timely filing of an appeal brief" if Complaint Counsel file their Answering and Cross-Appeal Brief by that date, whether or not Respondent has previously perfected its appeal. Complaint Counsel's Answering and Cross-Appeal Brief shall not exceed 26,250 words in length.;

IT IS FURTHER ORDERED THAT Respondent shall file its Reply and Answering Brief on or before March 15, 2006. Respondent's Reply and Answering Brief shall not exceed 18,750 words in length.;

IT IS FURTHER ORDERED THAT Complaint Counsel shall file their Rebuttal Brief on or before April 5, 2006. Complaint Counsel's Rebuttal Brief shall not exceed 11,250 words in length.; and

IT IS FURTHER ORDERED THAT all of the foregoing

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Briefs shall in all other respects conform to the requirements of Commission Rule 3.52, 16 C.F.R. § 3.52.

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IN THE MATTER OF

EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

ORDER GRANTING EXPEDITED MOTION AND PERMITTING ENLARGEMENT OF LENGTHS OF APPEAL BRIEFS

Respondent Evanston Northwestern Healthcare, Inc. has filed an Expedited Motion for Extension of Length of Initial Appeal Brief ("Expedited Motion"), requesting leave to file an opening brief not to exceed 24,000 words in length. This amount is a 28 percent increase over the 18,750 word limitation prescribed by Commission Rule 3.52(b)(2). For the reasons set forth below, the Commission grants the Expedited Motion, and also enlarges by the same percentage amount the word limitations for the other three briefs that may be filed by the parties in this appeal.

This is the second motion for an extension of the word limitations filed by Respondent. By Order dated November 18, 2005, the Commission denied the portion of a previous Joint Motion filed by Respondent and Complaint Counsel that requested that the Commission enlarge the word limitations for all of the briefs by 60 percent. Commission Rule 3.52(k) expressly provides that "[e]xtensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit." In their Joint Motion, however, the parties based their request to extend the word limitations only on their assertions that the case involved "complex underlying issues" and on the length of the trial record, the prior pleadings, and the Initial Decision. Joint Motion at 3-4. The Commission denied the parties' request because "[t]hese facts, offered without any elaboration as to the nature of the complexity of the issues, [did] not by themselves constitute the necessary strong showing to warrant extending the word count limitation." November 18 Order at 2. Many of the Commission's matters involve complex

issues and large records. To make the showing required by Commission Rule 3.52(k), a party must, at minimum, state with specificity the reasons for the request for the extension, including the precise issues to be covered in the briefs, and why those issues cannot be adequately briefed in the specified word limitations. Otherwise, any party could seek an extension to the Commission's word limitations for briefs simply by making a general assertion about the complexity of the issues in the case at issue.

Respondent's Expedited Motion states that if it is bound in its Appeal Brief to the 18,750 word limitation prescribed by Commission Rule 3.52(b)(2), it will have to omit "important arguments necessary for its defense and will so limit its discussion of other complex, nuanced and novel issues raised on this appeal as to interfere with their clarity and completeness." Expedited Motion at 2. Respondent contends that these arguments and issues include (1) whether the merger at issue produced "substantial, verified pro-competitive effects arising from improved quality of care," and if so, whether any such improvements were merger specific; (2) whether the merger produced improvements "in other areas;" (3) whether, and if so to what extent, the merger affected prices, as reflected in "complex pricing analyses and internal documentary evidence;" (4) the contours of relevant markets, and the manner in which they should be defined; and (5) whether, and if so to what extent, the merger produced unilateral anticompetitive effects. Expedited Motion at 5-7.[1]

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[1] Respondent advises that Complaint Counsel takes no position on the relief requested in Respondent's motion. Expedited Motion at 2.

before the Commission, combined with the substantial size of the record in this matter, are sufficiently specific and well-founded to warrant extending the word limitation for Respondent's opening brief by the requested 28 percent amount.[2] Therefore, the Commission grants the Expedited Motion, and also enlarges by the same percentage amount the word limitations for the other three briefs that may be filed by the parties in this appeal.

