

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

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Maureen K. Ohlhausen
 Terrell McSweeney

In the Matter of

**Victrex plc,
a corporation,**

**Invibio Limited,
a corporation, and**

**Invibio, Inc.,
a corporation.**

Docket No. C-4586

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Victrex plc, Invibio Limited, and Invibio, Inc. (hereinafter collectively referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal

The Commission having thereafter considered the matter and having found reason to believe that Respondents have violated the said Act, 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, 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 Decision and Order (“Order”):

1. Respondent Victrex plc is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Victrex Technology Centre, Hillhouse International, Thornton Cleveleys, Lancashire FY5 4QD.
2. Respondent Invibio Limited is a wholly-owned subsidiary of Victrex plc and is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Victrex Technology Centre Hillhouse International, Thornton, Cleveleys, Lancashire FY5 4QD.
3. Respondent Invibio, Inc. is a wholly-owned subsidiary of Victrex plc and is a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 300 Conshohocken State Rd, Suite 120, West Conshohocken, Pennsylvania 19428.
4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and the proceeding is in the public interest.

ORDER

I.

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Inc.; and the respective directors, officers, employees, agents, consultants, representatives, successors, and assigns of each.

- C. “Invibio, Inc.” means Invibio, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Invibio, Inc.; and the respective directors, officers, employees, agents, consultants, representatives, successors, and assigns of each.
- D. “Respondents” means Victrex, Invibio Limited, and Invibio, Inc.
- E. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- F. “Antitrust Compliance Program” means the program to ensure compliance with this Order and with the Antitrust Laws, as required by Paragraph III of this Order.
- G. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et. seq.the Sherman Act, 15 U.S.C. § 1 et. seq.and the Clayton Act, 15 U.S.C. § 12 et. seq
- H. “Competing PEEK” means any PEEK manufactured or sold by any Person other than the Respondents.
- I. “Competing PEEK Supplier” means any Person other than Respondents that manufactures, markets, sells, offers to sell, or seeks to sell Competing PEEK.
- J. “Custom Component” means a Customer-specific component of a Customer Product or ~~near net shape that (i) is not~~

- R. “Jointly Developed Product” means a new Customer Product containing PEEK that is developed jointly by Respondents and the Customer, the development of which resulted from a contribution of significant capital, intellectual property rights, labor, or other things of value by both Respondents and the Customer.
- S. “Legacy Contract” means any agreement or contract for the sale and purchase of Respondents’ PEEK in effect as of February 1, 2016, and any subsequent renewal or extension of the agreement or contract, so long as: (i) the term of such renewal or extension does not extend beyond one (1) year after this Order is issued and (ii) such renewal or extension is terminable by the Customer upon thirty (30) days’ notice.
- T. “Mutual Exclusivity” means an agreement in writing and executed by both Respondent(s) and the Customer that, for a specified and concurrent period of time, (i) a Customer purchases or uses only Respondents’ PEEK in a specified Custom Component or specified Jointly Developed Product; and (ii) Respondents do not manufacture, market, sell, or offer to sell the specified Custom Component or specified Jointly Developed Product other than to such Customer.
- U. “New Contract” means any agreement or contract for the sale and purchase of Respondents’ PEEK that is entered into after February 1, 2016.
- V. “PEEK” means polyetheretherketone of any grade or form (including, but not limited to, granules, rods, near net shapes, and components) used or intended for continuous or discontinuous use in a medical device, implant, medical instrument, or similar item intended for use inside of or in contact with a human body for longer than 24 hours.
- W. “Person” means any individual, partnership, joint venture, firm, cor0 Tw 25.45 0 Td ()Tj [(c)4

other terms provided by Respondents to a Customer, in connection with the purchase or sale of any of Respondents' PEEK.

- AA. "Unit Payments" mean any payments owed to Respondents that are calculated based on the number of units of Customer Products sold or manufactured by or on behalf of the Customer.
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5. Conditioning the sale or availability of one type of PEEK on

4. Withdrawing or modifying, or threatening or proposing thereto, favorable Sales Terms or Product Support to the Customer;
5. Providing, or threatening or proposing thereto, less favorable Sales Terms or Product Support to the Customer;
6. Withholding from the Customer any form or grade of Respondents' PEEK;
7. Refusing to deal with the Customer on terms and conditions generally available to other Customers; and
8. Notwithstanding the existence or non-existence of any severability or other provisions in Respondents' agreement(s) or contract(s) with any Customer(s), terminating, suspending, or requiring renegotiation of any term of any agreement or contract for the purchase and sale of Respondents' PEEK, as a result of the Exclusivity terms or other terms inconsistent with this Order being waived, invalid, illegal, or unenforceable.

For the avoidance of doubt, it shall not constitute, in and of itself, a violation of this Order for Respondents to engage in the conduct described in Paragraph II.B(1-7) above, when such conduct results from independent and verifiable business reasons unrelated to a Customer's use of Competing PEEK or refusal to accede to Exclusivity.

