FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2022, TO JUNE 30, 2022

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2022 TO JUNE 30, 2022

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Took oath of office June 15, 2021

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Took oath of office May 16, 2022

APRIL J. TABOR, *Secretary*
Appointed June 8, 2020.

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FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2022, TO JUNE 30, 2022

IN THE MATTER OF

ANI PHARMACEUTICALS, INC., NOVITIUM PHARMA LLC, AND ESJAY LLC

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

Docket No. C-4754; File No. 211 0101
Complaint, November 9, 2021 – Decision, January 11, 2022

This consent order addresses the $210 million acquisition by ANI Pharmaceuticals, Inc. of certain assets of Novitium Pharma LLC and Esjay LLC. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening future competition in the markets for (1) generic SMX-TMP oral suspension; and (2) generic dexamethasone tablets in the United States. The consent order requires Respondents to divest all of ANI's rights and assets related to (1) generic sulfamethoxazole-trimethoprim oral suspension; and (2) generic dexamethasone tablets to Prasco LLC.

Participants

For the *Commission*: *Kari A. Wallace.*

For the *Respondents*: *Patrick C. English* and *Amanda P. Reeves, Latham & Watkins LLP; Elena Kamenir* and *Amy Ray, Orrick Herrington & Sutcliffe LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent ANI Pharmaceuticals, Inc. ("ANI"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire non-corporate interests of Respondent Novitium Pharma LLC, whose ultimate parent entity is Respondent Esjay LLC (collectively, "Novitium"), companies subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such 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, 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 ANI Pharmaceuticals, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 210 Main Street West, Baudette, Minnesota 56623.

2. Respondent Novitium Pharma LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 70 Lake Drive, East Windsor, New Jersey 08520.

3. Respondent Esjay LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 16732 Strasbourg Lane, Delray Beach, Florida 33446.

4. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and engages in business that is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

5. Pursuant to an agreement and plan of merger dated March 8, 2021, Respondent ANI proposes to acquire the non-corporate equity interests of Respondent Novitium in transaction valued at approximately $210 million (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

6. The relevant lines of commerce in which to analyze the effects of the Acquisition are the development, license, manufacture, marketing, distribution, and sale of the following generic pharmaceutical products:

a. sulfamethoxazole-trimethoprim ("SMX-TMP") oral suspension; and

b. dexamethasone tablets.

7. The United States is the relevant geographic area in which to assess the competitive effects of the Acquisition in the relevant lines of commerce.

IV. THE STRUCTURE OF THE MARKETS

8. Generic SMX-TMP oral suspension is an antibiotic product used to treat a variety of infections. Five companies, including ANI, currently market the product in the United States, but at least one has had difficulty manufacturing the product. Novitium is one of a limited number of suppliers capable of entering the market for SMX-TMP oral suspension in the near future.

9. Generic dexamethasone tablets are an oral steroid product used to treat inflammation associated with a variety of conditions. Recently, dexamethasone tablets have been used to reduce mortality in hospitalized COVID-19 patients who require supplemental oxygen. Dexamethasone tablets are available in a variety of strengths, although the most widely-used strength is the 4 mg strength. Only two companies sell the 4 mg strength of dexamethasone tablets in the United States today, and ANI and Novitium are two of a limited number of companies entering the market in the near future.

V. ENTRY CONDITIONS

10. Entry into the relevant markets described in Paragraphs 6-7 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. *De novo* entry would not take place in a timely manner because the combination of drug development times and FDA approval requirements would be lengthy. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

VI. THE EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition 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 future competition between ANI and Novitium in the markets for (1) generic SMX-TMP oral suspension and (2) generic dexamethasone tablets, thereby (a) increasing the likelihood that the combined entity would forego or delay the launch of each product, and (b) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional supplier of each product.

VII. VIOLATIONS CHARGED

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

13. The Acquisition described in Paragraph 5, 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 ninth day of November 2021 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission initiated an investigation of Respondent ANI Pharmaceuticals, Inc.'s proposal to acquire the non-corporate interests of Respondent Novitium Pharma LLC, whose ultimate parent entity is Respondent Esjay LLC (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to each Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Order to Maintain Assets:

1. Respondent ANI Pharmaceuticals, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 210 Main Street West, Baudette, Minnesota 56623.

2. Respondent Novitium Pharma LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 70 Lake Drive, East Windsor, New Jersey 08520.

3. Respondent Esjay LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 16732 Strasbourg Lane, Delray Beach, Florida 33446.

4. Prasco LLC is a limited liability company organized, existing and doing business under the laws of the State of Ohio with its executive offices and principal place of business located at 6125 Commerce Court, Mason, Ohio 45040.

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

ORDER TO MAINTAIN ASSETS

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

A. "Decision and Order" means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.

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

II. Divestiture Related Obligations

IT IS FURTHER ORDERED that:

A. Prior to the Divestiture Date, Respondents shall provide the Acquirer with the opportunity to review Product Contracts related to each of the Divestiture Products so that the Acquirer can determine whether to assume each Product Contract;

Provided, however, that in cases in which any Product Contract also relates to a Retained Product the Respondent shall, at the option of that Acquirer, assign or otherwise make available to that Acquirer all such rights under the contract or agreement as are related to the specified Divestiture Product.

B. Prior to the Divestiture Date, Respondents shall secure all approvals, consents, ratifications, waivers, or other authorizations from all non-governmental third parties that are necessary to permit Respondents to divest the Divestiture Assets and to grant or assign rights to the Divestiture Products to the Acquirer, and to permit that Acquirer to continue in the related Divestiture Product Business in the United States without interruption or impairment.

C. As related to the Product Manufacturing Technology and any ingredient, material, or component used in the manufacture of the Divestiture Product, Respondents shall not enforce any agreement against a third party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the third party a license or other right to the Product Manufacturing Technology or any ingredient, material, or component used in the

manufacture of the Divestiture Product. Such agreements include agreements that might limit the ability of a third party to disclose Confidential Business Information related to such Product Manufacturing Technology to the Acquirer. No later than 10 days after the Divestiture Date, Respondents shall grant a release to each third party that is subject to any such agreement that allows the third party to provide the Product Manufacturing Technology or any ingredient, material, or component used in the manufacture of the Divestiture Product to the Acquirer. Within 5 days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer;

Provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant third parties.

D. Respondents shall transfer the Product Manufacturing Technology related to the Divestiture Products to the Acquirer, or at the Acquirer's option, to its Manufacturing Designee, in a manner consistent with the Technology Transfer Standards. Respondents shall bear all costs related to these transfers.

E. No later than 10 days after the Divestiture Date, Respondents shall designate employees of Respondents knowledgeable about the marketing, distribution, warehousing, and sale of each of the Divestiture Products to assist the Acquirer of each of the Divestiture Products to transfer and integrate the related Divestiture Product Business.

F. No later than 10 days after the Divestiture Date, Respondents shall provide the following to the relevant Acquirer of each of the Divestiture Products:

1. A list of any finished batch or lot of the relevant Divestiture Product that any Respondent, any manufacturer for a Respondent, or regulatory Agency determined to be out-of-specification at any time during the three-year period immediately preceding the Divestiture Date, and, for each such batch or lot: (a) a detailed description of the known deficiencies or defects (*e.g.*, impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure); (b) the corrective actions taken to remediate any cGMP deficiencies in that Divestiture Product; and (c) to the extent known by any Respondent, the employees (whether current or former) responsible for taking such corrective actions;

2. A list by stock-keeping unit by Customer that contains the current net price per unit as packaged for sale (*i.e.*, the price net of all customer-level discounts, rebates, or promotions) for the relevant Divestiture Product for each order sold to that Customer during the two-year period prior to the Divestiture Date;

3. A list of the inventory levels (weeks of supply) of the relevant Divestiture Product in the possession of each Customer to the extent known or available to any Respondent, as of the date prior to and closest to the Divestiture Date as is available;

4. A list of any pending reorder dates for the relevant Divestiture Product by Customer as of the Divestiture Date to the extent known by any Respondent;

5. A list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by law, to control, prohibit, or otherwise limit the use, including the use in Customer cross-referencing, of such NDC numbers by the Respondents, *unless* that Divestiture Product has not been marketed or sold in the United States prior to the Divestiture Date; and

6. The quantity and delivery terms in all unfilled Customer purchase orders for the relevant Divestiture Product as of the Divestiture Date.

G. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Product Releasees under any Patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair the Acquirer's freedom to research and Develop, or manufacture anywhere in the world the Divestiture Product(s), or to distribute, market, sell, or offer for sale within the United States any such Divestiture Product.

H. Upon reasonable written request from the Acquirer to a Respondent, that Respondent shall provide, in a timely manner, assistance of knowledgeable employees of that Respondent (*i.e.*, employees of that Respondent that were involved in the Development of the Divestiture Products) to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a third party related to the Product Intellectual Property for the Divestiture Products acquired by that Acquirer from a Respondent. A Respondent shall make its employees available to that Acquirer for the fee provided in the relevant Divestiture Agreement, or if no fee is provided, at no greater than Direct Cost.

I. For any patent infringement suit that is filed or to be filed within the United States that is (x) filed by, or brought against, a Respondent prior to the Divestiture Date related to any Divestiture Product or (y) any potential patent infringement suit that a Respondent has prepared, or is preparing, to bring or defend against as of the Divestiture Date that is related to any Divestiture Product, that Respondent shall:

1. Cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of such patent infringement suit;

2. Waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent the Acquirer in any such patent infringement suit; and

3. Permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of that Respondent's outside counsel related to such patent infringement suit.

III. Asset Maintenance

IT IS FURTHER ORDERED that, until the Respondents have physically transferred the Dexamethasone Divestiture Assets and the Sulfamethoxazole/Trimethoprim Divestiture Assets to the Acquirer pursuant to Section II of the Decision and Order, Respondents shall operate and maintain each of the respective Divestiture Assets and each of the respective Divestiture Product Businesses in the ordinary course of business consistent with past practices. Included in these obligations, Respondents shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses, to minimize the risk of loss of competitive potential of such Divestiture Product Businesses, to operate such Divestiture Product Businesses in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, or deterioration of any of the Divestiture Assets, except for ordinary wear and tear.

B. Not sell, transfer, encumber, or otherwise impair such Divestiture Assets, or terminate any of the operations of such Divestiture Product Businesses, other than in the ordinary course of business consistent with past practice or as prescribed in the Orders.

C. Make all payments required to be paid under any contract or lease when due, and pay all liabilities and satisfy all obligations associated with such Divestiture Product Businesses.

D. Provide such Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on, at least at their scheduled pace, all capital projects, business plans, promotional plans, capital expenditure plans, research and development plans, and commercial activities for such Divestiture Product Businesses.

E. Use best efforts to preserve the existing relationships and goodwill with suppliers, customers, employees, vendors, distributors, landlords, licensors, licensees, government entities, brokers, contractors, and others having business relations with such Divestiture Product Businesses.

F. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with such Divestiture Product Businesses, including by:

1. Filling vacancies that occur in the regular and ordinary course of business consistent with past practice; and

2. Not transferring any employees from such Divestiture Product Businesses to another of Respondents' businesses.

G. Maintain and preserve the Business Information of such Divestiture Product Businesses.

H. Provide the resources necessary for such Divestiture Product Businesses to respond to competition, prevent diminution in sales, and maintain its competitive strength.

I. Continue providing customary levels of support services to such Divestiture Product Businesses.

J. Maintain all licenses, permits, approvals, authorizations, or certifications used in the operation of such Divestiture Product Businesses, and operate such Divestiture Product Businesses in accordance and compliance with all regulatory obligations and requirements.

K. Maintain the levels of production, quality, pricing, service, or customer support typically associated with such Divestiture Product Businesses.

Provided, *however*, Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by a Monitor (in consultation with Commission staff), in all cases to facilitate that Acquirer's acquisition of the Divestiture Assets and rights in the Divestiture Products and consistent with the purposes of the Orders.

IV. Transition Services and Manufacturing by Respondents

IT IS FURTHER ORDERED that:

A. At the request of the Acquirer, in a timely manner, at no greater than Direct Cost or at such cost as provided in a Divestiture Agreement, Respondents shall provide transition services sufficient to enable the Acquirer of each of the Divestiture Products to operate the related Divestiture Product Business in substantially the same manner that Respondents have operated that Business prior to the Acquisition Date.

B. Upon reasonable written notice and request from the Acquirer, Respondents shall manufacture, deliver and supply, or cause to be manufactured, delivered, and

supplied, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, that Acquirer's requested supply of each of the Divestiture Products and any of the active pharmaceutical ingredients used in the Divestiture Products that are made by a Respondent, as applicable, hereinafter "Supplied Products." The requested supply of Supplied Products shall be provided at no greater than Supply Cost or at such cost as provided in a Divestiture Agreement.

C. The Respondents shall make representations and warranties to the Acquirer that the Supplied Products meet the relevant Agency-approved specifications and, with the consent of the Acquirer, shall amend any agreement between the Respondents and the Acquirer that is related to the quality controls of a Divestiture Product to address any necessary changes to the agreement in order to comply with relevant Agency regulations or recommendations.

D. The Respondents shall agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Supplied Products to meet cGMP, but the Respondents may make this obligation contingent upon the Acquirer giving the Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

Provided, however, that the Respondents may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the Respondents' responsibilities to supply the Supplied Products in the manner required by this Order;

Provided further, however, that this obligation shall not require the Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the Respondents to the Acquirer in a Divestiture Agreement.

E. The Respondents shall agree to hold harmless and indemnify the Acquirer for any liabilities, loss of profits, or consequential damages resulting from the failure of the Respondents to deliver the Supplied Products to the Acquirer in a timely manner *unless* (1) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (2) Respondents are able to cure the supply failure no later than 30 days after the receipt of notice from that Acquirer of a supply failure.

F. The Respondents shall give priority to supplying the Acquirer over the supplying of Products for any Respondent's own use or sale.

G. During the term of any agreement for a Respondent to supply the Supplied Products, upon written request of the Acquirer or a Monitor, the Respondent shall make available to the supplied Acquirer and a Monitor all records generated or

created after the Divestiture Date that relate directly to the manufacture of the applicable Supplied Products.

H. The Respondents shall provide the Acquirer with the actual costs incurred or the price paid for active ingredients, components, and excipients the Respondents use to manufacture the applicable Supplied Products.

I. During the term of any agreement for a Respondent to supply the Supplied Products, Respondents shall take all actions as are reasonably necessary to ensure an uninterrupted supply of each of the Supplied Products.

J. Respondents shall not be entitled to terminate any agreement to supply the Supplied Products due to (x) a breach by the Acquirer of a Divestiture Agreement, or (y) that Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency law;

Provided, however, that this Paragraph IV.J shall not prohibit a Respondent from seeking compensatory damages from the Acquirer for that Acquirer's breach of its payment obligations to the Respondent under the agreement.

