Consumer Protection, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 25, 2010), on the World Wide Web, at (http://www.ftc.gov/os/actions.shtm). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the ADDRESSES section above, and must be received on or before the date specified in the DATES section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission (''FTC'' or ''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Richard J. Stanton (''respondent''), the founder and former Chief Executive Officer of ControlScan, Inc. (''ControlScan''). The Commission has entered into a separate settlement with ControlScan to be filed in federal district court in the Northern District of Georgia.

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 again will review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves respondent's marketing and distribution of a variety of online seal certification marks (''website seals'' or ''seals'') for companies to display on their websites. The FTC complaint alleges that respondent violated Section 5(a) of the FTC Act by falsely representing to consumers that ControlScan had verified the privacy and data security practices of companies displaying its website seals, when in fact it had not. Specifically, the complaint alleges that respondent falsely represented to consumers that ControlScan had verified the privacy and security protections offered by a company displaying ControlScan's Business Background Reviewed, Registered Member, Privacy Protected, and Privacy Reviewed seals, and falsely represented how frequently ControlScan reviewed such companies' fitness to display each of these seals. In addition, the complaint alleges that respondent falsely represented to consumers how frequently ControlScan reviewed companies' fitness to display the Verified Secure seal. The FTC complaint describes, with specificity, the claims respondent made regarding ControlScan's verification of a company displaying each of the challenged seals, as well as the verification that ControlScan in fact conducted in connection with each seal.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits respondent from misrepresenting: 1) the verification that is conducted concerning the protection that a company provides for the privacy and/or security of consumer information or the steps a company has taken to provide such protection; or 2) the frequency of such verification. Part II requires respondent to pay to the Commission $102,000 in equitable monetary relief. Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires respondent to keep copies of documents relevant to compliance with the order for a five-year period. Part IV requires respondent to provide copies of the order to certain personnel of companies he controls, and Part V requires him to notify the Commission of changes in his employment or affiliation with any business that involves offering or providing seals or related products or services. Part VI mandates that respondent file an initial compliance report with the Commission and respond to other requests from FTC staff. Part VII is a provision ''sunsetting'' the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to

Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before April 5, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Transitions Optical, File No. 091 0062'' to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (http://www.ftc.gov/os/publiccomments.shtm).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential . . . ,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled

''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (https://public.commentworks.com/ftc/transitionsoptical) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (https://public.commentworks.com/ftc/transitionsoptical). If this Notice appears at (http://www.regulations.gov/search/index.jsp), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (http://www.ftc.gov/) to read the Notice and the news release describing it.

A comment filed in paper form should include the ''Transitions Optical, File No. 091 0062'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act (''FTC Act'') and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (http://www.ftc.gov/os/publiccomments.shtm). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (http://www.ftc.gov/ftc/privacy.shtm).

FOR FURTHER INFORMATION CONTACT: Linda M. Holleran (202-326-2267), Bureau of Competition, 600

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

remove glare) and fixed-tint lenses (*e.g.*, prescription sunglasses).

Transitions produces its photochromic lenses in partnership with lens manufacturers known as "lens casters." Lens casters supply the corrective ophthalmic lenses to Transitions, and Transitions uses proprietary methods to apply patented photochromic dyes or other photochromic materials to the lenses. Transitions then sells the lenses, now photochromic, back to the lens casters. These lens casters are Transitions' only direct customers.

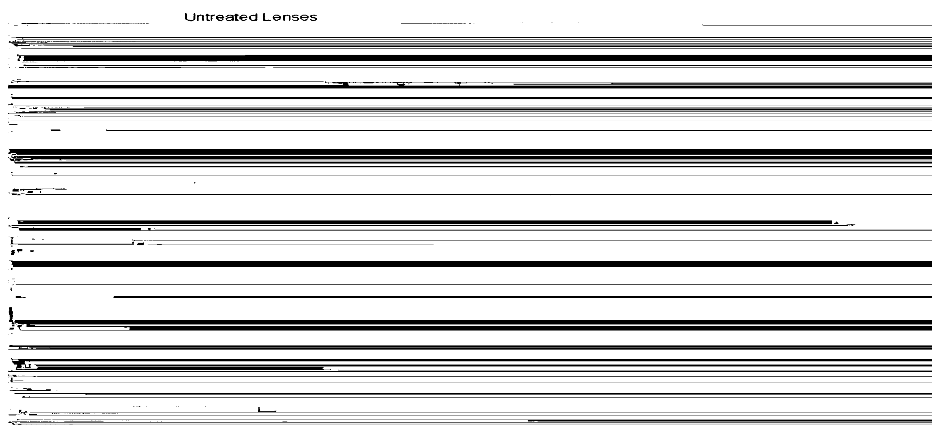
Lens casters, in turn, resell the photochromic lenses to wholesale optical laboratories ("wholesale labs") and optical retailers ("retailers"). Wholesale labs generally sell corrective ophthalmic lenses, including photochromic lenses, to ophthalmologists, optometrists, and opticians (collectively known as "eye care practitioners") who are not affiliated with retailers. Wholesale labs grind the lens according to the lens prescription, fit the lens into an eyeglass frame, and deliver the frame with the finished lens back to the eye care practitioner. In addition to these laboratory functions, a wholesale lab will often employ a sales force to promote specific lenses to eye care practitioners. Photochromic lens suppliers, such as Transitions, use wholesale labs and their sales forces to market their lenses because wholesale labs are the most efficient means for a photochromic lens supplier to promote and sell its products to the tens of thousands of independent eye care practitioners prescribing photochromic lenses to consumers.