Accordingly,

IT IS ORDERED THAT Respondent's Appeal Brief shall not exceed 24,000 words in length.;

IT IS FURTHER ORDERED THAT if Complaint Counsel perfects its Cross-Appeal, Complaint Counsel's Answering and Cross-Appeal Brief shall not exceed 33,600 words in length;[3]

IT IS FURTHER ORDERED THAT Responde1.7(uf74.6h.5(R THE)490 shal 451.6874.6hm

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[2] *S h* , Docket No. 9302, Order Granting Extensions of Time To File Appellate Briefs and Increases in Word Count Limits (March 18, 2005), at 2.

[3] For purposes of this Order, Complaint Counsel's Cross-Appeal will be deemed to have been perfected if its Answering and Cross-Appeal Brief contains "its arguments as to any issues [Complaint Counsel] is raising on cross-appeal . . ." Commission Rule 3.52(c), 16 C.F.R. § 3.52(c). If Complaint Counsel do not perfect their cross-appeal, then their Answering Brief shall not exceed 24,000 words in length.

The Honorable Dan Flynn
Texas State Representative
House District 2

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[1] It is our understanding that your request is prompted by the May 2004 decision granting partial summary judgment in *SC S*, No. 2002-740, Order Granting Plaintiff's Motion for Partial Summary Judgment and Establishing Issues Under Rule 166a(e), T.R.C.P. and Denying Defendants' Second Motion for Summary Judgment (County Court at Law No. 3, El Paso, May 21, 2004), in which the court held that the defendant violated the cash advance disclosure provision of the Funeral Rule by failing to disclose each fee charged to the plaintiff for the cost of advancing funds on behalf of the plaintiff for goods and services purchased from third parties and resold to plaintiff. The Court in based its holding on an interpretation of the term "cash advance item" that would include the following items, when purchased from a third party and resold to persons arranging funerals: "direct cremation; immediate burial; forwarding remains; receiving remains; embalming; refrigeration; other preparation; transportation; casket/cremation casket; alternative container; outside enclosure; clothing/shroud; memorial booklet; service folders/prayer cards; acknowledgment cards; flowers;

term "cash advance item" is important because it determines the breadth and impact of certain substantive provisions of the Funeral Rule that employ that term.

The Commission believes that the court is incorrect in ruling that *a* goods or services purchased from a third-party vendor are

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shipping container; crematory services; crucifix; escorts; certified copies; public transportation; outside funeral director's expense; vault installation; clergy/religious facility; musicians or singers; hairdressing; and permits."

[2] The Commission promulgated the original Funeral Rule on September 24, 1982, making it fully effective on April 30, 1984. 47 Fed. Reg. 42260 (Sept. 24, 1982). The Commission amended the Rule in 1994, following a lengthy review proceeding, and that 1994 amended Rule continues to be in effect. 59 Fed. Reg. 1592 (Jan. 11, 1994). All references to "the Funeral Rule" or "the Rule" are to the 1994 amended Rule, currently in effect. References to the 1982 Rule are to "the original Rule."

purchaser as a "cash advance," "accommodation," "cash disbursement," or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may include, but are not limited to: cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities; and, death certificates. 16 C.F.R. § 453.1(b).

The first sentence of this definition quite clearly states that any item a funeral provider describes expressly using the words "cash advance" item (or similar words or phrases) is, in fact, a cash advance item for purposes of the Funeral Rule. The second sentence broadens the definition to cover situations when a funeral provider purports to act "on behalf" of a particular customer, more as that customer's procurement agent rather than as a retailer serving the general public. The third sentence merely provides an illustrative list of the various types of goods or services that funeral providers typically may treat as cash advance items.

Certain substantive provisions in the Funeral Rule employ the defined term "cash advance item." Specifically, §§ 453.3(f)(1)(ii) and 453.3(f)(2) require a funeral provider who is charging a customer more for a cash advance item than the funeral director paid for it to disclose that material fact (, the existence of a mark-up, but not the amount) to the customer on the statement of funeral goods and services selected by the customer.[3]

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[3] Also, the statement of goods and services that the funeral provider must give to the customer at the conclusion of the discussion of funeral arrangements must itemize any cash advance items that are part of the agreed-upon funeral arrangements, and must state the price, or if not known, the estimated price, of those items. The Rule states: "(These prices must be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall

be given and a written statement of the actual charges shall be provided before the final bill is paid.)" 16 C.F.R. § 453.2(b)(5)(i)(B).