K. The Respondents shall permit the Acquirer to terminate the agreement for the supply of the Supplied Products on a product-by-product basis, at any time, upon commercially reasonable notice, and without cost or penalty (other than costs or penalties due by the Respondent to third parties pursuant to the termination of such agreement, which may be the responsibility of that Acquirer).

L. In the event that that a Respondent becomes (x) unable to supply or produce a Supplied Product from the facility that has been supplying the Acquirer, and (y) any Respondent has a different facility that is listed on the FDA Authorization for that Supplied Product and is still suitable for use to manufacture the Supplied Product, or any Respondent has a facility that manufactures the Therapeutic Equivalent of such Supplied Product, then such Respondent shall, at the option of the supplied Acquirer, provide a supply of either the Therapeutic Equivalent or the Supplied Product from the other facility under the same terms and conditions as contained in the Divestiture Agreement to supply.

M. During the term of any agreement for a Respondent to supply the Supplied Products, the Respondents shall provide consultation with knowledgeable employees of Respondents and training, at the written request of the supplied Acquirer and at a facility chosen by the supplied Acquirer, for the purposes of enabling that Acquirer (or its Manufacturing Designee) to obtain all Product Approvals to manufacture the applicable Supplied Products in final form in the same quality achieved by, or on behalf of, Respondents and in commercial quantities, in a manner consistent with cGMP, independently of Respondents and

sufficient to satisfy management of that Acquirer that its personnel (or its Manufacturing Designee's personnel) are adequately trained in the manufacture of the applicable Supplied Products.

N. For any Supplied Product that is made in a facility owned by Respondents, Respondents shall transfer such manufacturing to a facility owned, controlled, or operated by the Acquirer or, at the option of the Acquirer, to its Manufacturing Designee. Respondents shall bear all costs for this transfer including the cost to validate the Supplied Products at the changed facility and the costs for any changes in the specifications for any Supplied Product required by the FDA prior to the FDA's granting approval to market such Product from the changed site of manufacture.

O. For any Divestiture Product, at the Acquirer's option, Respondents shall bear the costs to qualify and obtain FDA regulatory approval to change the source of the active pharmaceutical ingredient(s).

V. Employees

IT IS FURTHER ORDERED that:

A. Until 2 years after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer to evaluate independently and offer employment to the Relevant Employees for the Divestiture Products acquired by that Acquirer.

B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to that Acquirer a list of all Relevant Employees and provide Employee Information for each Relevant Employee;

2. No later than 10 days after a request from the Acquirer, provide that Acquirer or its Manufacturing Designee an opportunity to meet individually and outside the presence or hearing of any employee or agent of Respondents with any of the Relevant Employees, and to make offers of employment to any of the Relevant Employees;

3. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Acquirer or its Manufacturing Designee, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee, and shall not make any counteroffer to a Relevant Employee who receives an offer of employment from that Acquirer or its Manufacturing Designee;

Provided, however, that nothing in the Orders shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee; and

4. Not interfere, directly or indirectly, with the hiring or employing by that Acquirer or its Manufacturing Designee of any Relevant Employees, not offer any incentive to such employees to decline employment with that Acquirer or its Manufacturing Designee, and not otherwise interfere with the recruitment of any Relevant Employees by that Acquirer.

C. Respondents shall continue to provide Relevant Employees compensation and benefits, including regularly scheduled raises and bonuses, until the Divestiture Date or as may be necessary to comply with the provisions of the Orders to provide manufacturing and supply of Divestiture Products or transition services to the Acquirer.

D. Respondents shall provide reasonable financial incentives for Relevant Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Relevant Employees by the Acquirer.

E. If, at any point within 6 months of the Divestiture Date, the Commission, in consultation with the Acquirer and a Monitor, determines in its sole discretion that the Acquirer or its Manufacturing Designee should have the ability to interview, make offers of employment to, or hire any of Respondents' employees who were not included as Relevant Employees, but who either (1) were involved with any of the Divestiture Products, or (2) provided manufacturing and supply of Divestiture Products or transition services to the Acquirer, then the Commission may notify Respondents that such employees are to be designated as Relevant Employees, and Section V shall apply to such employees as of that notification date.

F. Respondents shall not, for a period of one year following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Acquirer or its Manufacturing Designee to terminate the employee's employment with the Acquirer or its Manufacturing Designee;

Provided, however, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of Relevant Employees; and

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

VI. Business Information and Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall transfer and deliver all Business Information related to a Divestiture Product Business to the Acquirer pursuant to the following:

1. Respondents shall deliver the Business Information to that Acquirer, at Respondents' expense, in good faith, in a timely manner (*i.e.* as soon as practicable, avoiding any delays in transmission), and in a manner that ensures the completeness and accuracy of all information and ensures its usefulness;

2. Pending complete delivery of all Confidential Business Information, Respondents shall provide that Acquirer with access to all Business Information and to employees who possess or are able to locate this information for the purposes of identifying the Business Information that contains Confidential Business Information and facilitating the delivery in a manner consistent with the Orders;

3. Not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:

a. The requirements of the Orders;

b. Respondents' obligations to that Acquirer under the terms of the related Divestiture Agreements; or

c. Applicable law;

4. Not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person *except* (a) that Acquirer, (b) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services, manufacturing Divestiture Products, or who are engaged in the transfer and delivery of the Product Manufacturing Technology), (c) the Commission, or (d) a Monitor, and *except* to the extent necessary to comply with applicable law;

5. Not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the

business that is being retained, owned, or controlled by a Respondent, other than those employees specifically authorized as described above;

6. Institute procedures and requirements to ensure that those employees of a Respondent that are authorized by that Acquirer to have access to such Confidential Business information:

   a. Do not provide, disclose, or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and

   b. Do not solicit, access, or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. Take all actions necessary and appropriate to prevent access to, and the disclosure or use of, such Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

   a. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system or network controls and restrictions;

   b. To the extent practicable, maintaining such Confidential Business Information separate from other data or information of any Respondent; and

   c. Ensuring by other reasonable and appropriate means that such Confidential Business Information is not shared with a Respondent's personnel engaged in any Business related to the same or substantially the same type of Business as the Divestiture Products, including a Respondent's personnel engaged in the marketing and sale within the United States of Products Developed or in Development for the same or similar indications as the Divestiture Products or that use the same active pharmaceutical ingredients as the Divestiture Products.

B. As a condition of continued employment after the Divestiture Date, Respondents shall require each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one-year period prior to the Divestiture Date, and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that are Developed or in Development for the same or similar indications as the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and

the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which that employee shall be required to maintain all such Confidential Business Information as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of any Respondent (other than as necessary to comply with the requirements of the Orders).

C. No later than 30 days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the above-described Confidential Business Information by that Respondent's personnel to all of its employees who (1) may be in possession of such Confidential Business Information or (2) may have access to such Confidential Business Information. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for 2 years after the Divestiture Date. Respondents shall provide a copy of their notifications to the Acquirer. Respondents shall maintain complete records of all such notifications at the respective Respondent's principal executive offices within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondents shall provide that Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. Each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to the Acquirer or access original documents provided to that Acquirer, except under circumstances in which copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. To assure such Respondent's compliance with any Divestiture Agreement, the Orders, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable government entity, or any taxation requirements; or

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 an Divestiture Product, the Divestiture Assets, or the Divestiture Product Business;

Provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph VI.D pursuant to an appropriate confidentiality order, agreement, or arrangement;

Provided further, *however*, that pursuant to this Paragraph VI.D, a Respondent needing such access to original documents shall: (1) require those who view such

unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication

VII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Denise Smart of Smart Consulting Group, LLC as Monitor to observe and report on Respondents' compliance with the terms of the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement shall:

1. Be subject to the approval of the Commission;

2. Not limit, and the signatories shall not construe it to limit, the terms of Section VIII of the Decision and Order or Section VII of this Order to Maintain Assets ("Monitor Sections") and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee, or agent of the Respondents or of the Commission;

4. Shall serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional, or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter, and at such other times as may be requested by staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents obligations to provide manufacturing and supply of Divestiture Products pursuant to this Order have expired or been terminated and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing the Monitor's duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform the Monitor's duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing the Monitor's duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and

assistants that are reasonably necessary to assist the Monitor in carrying out the Monitor's duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement provided that such agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. Respondents shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including the Monitor's written reports submitted to the Commission, or any other Person with whom the Monitors communicate in the performance of their duties.

G. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same

terms as the Commission-approved agreement referenced in Paragraph VII.B of the Monitor Sections; or (b) receives Commission approval.

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

VIII. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Assets or the rights to the Divestiture Products as required by the Decision and Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of the Decision and Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section VIII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with the Orders.

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

C. No later than 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 divestiture required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section VIII, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one 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- year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission;

Provided, however, the Commission may extend the divestiture period only 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 divestitures. Any delays in divestiture caused by a Respondent shall extend the time for divestiture under SectionVIII 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to the Acquirer that receives the prior approval of the Commission as required by this Order;

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission;

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

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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct 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.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement;

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to enter into a non-disclosure or other confidentiality

agreement with the Commission related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. 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 Section VIII.

G. 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(s) required by this Order.

IX. Prior Approval

IT IS FURTHER ORDERED that each Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any rights or interests in the Dexamethasone Products, the Sulfamethoxazole/Trimethoprim Products, and the Erythromycin/Ethylsuccinate Products, or the Therapeutic Equivalent or Biosimilar of any of these Products without the prior approval of the Commission.

X. Compliance Reports

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following**:**

A. Respondents shall submit compliance reports 30 days after the Commission issues this Order to Maintain Assets and every 30 days thereafter until the Commission issues a Decision and Order in this matter.

B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are complying with their obligations under the Orders. Conclusory statements that Respondents have complied with its obligations are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance:

1. A full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of in the Orders;

2. A detailed description of all substantive contacts, negotiations, or recommendations related to the transfer and delivery to the Acquirer of (i) the Divestiture Assets and the rights to the Divestiture Products, (ii) the Business Information related to each of the Divestiture Product Businesses, and (iii) the provision of manufacturing and supply of Divestiture Products to that Acquirer;

3. A detailed description of the transfer of the Product Manufacturing Technology related to the Acquirer or the Acquirer's Manufacturing Designee and progress toward the manufacturing of these products at a facility that is not owned or controlled by Respondents; and

4. A detailed description of the timing for the completion of such obligations.

C. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Orders and provide copies of these documents to Commission staff upon request.

D. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter

XI. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The dissolution of: ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC;

B. Any proposed acquisition, merger, or consolidation of ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC; or

C. Any other change in Respondents including, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

XII. Access

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

A. Access, during business 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 the Orders, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

XIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses through its full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Product Businesses; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

XIV. Term

IT IS FURTHER ORDERED that this Order shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

DECISION

The Federal Trade Commission initiated an investigation of Respondent ANI Pharmaceuticals, Inc.'s proposal to acquire the non-corporate interests of Respondent Novitium Pharma LLC, whose ultimate parent entity is Respondent Esjay LLC (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to each Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the

jurisdictional facts set forth in the Draft Complaint; (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent ANI Pharmaceuticals, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 210 Main Street West, Baudette, Minnesota 56623.

2. Respondent Novitium Pharma LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 70 Lake Drive, East Windsor, New Jersey 08520.

3. Respondent Esjay LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 16732 Strasbourg Lane, Delray Beach, Florida 33446.

4. Prasco LLC is a limited liability company organized, existing and doing business under the laws of the State of Ohio with its executive offices and principal place of business located at 6125 Commerce Court, Mason, Ohio 45040.

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

ORDER

I. Definitions

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

A. "ANI" means ANI Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by ANI Pharmaceuticals, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Novitium" means Novitium Pharma LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Novitium Pharma LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Esjay" means Esjay LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Novitium Pharma LLC, partnerships, divisions, groups, and affiliates controlled by Esjay LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Respondents" means ANI, Novitium, and Esjay.

F. "Acquirer(s)" means:

1. Prasco; or

2. Any other Person that the Commission approves to acquire Divestiture Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in agreement titled the *Agreement and Plan of Merger* by and among ANI Pharmaceuticals, Inc., Nile Merger Sub LLC, Novitium Pharma LLC, Esjay LLC, Chali Properties LLC, Chad Gassert, Muthusamy Shanmugam, Thorappadi Vijayaraj, and Shareholder Representative Services LLC, dated as of March 8, 2021.

H. "Acquisition Date" means the date of the closing on the above-referenced *Agreement and Plan of Merger*.

I. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s),

license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes the FDA.

J. "Biosimilar" means any biologic drug product that is highly similar to, and has no clinically meaningful difference from, an existing FDA-approved biologic drug product or that otherwise meets the FDA's criteria for classification as a biosimilar.

K. "Business Information" means all written information, wherever located or stored, relating to or used in a Divestiture Product Business, including documents, graphic materials, and data and information in electronic format. Business Information includes records and information relating to research and development (including copies of Product Development Reports), manufacturing, process technology, engineering, product formulations, production, sales, marketing (including Product Marketing Materials), logistics, advertising, personnel, accounting, business strategy, information technology systems, customers, customer purchasing histories, customer preferences, delivery histories, delivery routing information, suppliers and all other aspects of the Divestiture Product Business. For clarity, Business Information includes any Respondent's rights and control over information and material provided by that Respondent to any other Person. Business Information includes Confidential Business Information.

L. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

M. "Confidential Business Information" means all Business Information that is not in the public domain.

N. "Customer" means any Person that is either a direct purchaser or who negotiates price on behalf of a direct purchaser (*e.g.*, group purchasing organization) of any Divestiture Product from a Respondent or the Acquirer.

O. "Development" means all research related to a Product, and all studies of the safety or efficacy of a Product, including: discovery or identification of a new chemical entity, test method development; toxicology; bioequivalency; bioavailability; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; stability testing; statistical analysis and report writing; conducting studies of the safety or efficacy of a Product in animals or humans 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, labeling, and sale of a Product(including any government price or reimbursement approvals). "Develop" means to engage in Development.

P. "Dexamethasone Products" mean the Products in Development or authorized for marketing or sale in the United States pursuant to ANDA No. 080399, and any

supplements, amendments, or revisions to this ANDA, and any other Products that are or were in Development or Developed by ANI as of March 8, 2021 (the date the Respondents signed the *Agreement and Plan of Merger*) that are orally administered tablets and contain, as the active pharmaceutical ingredient, dexamethasone at a 0.75mg strength.

Q. "Dexamethasone Divestiture Assets" means all rights, title and interest in the Divestiture Product Business related to the Dexamethasone Products, including all of the Divestiture Assets related to the Dexamethasone Products.

R. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees shall not exceed then-current average hourly wage rate for such employee.