- C. As to any New Contract, Respondents shall not invite, enter into, implement, enforce, or attempt thereto, any condition, policy, practice, agreement, contract, contract term, understanding, or any other requirement that:

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exceed Y kilograms. For the avoidance of doubt, Respondents may offer a discount that is volume-based, above average variable cost, and not retroactive, i.e., a discount of X% on those sales in excess of Y kilograms.

Provided, however, that it shall not be a violation of this Paragraph II.C for Respondents to provide discounts, rebates, or other price or non-price incentives to purchase Respondents' PEEK that are designed to meet competition, if Respondents determine in good faith that one or more Competing PEEK Suppliers are offering terms of sale for Competing PEEK that Respondents need to match in order to win contested business. For the avoidance of doubt, under no circumstances may Respondents tie any such incentives to Exclusivity.

- D. Notwithstanding any other provision of this Order, it shall not constitute a violation of this Order for Respondents to

3. for any Custom Component, the Mutual Exclusivity term does not extend beyond three (3) years from (i) the date of first FDA approval for sale of the Customer Product(s) within which the Custom Component is incorporated, or (ii) if the Custom Component is incorporated into a Customer Product previously approved by the FDA, the first commercial sale of the Custom Component following completion of the validation master plan; and
4. Respondents' sales allowed under this Paragraph II.E do not exceed thirty (30) percent of all PEEK sales by Respondents in any twelve-month period, as measured either in units or in revenues.

F. Notwithstanding any other provision of this Order, if:

1. Respondents timely deliver the Order and Exhibits B and C to a Customer with an applicable Legacy Contract as required by Paragraph III(G); and
2. the Customer has not indicated that it will comply with the terms of Exhibit C by counter-signing and delivering Exhibit C to Respondents,

it shall not constitute a violation of this Order for Respondents to (i) enforce existing Exclusivity terms in a Legacy Contract, but only as applied to Customer Products for which the Customer has made a submission for regulatory clearance as of the date this Order is issued, or (ii) enforce terms under a Legacy Contract that prohibit Dual Sourcing of any Customer Product.

Provided however that as to any Customer that has counter-signed and delivered Exhibit C to Respondents, Respondents shall submit to the Commission written notice of any communication from any Respondent to the Customer that the Customer has breached the terms set forth in Exhibit C. Respondents shall submit any such notice to the Commission at least sixty (60) days prior to exercising any right of termination resulting from the alleged breach, during which time the Customer shall be given the opportunity to cure the alleged breach.

III.

IT IS FURTHER ORDERED that Respondents shall design, maintain, and operate an Antitrust Compliance Program that sets forth the policies and procedures Respondents have implemented to comply with this Order and with the Antitrust Laws. So long as Respondents are under common ownership, they may operate under a single Antitrust Compliance Program. This program shall include, but not be limited to:

- A. Respondents' designation and retention for the duration of the Order of an antitrust compliance officer

- B. Training regarding Respondents' obligations under this Order and the Antitrust Laws for Respondents' Executive and Sales Staff to occur:
 - 1. Within thirty (30) days after this Order becomes final, or for any subsequently hired Executive and Sales Staff, within thirty (30) days of their employment start date; and
 - 2. At least annually to all Executive and Sales Staff of Respondents.
- C. Policies and procedures for employees and representatives of Respondents to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;
- D. Policies and procedures for disciplining employees and representatives of Respondents for failure to comply with this Order and the Antitrust Laws;
- E. The retention of documents and records sufficient to record Respondents' compliance with its obligations under this Paragraph III of this Order, including but not limited to records showing that employees and representatives of Respondents have received all trainings required under this Order during the preceding two (2) years;
- F. Distribution of a copy of this Order and Exhibit A to this Order to all Executive and Sales Staff:
 - 1. Within thirty (30) days of the date this Order is issued;
 - 2. Annually within thirty (30) days of the anniversary of the date this Order is issued until the Order terminates; and
 - 3. Within thirty (30) days of any Person first becoming a member of Executive and Sales Staff.
- G. Within ten (10) days of the date this Order is issued, delivery to each Customer that has a current contract with any Respondent, of a copy of: (1) this Order; and (2) as applicable, either: (a) for a Customer with a contract that includes Exclusivity terms, Exhibits B and C; or (b) for a Customer with a contract that does not include Exclusivity terms, Exhibit D. Delivery under this Paragraph III.G shall be made (i) to the Customer's President, CEO, chief legal counsel, or senior executive overseeing PEEK purchasing; and (ii) ten

IV.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days

1. The name, title, business address, e-

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

VII.

IT IS FURTHER ORDERED that this Order shall terminate on July 13, 2036.

By the Commission.

Donald S. Clark
Secretary

[SEAL]

ISSUED: July 13, 2016

EXHIBIT A
[Internal Notice]

The Federal Trade Commission (“FTC”) has been investigating various practices used by Victrex plc, Invibio, Inc., and Invibio Limited (hereinafter collectively referred to as “Invibio”) in the marketing and sale of implant- and medical-grade polyetheretherketone (“PEEK”). The purpose of the FTC’s investigation has been to determine