[4] This mark-up was achieved both directly and indirectly. As noted in the Final Staff Report, "[s]ometimes, [the mark-up] has been accomplished by simply inflating the amount of the charge on the customer's bill. In other instances, the same effect has been achieved by the funeral home securing some form of kickback or rebate from the supplier of the cash advance item after charging the customer the full price." Final Staff Report (June 1978) at 249. Marking up cash advance items was not an uncommon practice. The Commission noted, in adopting the original Rule, that "the evidence demonstrates that many individual funeral providers do charge mark-ups for cash advances. In a 1976 survey of California funeral directors, 12% of the 291 respondents admitted charging 'in excess of the amount

[5] Final Staff Report (June 1978) at 249.

[6] 47 Fed. Reg. 42278-42279 (Sept. 24, 1982).

The Commission found that, in describing a particular item to a customer, a funeral provider's express use of the term "cash advance item" (or alternative formulations such as "accommodation" or "cash disbursement") implies that the cost to the customer for that item is the same as the cost to the funeral provider. Thus, in cases where a funeral provider describes an item in this manner, yet charges the customer more for it than the funeral provider paid for it, the Commission requires a corrective disclosure to prevent the customer from being deceived. Specifically, in such a circumstance, the Funeral Rule requires that the following disclosure be placed on the statement of funeral goods and services selected: "We charge you for our services in obtaining: (specify cash advance items)."[7] This is the scenario addressed by the first sentence in the "cash advance item" definition.

The second sentence of the definition, indicating that "[a] cash advance item is TJ-16.8lyT -2.36 TDt96em iuence.8(ndd brom 42.8(sathisrdpai46.8(mrty45.8(fgntral prublic Tpecifically,.36(,the spurpos of th)s tencing-in"fa ecif thprom bevadng thscrheing

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[7] 16 C.F.R § 453.3(f)(2). The Rule also specifically prohibits this type of affirmative misrepresentation. 16 C.F.R § 453.3(f)(1)(i).

[8] Under the "fencing-in" doctrine, the FTC may frame a remedy which extends beyond the precise illegal conduct found. *C* *C*, 738 F.2d 554, 561 (2d Cir. 1984).

item as a "cash advance item" (or alternative formulations), yet nevertheless conveying to a customer acting reasonably under the circumstances that obtaining the item involves merely a forwarding of cash by the funeral provider and a subsequent dollar-for-dollar reimbursement by the customer. The Commission's intention, in sum, is that this part of the "cash advance item" definition function to foreclose funeral providers from attempting to sidestep the strict letter of the Rule by using implied misrepresentations rather than express ones.

In the absence of either the funeral provider's express representation that an item is a "cash advance item" or implied representations that the item is procured for a particular customer at the funeral provider's cost, a consumer, acting reasonably under the circumstances, would not believe that the amount he or she is billed for an item is the same as the amount the funeral provider pays its supplier. Indeed, such a belief would be contrary to a reasonable consumer's most elementary experience in the everyday marketplace. In these circumstances, the funeral provider is generally acting like any retailer who purchases goods or services from third parties for resale to consumers.

The Commission believes that reasonable consumers generally understand that the price charged by a retail seller – including funeral providers – includes profit.[9] Thus, the corrective disclosure about cash advance items that § 435.3(f)(2) requires is unnecessary when the funeral provider does not mislead the customer through either express representations that the item is a "cash advance item" (or alternative formulations), or implied representations that the customer is paying no more for an item than the amount the funeral provider paid for it.

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[9] As the Commission noted in the Statement of Basis and Purpose for the original Rule, "The Commission does not suggest that it is improper for funeral providers to profit on items obtained from third parties. It is clear that it is wholly proper for providers to do so." 47 Fed. Reg. 42278 (Sept. 24, 1982).

It is worth noting that the text and structure of the Rule overall reflect the fundamental distinction between cash advance items and non-cash advance items. For items that are typically non-cash

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[10] Funeral providers must "[i]nclude on the [general] price list, in any order, the *a* prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified below for at least each of the following items, if offered for sale . . . ." The rule then lists: forwarding of remains to or receiving remains from another funeral home; direct cremation; immediate burial; transferring remains to the provider's premises; embalming and other preparation of the body; use of the provider's facilities and staff for viewing, for a funeral ceremony, or for a memorial service; use of the provider's equipment and staff for a graveside service; the use of the provider's hearse or limousine; and the provider's basic services fee. 16 C.F.R. § 453.2(b)(4). (Emphasis supplied.)