S. "Divestiture Agreements" mean:

1. Asset Purchase Agreement by and between Prasco and ANI Pharmaceuticals, Inc. dated as of October 21, 2021; and all amendments, exhibits, attachments, agreements to the above-referenced agreement; and

2. Any other agreement between a Respondent(s) and the Acquirer (or between a Divestiture Trustee and the Acquirer, or between Respondents for the benefit of the Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

T. "Divestiture Assets" mean Respondents' equitable and legal right, title, and interests in and to all tangible and intangible assets that are not Excluded Assets, wherever located, relating to a Divestiture Product Business, including the following:

1. All Product Approvals;

2. All FDA Authorizations;

3. All Product Development Reports;

4. All Product Intellectual Property;

5. At the option of the Acquirer, Product Manufacturing Equipment;

6. All technological, scientific, chemical, biological, pharmacological, toxicological, regulatory materials and information, including studies of the safety, efficacy, stability, bioequivalency, bioavailability, and toxicology of a Product;

7. All website(s), Domain Names, and social media sites related exclusively to the Divestiture Product and the content thereon related exclusively to the Divestiture Product, and the content related exclusively to the Divestiture Product that is displayed on any website that is not dedicated exclusively to the Divestiture Product;

8. At the option of the Acquirer, Product Contracts;

9. All Business Information;

10. At the option of the Acquirer, all inventory and all ingredients, materials, or components used in the manufacture of the specified Divestiture Product in existence as of the Divestiture Date including, the active pharmaceutical ingredient(s), excipient(s), raw materials, packaging materials, work-in-process, and finished goods related to that Divestiture Product; and

11. At the option of the Acquirer, the right to fill any or all unfilled Customer purchase orders for the specified Divestiture Product as of the Divestiture Date.

U. "Divestiture Date" means the date on which a Respondent (or a Divestiture Trustee) closes on a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey rights or assets related to a Divestiture Product to the Acquirer as required by Section II of this Order.

V. "Divestiture Products" means the:

1. Dexamethasone Products; and

2. Sulfamethoxazole/Trimethoprim Products.

W. "Divestiture Product Business" means the research, Development, manufacture, commercialization, distribution, marketing, advertisement, importation, and sale related to a Divestiture Product.

X. "Divestiture Trustee" means any Person appointed by the Commission to serve as a divestiture trustee pursuant to the Orders.

Y. "Domain Name" means the domain name(s) and the related uniform resource locator(s) and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.

Z. "Employee Information" means the following, for each Relevant Employee, as and to the extent permitted by law:

1. With respect to each such employee, the following information:

    a. Name, job title or position, date of hire, and effective service date;

    b. Specific description of the employee's responsibilities;

    c. Base salary or current wages;

    d. Most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

    e. Employment status (*i.e.*, active or on leave or disability; full-time or part-time); and

    f. All other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

2. At the option of the Acquirer, copies of all employee benefit plans and summary.

AA. "Erythromycin/Ethylsuccinate Products" mean the Products in Development or authorized for marketing or sale in the United States pursuant to ANDA No. 211991, and any supplements, amendments, or revisions to this ANDA, and any other Products in Development or Developed, marketed or sold by any Person other than a Respondent that are orally administered granules (for suspension) and contain, as the active pharmaceutical ingredients, erythromycin and ethylsuccinate at the EQ 200mg, BASE 5ml strengths.

BB. "Excluded Assets" mean:

1. Any real estate and the buildings and other permanent structures located on such real estate;

2. Corporate names or corporate trade dress of a Respondent or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which a Respondent can be identified or defined;

3. The portion of any Business Information that contains information about any of a Respondent's business other than a Divestiture Product Business, in those cases in which the redaction does not impair the usefulness of the information related to the Divestiture Product Business;

4. Any original document that a Respondent has a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that Respondents shall provide copies of the document to the Acquirer and shall provide that Acquirer access to the original document if copies are insufficient for regulatory or evidentiary purposes;

5. Any tax asset relating to (a) the Divestiture Assets for pre-Divestiture Date tax periods or (b) any tax liability that any Respondent is responsible for arising out of the divestiture of the Divestiture Assets;

6. All accounts receivable, notes receivable, rebates receivable and other miscellaneous receivables of any Respondent that are related to the Divestiture Product Business and arising out of the operation of the Divestiture Product Business prior to the Divestiture Date;

7. All cash, cash equivalents, credit cards and bank accounts of any Respondent; and

8. Any records or documents reflecting attorney-client, work product or similar privilege of any Respondent or otherwise relating to the Divestiture Assets as a result of legal counsel representing any Respondent in connection with the divestiture of the Divestiture Assets pursuant to this Order or the Divestiture Agreements.

CC. "FDA" means the United States Food and Drug Administration.

DD. "FDA Authorization(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto. "FDA Authorization" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto. "FDA Authorization" also includes any Biologic License Application ("BLA") filed or to be filed with the FDA pursuant to 21 C.F.R. 601.2, et seq., and Section 351 of the Public Health Service Act, and any NDA deemed to be a BLA by the FDA, and all supplements, amendments, revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between the Respondents and the FDA or other government regulatory authority relative thereto.

EE. "Licensed Intellectual Property" means; (a) all Product Manufacturing Technology that is used (but not exclusively, predominantly, or primarily used) in the manufacture of a Divestiture Product, and (b) copyrights used (but not exclusively, predominantly, or primarily used), to commercialize, distribute, market, advertise, or sell any Divestiture Product as of the applicable Divestiture Date.

FF. "Manufacturing Designee" means any Person other than a Respondent that has been designated by the Acquirer to perform any part of the manufacturing process, including the finish or packaging of a Divestiture Product on behalf of that Acquirer.

GG. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to the Orders.

HH. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code and package size code for a specific Product.

II. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

JJ. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

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

LL. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

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

NN. "Prasco" means Prasco, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Prasco, LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

OO. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient, or that is the subject of an FDA Authorization.

PP. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other regulatory approvals, and pending applications and requests therefor, required by applicable Agencies, related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Product, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any FDA Authorization related to that Product.

QQ. "Product Contracts" means all contracts, agreements, mutual understandings, arrangements, or commitments related to the Divestiture Product Business, including those:

1. Pursuant to which any third party, including a Customer, purchases, or has the option to purchase, a Product from a Respondent or negotiates the purchase price on behalf of another Customer;

2. Pursuant to which a Respondent had, or has as of the Divestiture Date, the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), from any third party for use in connection with the manufacture of a Product;

3. Relating to any study of the safety or efficacy of a Product;

4. With universities or other research institutions for the use of a Product in scientific research;

5. For the marketing of a Product or educational matters relating solely to the Products;

6. Pursuant to which a third party manufactures or plans to manufacture a Product as a finished dosage form on behalf of a Respondent;

7. Pursuant to which a third party provides or plans to provide any part of the manufacturing process, including, without limitation, the finish or packaging of a Product on behalf of a Respondent;

8. Pursuant to which a third party licenses any Product Intellectual Property or Product Manufacturing Technology related to a Product to a Respondent;

9. Pursuant to which a third party is licensed by a Respondent to use any of the Product Intellectual Property or Product Manufacturing Technology;

10. Constituting confidentiality agreements involving a Product;

11. Involving any royalty, licensing, covenant not to sue, or similar arrangement related to a Product;

12. Pursuant to which a third party provides any specialized services necessary to the research, Development, manufacture, or distribution of a Product to a Respondent including, consultation arrangements; and

13. Pursuant to which any third party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of a Product.

RR. "Product Development Reports" means information related to the Development of a Product, including:

1. Pharmacokinetic study reports;

2. Bioavailability study reports;

3. Bioequivalence study reports;

4. All correspondence, submissions, notifications, communications, registrations, or other filings made to, received from, or otherwise conducted with the FDA relating to the FDA Authorization(s);

5. Annual and periodic reports related to the above-described FDA Authorization(s), including any safety update reports;

6. FDA approved labeling or other Agency-approved labeling;

7. Currently used or planned product package inserts (including historical change of controls summaries);

8. FDA approved patient circulars;

9. Adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of efficacy;

10. Summaries of complaints from physicians or other health care providers;

11. Summaries of complaints from ultimate users of the Product;

12. Summaries of complaints from Customers;

13. Product recall reports filed with the FDA or any other Agency, and all reports, studies, and other documents related to such recalls;

14. Investigation reports and other documents related to any out of specification results for any impurities or defects found in any Product;

15. Reports from any Person (e.g., any consultant or outside contractor) engaged to investigate or perform testing for the purposes of resolving any Product or process issues, including, without limitation, identification and sources of impurities or defects;

16. Reports from vendors of the component(s), active pharmaceutical ingredient(s), excipient(s), packaging component(s), and detergent(s) used to produce any Product that relate to the specifications, degradation, chemical interactions, testing, and historical trends of the production of any Product;

17. Analytical methods development records;

18. Manufacturing batch or lot records;

19. Stability testing records;

20. Change in control history; and

21. Executed validation and qualification protocols and reports.

SS. "Product Intellectual Property" means intellectual property of any kind (other than Licensed Intellectual Property), that is owned, licensed, held, or controlled by a Respondent as of the Divestiture Date, including Patents, patent applications, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, know-how, trade secrets, and proprietary information.

TT. "Product Manufacturing Equipment" means equipment that is being used, or has been used to manufacture the specified Divestiture Product.

UU. "Product Manufacturing Technology" means all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of a Product, including the following: all product specifications, processes, analytical methods, product designs, plans, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the conformance of any Product Approvals, conformance with any

Agency requirements, and cGMP compliance, labeling and all other information related to the manufacturing process, and supplier lists.

VV. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the United States as of the Divestiture Date that are owned or controlled by a Respondent, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), Customer information (including Customer net purchase information to be provided on the basis of dollars and units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, website content, artwork for the production of packaging components, television masters, and other similar materials related to the specified Divestiture Product.

WW. "Product Releasee(s)" means any of the following Persons:

1. The Acquirer;

2. Any Person controlled by or under common control with that Acquirer;

3. Any Manufacturing Designee(s); and

4. Any licensees, sublicensees, manufacturers, suppliers, marketers, distributors, and Customers of that Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to each Divestiture Product acquired by that Acquirer.

XX. "Relevant Employees" includes:

1. Manufacturing Employees means all employees of a Respondent who have participated at any time during the 3-year period immediately prior to the Acquisition Date (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: (a) Developing and validating the commercial manufacturing process, (b) formulating the manufacturing process performance qualification protocol, (c) controlling the manufacturing process to assure performance Product quality, (d) assuring that during routine manufacturing the process remains in a state of control, (e) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (f) managing the operation of the

manufacturing process, or (g) managing the transfer of the Product Manufacturing Technology to a different facility; and

2. Marketing Employees means all management-level employees of a Respondent who have participated at any time during the 3-year period immediately prior to the Acquisition date (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: sales management, brand management, sales training, market research, or marketing and contracting with any of the following: drug wholesalers or distributers, group purchasing organizations, pharmacy benefit organizations, managed care organizations, or hospitals, *excluding* administrative assistants.

YY. "Retained Product(s)" means any Product(s) other than a Divestiture Product that is manufactured, in Development, marketed, sold, owned, controlled, or licensed by a Respondent anywhere in the world on or before the Acquisition Date and that has not been discontinued or permanently withdrawn from the market.

ZZ. "Sulfamethoxazole/Trimethoprim Products" mean the Products in Development or authorized for marketing or sale in the United States pursuant to the following FDA Authorizations: ANDA No. 077612, and any supplements, amendments, or revisions to this ANDAs.

AAA. "Sulfamethoxazole/Trimethoprim Divestiture Assets" means all rights, title and interest in the Divestiture Product Business related to the Sulfamethoxazole/Trimethoprim Products, including all of the Divestiture Assets related to the Sulfamethoxazole/Trimethoprim.

BBB. "Supply Cost" means the actual cost of materials, ingredients, packaging, direct labor, and direct overhead *excluding* any allocation or absorption of costs for excess or idle capacity, and *excluding* any intracompany transfer profits *plus* the actual cost of shipping and transportation in cases in which those costs are incurred by a Respondent.

CCC. "Technology Transfer Standards" mean requirements and standards sufficient to ensure that the information and assets required to be transferred and delivered are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, as related to the specified Divestiture Product(s), *inter alia*:

1. Designating employees or other Persons working on behalf of a Respondent knowledgeable about the Product Manufacturing Technology who will be responsible for communicating directly with the receiving Person, and a Monitor, for the purpose of effecting such delivery;

2. Preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Product that are acceptable to the receiving Person;

3. Preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology to the receiving Person;

4. For any part of the manufacturing process that is performed by a Respondent, permitting employees of the receiving Person to visit the Respondent's facility where that process occurs for the purposes of evaluating and learning that process or discussing the process with employees of the Respondent involved in that process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, and methods to ensure batch or lot consistency); and

5. Providing, in a timely manner, assistance and advice to enable the receiving Person to:

   a. Manufacture the Product in the quality and quantities achieved by a Respondent prior to the Acquisition Date;

   b. Obtain any Product Approvals necessary for the receiving Person to manufacture the Product for the Acquirer in a manner that allows that Acquirer to distribute, market, and sell the Product in commercial quantities and to meet all Agency-approved specifications for the Product; and

   c. Receive, integrate, and use all Product Manufacturing Technology used in, and all Product Intellectual Property that is related to, the manufacture of the Product.

DDD. "Therapeutic Equivalent" means a drug product that is classified by the FDA as being therapeutically equivalent to another drug product or that otherwise meets the FDA's criteria for such classification.

EEE. "United States" means the United States of America, and its territories, districts, commonwealths, and possessions.

II. Divestitures

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall, absolutely and in good faith, divest the Dexamethasone Divestiture Assets and the Sulfamethoxazole/Trimethoprim Divestiture Assets and grant a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to use the related Licensed Intellectual Property in the related Divestiture Product Business to Prasco.

Provided, however, that, if within 12 months after the Order Date, the Commission determines, in consultation with the Acquirer and a Monitor, the Acquirer needs one or more Excluded Assets to operate any of the Divestiture Product Businesses in a manner that achieves the purposes of this Order, Respondents shall divest or license (as applicable) absolutely and in good faith, the needed Excluded Assets to that Acquirer.

B. If Respondents have divested any of the Divestiture Assets or granted or assigned rights to the Divestiture Products to Prasco prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. The named Acquirer is not an acceptable purchaser of any of the Divestiture Assets or rights related to the Divestiture Products, then Respondents shall immediately rescind the transaction with that Acquirer as directed by the Commission, and shall divest the respective Divestiture Assets or grant or assign the rights related to the Divestiture Products, as applicable, within 180 days after the Order Date, absolutely and in good faith, at no minimum price, to a different Acquirer that receives the prior approval of the Commission, 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, then Respondents shall make such modifications to the manner of divestiture of the Divestiture Assets or the grant or assignment of rights to the Divestiture Products, as applicable, to the Acquirer named in this Order (including, entering into additional agreements or arrangements) as the Commission determines are necessary to satisfy the requirements of this Order.