Retailers, on the other hand, combine both eye care practitioner and laboratory services. They employ their own eye care practitioners who deal directly with consumers. In addition, retailers grind and fit lenses into eyeglass frames and deliver the frame with the finished lens to the consumer. The retail channel is generally a more efficient means for promoting and selling photochromic lenses to consumers than comparable efforts through the wholesale lab channel because a single sales effort to a large retailer can influence the prescribing behavior of hundreds of eye care practitioners. Retailers range from large national retail chains to smaller, regional ones.

This industry structure is reflected in the diagram below.

B. Transitions' Monopoly Power

Transitions has monopoly power in the relevant market for the development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses in the United States. Transitions has garnered a persistently high share of at least 80 percent of this market over the past five years, and over 85 percent in 2008. The photochromic lens industry has high barriers to entry, which include significant product development costs and capital requirements, substantial intellectual property rights, regulatory requirements, and Transitions' anticompetitive and exclusionary conduct. Direct evidence of Transitions' ability to exclude competitors and to control prices confirms Transitions' monopoly power.



C. Transitions' Conduct

Transitions has maintained its dominance, in significant part, by implementing exclusive agreements and other exclusionary policies at nearly every level of the photochromic lens distribution chain.

1. Exclusionary Practices with Direct Customers (Lens Casters)

In 1999, Corning Inc. introduced a new plastic photochromic lens, Sunsensors , which was a direct challenge to Transitions. Transitions responded to this competitive threat by terminating the first lens caster that began selling the new SunSensors lens, Signet Armorlite, Inc. ("Signet"), and by adopting a general policy not to deal with lens casters that sold or promoted a competing photochromic lens. Transitions furthered its anticompetitive and exclusionary efforts by, among other things: (i) entering into exclusive agreements with certain lens casters; (ii) announcing to the industry its policy of dealing only with lens casters that sold its lenses on an exclusive basis; (iii) threatening to terminate lens casters that did not want to sell its lenses on an exclusive basis; and (iv) terminating a second lens caster, Vision-Ease Lens ("Vision-Ease"), that developed a photochromic treatment, LifeRx , to apply to its own ophthalmic lenses. Because of Transitions' course of conduct, even lens casters that have not signed exclusive agreements have a clear understanding that they cannot sell or promote a competing photochromic lens without being terminated by Transitions.

Transitions' exclusive policy is coercive to lens casters and acts as a powerful deterrent against selling a competing photochromic treatment because Transitions is such a large part of the photochromic lens market. Losing the sales generated by Transitions' photochromic lenses can jeopardize up to 40 percent of a lens caster's overall profit. Additionally, losing the ability to sell Transitions' photochromic lenses can endanger a lens caster's sales of clear lenses because many retailers and wholesale labs (and their eye care practitioner customers) prefer to buy both clear and photochromic versions of the same lens.

For all these reasons, Transitions has succeeded in foreclosing competitors from dealing with lens casters collectively accounting for over 85 percent of photochromic lens sales in the United States. These lens casters deal with Transitions on an exclusive basis and will not do business with any other suppliers of photochromic treatments.

2. Exclusionary Practices with Indirect Customers (Retailers and Wholesale Labs)

In an effort to shut out its rivals, Transitions also directed its exclusionary practices at its indirect customers: wholesale labs and retailers. In 2005, in order to mitigate the new competitive threat posed by Vision-Ease's introduction of LifeRx , Transitions began an exclusionary agreement campaign with major retailers. Transitions induced over 50 retailers, including many of the largest chains, with up-front payments and/or rebates to enter into long term exclusive agreements that were difficult to terminate.