[11] "The funeral provider must offer the [casket price] list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the *a* prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list." 16 C.F.R. § 453.2(b)(2)(i). (Emphasis supplied.)

[12] Section 453.2(b)(4)(i)(C) of the Rule sets forth the minimum information that must be included on a funeral provider's general price list. These items include: caskets; outer burial containers; forwarding of remains to or receiving remains from another funeral home; direct cremation; immediate burial;

the cash advance disclosures unless the funeral provider expressly represents the items as "cash advance items" (or alternative formulations) or represents by implication that items can be procured on behalf of the particular customer and provided at the same price the funeral provider paid for them.

Accordingly, the Commission wishes to be clear that the term "cash advance item" does not apply to good or service that a funeral provider obtains from a third party. This overbroad interpretation, which potentially brings within its scope every component good or service of a funeral, does not comport with the Commission's intention in promulgating the "cash advance" provisions of the Rule. Rather, based on a review of the original Rule and the rulemaking record, the Commission finds that the term "cash advance item" in the Rule applies only to those items that the funeral provider represents expressly to be "cash advance items" or represents by implication to be procured on behalf of a particular customer and provided to that customer at the same price the funeral provider paid for them.

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transferring remains to the provider's premises; embalming and other preparation of the body; use of the provider's facilities and staff for viewing, for a funeral ceremony, or for a memorial service; use of the provider's equipment and staff for a graveside service; the use of the provider's hearse or limousine; and the provider's basic services fee.

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Re: File No. 051-0131

July 15, 2005

Dear Mr. Schildkraut:

This letter advises you of the disposition of the Petition to Quash Civil Investigative Demand ("Petition to Quash") served on Aloha Petroleum, Ltd. (hereinafter "Petitioner" or "Aloha") in conjunction with an investigation by the Federal Trade Commission (hereinafter "FTC" or "Commission") of a proposed transaction between Aloha and Trustreet Properties, Inc. ("Trustreet"). The Petition to Quash is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand ("CID") is July 18, 2005.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. S 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1] The filing of such a request for review does not, however, stay the time for compliance established herein. 16. C.F.R. § 2.7(f).

I. Background and Summary

On June 29, 2005, the Commission issued a CID to Petitioner in connection with the Commission's investigation. Petitioner received the CID on July 5, 2005. The original return date, July 6, 2005, was extended by letter dated July 8, 2005 until July 13,

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[1] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal should be calculated from the date you receive the original by express mail.

[2] Even if the Commission were to treat this cryptic statement as an assertion that compliance was too burdensome, Petitioner has failed to carry its burden of demonstrating such unreasonableness. *See* Federal Trade Commission v. Rockefeller, 591 F.2d 182, 190 (2nd

II. Analysis

When reviewed by a federal court, a CID must be enforced so long as the information sought is: (1) reasonably relevant, , not plainly incompetent or irrelevant to any lawful purpose of the agency; and (2) not unduly burdensome to produce. *C S C* , 965 F.2d 1086, 1089 (D.C. Cir. 1992). *S O h S* , 124 F.3d 1304, 107 (D.C. Cir. 1997).[4] Though the Commission is not a federal court, the standard by which the courts would evaluate the Commission's decision is the appropriate standard for the evaluation of the Petition to Quash.

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enforcement action that might be authorized by a vote of the Commissioners. After receiving that advice from Staff, meetings with the parties may be scheduled with individual Commissioners to provide an opportunity for the subjects of the investigation to present reasons why the Commissioners should not adopt a particular Staff enforcement recommendation with which they disagree. The timing of this transaction is such that production of materials on July 18th will not provide enough time for either additional Staff discussions or Commissioner meetings before the time that the Commission must make a decision on whether it should seek to enjoin the consummation of this transaction. No legally cognizable right of Aloha would be adversely affected if such additional consultation cannot occur here. Further, the timing constraints here are not of the Commission's making. The dates by which Aloha and Trustreet have advised the Commission that this transaction must close are solely within the control of one or the other of them. If the transaction parties desire the Commission to have additional time for consultation, it is a problem uniquely within their hands to resolve.