C. Prior to the Divestiture Date, Respondents shall provide the Acquirer with the opportunity to review Product Contracts related to each of the Divestiture Products so that the Acquirer can determine whether to assume each Product Contract;

Provided, however, that in cases in which any Product Contract also relates to a Retained Product the Respondent shall, at the option of that Acquirer, assign or

otherwise make available to that Acquirer all such rights under the contract or agreement as are related to the specified Divestiture Product.

D. Prior to the Divestiture Date, Respondents shall secure all approvals, consents, ratifications, waivers, or other authorizations from all non-governmental third parties that are necessary to permit Respondents to divest the Divestiture Assets and to grant or assign rights to the Divestiture Products to the Acquirer, and to permit that Acquirer to continue in the related Divestiture Product Business in the United States without interruption or impairment.

E. As related to the Product Manufacturing Technology and any ingredient, material, or component used in the manufacture of the Divestiture Product, Respondents shall not enforce any agreement against a third party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the third party a license or other right to the Product Manufacturing Technology or any ingredient, material, or component used in the manufacture of the Divestiture Product. Such agreements include agreements that might limit the ability of a third party to disclose Confidential Business Information related to such Product Manufacturing Technology to the Acquirer. No later than 10 days after the Divestiture Date, Respondents shall grant a release to each third party that is subject to any such agreement that allows the third party to provide the Product Manufacturing Technology or any ingredient, material, or component used in the manufacture of the Divestiture Product to the Acquirer. Within 5 days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer;

Provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant third parties.

F. Respondents shall transfer the Product Manufacturing Technology related to the Divestiture Products to the Acquirer, or at the Acquirer's option, to its Manufacturing Designee, in a manner consistent with the Technology Transfer Standards. Respondents shall bear all costs related to these transfers.

G. No later than 10 days after the Divestiture Date, Respondents shall designate employees of Respondents knowledgeable about the marketing, distribution, warehousing, and sale of each of the Divestiture Products to assist the Acquirer of each of the Divestiture Products to transfer and integrate the related Divestiture Product Business.

H. No later than 10 days after the Divestiture Date, Respondents shall provide the following to the relevant Acquirer of each of the Divestiture Products:

1. A list of any finished batch or lot of the relevant Divestiture Product that any Respondent, any manufacturer for a Respondent, or regulatory Agency

determined to be out-of-specification at any time during the three-year period immediately preceding the Divestiture Date, and, for each such batch or lot: (a) a detailed description of the known deficiencies or defects (*e.g.*, impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure); (b) the corrective actions taken to remediate any cGMP deficiencies in that Divestiture Product; and (c) to the extent known by any Respondent, the employees (whether current or former) responsible for taking such corrective actions;

2. A list by stock-keeping unit by Customer that contains the current net price per unit as packaged for sale (*i.e.*, the price net of all customer-level discounts, rebates, or promotions) for the relevant Divestiture Product for each order sold to that Customer during the two-year period prior to the Divestiture Date;

3. A list of the inventory levels (weeks of supply) of the relevant Divestiture Product in the possession of each Customer to the extent known or available to any Respondent, as of the date prior to and closest to the Divestiture Date as is available;

4. A list of any pending reorder dates for the relevant Divestiture Product by Customer as of the Divestiture Date to the extent known by any Respondent;

5. A list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by law, to control, prohibit, or otherwise limit the use, including the use in Customer cross-referencing, of such NDC numbers by the Respondents, *unless* that Divestiture Product has not been marketed or sold in the United States prior to the Divestiture Date; and

6. The quantity and delivery terms in all unfilled Customer purchase orders for the relevant Divestiture Product as of the Divestiture Date.

I. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Product Releasees under any Patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair the Acquirer's freedom to research and Develop, or manufacture anywhere in the world the Divestiture Product(s), or to distribute, market, sell, or offer for sale within the United States any such Divestiture Product.

J. Upon reasonable written request from the Acquirer to a Respondent, that Respondent shall provide, in a timely manner, assistance of knowledgeable employees of that Respondent (*i.e.*, employees of that Respondent that were involved in the Development of the Divestiture Products) to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a third party related to the Product Intellectual Property for the Divestiture Products

acquired by that Acquirer from a Respondent. A Respondent shall make its employees available to that Acquirer for the fee provided in the relevant Divestiture Agreement, or if no fee is provided, at no greater than Direct Cost.

K. For any patent infringement suit that is filed or to be filed within the United States that is (x) filed by, or brought against, a Respondent prior to the Divestiture Date related to any Divestiture Product or (y) any potential patent infringement suit that a Respondent has prepared, or is preparing, to bring or defend against as of the Divestiture Date that is related to any Divestiture Product, that Respondent shall:

1. Cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of such patent infringement suit;

2. Waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent the Acquirer in any such patent infringement suit; and

3. Permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of that Respondent's outside counsel related to such patent infringement suit.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by a Respondent to comply with any term of the Divestiture Agreements shall constitute a violation of this Order;

Provided, however, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that the Respondents cannot fully comply with both, Respondents shall comply with this Order.

B. Respondents shall include in the Divestiture Agreements a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of the Respondents' obligations to the Acquirer pursuant to this Order.

C. Respondents shall not modify or amend any of the terms of any Divestiture Agreement without the prior approval of the Commission, *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

IV. Transition Services and Manufacturing by Respondents

IT IS FURTHER ORDERED that:

A. At the request of the Acquirer, in a timely manner, at no greater than Direct Cost or at such cost as provided in a Divestiture Agreement, Respondents shall provide transition services sufficient to enable the Acquirer of each of the Divestiture Products to operate the related Divestiture Product Business in substantially the same manner that Respondents have operated that Business prior to the Acquisition Date.

B. Upon reasonable written notice and request from the Acquirer, Respondents shall manufacture, deliver and supply, or cause to be manufactured, delivered, and supplied, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, that Acquirer's requested supply of each of the Divestiture Products and any of the active pharmaceutical ingredients used in the Divestiture Products that are made by a Respondent, as applicable, hereinafter "Supplied Products." The requested supply of Supplied Products shall be provided at no greater than Supply Cost or at such cost as provided in a Divestiture Agreement.

C. The Respondents shall make representations and warranties to the Acquirer that the Supplied Products meet the relevant Agency-approved specifications and, with the consent of the Acquirer, shall amend any agreement between the Respondents and the Acquirer that is related to the quality controls of a Divestiture Product to address any necessary changes to the agreement in order to comply with relevant Agency regulations or recommendations.

D. The Respondents shall agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Supplied Products to meet cGMP, but the Respondents may make this obligation contingent upon the Acquirer giving the Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

Provided, however, that the Respondents may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the Respondents' responsibilities to supply the Supplied Products in the manner required by this Order;

Provided further, however, that this obligation shall not require the Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the Respondents to the Acquirer in a Divestiture Agreement.

E. The Respondents shall agree to hold harmless and indemnify the Acquirer for any liabilities, loss of profits, or consequential damages resulting from the failure of the Respondents to deliver the Supplied Products to the Acquirer in a timely manner *unless* (1) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (2) Respondents are able to cure the supply failure no later than 30 days after the receipt of notice from that Acquirer of a supply failure.

F. The Respondents shall give priority to supplying the Acquirer over the supplying of Products for any Respondent's own use or sale.

G. During the term of any agreement for a Respondent to supply the Supplied Products, upon written request of the Acquirer or a Monitor, the Respondent shall make available to the supplied Acquirer and a Monitor all records generated or created after the Divestiture Date that relate directly to the manufacture of the applicable Supplied Products.

H. The Respondents shall provide the Acquirer with the actual costs incurred or the price paid for active ingredients, components, and excipients the Respondents use to manufacture the applicable Supplied Products.

I. During the term of any agreement for a Respondent to supply the Supplied Products, Respondents shall take all actions as are reasonably necessary to ensure an uninterrupted supply of each of the Supplied Products.

J. Respondents shall not be entitled to terminate any agreement to supply the Supplied Products due to (x) a breach by the Acquirer of a Divestiture Agreement, or (y) that Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency law;

Provided, however, that this Paragraph IV.J shall not prohibit a Respondent from seeking compensatory damages from the Acquirer for that Acquirer's breach of its payment obligations to the Respondent under the agreement.

K. The Respondents shall permit the Acquirer to terminate the agreement for the supply of the Supplied Products on a product-by-product basis, at any time, upon commercially reasonable notice, and without cost or penalty (other than costs or penalties due by the Respondent to third parties pursuant to the termination of such agreement, which may be the responsibility of that Acquirer).

L. In the event that that a Respondent becomes (x) unable to supply or produce a Supplied Product from the facility that has been supplying the Acquirer, and (y) any Respondent has a different facility that is listed on the FDA Authorization for that Supplied Product and is still suitable for use to manufacture the Supplied

Product, or any Respondent has a facility that manufactures the Therapeutic Equivalent of such Supplied Product, then such Respondent shall, at the option of the supplied Acquirer, provide a supply of either the Therapeutic Equivalent or the Supplied Product from the other facility under the same terms and conditions as contained in the Divestiture Agreement to supply.

M. During the term of any agreement for a Respondent to supply the Supplied Products, the Respondents shall provide consultation with knowledgeable employees of Respondents and training, at the written request of the supplied Acquirer and at a facility chosen by the supplied Acquirer, for the purposes of enabling that Acquirer (or its Manufacturing Designee) to obtain all Product Approvals to manufacture the applicable Supplied Products in final form in the same quality achieved by, or on behalf of, Respondents and in commercial quantities, in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of that Acquirer that its personnel (or its Manufacturing Designee's personnel) are adequately trained in the manufacture of the applicable Supplied Products.

N. For any Supplied Product that is made in a facility owned by Respondents, Respondents shall transfer such manufacturing to a facility owned, controlled, or operated by the Acquirer or, at the option of the Acquirer, to its Manufacturing Designee. Respondents shall bear all costs for this transfer including the cost to validate the Supplied Products at the changed facility and the costs for any changes in the specifications for any Supplied Product required by the FDA prior to the FDA's granting approval to market such Product from the changed site of manufacture.

O. For any Divestiture Product, at the Acquirer's option, Respondents shall bear the costs to qualify and obtain FDA regulatory approval to change the source of the active pharmaceutical ingredient(s).

V. Asset Maintenance

IT IS FURTHER ORDERED that, until the Respondents have physically transferred the Dexamethasone Divestiture Assets and the Sulfamethoxazole/Trimethoprim Divestiture Assets to the Acquirer pursuant to Section II of this Order, Respondents shall operate and maintain each of the respective Divestiture Assets and each of the respective Divestiture Product Businesses in the ordinary course of business consistent with past practices. Included in these obligations, Respondents shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses, to minimize the risk of loss of competitive potential of such Divestiture Product Businesses, to operate such Divestiture Product Businesses in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, or deterioration of any of the Divestiture Assets, except for ordinary wear and tear.

B. Not sell, transfer, encumber, or otherwise impair such Divestiture Assets, or terminate any of the operations of such Divestiture Product Businesses, other than in the ordinary course of business consistent with past practice or as prescribed in the Orders.

C. Make all payments required to be paid under any contract or lease when due, and pay all liabilities and satisfy all obligations associated with such Divestiture Product Businesses.

D. Provide such Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on, at least at their scheduled pace, all capital projects, business plans, promotional plans, capital expenditure plans, research and development plans, and commercial activities for such Divestiture Product Businesses.

E. Use best efforts to preserve the existing relationships and goodwill with suppliers, customers, employees, vendors, distributors, landlords, licensors, licensees, government entities, brokers, contractors, and others having business relations with such Divestiture Product Businesses.

F. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with such Divestiture Product Businesses, including by:

1. Filling vacancies that occur in the regular and ordinary course of business consistent with past practice; and

2. Not transferring any employees from such Divestiture Product Businesses to another of Respondents' businesses.

G. Maintain and preserve the Business Information of such Divestiture Product Businesses.

H. Provide the resources necessary for such Divestiture Product Businesses to respond to competition, prevent diminution in sales, and maintain its competitive strength.

I. Continue providing customary levels of support services to such Divestiture Product Businesses.

J. Maintain all licenses, permits, approvals, authorizations, or certifications used in the operation of such Divestiture Product Businesses, and operate such Divestiture Product Businesses in accordance and compliance with all regulatory obligations and requirements.

K. Maintain the levels of production, quality, pricing, service, or customer support typically associated with such Divestiture Product Businesses.

Provided, however, Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by a Monitor (in consultation with Commission staff), in all cases to facilitate that Acquirer's acquisition of the Divestiture Assets and rights in the Divestiture Products and consistent with the purposes of the Orders.

VI. Employees

IT IS FURTHER ORDERED that:

A. Until 2 years after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer to evaluate independently and offer employment to the Relevant Employees for the Divestiture Products acquired by that Acquirer.

B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to that Acquirer a list of all Relevant Employees and provide Employee Information for each Relevant Employee;

2. No later than 10 days after a request from the Acquirer, provide that Acquirer or its Manufacturing Designee an opportunity to meet individually and outside the presence or hearing of any employee or agent of Respondents with any of the Relevant Employees, and to make offers of employment to any of the Relevant Employees;

3. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Acquirer or its Manufacturing Designee, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee, and shall not make any counteroffer to a Relevant Employee who receives an offer of employment from that Acquirer or its Manufacturing Designee;

Provided, however, that nothing in the Orders shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee; and

4. Not interfere, directly or indirectly, with the hiring or employing by that Acquirer or its Manufacturing Designee of any Relevant Employees, not offer any incentive to such employees to decline employment with that

Acquirer or its Manufacturing Designee, and not otherwise interfere with the recruitment of any Relevant Employees by that Acquirer.

C. Respondents shall continue to provide Relevant Employees compensation and benefits, including regularly scheduled raises and bonuses, until the Divestiture Date or as may be necessary to comply with the provisions of the Orders to provide manufacturing and supply of Divestiture Products or transition services to the Acquirer.

D. Respondents shall provide reasonable financial incentives for Relevant Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Relevant Employees by the Acquirer.

E. If, at any point within 6 months of the Divestiture Date, the Commission, in consultation with the Acquirer and a Monitor, determines in its sole discretion that the Acquirer or its Manufacturing Designee should have the ability to interview, make offers of employment to, or hire any of Respondents' employees who were not included as Relevant Employees, but who either (1) were involved with any of the Divestiture Products, or (2) provided manufacturing and supply of Divestiture Products or transition services to the Acquirer, then the Commission may notify Respondents that such employees are to be designated as Relevant Employees, and Section VI of this Order shall apply to such employees as of that notification date.

F. Respondents shall not, for a period of one year following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Acquirer or its Manufacturing Designee to terminate the employee's employment with the Acquirer or its Manufacturing Designee;

Provided, however, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of Relevant Employees; and

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section VI.