Transitions also has entered into over 100 agreements with wholesale labs that require the wholesale labs to promote Transitions' lenses as their "preferred" photochromic lens and to withhold normal sales efforts for competing photochromic lenses in exchange for rebates or other items of pecuniary value. Further, at least 50 percent of all wholesale labs are owned by lens casters that sell only Transitions' lenses. Because these lens casters generally use their wholesale labs to promote and sell primarily their own brand of lenses, this further impairs competitors' access to wholesale labs.

Additionally, Transitions' agreements with retailers and wholesale labs generally provide a discount only if the customer purchases all or almost all of its photochromic lens needs from Transitions. Because no other supplier has a photochromic treatment that applies to a full line of ophthalmic lenses, Transitions' discount structure impairs the ability of rivals to compete for sales to these customers. It also erects a significant entry barrier by limiting the ability of a rival to enter the market with a new photochromic treatment that applies to less than a full line of ophthalmic lenses.

Transitions' exclusionary practices with retailers and wholesale labs foreclose rivals, in whole or in part, from a substantial share – as much as 40 percent or more – of the retailer and wholesale lab distribution channels.

D. Competitive Impact of Transitions' Conduct

Transitions' course of conduct harms competition by marginalizing existing competitors and by deterring new entry. Faced with the threat of termination by Transitions, no major lens caster operating in the United States has been willing to carry the plastic SunSensors lens since Transitions terminated Signet. Without access to effective distribution, Corning has been unable to pose a competitive threat to Transitions' monopoly, and has had little incentive to invest in research and development to improve its product. Further, some lens casters would likely develop and/ or sell competing photochromic lenses, but Transitions' exclusive dealing – particularly its "all or nothing" ultimatum to lens casters – effectively deters new entrants.

Transitions' conduct at the wholesale lab and retailer levels also has harmed competition. For example, Transitions deprived Vision-Ease of access to many large retailers (one of the most efficient channels for distributing photochromic lenses to consumers), which blunted the force of its entry into the market and diminished its ability to constrain Transitions' exercise of monopoly power. Potential entrants observed Transitions' exclusionary campaign against Vision-Ease and have been deterred from entering the market.

Further, Transitions' exclusionary policies at all levels of the distribution chain deter potential competitors from entering the market on an incremental basis. Transitions' "all or nothing" policy with lens casters deters them from purchasing or developing a competing photochromic treatment that can be applied to less than a full line of ophthalmic lenses because the lens caster is unlikely to be able to recoup the substantial profits it would have made from the sale of the full line of Transitions' products. Similarly, the structure of Transitions' discounts to retailers and wholesale labs – which are generally conditioned on the customer's purchase of all or almost all of Transitions' products – places competitors with less than a full line of photochromic lenses at a disadvantage when competing for this business.

Transitions' exclusionary practices have likely increased prices and reduced output. For example, because it

distribution,-re

consumer demand and refuse to supply its low-priced, private label

product in other markets.

Transitions' conduct has also harmed consumers by depriving rivals of the incentive to innoineuucalso harme.8.eo -1 -1.4cest c2

[2] See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp. , 472 U.S. 585, 605 & n.32 (1985) (exclusionary conduct "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way") (citations omitted); Lorain Journal Co. v. United States , 342 U.S. 143, 151-54 (1951) (condemning newspaper's refusal to deal with customers that also advertised on rival radio station because it harmed the radio station's ability to compete); United States v. Microsoft Corp. , 253 F.3d 34, 68-71 (D.C. Cir. 2001) (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly"); United States v. Dentsply Int'l, Inc. , 399 F.3d 181, 191 (3d Cir. 2005) ("test is not total foreclosure but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit"); LePage's, Inc. v. 3M, 324 F.3d 141, 159-60 (3d Cir. 2003) (same).

[3] See, e.g., Microsoft, 253 F.3d at 64 (condemning exclusive agreements that foreclosed rivals from "cost-efficient" distribution channels); LePage's, 324 F.3d at 159-60 (finding "exclusionary conduct cut LePage's off from key retail pipelines"). See also Richard A. Posner, ANTITRUST LAW 229 (2d ed. 2002) (noting that exclusive dealing may "increase the scale necessary for new entry, and . . . increase the time required for entry and hence the opportunity for monopoly pricing").