[4] It also must be within an agency's authority to conduct an investigation and to issue a CID. In this merger, the Commission's authority neither is nor could be challenged.

Notably, the Petition does assert that the information sought by the CID is not relevant to the transaction. Indeed, such

the Commission. Moreover, Commissioners are fully capable of evaluating such evidence directly, without the need for Staff intercession.

III. Conclusion and Order

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition to Quash should be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e),[5] the new date for Petitioner to comply with the subject Subpoena and CID, as amended herein, is July 18, 2005.[6]

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[5] 16 C.F.R. § 2.7(e).

[6] Petitioner is urged, but not required, to respond to the Subpoena on a rolling basis.

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Re: h 7

October 13, 2005

Dear Mr. Seiger:

This letter advises you of the disposition of the Petition to Limit or Quash (hereinafter "Petition") filed by Garden of Life, Inc. (hereinafter "Petitioner") in conjunction with an investigation by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Petition appears to be moot.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. S 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1]

The Petition was timely filed on March 25, 2004. At that time, the Commission had reason to believe that Petitioner intended to comply with the terms of the Civil Investigative Demand in accordance with a schedule being negotiated with Staff. A ruling on the Petition was, therefore, held in abeyance. The Commission now has reason to believe that Petitioner and Staff did negotiate a satisfactory schedule for compliance and that production has been completed. Those developments have mooted the Petition. Accordingly,

IT IS ORDERED THAT the Petition to Limit or Quash filed by Petitioner should be, and it hereby is, **DENIED** on the grounds that it is **MOOT**.

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[1] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal is to be calculated from the date you received the original by express mail.

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Re:

October 13, 2005

Dear Mr. Zachry:

This letter advises you of the disposition of the Movants' Motion to Quash Civil Investigative Demands ("CIDs") for written interrogatories, documentary materials, and oral testimony in conjunction with an investigation by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Motion is denied in part and granted in part for the reasons hereinafter stated. Pursuant to 16 C.F.R. § 2.7(e), the new date for Steve Wingard to comply with the document production CID and for the Ashley entities to comply with the CIDs for document production and interrogatory answers is October 27, 2005, and the new date for Steve Wingard to comply with the CID for oral testimony is November 10, 2005.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *S* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[2]

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[1] Ashley Industries, LLC, Ashley Industries, LP, and Ashley Industries GP, LLC will be referred to herein as "the Ashley entities." The Ashley entities and Steve Wingard will be referred to herein as "Movants."

[2] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail.

I. Background and Summary

The CIDs[3] were issued on June 30, 2005 – production of interrogatory answers and documents was required by July 25, 2005 and the investigational hearing was scheduled for August 8, 2005. On July 18, 2005 counsel for Movants spoke with Staff as required by Commission Rule § 2.7(d)(2), 16 C.F.R. § 2.7(d)(2). In particular, Staff were advised that Movants would only comply with the CIDs if Steve Wingard were granted immunity from prosecution. Staff advised Movants that the FTC had neither the authority to prosecute criminal claims nor the power to grant immunity from prosecution. On July 20, 2005, the Motion to Quash was filed.

II. Movants Are Only Entitled To Relief With Regard to One of the CIDs.

The factual basis for this Motion is the unsupported assertion

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[3] Five separate CIDs are involved in this matter. Three were issued to Steve Wingard – one for testimony, one for interrogatory answers and one for document production. Two were issued to the Ashley entities – one for interrogatory answers and one for document production.