VII. Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall transfer and deliver all Business Information related to a Divestiture Product Business to the Acquirer pursuant to the following:

1. Respondents shall deliver the Business Information to that Acquirer, at Respondents' expense, in good faith, in a timely manner (*i.e*. as soon as practicable, avoiding any delays in transmission), and in a manner that ensures the completeness and accuracy of all information and ensures its usefulness;

2. Pending complete delivery of all Confidential Business Information, Respondents shall provide that Acquirer with access to all Business Information and to employees who possess or are able to locate this information for the purposes of identifying the Business Information that contains Confidential Business Information and facilitating the delivery in a manner consistent with the Orders;

3. Not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:

   a. The requirements of the Orders;

   b. Respondents' obligations to that Acquirer under the terms of the related Divestiture Agreements; or

   c. Applicable law;

4. Not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person *except* (a) that Acquirer, (b) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services, manufacturing Divestiture Products, or who are engaged in the transfer and delivery of the Product Manufacturing Technology), (c) the Commission, or (d) a Monitor, and *except* to the extent necessary to comply with applicable law;

5. Not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by a Respondent, other than those employees specifically authorized as described above;

6. Institute procedures and requirements to ensure that those employees of a Respondent that are authorized by that Acquirer to have access to such Confidential Business information:

   a. Do not provide, disclose, or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and

   b. Do not solicit, access, or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. Take all actions necessary and appropriate to prevent access to, and the disclosure or use of, such Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

   a. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system or network controls and restrictions;

   b. To the extent practicable, maintaining such Confidential Business Information separate from other data or information of any Respondent; and

   c. Ensuring by other reasonable and appropriate means that such Confidential Business Information is not shared with a Respondent's personnel engaged in any Business related to the same or substantially the same type of Business as the Divestiture Products, including a Respondent's personnel engaged in the marketing and sale within the United States of Products Developed or in Development for the same or similar indications as the Divestiture Products or that use the same active pharmaceutical ingredients as the Divestiture Products.

B. As a condition of continued employment after the Divestiture Date, Respondents shall require each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one-year period prior to the Divestiture Date, and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that are Developed or in Development for the same or similar indications as the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which that employee shall be required to maintain all such Confidential Business Information as strictly confidential, including the nondisclosure of that

information to all other employees, executives, or other personnel of any Respondent (other than as necessary to comply with the requirements of the Orders).

C. No later than 30 days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the above-described Confidential Business Information by that Respondent's personnel to all of its employees who (1) may be in possession of such Confidential Business Information or (2) may have access to such Confidential Business Information. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for 2 years after the Divestiture Date. Respondents shall provide a copy of their notifications to the Acquirer. Respondents shall maintain complete records of all such notifications at the respective Respondent's principal executive offices within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondents shall provide that Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. Each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to the Acquirer or access original documents provided to that Acquirer, except under circumstances in which copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. To assure such Respondent's compliance with any Divestiture Agreement, the Orders, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable government entity, or any taxation requirements; or

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 an Divestiture Product, the Divestiture Assets, or the Divestiture Product Business;

Provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph VII.D pursuant to an appropriate confidentiality order, agreement, or arrangement;

Provided further, *however*, that pursuant to this Paragraph VII.D, a Respondent needing such access to original documents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain

a protective order to protect the confidentiality of such information during any adjudication.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Denise Smart of Smart Consulting Group, LLC as Monitor to observe and report on Respondents' compliance with the terms of the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement shall:

1. Be subject to the approval of the Commission;

2. Not limit, and the signatories shall not construe it to limit, the terms of this Section VIII or Section VII of the Order to Maintain Assets ("Monitor Sections") and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee, or agent of the Respondents or of the Commission;

4. Shall serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that

each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional, or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter, and at such other times as may be requested by staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents obligations to provide manufacturing and supply of Divestiture Products pursuant to this Order have expired or been terminated and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing the Monitor's duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform the Monitor's duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing the Monitor's duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out the Monitor's duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement provided that such agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. Respondents shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including the Monitor's written reports submitted to the Commission, or any other Person with whom the Monitor communicates in the performance of their duties.

G. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph B of the Monitor Sections; or (b) receives Commission approval.

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

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Assets or the rights to the Divestiture Products as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with the Orders.

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

C. No later than 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 divestiture required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one 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- year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission;

   Provided, however, the Commission may extend the divestiture period only 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 divestitures. Any delays in divestiture caused by a Respondent shall extend the time for divestiture under Section IX 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 Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to the Acquirer that receives the prior approval of the Commission as required by this Order;

   Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission;

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

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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct 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.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement;

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. 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 Section IX.

G. 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(s) required by this Order.

X. Prior Approval

IT IS FURTHER ORDERED that each Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any rights or interests in the Dexamethasone Products, the Sulfamethoxazole/Trimethoprim Products, and the Erythromycin/Ethylsuccinate Products, or the Therapeutic Equivalent or Biosimilar of any of these Products without the prior approval of the Commission.

XI. Prior Approval for Acquirer

IT IS FURTHER ORDERED that:

A. For a period of 3 years after the Divestiture Date, Prasco or any other Acquirer shall not sell or license, through subsidiaries or otherwise, without the prior approval of the Commission, any of the FDA Authorizations that were divested pursuant to Section II, to any Person; and

B. For a period of 7 years after the term of Paragraph XI.A ends, Prasco or any other Acquirer shall not sell or license, through subsidiaries or otherwise, without the prior approval of the Commission, any FDA Authorizations that were divested pursuant to Section II, to any Person who owns, directly or indirectly, an FDA Authorization, or is seeking approval from the FDA for an FDA Authorization, to manufacture and sell a Therapeutic Equivalent of a Divestiture Product.

Provided, however, Prasco is not required to obtain prior approval of the Commission under this Section XI for a change of control, merger, reorganization, or sale of all or substantially all of its business, or for a non-exclusive license to a contract manufacturer for the purpose of manufacturing a Divestiture Product.

XII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and the Divestiture Dates no later than 5 days after the occurrence of each; and

2. Submit the complete copies of each of the Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents shall file verified written reports ("Compliance Reports") in accordance with the following:

1. Respondents shall submit interim Compliance Reports within 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter until Respondents have completed all of the following: (a) the transfer and delivery of the Divestiture Assets and the rights to the Divestiture Products to the Acquirer, (b) the transfer and delivery of all of the Product Manufacturing Technology related to the Divestiture Products to the Acquirer or the Acquirer's Manufacturing Designee, (c) the transfer and delivery of all Business Information to the Acquirer, and (d) the Acquirer or the Acquirer's Manufacturing Designee is FDA approved to manufacture each of the Divestiture Products at a facility that is not owned or controlled by Respondents; and Respondents shall submit annual Compliance Reports one year after the Order Date, and annually for the following 4 years on the anniversary of the Order Date; and additional Compliance Reports as the Commission or its staff may request;

2. Each Respondent's Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether the Respondent is in compliance with the Orders. Conclusory statements that the Respondent has complied with its obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other information or documentation that may be necessary to demonstrate compliance:

a. A detailed description of all substantive contacts, negotiations, or recommendations related to the transfer and delivery to the Acquirer of (i) the Divestiture Assets and the rights to the Divestiture Products, (ii) the Business Information related to each of the Divestiture Product Businesses, and (iii) the provision of manufacturing and supply of Divestiture Products to that Acquirer;

b. A detailed description of the transfer of the Product Manufacturing Technology related to the Acquirer or the Acquirer's Manufacturing Designee and progress toward the manufacturing of these products at a facility that is not owned or controlled by Respondents; and

c. A detailed description of the timing for the completion of such obligations.

3. Each annual Compliance Report shall include the previous year's market information for each market alleged in the Complaint including the aggregate size of the market in units and in dollars; the monthly sales in units and in dollars for each market participant; the market share for each market participant calculated based on units and on dollars; and, to the

extent known, an explanation of any significant changes in the total size of the market and any significant adverse impacts to the manufacture or supply of competing products to the market;

4. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Orders and provide copies of these documents to Commission staff upon request.

C. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XIII. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The dissolution of: ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC;

B. Any proposed acquisition, merger, or consolidation of ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC; or

C. Any other change in Respondents including, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

XIV. Access

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

A. Access, during business 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 the Orders, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

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

XV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy in a timely and sufficient manner the lessening of competition as alleged in the Commission's Complaint by:

A. Ensuring that the Acquirer can continue to use the Divestiture Assets and rights in the Divestiture Products granted or assigned pursuant to this Order for the purposes of each of the respective Divestiture Product Businesses within the United States; and

B. Creating a viable and effective competitor in the respective Divestiture Product Businesses within the United States.

XVI. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

NONPUBLIC APPENDIX I

AGREEMENTS RELATED TO THE DIVESTITURES

[Redacted from the Public Record but Incorporated by Reference]

NONPUBLIC APPENDIX II

MONITOR COMPENSATION

[Redacted from the Public Record but Incorporated by Reference]

PUBLIC APPENDIX

MONITOR AGREEMENT

This Monitor Agreement (Monitor Agreement) entered into as of this 6th day of October, 2021 by and among Denise Smart of SMART CONSULTING GROUP, LLC, 420 W. Miner St., West Chester, PA 19382 (Monitor) and ANI PHARMACEUTICALS, INC., 210 Main Street West Baudette, MN 56623 (Respondent) provides as follows:

WHEREAS, the United States Federal Trade Commission (the Commission) has or shortly will approve a Decision and Order and Order to Maintain Assets (Orders) with Respondent which, among other things, requires Respondent to license or transfer certain defined assets and maintain those assets pending such license or transfer, and provided for the appointment of a Monitor to ensure that Respondent complies with its obligations under the Orders;

WHEREAS, the Commission may appoint Denise Smart as such Monitor (the Monitor) pursuant to the Orders to monitor Respondent's compliance with the terms of the Consent Agreement and Orders and with the Divestiture Agreements referenced in the Orders, and to monitor the efforts of the Acquirer (as defined in the Orders) to obtain all necessary FDA approvals, as applicable, and the Monitor has consented to such appointment;

WHEREAS, the Orders further provides or will provide that Respondent shall execute a Monitor Agreement, subject to the prior approval of the Commission, conferring all the rights, powers and authority necessary to permit the Monitor to carry out such duties and responsibilities pursuant to the Orders;

WHEREAS, this Monitor Agreement conforms with the requirements of the Orders and does not contradict the Orders;

WHEREAS, this Monitor Agreement, although subject to Commission approval, is effective for any purpose, including but not limited to imposing rights and responsibilities on Respondents or the Monitor under the Orders, upon execution by the parties; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound; NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Consent Agreement and the Orders.

2. The Monitor shall have the authority to monitor Respondents' compliance with the obligations set forth in the Orders including all of the powers, responsibilities and protections conferred upon the Monitor by the Orders. This authority shall include, but is not limited to:

   a. supervising the divestiture of the Assets; and

   b. supervising the performance of any transition services required by the Orders

   c. acting in consultation with the Commission or its staff

The Orders are hereby attached as Exhibit A to this Monitor Agreement, the terms of which areincorporated herein by reference.

3. Respondent hereby agrees that, upon execution by both parties of the Monitor Agreement, Respondent will fully comply with all terms of the Orders requiring them to confer all rights, powers, authority and privileges upon the Monitor, or to impose upon themselves any duties or obligations with respect to the Monitor, to enable the Monitor to perform the duties and responsibilities of the Monitor thereunder.

4. Respondent further agrees that:

   a. it will cooperate with and assist the Monitor in performing the Monitor's duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

   b. it will not interfere with the ability of the Monitor to perform the Monitor's duties pursuant to the Orders;

   c. it shall not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders;

   d. it will use their best efforts to ensure that the Acquirer which is acquiring or licensing assets pursuant to the Orders (or as otherwise specified by the Commission) enters into an appropriate agreement with the Monitor as soon as practicable after the execution of this Monitor Agreement;

   e. no later than **ten (10)** Business Days after the Commission approves this Monitor Agreement,it will provide the Monitor with:

      (1) a copy of the Divestiture Agreements (or drafts thereof) relating to the Assets, including any exhibits, schedules and appendices;

      (2) offering or information memoranda, or similar documents and information, provided to the Acquirer(s) relating to the sale of the Assets;

      (3) copies of correspondence with, and written reports or minutes of meetings of all substantive contacts and discussions with, any Acquirer(s) relating to the Assets or Divestiture Agreements; and

      (4) a complete description of the Assets being divested, identifying, in particular, those Assets which may require actions to maintain their viability and marketability, and the person(s) responsible for taking those actions;

(5) a complete inventory of all existing FDA approvals and pending FDA approvals for the Products included in the Assets identifying actions required to maintain or complete such approvals and identifying the person(s) responsible for taking such actions;

(6) a complete inventory of all activities or operations that relate to the manufacture of the Products relating to the Assets, and which relate to Respondent's compliance with the Orders, including, to the extent applicable, processes and process validations which are under development, key equipment, test methods, special facilities, identifying the person(s) responsible for maintaining or pursuing such activities and giving an inventory of materials and records relating to such manufacture; and

(7) a complete inventory of all Patents included in the Assets, if any, related to the manufacture or sale of the Assets in the United States, identifying actions needed to maintain such Patents and the person(s) responsible for such actions;

f. it will designate a senior individual as a primary contact for the Monitor and providea written list of the principal individuals involved in the licensing of the Divestiture Assets to the Acquirer, together with their location, telephone numbers, electronic mail address (if available), and responsibilities, and will provide the Monitor with written notice of any changes in such personnel occurring thereafter;

g. it will provide the Monitor with prompt notification of significant meetings, including date, time and venue, scheduled after the execution of this Monitor Agreement, relating to the development, manufacture, registration, regulatory approvals, marketing, sale and divestiture of the Divestiture Assets, and such meetings may be attended by the Monitor or its representative, at the Monitor's option or at the request of the Commission or staff ofthe Commission;

h. it will provide the Monitor the minutes of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondents;

i. it will provide the Monitor with all correspondence, meeting minutes, reports, sent to or received from the FDA relating to the Divestiture Assets; and will provide prompt notice of any and all meetings or communications with the FDA relating to or affecting the Divestiture Assets;

j. it will provide the Monitor with electronic or hard copies, as may be appropriate, of all reports submitted to the Commission pursuant to the Consent Agreement and the Orders, simultaneous with the submission of such reports to the Commission;

k. to the extent not reflected in the reports submitted to the Commission pursuant to the Consent Agreement and the Orders, it will provide every (3) months commencing one (1) month after the Consent Agreement is accepted by the Commission for public comment, or as requested by the Monitor, full and detailed

electronic or hard copy reports to the Monitor as to all of Respondent's activities and obligations under the Orders concerning the Divestiture Assets including, without limitation to the extent applicable:

(1) all activities involving the research and development, preclinical and clinical studies where appropriate and pursuit and maintenance of FDA clearance or approvals relating tothe Divestiture Assets;

(2) all activities concerned with the licensing, manufacture, supply and technology transfer of the Product that is identified in the Divestiture Assets, including, without limitation, negotiation and operation of supply agreements, actual supply and inventory;

(3) all minutes and records of meetings, action plans, and follow-ups to actions plans and meetings, with the Acquirers related to the licensing, manufacture,supply, and technology transfer of the Products identified in the Divestiture Assets;

(4) all activities concerning the assistance, advice and consultation provided to any Acquirer generally as provided in the Decision and Orders; and

(5) on request, Respondent will provide the Monitor with any and all records that relate to the licensing and manufacture of the Products identified in the Divestiture Assetswith the right to use them to achieve the purpose of the Orders;

provided, however, that at the time the Orders become final, the reports described in this paragraph together with all other information and documents referred to herein shall be dueto the Monitor either as requested by the Monitor or within five (5) Business Days of the date that Respondent files the Respondent's reports with the Commission as required pursuant to the relevant provisions of the Orders;

l. it will comply with the Monitor's requests for on-site visits and audits of Respondent's facility used to manufacture the Products identified in the Divestiture Assets;

m. it will comply with the Monitor's requests for follow-up discussions or supplementary information concerning any reports provided to or requested by the Monitor pursuant to this Agreement or in connection with any matters the Monitor deems reasonably necessary to perform its responsibilities under the Orders, including, without limitation, meetings and discussions with the principal staff involved in any activitiesrelating to the research, development, manufacture, sale, licensing, and/or divestiture of the Divestiture Assets or any Product comprised therein and, further including, actions necessary to maintain all necessary FDA or other foreign regulatory agency equivalent approvals to manufacture and sell any of the Divestiture Assets, to maintain the viability and marketability of the Divestiture Assets, as well as the tangible assets of the facilities used to manufacture and sell all of the Divestiture Assets, and to prevent the destruction,

removal, wasting, deterioration or impairment of the Divestiture Assets, and will provide the Monitor with access to and hard and electronic copies of all other data, records or other information that the Monitor believes are necessary to the proper discharge of its responsibilities under the Orders;

n. it will provide prompt notice of any meetings, activities or events affecting or likely to affect the maintenance of the Divestiture Assets including, but not limited to, any and all meetings or communications with the FDA; and

o. it will provide the Monitor with such other information, documents and the like requested by the Monitor in order to carry out its responsibilities under this Monitoring Agreement.

5. Respondent shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and Respondent related to the Orders or this Monitor Agreement, together with electronic or hard copies (or, in the case of oral communications, summaries), as may be requested by the Monitor, of such communications.

6. Respondent agrees that, to the extent authorized by the Orders, the Monitor shall have the option and 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 Monitor's duties and responsibilities, including but not limited to supervising the transfer of ConfidentialBusiness Information, and Intellectual Property, as defined in the Orders, related to the Divestiture Assets.

7. Respondent and the Monitor understand and agree that the Commission or its staff may request, pursuant to and consistent with the Orders, that the Monitor investigate and/or audit the Respondent's compliance with the Respondent's obligations to maintain assets pursuant to the Orders, and submit such additional written or oral reports, under applicable confidentiality restrictions,to the Commission as the Commission or its staff may at any time request concerning the Respondent's compliance with the Respondent's obligations to maintain or divest assets pursuant to the Orders.

Specifically, but not to limit the foregoing, the Monitor shall issue a written report to the Commission concerning Respondents' compliance with the Orders 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter, and at such other times as may be requested by staff of the Commission.

8. The Monitor shall maintain the confidentiality of all non-public information provided to the Monitor by Respondent. Such information shall be used by the Monitor only in connection with the performance of the Monitor's duties pursuant to this Agreement. Such information shall not be disclosed by the Monitor to any third party other than:

a. persons engaged or employed by, or working with, the Monitor under this Monitor Agreement who agree to be bound by the confidentiality stipulations contained herein;

b. the Acquirer to the extent that the information is of a non-privileged nature and relates to the Divestiture Assets; or

c. persons employed at or by the Commission and working on this matter.

d. A recipient who can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Respondent, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Respondent, when such source is entitled to make such disclosure to such recipient.

Notwithstanding anything herein to the contrary, Respondent shall use its best efforts to identify and/or label such information in writing they desire to treat as confidential and not to be disclosed to the Acquirer.

However, it is understood that to the extent that Respondent fails to so identify such confidential to the Monitor (a "Failure to Identify"), the Monitor shall not have liability for disclosure of same to the Acquirer, unless, notwithstanding a Failure toIdentify by Respondent, the Monitor knew or should have known that information was privileged or not to be disclosed, and nonetheless discloses such information to the Acquirer.

9. The Monitor shall maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom confidential information related to this Agreement has been disclosed.

10. The Monitor shall enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into a non-disclosure or other confidentiality agreement with the Commission;

11. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall, at the Respondent's request and expense, promptly return to Respondent all material provided to the Monitor by Respondent that is confidential to Respondent and shall destroy any material prepared by the Monitor that contains or reflects any confidential information of Respondents provided that the Monitor provides notice to the Commission staff and the Commission staff does not require the Monitor to maintain the materials; provided, however, notwithstanding the foregoing, the Monitor shall be entitled to retain for its records, on a confidential basis, any materials or documents developed by it in furtherance of its responsibilitiesand obligations under this Monitor Agreement, regardless of whether such materials contain confidential information. Nothing herein shall abrogate the Monitor's duty of confidentiality, including the obligation to keep such information confidential for a period of five (5) years after the termination of this Monitor Agreement. The Monitor shall provide Respondent with a copy ofthe list of parties to whom the Monitor has divulged Respondent's confidential and privilegedinformation.

12. In addition and except as otherwise permitted in Section 10 above, the Monitor shall keep confidential for a period of five (5) years all other aspects of the performance of its duties under this Monitor Agreement and shall not disclose any confidential or proprietary

information relating thereto. To the extent that the Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Monitor in accordance with the Orders, the Monitor shall ensure that such persons execute an appropriate confidentiality agreement.

For the purpose of this Section, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known or became known to the recipient at the time of receipt from a source other than the Monitor, the Respondent or any director, officer, employee, agent, consultant or affiliate of Respondent when such source is entitled to make such disclosure to such recipient.

13. Nothing in this Monitor Agreement shall require Respondent to disclose any materials or information that is subject to a legally recognized privilege or that Respondent is prohibited from disclosing by reason of law or an agreement with a third party.

14. The Monitor shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission.

15. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Orders as it relates to Respondent.

16. Respondent will pay the Monitor in accordance with the fee schedule attached hereto as Confidential Appendix A for all time spent in the performance of the Monitor's duties including all monitoring activities related to the efforts of the Acquirer of the Divestiture Assets (including any and all such activities performed prior to the date of this Agreement), all work in connection with the negotiation and preparation of this Monitor Agreement, and all reasonable and necessary travel time. Every six months such hourly rates should be reviewed and may be adjusted by agreement with Respondent.

    a. In addition, Respondent will pay (i) all reasonable out-of-pocket expenses incurred by the Monitor in the performance of the Monitor's duties, which conform to the Respondent's expense policies in effect from time to time including any auto, train or air travel in the performance of the Monitor's duties, international telephone calls, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives andassistants as are reasonably necessary to carry out the Monitor's duties.

    b. Any expense charged to a credit card incurred in a currency other than U.S. dollars shall be converted into dollars for expense reimbursement purposes at the exchange rate used for said credit card transaction and any ancillary cash expenses for which a credit card is not possible shall be converted at the exchange rate for which said currency was purchased.

c. The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and thelike.

17. Respondent hereby confirms its obligation and agrees to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Orders (and, upon direction by the Commission to the Monitor to divest any Divestiture Assets).

Without in any way limiting the generality of the foregoing, Respondent shall indemnify the Monitor and any subcontractor and their respective consultants, agents, partners, principles, directors, officers, members, managers and employees (the "Indemnified Parties") and hold the Indemnified Parties harmless (regardless of form of action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities, expenses (including attorneys' fees and out of pocket costs) incurred in connection with the preparations for, or defense of any claim, whether or not resulting in any liability, that may arise out of or is connected with, a claim concerning the performance of the Monitor's duties and obligations under the Orders. except to the extent that such losses, claims, damages, liabilities, or expenses are finally judicially determined to result from the gross negligence or willful misconduct of the Monitor. This section shall survive the termination or expiration of this Agreement.

18. The Monitor's maximum liability to the Respondent relating to services rendered pursuant to this Agreement (regardless of the form of the action, whether in contract, statutory law, tort or otherwise) shall be limited to the total sum of the fees paid to the Monitor by Respondent, not to exceed one hundred fifty thousand dollars ($150,000). IN NO CIRCUMSTANCES WHATSOEVER SHALL MONITOR BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES. The Monitor is not responsible for evaluating the legal or technical sufficiency of any documents, materials or actions of Respondent or the Acquirer under the Orders. The Monitor shall not incur any liabilityof any nature for the failure of Respondents, any Acquirer, or the Commission to perform any acts, or not perform any acts. This section shall survive the termination or expirationof this Agreement.

19. Respondent agrees that the Monitor and any subcontractor, consultants, agents, partners, principles, directors, officers, members, managers and employees will serve without bond or other security.

20. Respondent agrees that the Respondents' obligations to indemnify the Monitor and the Indemnified Parties extend to any agreement that is entered between the Monitor and any Acquirer and that relates to the Monitor's responsibilities under the Monitor Agreement or the Orders. This section shall survive the termination or expiration of this Agreement.

21. Upon this Monitor Agreement becoming effective, the Monitor shall be permitted, and Respondent shall be required, to notify the Acquirer with respect to this appointment as Monitor.

22. In the event that a disagreement or dispute between Respondent and the Monitor cannot be resolved by the parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division to resolve this issue. In the event that such disagreement or dispute cannot be resolved by the parties, the parties shall submit the matter to binding arbitration before the American Arbitration Association under its Commercial Arbitration Rules, but only if the individual in charge of the Commission's Compliance division determines within the Commission's reasonable discretion that such a matter is appropriate for submission to the American Arbitration Association. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning the Respondents' obligations pursuant to the Orders.

23. This agreement shall be subject to the substantive law of the Commonwealth of Pennsylvania (regardless of any other jurisdictions choice of law principles).

24. This Monitor Agreement shall terminate when the Monitor and Respondent have been notified by the Commission in writing that the Commission staff has determined that Respondents obligations to provide manufacturing and supply of Divestiture Products pursuant to this Order have expired or been terminated and files a final report or (2) at any other such time as determined by the Commission or its staff.. or (2) In all cases, the Commission may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. The confidentiality and indemnity obligations of this Monitor Agreement shall survive its termination.

25. The Monitor shall notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional, or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict; The Monitor represents that it is aware of no such conflicts as of the Effective Dateof this Agreement.

26. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

27. This Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings.

28. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by certified mail or electronic mail (with acknowledgement of receipt by the recipient of such electronic mail having been received), to the applicable party at its address below (orto such other address as to which such party shall hereafter notify the other party):

If to the Monitor, to:

Address: Denise Smart, Esq.
President
Smart Consulting Group, LLC

P.O. Box 884
West Chester, PA 19382

Telephone: 610-344-9218
Mobile Phone: 484-467-0707
Email: dsmart@smartconsultinggroup.com

If to Respondents, to:

Address: Nikhil Lalwani
Chief Executive Officer and President
ANI Pharmaceuticals, Inc.
210 Main Street
West Baudette, MN 56623

Telephone: 218-634-3500
Email: nikhil.lalwani@anipharmaceuticals.com

If to the Commission, to:

Address: Danielle Sims, Esq.
Compliance Division
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20580

Telephone: 202-326-3241
Email: dsims1@ftc.gov

This Monitor Agreement shall become binding upon execution, although it will be subject to approvalby the Commission.

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the datefirst above written.

ANI PHARMACEUTICALS, INC.	SMART CONSULTING GROUP MONITOR
DocuSigned by: Nikhil Lalwani E0357CB4804D41D...	DocuSigned by: Denise Smart EFE07271D9FA43B...
Nikhil Lalwani Chief Executive Officer and President	Denise Smart President

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from ANI Pharmaceuticals, Inc. ("ANI") and Novitium Pharma LLC and Esjay LLC (collectively, "Novitium") that is designed to remedy the anticompetitive effects resulting from ANI's acquisition of the non-corporate interests of Novitium. Pursuant to an agreement dated March 8, 2021, ANI proposes to acquire Novitium in a transaction valued at approximately $210 million. The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening future competition in the following two U.S. markets: (1) generic SMX-TMP oral suspension; and (2) generic dexamethasone tablets. The Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be eliminated by the Proposed Acquisition.

Under the terms of the proposed Decision and Order ("Order"), Respondents are required to divest all of ANI's rights and assets related to the following two products to Prasco LLC ("Prasco"): (1) generic sulfamethoxazole-trimethoprim ("SMX-TMP") oral suspension; and (2) generic dexamethasone tablets. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture product in the normal course of business until the products are ultimately divested to Prasco. The Commission also issued the Order to Maintain Assets.

The Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the Consent Agreement, along with the comments received, to make a final decision as to whether it should withdraw from the Consent Agreement, modify it, or make final the proposed Order.

I. The Respondents

Respondent ANI is a public specialty pharmaceutical company headquartered in Baudette, Minnesota selling both branded and generic pharmaceutical products.

Respondent Novitium is a privately-held company based in East Windsor, New Jersey. The company develops, manufactures, and commercializes generic pharmaceutical products.

II. The Products and Structure of the Markets

In human pharmaceutical markets, price(s) generally decreases as the number of generic competitors increase. Prices continue to decrease incrementally with the entry of the second, third, fourth, and further pharmaceutical competitors. Accordingly, a reduction in the number of suppliers within each relevant market has a direct and substantial effect on pricing.

The Proposed Acquisition would reduce future competition in the SMX-TMP oral suspension market, where ANI is a current competitor and Novitium is likely to enter the market.

Generic SMX-TMP oral suspension is an antibiotic product used to treat a variety of infections. Five companies, including ANI, currently market the product in the United States, but at least one has had difficulty manufacturing the product. Novitium is one of a limited number of suppliers capable of entering the market for SMX-TMP oral suspension in the near future.

Similarly, the Proposed Acquisition would reduce future competition in the 4 mg strength of generic dexamethasone tablets market, where both ANI and Novitium are likely to enter the market in the near future. Generic dexamethasone tablets are an oral steroid product used to treat inflammation associated with a variety of conditions. Dexamethasone tablets are available in a variety of strengths, although the most widely-used strength is the 4 mg strength. Only two companies sell the 4 mg strength of dexamethasone tablets in the United States today, and ANI and Novitium are two of a limited number of companies likely to enter the market in the near future.

III. Entry

Entry into the two markets at issue would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The combination of drug development times and regulatory requirements, including approval by the FDA, is costly and lengthy.

IV. Competitive Effects

The Proposed Acquisition likely would delay or reduce the introduction of beneficial competition, and subsequent price decreases, by eliminating future competition in the two markets at issue. While five companies, including ANI, currently market the generic SMX-TMP product in the United States, at least one has had difficulty manufacturing the product, and Novitium is one of a limited number of suppliers capable of entering the market in the near future. In the generic dexamethasone tablets market, only two companies sell the 4 mg strength in the United States today and ANI and Novitium are two of a limited number of companies entering the market in the near future. Absent a remedy, the Proposed Acquisition likely would cause U.S. consumers to pay higher prices for the aforementioned generic products.

V. The Proposed Order and the Order To Maintain Assets

The proposed Order and the Order to Maintain Assets effectively remedy the competitive concerns raised by the Proposed Combination for the two generic pharmaceutical product areas at issue. Pursuant to the proposed Order, the parties are required to divest ANI's rights and assets related to the two products to Prasco. The parties must accomplish these divestitures no later than ten days after the Proposed Combination is consummated. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products.

While ANI and Novitium do not compete again each other in the market for generic erythromycin and ethylsuccinate granules for oral suspension, Novitium has an unexecuted option to acquire a product from another company and ANI sells a product today. The proposed Order requires prior Commission approval before ANI or Novitium may acquire any rights or interests

in certain products containing, as the active pharmaceutical ingredients, erythromycin and ethylsuccinate. This provision allows the Commission to evaluate whether a future acquisition of the erythromycin and ethylsuccinate product would reduce competition at the time the acquisition is proposed. The proposed Order also requires ANI and Novitium to seek Commission approval before acquiring any other SMX-TMP or dexamethasone tablet product.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Combination. Prasco is a capable purchaser with management and employees who have experience marketing and distributing generic pharmaceutical products. It will be able to replicate the competition otherwise lost from the Proposed Combination.

The proposed Order contains several provisions to help ensure that the divestitures are successful. ANI will supply Prasco with SMX-TMP oral suspension and dexamethasone tablets for up to three years while the company transfers the manufacturing technology to Prasco's contract manufacturing designee. The proposed Order also requires ANI to provide transitional services to Prasco to assist it in establishing its manufacturing capabilities and securing all of the necessary FDA approvals. These transitional services include technical assistance to have the products manufactured in substantially the same manner and quality employed or achieved by ANI. It also includes advice and training from knowledgeable employees of the parties. Further, the proposed Order requires prior Commission approval before Prasco may sell, license, or otherwise convey any of the assets divested pursuant to the proposed Order.

Under the proposed Order, the Commission also will appoint a Monitor to ensure that ANI and Novitium comply with their obligations under the proposed Order and Order to Maintain Assets. The Commission has appointed Denise Smart of Smart Consulting Group, LLC as the Monitor. Ms. Smart is an expert in areas such as pharmaceutical R&D, regulatory approval, manufacturing and supply, and marketing, and she has over thirty years of experience in the pharmaceutical area and has provided consulting services in healthcare business development to major pharmaceutical companies, biotechnology companies, universities, and other government agencies, including the FDA, Department of Defense, and Health and Human Services.

The proposed Order also contains a prior approval provision relating to Prasco, which prohibits Prasco from selling the acquired products for a combined period of ten years after the Order is issued, except to an acquirer that receives the prior approval of the Commission.

* * *

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.

Complaint

IN THE MATTER OF

DAVITA INC.,
AND
TOTAL RENAL CARE, INC.

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

Docket No. C-4752; File No. 211 0013
Complaint, October 21, 2021 – Decision, January 12, 2022

This consent order addresses the $80.9 million acquisition by DaVita, Inc. of certain assets of University of Utah. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by reducing competition and increasing concentration in outpatient dialysis services provided in the Provo, Utah market. The consent order requires DaVita to divest three dialysis clinics to Sanderling Renal Services, Inc., ("SRS") and provide SRS with transition services for one year.

Participants

For the *Commission*: *Stuart Hirschfeld, Ben Lorigo, Danica Noble,* and *David Von Nirschl.*

For the *Respondents*: *Michael Perry, Steve Pet,* and *Stephen Weissman, Gibson Dunn; David Simon, Foley & Lardner.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent DaVita Inc., through its wholly-owned subsidiary, Total Renal Care, Inc. ("DaVita"), subject to the jurisdiction of the Commission, entered into an agreement to acquire substantially all the dialysis assets of the dialysis business of the University of Utah ("the University"), in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such 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, 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 DaVita is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202. DaVita is the largest provider of dialysis services in the United States. DaVita owns and manages outpatient dialysis facilities throughout the United States and provides acute inpatient dialysis services within hospitals.

2. Respondent Total Renal Care, Inc. is a wholly-owned subsidiary of DaVita and is a corporation organized, existing, and doing business under, and by virtue of the laws of the State of California, with its executive offices and principal place of businesses located at 601 Hawaii Street, Segundo, California 90245.

3. DaVita 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, 5 U.S.C. § 12, and are companies whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED ASSETS

4. The University is an academic medical health system and public research university of the State of Utah, with its office and principal place of business located at 201 Presidents Circle, Salt Lake City, Utah 84112-9018.

5. DaVita proposes to acquire the University's 18 dialysis clinics and associated assets. The clinics extend from the southeast corner of Nevada to the southern part of Idaho, with the majority of the clinics in Utah along the corridor that connects Las Vegas and Boise.

III. THE PROPOSED ACQUISITION

6. Pursuant to an Asset Purchase Agreement ("Agreement") between DaVita and the University dated September 23, 2021, DaVita will acquire all rights, titles, and interests in, and substantially all the assets and properties of the University's dialysis business, including its 18 dialysis clinics, in a non-HSR-reportable transaction.

7. The Agreement constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

IV. THE RELEVANT MARKET

8. The relevant line of commerce in which to analyze the effects of the Agreement is the provision of outpatient dialysis services. Patients receiving dialysis services have end stage renal disease ("ESRD"), a chronic disease characterized by a near total loss of function of the kidneys. ESRD is fatal if not treated.

9. The only alternative to dialysis treatment for patients suffering from ESRD is curing the disease through a kidney transplant. However, many ESRD patients are not viable transplant candidates, and for those who are, the wait time for donor kidneys, can exceed three years, during which ESRD patients must receive dialysis treatment. Additionally, most ESRD patients are not viable candidates for home dialysis. As a result, many ESRD patients have no alternative to outpatient dialysis treatment.

10. The distance ESRD patients will travel to receive dialysis treatments defines the outer boundaries of the relevant geographic markets for the provision of outpatient dialysis

services. Because ESRD patients often suffer from multiple health problems and may require assistance traveling to and from the dialysis clinic, these patients will not or cannot travel long distances to receive dialysis treatment. Also, most ESRD patients receive dialysis treatment three times per week in sessions lasting between three and four hours. Accordingly, as a general rule, most ESRD patients are unwilling or unable to travel more than 30 minutes or 30 miles for treatment, although travel times and distances may vary by location.

11. The relevant geographic market within which to assess the competitive effects of the Agreement is the greater Provo, Utah area. The relevant geographic market is defined by the contiguous communities located along Interstate 15 east of Utah Lake and south of Salt Lake City. The market is centered on Provo, Utah and extends north to Orem, Utah and south to Payson, Utah.

V. MARKET STRUCTURE

12. In Utah there are currently five providers of outpatient dialysis services: the University, Fresenius, DaVita, Intermountain Healthcare, and Anthem. In the greater Provo market, there are only three providers: the University (which has three clinics in the market), DaVita (four clinics), and Fresenius (one clinic). The University and DaVita directly and substantially compete in the relevant geographic market.

VI. ENTRY CONDITIONS

13. Entry into the relevant market described in Section IV would not be likely, timely, or sufficient in magnitude, character, and scope to deter or counteract the expected anticompetitive effects of the Agreement.

14. The most significant entry barrier is engaging a nephrologist with an established referral base to serve as the dialysis clinic's medical director. By law, each dialysis clinic must have a nephrologist medical director. Locating and contracting with a nephrologist to serve as medical director is difficult because clinics typically enter into exclusive contractual arrangements with a nephrologist who is paid a medical director fee. Finding patients may also be difficult if the nephrologist does not have local ties, because most nephrologists typically refer their patients to the clinic at which they (or one of their partners) are medical director. A potential entrant into the relevant markets would also need to develop a reputation for consistent quality and service before referrals would be made. Additionally, other things being equal, an area must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry. The absence of these attributes is an additional impediment to entry into the relevant market.

VII. EFFECTS OF THE AGREEMENT

15. The effects of the Agreement, if consummated, may be to substantially 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. The Acquisition would eliminate actual, direct, and substantial competition between DaVita and University in the market for outpatient dialysis services in the relevant area, increasing the

ability of the merged entity unilaterally to raise prices for outpatient dialysis services and reducing incentives to improve service or quality in the relevant market.

VIII. VIOLATIONS CHARGED

16. The Acquisition, 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 October, 2021 issues its Complaint against said Respondent.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Total Renal Care, Inc., a wholly owned subsidiary of Respondent DaVita Inc. ("Respondents"), of certain assets comprising dialysis clinics owned and operated by the University of Utah. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. §

2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues this 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 executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.

2. Respondent Total Renal Care, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its executive offices and principal place of business located at 601 Hawaii Street, Segundo, California 90245.

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

ORDER TO MAINTAIN ASSETS

I. Definitions

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 Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

A. "Decision and Order" means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.

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

II. Maintain Assets

IT IS FURTHER ORDERED that until the Divestiture Clinic Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Orders, ensure that the Divestiture Clinic Assets and Divestiture Clinics are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, to minimize any risk of loss of competitive potential of the Divestiture Clinic Assets and Divestiture Clinics, to operate the Divestiture Clinic Assets and Divestiture Clinics in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Clinic Assets and Divestiture Clinics, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Clinic Assets and Divestiture Clinics (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Clinic Assets and Divestiture Clinics; and

B. Not terminate the Dialysis Business of the Divestiture Clinics, and shall conduct or cause to be conducted the Dialysis Business of the Divestiture Clinics in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Divestiture Clinics.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Clinic Assets and consistent with the purposes of the Orders.

III. Transition Assistance

IT IS FURTHER ORDERED that:

A. At the option of the Acquirer, Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Divestiture Clinic Assets and the related Dialysis Business to the Acquirer, and (2) assist the Acquirer in operating the Divestiture Clinics in all material respects in the manner in which they were operated prior to the Acquisition.

B. Respondents shall provide such Transition Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section III, which shall be, at the option of the Acquirer, the later of (1) up to one year after the Divestiture Date, or (2) the date the Acquirer has its own Centers for Medicare & Medicaid Service billing numbers for each of the Divestiture Clinic locations, unless the Acquirer terminates the provision of such Transition Assistance at an earlier date. *Provided however,* that upon the Acquirer's request, Respondents must file with the Commission a written request to extend the time period.

C. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

D. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreement.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Divestiture Clinic Assets to evaluate independently and offer employment to the Divestiture Clinic Employees.

B. Until 90 days after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Divestiture Clinic Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Divestiture Clinic Employees, and to make offers of employment to any of the Divestiture Clinic Employees;

3. Remove any impediments within the control of Respondents that may deter Divestiture Clinic Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Divestiture Clinic Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Divestiture Clinic Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents;

5. Provide reasonable financial incentives for Divestiture Clinic Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Divestiture Clinic Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Divestiture Clinic Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not

otherwise interfere with the recruitment of any Divestiture Clinic Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Divestiture Clinic Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Divestiture Clinic Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section IV.

D. With respect to each Physician who has provided services to a Divestiture Clinic pursuant to any of the Clinic Physician Contracts in effect at any time during the 4 months preceding the Divestiture Date of the Divestiture Clinic ("Contract Physician"), Respondents shall not, for a period of 180 days, 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 a Divestiture Clinic acquired by the Acquirer, 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 any information related to the operation of a Divestiture Clinic.

E. Respondents:

1. Shall not enforce, directly or indirectly, any non-compete provision or agreement, and not enter into any new non-compete provision or agreement, with any Physician employed by the University of Utah, that limit the Physician's right to be a medical director at any Clinic owned or operated by a Person other than the Respondents within the State of Utah; *provided, however*, Respondents may require, directly or indirectly, any University of Utah nephrologist serving under a Respondent's Clinic Physician Contract at a dialysis clinic operated by Respondents to abide by a non-compete provision or agreement effective solely to restrict such nephrologist from simultaneously being a medical director at a clinic not operated by Respondents; and

2. Shall give each Physician affected by Paragraph IV.E.1 written notice of Paragraph IV.E.1. Such notice shall include the contents of Paragraph IV.E.1 and a description of its terms, including notice that Respondents cannot enforce any non-compete that prevents the Physician from serving as a medical director, at any time and without penalty, at a Clinic owned or operated by a Person other than the Respondents except as provided above, in Paragraph IV.E.1.

F. Respondents shall not enter into any agreement with the Acquirer that restricts the Acquirer from soliciting Respondents' employees for employment at the Acquirer.

V. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Clinic Assets or Divestiture Clinics, or as required by law, rule or regulation.

B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph V.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.

C. Respondents shall enforce the terms of Section V and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Richard Shermer of R. Shermer & Co. as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VI or the Section relating to the Monitor in the Decision and Order ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of the Decision and Order, and file a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage,

liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

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

VII. Divestiture Trustee

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 the Divestiture Clinic Assets as required by the Decision and Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or

otherwise convey these assets in a manner that satisfies the requirements of the Orders.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with the Orders.

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

D. Not later than 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 relevant divestiture or other action required by the Orders.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section VII, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by the Decision and Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the

divestitures 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 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 the Decision and 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by the Decision and Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 the Decision and 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Clinic Assets required to be divested by the Decision and Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. 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 Section IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section IX.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by the Orders.

VIII. Prior Approval

IT IS FURTHERED ORDERED that Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Clinic, within the 6 months prior to the date of such proposed acquisition, within the State of Utah;

B. Acquire any ownership interest in any Person that owns any interest in or operates a Clinic within the State of Utah, *provided, however*, Respondents are not required to obtain the prior approval of the Commission if the only Clinic ownership interest is a Clinic owned or operated by Respondents within the State of Utah; and

C. Enter into any contract for Respondents to participate in the management or Dialysis Business of a Clinic located in within the State of Utah;

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction, opening, or participation in the management of new facilities.

Provided further, however, that if Respondents propose to acquire any ownership interest in any Person that owns any interest in or operates Clinics within both the State of Utah and other states, including if such an acquisition requires a Hart-Scott-Rodino premerger notification, this Section applies only to the Clinics within the State of Utah.