A. The Ashley entities have provided no factual basis for their claims under the Fifth Amendment.

An individual is protected from the compelled provision of incriminating testimony by the Fifth Amendment under many circumstances. However, the Movants have demonstrated no factual support for their claim that such protection is available to the Ashley entities. In the first place, the privilege against compelled incriminating testimony does not extend to corporations or other collective entities. *S* , 487 U.S. 99 (1988); and *S* , 417 U.S. 85, 88-90 (1974). Public records of the State of Texas show that the Ashley entities are corporations or other collective entities within the meaning of the law.[4] As such, the Ashley entities have no rights against self-incrimination to assert. , 487 U.S. at 102. Additionally, the contents of the business records of the Ashley entities are not privileged. . Finally, service of the CIDs on the Ashley entities to respond to interrogatories and to produce documents also imposed on them the obligation to "find the means by which to comply because no Fifth Amendment defense

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[4] On April 12, 2002, Ashley Industries GP, LLC filed Articles of Organization with the Corporations Section of the Office of the Secretary of State of the State of Texas establishing itself as a Texas limited liability company. Article Four on the first page of that document names Steve Wingard as the company's initial registered agent. Article Five, beginning on the first page of that document, states that the company will be managed by its "members" and names Steve Wingard as its initial member. On that same date, Steve Wingard, "President and Sole Member" of Ashley Industries, LP filed its "Certificate of Limited Partnership" with the Corporations Section of the Office of Secretary of State of the State of Texas. On September 24, 2003, Steve Wingard filed a "Texas Franchise Tax Public Information Report" with the Texas Secretary of State on behalf of Ashley Industries LLC in which Steve Wingard was listed as the President, a Director, and the Registered Agent of that company.

[5] Movants claim an entitlement to be treated as sole proprietorships based on the assertion that "Steve Wingard has always operated Ashley Industries as a sole proprietorship." Motion at 1 & 4. It is unclear whether this assertion is intended to be a subtle distinction between a company "being" a sole proprietorship as opposed to a company being "operated" as a sole proprietorship. The claim fails nevertheless because Movants cite no authority upholding this apparent distinction nor do they provide any factual basis for either the fact of being sole proprietorships or for the fact that the companies are being operated as sole proprietorships. Further, even if the Ashley entities were sole proprietorships, Movants have not provided an adequate factual basis for quashing the CIDs issued to them. *S* , Shapiro v. United States, 335 U.S. 1, 18 (1948) (holding that "required records" cannot be treated as private papers subject to the privilege).

advantages and protections that such organizational structures provided to him and them and may not now simply walk away from those choices in order to protect their business records from production. *S S* , 976 F. 2d 909, 912 (4th Cir. 1992).

It is well established that "without regard to whether the subpoena is addressed to the corporation or, as here, to the individual in his capacity as a custodian, . . . a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds." , 487 U.S. 108-09 (citations omitted). Even if "the act of production may prove personally incriminating" to the custodian, the custodian is not entitled to claim protection from the Fifth Amendment. . at 111-12. The Supreme "Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. . . . Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege." . at 110-11.

The Court held that the custodian of corporate records could not assert a Fifth Amendment privilege against the production of corporate records; however, that Court left "open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records." . at 118, n. 11. That argument fails here because Movants have not provided any evidence to show that the Ashley entities are a sole proprietorship. Additionally, the Fourth Circuit has squarely rejected that claim in *S S* [6] when it held that even if a company

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[6] 976 F.2d at 912 (citations omitted).

> is a one-man operation, . . . it is still a corporation, a state law regulated entity that has a separate legal existence from [the individual] shielding him from its liabilities. The business could have been formed as an unincorporated sole proprietorship and production of its business records protected by the privilege against self-incrimination. . . . [The individual] chose the corporate form and gained its attendant benefits, and we hold, in accord with the decisions of sister circuits, that he cannot now disregard the corporate form to shield his business records from production.

Accordingly, we find that Steve Wingard is the custodian of the records of the Ashley entities. As such, he is not entitled to assert a claim of Fifth Amendment privilege with respect to either the production of such records or the provision of testimony "to identify or authenticate the documents for admission in evidence." , 487 U.S. at 114 (quoting

[7] Because the privilege must be asserted by the witness at the time each question is propounded and in response to each such question where it can be asserted, there is no reason to excuse the attendance of Steve Wingard from the investigational hearing commanded by the CID. Further, as the Sixth Circuit

1995); and , 918 F.2d at 84 ("A person must have the chance to present himself for questioning, and as to each question elect to raise or not to raise the defense.") (internal quotation marks omitted). Accordingly, Steve Wingard's blanket assertion of privilege under the Fifth Amendment with respect to the provision of oral testimony must be denied.

D. Steve Wingard has adequately asserted a claim of privilege under the Fifth Amendment with respect to the CID directing him to answer interrogatories.

Unlike the document production CID that was served on Steve Wingard, the CID for responses to interrogatories does not differentiate between the personal knowledge of Mr. Wingard and knowledge derived from the contents of the business records of the Ashley entities. Further, Mr. Wingard has asserted, albeit in a

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> controlling decision is that of the witness himself. . . . There may be a constitutional privilege against testifying and at the same time be a powerful incentive to get on the stand and tell the truth. The alternatives for the witness are seldom easy.

speculative. *S C* , 406 U.S. 472, 478 (1972). "When the danger is not readily apparent from the implications of the question asked or the circumstances surrounding the inquiry, the burden of establishing its existence rests on the person claiming the privilege." *h C* , 905 F.2d 645, 649 (2nd Cir. 1990).

In this instance, counsel for Mr. Wingard has advised the Commission that Mr. Wingard's business activities are being investigated for possible criminal violations by the United States Attorney for the Western District of Texas. Further, the Commission has reason to believe that the subject of that inquiry may involve some of the same business conduct that is the subject of the Commission's investigation. A review of each of the seven interrogatories directed to Mr. Wingard shows that it is apparent from both the implications of the questions asked and the circumstances surrounding the Commission's investigation that Mr. Wingard's answers to the Commission's interrogatories may be self-incriminating to Mr. Wingard. Accordingly, his Motion to Quash must be granted, at least in part.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** Movants' Motion to Quash should be, and it hereby is, **DENIED** with respect to the CIDs directed to Steve Wingard and the Ashley entities for document production, the CID directed to the Ashley entities for responses to interrogatories, and the CID directed to Steve Wingard for oral testimony; and **IT IS FURTHER ORDERED THAT** Movants' Motion to Quash should be, and it TD0 T1ieseRTHER

practices prohibited by that rule or the FTC Act;" Petition at 1, and (2) Specification D-9 of the CID's Schedule of Documents to be Produced "requests documents which [sic] are privileged and/or confidential based on the attorney-client privilege, trade secrets, and other applicable privileges." Petition at 2.

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[2] In cases where the issue raised is primarily, if not exclusively, an issue of law, a summary meet-and-confer might be appropriate. However, where, as here, the issues are primarily mixed questions of law and fact (confidentiality, relevance and materiality), a failure on the part of counsel to engage in a meaningful meet-and-confer with Commission counsel is less tolerable.

practices of the recipients of its process. Demanding good faith attempts to resolve avoidable compliance problems is of equal interest and concern to the Commission and any process recipient. The meet-and-confer requirement provides both sides a mechanism within which adjustments can be made to competing interests in a quick and efficient manner.[3] Petitioner's failure to comply with the meet-and-confer requirements of FTC rules is sufficient, in and of itself, to deny the instant Petition. However, inasmuch as the Petition does not otherwise exhibit any substantial merit, it is additionally denied on that ground as well.

III. Petitioner Failed to Provide a Factual or Legal Basis for the Relief Requested.

The Petition asserts claims without providing any factual or legal support for those claims. This opinion has already recited the entire substantive content of the Petition in Section I, . This Petition contains no hint regarding the facts underlying the claims advanced by the Petition or any indication of the legal authority upon which Petitioner relies. We are unwilling to speculate at large on these matters about which Petitioner apparently wished us to be uninformed.

Even a casual review of the specifications of the challenged CID shows that the information requested is relevant to the subject of the Commission's investigation. Moreover, Petitioner has not argued that the Commission's investigation is outside its authority, or that the specifications are too indefinite. Accordingly, Petitioner's jurisdictional challenge is rejected. *S* *S* *S* , 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is

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[3] We understand that in most cases significant accommodation of legitimate interests can be and is achieved without the necessity of any conduct more taxing than a phone call between well-intentioned counsel.

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Re: C kC
("Petition to Quash"), File No. 052-3092

December 13, 2005

Dear Mr. Volner:

This letter advises you of the disposition of the Petition to Quash Civil Investigative Demand ("CID") filed by BlueHippo Funding, LLC ("BlueHippo" or "Petitioner"). BlueHippo has petitioned the Commission to quash a CID issued to Wachovia Bank, NA ("Wachovia") for "information concerning any BlueHippo account with Wachovia." Petition at 1. The Petition is denied because BlueHippo lacks standing to challenge the CID served upon Wachovia and because the Petition to Quash is otherwise without merit. Pursuant to 16 C.F.R. § 2.7(e), Wachovia is ordered to comply with the CID on or before December 23, 2005 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. S 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1]

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[1] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

II. Petitioner Lacks Standing to Challenge the CID Issued to Wachovia.

According to its Petition to Quash, BlueHippo is a Maryland Corporation that "markets computers, televisions, and related equipment and accessories and extends credit to customers to enable them to make purchases." Petition at 2. Wachovia, the recipient of the CID, appears to be a wholly separate business entity with whom Petitioner claims no relationship other than that of a customer of Wachovia's banking services.

The records sought by the CID appear to be the business records of Wachovia and not those of BlueHippo. That being the case, it is clear that the mere fact that Wachovia's business records might contain information relevant to a Commission investigation of the business practices of BlueHippo does not give BlueHippo standing to quash a CID issued to Wachovia.

the bank." *C C C*, 87 F.R.D. 569, 570 (D. MD 1980), , , 425 U.S. at 440. Moreover, bank customers have "no legitimate 'expectation of privacy' in the contents of checks, deposit slips and other banking records." . Thus, a customer, such as BlueHippo, possesses no cognizable interest in the bank's records sufficient to provide it with standing to challenge the CID issued to Wachovia. *S S h C S h* 447 F.2d 166, 167 (10th Cir. 1971 (SEC administrative subpoena); and *S*, 536 F.2d 897 (9th Cir. 1976) (IRS administrative summons). Thus, BlueHippo lacks standing to challenge the CID issued to Wachovia.

III. The Petition to Quash Is Otherwise Without Merit

Even if BlueHippo had standing to challenge the CID issued to Wachovia, the Petition to Quash is otherwise without merit. Neither the claims of confidentiality nor those of irrelevancy advanced by BlueHippo provide any grounds for quashing the CID issued to Wachovia.

A. The Information Requested Is Relevant to the Investigation.

The CID was issued pursuant to the Resolution adopted by the Commission on May 14, 1994 permitting Staff to conduct investigations of possible violations of 16 C.F.R. § 435 ("Telemarketing Sales Rule" or "TSR") or § 5(a)(1) of the FTC Act (15 U.S.C. § 5(a)(1)) in connection with any such sales. BlueHippo's claim that this investigation is limited to issues related to the "timing of sales and shipments and delivery," Petition at 2-3, is simply wrong. The CID does not evidence any limitation of the type posited by Petitioner.

The Petition to Quash appropriately cites the *S* and *S C* cases to state the broad scope of the Commission's investigatory reach. *S S C*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is

[5] involved the question of whether the Commission might use investigative process after having issued a cease and desist order to determine whether an order violator had sufficient assets to make a consumer redress remedy a viable enforcement option. 965 F.2d at 1089. The instant investigation is a pre-complaint inquiry to determine whether sufficient evidence exists to warrant initiation of any form of enforcement action, as in *S C* .

[6] The DC Circuit affirmed the order directing Invention Submission Corp. to produce its financial information in response to a CID. *S C* , 965 F.2d at

DC Circuit, finds the case does not support granting the present Petition to Quash.

Further, BlueHippo's attempt at artificially cabining the investigation to "shipping representations and delays," Petition at 5, is at best illusory. The scope of the CID is determined by the resolution authorizing it rather than any particular theory of violation *S* *C* ., 965 F.2d at 1091-92 ("The Commission's compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we

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material to a particular theory of violation.").

Wachovia's business records, BlueHippo has provided no factual or legal support for a finding that the Commission's existing protection of confidential or sensitive information is somehow inadequate. *S* 15 U.S.C. § 57b-2(f).

IV. Conclusion and Order

Accordingly, no grounds having been established by BlueHippo to warrant quashing the CID issued to Wachovia, **IT IS ORDERED THAT** BlueHippo's Petition to Quash should be, and it hereby is, **DENIED.**

IT IS FURTHER ORDERED THAT Wachovia shall respond to the CID on or before December 23, 2005 at 5:00 p.m. E.S.T. The Secretary is directed to serve a copy of this letter decision on Wachovia by facsimile and express mail.