IX. Compliance Reports

IT IS FURTHER ORDERED that Respondents shall file verified written reports ("compliance reports") in accordance with the following:

A. Respondents shall submit compliance reports 30 days after the Commission issues this Order to Maintain Assets and every 30 days thereafter until the Commission issues a Decision and Order in this matter;

B. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented and plan to implement to comply with each paragraph of the Orders;

C. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the

compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request; and

D. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov; provided, however, that Respondents need only file electronic copies of the interim reports required by Paragraph XI.B.1 (a) of the Decision and Order. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

X. Change in Respondent

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

A. The proposed dissolution of DaVita Inc. or Total Renal Care Inc., respectively;

B. The proposed acquisition, merger, or consolidation of DaVita Inc. or Total Renal Care Inc., respectively; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of the Orders.

XI. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with the Orders, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the 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 the Respondents related to compliance with the Orders, which copying services shall be provided by the Respondents at their expense; and

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

XII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Clinic Assets through their full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Divestiture Clinic Assets; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Clinic Assets except for ordinary wear and tear.

XIII. Term

IT IS FURTHER ORDERED that this Order shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Total Renal Care, Inc., a wholly owned subsidiary of Respondent DaVita Inc. ("Respondents"), of certain assets comprising dialysis clinics owned and operated by the University of Utah. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it

issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission 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 executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.

2. Respondent Total Renal Care, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its executive offices and principal place of business located at 601 Hawaii Street, Segundo, California 90245.

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

ORDER

I. Definitions

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

A. "DaVita" or "Respondent" means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Total Renal Care, Inc., partnerships, divisions, groups, and affiliates controlled by DaVita Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Total Renal Care" or "Respondent" means Total Renal Care, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Total Renal Care, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "University of Utah" means the public research University of the State of Utah, with its office and principal place of business located at 201 Presidents Circle, Salt Lake City, Utah 84112-9018.

D. "Respondents" means both DaVita and Total Renal Care.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means: (1) Sanderling or (2) any other Person that acquires the Divestiture Clinic Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the Asset Purchase Agreement dated September 24, 2021, between Total Renal Care, Inc., a corporation owned by DaVita Inc., and the University of Utah.

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

I. "Business Information" means books, records, data, and information, wherever located and however stored, including electronic medical records, documents, written information, graphic materials, and data and information in electronic format. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, research and development, registrations, licenses, permits (to the extent transferable), and operations. For clarity, Business Information includes rights and control of any owner of a Divestiture Clinic over information and material provided to any other Person.

J. "Clinic" means a facility that provides outpatient hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

K. "Clinic Physician Contract" 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, agreements for the services of a medical director for the Clinic and "joinder" agreements with Physicians in the same medical practice as a medical director of the Clinic.

L. "Confidential Business Information" means all Business Information not in the public domain that is related to or used in connection with the Divestiture Clinic Assets or the Dialysis Business of any Divestiture Clinic, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

M. "Consent" means any approval, consent, ratification, waiver, or other authorization.

N. "Contract" means an agreement, contract, mutual understanding, arrangement, license agreement, lease, consensual obligation, commitment, promise and undertaking (whether written or oral and whether express or implied), whether or not legally binding.

O. "Dialysis Business" means all activities relating to the business of a Clinic, including:

1. Attracting patients to such Clinic for dialysis services;

2. Providing dialysis services to patients of such Clinic, and dealing with their physicians, including, services relating to hemodialysis and peritoneal dialysis;

3. Providing medical products to patients of such Clinic;

4. Maintaining the equipment on the premises of such Clinic, including, the equipment used in providing dialysis services to patients (which machines shall be delivered to the Acquirer in a condition that meets or exceeds all current operational, functional, and productive capabilities required to perform dialysis);

5. Purchasing supplies and equipment for such Clinic;

6. Negotiating leases for the premises of such Clinic;

7. Providing counseling and support services to patients receiving products or services from such Clinic;

8. Contracting for the services of medical directors for such Clinic;

9. Dealing with Payors, including, negotiating contracts with such Payors and submitting claims to such Payors; and

10. Obtaining or maintaining Governmental Permits relating to such Clinic or otherwise dealing with government entities that regulate operations of the Clinic.

P. "Direct Cost" means a cost not to exceed the actual cost of labor, materials, travel, and other expenditures. The cost of any labor included in Direct Cost shall not exceed the then-current average hourly wage rate for the employee providing such labor.

Q. "Divestiture Agreement" means

1. Asset Purchase Agreement by and between Sanderling and Total Renal Care, dated September 24, 2021, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Order as Nonpublic Appendix I; or

2. Any other agreement between a Respondent or the Divestiture Trustee and an Acquirer to purchase the Divestiture Clinic Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

R. "Divestiture Clinic" means any one, or all, of the following:

1. University of Utah's Provo, UT Clinic, located at 1675 N Freedom Boulevard, Suite 15, Provo, Utah, 84604;

2. University of Utah's Payson, UT Clinic, located at 15 S 1000 E, Suite 50, Payson, Utah, 84651; and

3. University of Utah's American Fork, UT Clinic, located at 1159 E 200 N, Suite 150, American Fork, Utah, 84003.

S. "Divestiture Clinic Assets" means the rights, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible of every kind and description, wherever located, used in or relating to the Dialysis Business of each Divestiture Clinic, other than the Excluded Assets, including:

1. All rights under the Clinic's Physician Contracts;

2. All rights to all of the leasehold interest in the real property at which the Divestiture Clinic is located and the building and improvements thereon (including rights in any related parking facility or lot);

3. At least a three-week supply of all general medical products regularly used in the conduct of the Dialysis Business at the Divestiture Clinic that are intended for one-time or temporary use (*e.g.*, gloves, needles, paper products, syringes, and wipes) and any other medical supplies, including dialysis supplies and pharmaceuticals including erythropoietin;

4. At least a three-week supply of janitorial supplies, including such supplies as are required to prevent exposure to potentially infectious materials;

5. All Fixtures and Equipment;

6. All computers and computer equipment, printers, software and databases, routers, servers, switches and time clocks and documentation relating to any of the foregoing used or held for use in the operation of the Dialysis Business of each of the Divestiture Clinics (all cabling within each facility shall remain in place), which shall also include access to any computer databases or patient information connected or related to each Divestiture Clinic held outside the respective Divestiture Clinic;

7. All Intellectual Property;

8. All Business Information;

9. Respondents' Medicare and Medicaid provider numbers, to the extent transferable;

10. All permits and licenses, to the extent transferable; and

11. Any other assets that are used in, or necessary for, the Dialysis Business of a Divestiture Clinic.

Provided, however, that "Divestiture Clinic Assets" do not include Excluded Assets.

T. "Divestiture Clinic Employee" means any full-time, part-time, or contract individual employed in the Dialysis Business of the Divestiture Clinic, as of September 1, 2020.

U. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Divestiture Clinic Assets.

V. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

W. "Employee Information" means for each Divestiture Clinic Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

X. "Excluded Assets" means those assets listed on Appendix II.

Y. "Fixtures and Equipment" means all furniture, fixtures, furnishings, machinery (including dialysis machines), equipment, supplies and other tangible personal property used or held for use in the operation of the Dialysis Business of each of the Divestiture Clinics respectively, or if leased, the leasehold interest therein.

Z. "Governmental Permit" means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of the Divestiture Clinic Assets to the Acquirer and for such Acquirer to operate the Divestiture Clinic.

AA. "Intellectual Property" means intellectual property of any kind including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

BB. "License" means a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights.

CC. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to the Orders.

DD. "Orders" means this Order and the Order to Maintain Assets entered in this action.

EE. "Payor" means any Person that administers, pays, or insures health or medical expenses on behalf of beneficiaries or recipients including the following: government entities (*e.g.*, Medicare or Medicaid), health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; healthcare maintenance organizations; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

FF. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, or other entity or a governmental body.

GG. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

HH. "Policies and Procedures" means the dialysis policies and procedures manual, whether in hard copy or electronic copy, that have been in effect at the Divestiture Clinic.

II. "Real Property" means the real property on which, or in which, any Divestiture Clinic is located, including real property used for parking and for other functions related to the Divestiture Clinic.

JJ. "Sanderling" means (1) Sanderling Renal Services-USA LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, (2) SRS-Utah, LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, and (3) any Person

controlled by or under common control of Sanderling Renal Services-USA LLC or SRS-Utah, LLC.

KK. "Transition Assistance" means technical services, personnel, assistance, training, and other logistical, administrative, and other transitional support as required by the Acquirer to facilitate the transfer of the Divestiture Clinic Assets to the Acquirer, including training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, general medical products supply, purchasing, quality control, transfer of information technology and related systems, maintenance and repair of facilities and Fixtures and Equipment, use of any name or brand used in the Dialysis Business of the respective Divestiture Clinic for transitional purposes, Governmental Permits, regulatory compliance, sales and marketing, patient services, and supply chain management and patient transfer logistics.

LL. "University of Utah Medical Protocols" means medical protocols promulgated by the University of Utah, whether in hard copy or electronic copy, that are or have been in effect at a Divestiture Clinic, *provided, however*, "University of Utah 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 the University of Utah.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Divestiture Clinic Assets, absolutely and in good faith, as an ongoing business, to Sanderling.

Provided, however, that, if within 12 months after the date the Commission issues this Order, the Commission determines, in consultation with the Acquirer and the Monitor (if one has been appointed), the Acquirer needs one or more of the Excluded Assets to operate the Dialysis Business of the Divestiture Clinics in a manner that achieves the purpose of this Order, Respondents shall divest or license, absolutely and in good faith, such needed Excluded Assets to the Acquirer.

B. If Respondents have divested the Divestiture Clinic Assets to Sanderling 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:

1. Sanderling is not acceptable as the acquirer of the Divestiture Clinic Assets, then Respondents shall immediately rescind the Divestiture Agreement, and shall divest the Divestiture Clinic Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price,

to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Divestiture Clinic Assets to Sanderling was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Clinic Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Respondents shall assist the Acquirer to conduct a due diligence investigation of the Divestiture Clinic Assets that the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording the Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, and Business Information, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

D. Respondents shall grant to Acquirer, absolutely and in good faith, a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights, for the use, without any limitation, of all Policies and Procedures related to the Divestiture Clinics, including the University of Utah Medical Protocols for the Divestiture Clinics.

E. Respondents shall not consummate the Acquisition until they have obtained for all the Divestiture Clinics:

1. All approvals for the assignment to the Acquirer of the rights, title, and interest to each lease for Real Property of each Divestiture Clinic;

2. All approvals for the assignment to the Acquirer of the Clinic Physician Contracts related to each Divestiture Clinic; and

3. All Governmental Permits.

F. Respondents shall:

1. Place no restrictions on the use by the Acquirer of any of the Divestiture Clinic Assets to be divested to such Acquirer, or interfere with or otherwise attempt to interfere with any Acquirer’s use of any of the Divestiture Clinic Assets to be divested to such Acquirer, including seeking or requesting the imposition of governmental restrictions on the Acquirer’s business operations relating to the Divestiture Clinic Assets.

2. Assign to the Acquirer all of the Clinic Physician Contracts related to each Divestiture Clinic.

Provided, however, that (i) if the Acquirer enters into a Clinic Physician Contract for a Divestiture Clinic before such Clinics are divested pursuant to Paragraph II.A of this Order, and (ii) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondents shall not be required to make the assignment for such Clinics as required by Section II.

3. With respect to all contracts included in the Divestiture Clinic Assets other than Clinic Physician Contracts, at the Acquirer's option and on the Divestiture Date of each Divestiture Clinic:

a. if such contract can be assigned without third party approval, assign Respondents' 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 such third party approval and in assigning the contract to the Acquirer, or in obtaining a new contract.

G. For 2 years following the Divestiture Date, Respondents shall not solicit the business of any patient who received any goods or services from the Divestiture Clinics between September 1, 2020, and the Divestiture Date.

Provided, however, Respondents may (i) make general advertisements for the business of such patients including 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 employee of Respondents.

III. Divestiture Agreement

IT IS FURTHERED ORDERED that:

A. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order; *provided, however*, that no Divestiture Agreement shall limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the

Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. At the option of the Acquirer, Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Divestiture Clinic Assets and the related Dialysis Business to the Acquirer, and (2) assist the Acquirer in operating the Divestiture Clinics in all material respects in the manner in which they were operated prior to the Acquisition.

B. Respondents shall provide such Transition Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, the later of (1) up to one year after the Divestiture Date, or (2) the date the Acquirer has its own Centers for Medicare & Medicaid Service billing numbers for each of the Divestiture Clinic locations, unless the Acquirer terminates the provision of such Transition Assistance at an earlier date. *Provided however,* that upon the Acquirer's request, Respondents must file with the Commission a written request to extend the time period.

C. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

D. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Divestiture Clinic Assets to evaluate independently and offer employment to the Divestiture Clinic Employees.

B. Until 90 days after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Divestiture Clinic Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Divestiture Clinic Employees, and to make offers of employment to any of the Divestiture Clinic Employees;

3. Remove any impediments within the control of Respondents that may deter Divestiture Clinic Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Divestiture Clinic Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Divestiture Clinic Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents;

5. Provide reasonable financial incentives for Divestiture Clinic Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Divestiture Clinic Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Divestiture Clinic Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Divestiture Clinic Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Divestiture Clinic Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either

case not targeted specifically at one or more Divestiture Clinic Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

D. With respect to each Physician who has provided services to a Divestiture Clinic pursuant to any of the Clinic Physician Contracts in effect at any time during the 4 months preceding the Divestiture Date of the Divestiture Clinic ("Contract Physician"), Respondents shall not, for a period of 180 days, 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 a Divestiture Clinic acquired by the Acquirer, 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 any information related to the operation of a Divestiture Clinic.

E. Respondents:

1. Shall not enforce, directly or indirectly, any non-compete provision or agreement, and not enter into any new non-compete provision or agreement, with any Physician employed by the University of Utah, that limit the Physician's right to be a medical director at any Clinic owned or operated by a Person other than the Respondents within the State of Utah; *provided, however,* Respondents may require, directly or indirectly, any University of Utah nephrologist serving under a Respondent's Clinic Physician Contract at a dialysis clinic operated by Respondents to abide by a non-compete provision or agreement effective solely to restrict such nephrologist from simultaneously being a medical director at a clinic not operated by Respondents; and

2. Shall give each Physician affected by Paragraph V.E.1 written notice of Paragraph V.E.1. Such notice shall include the contents of Paragraph V.E.1 and a description of its terms, including notice that Respondents cannot enforce any non-compete that prevents the Physician from serving as a medical director, at any time and without penalty, at a Clinic owned or operated by a Person other than the Respondents except as provided above, in Paragraph V.E.1.

F. Respondents shall not enter into any agreement with the Acquirer that restricts the Acquirer from soliciting Respondents' employees for employment at the Acquirer.

VI. Asset Maintenance

IT IS FURTHER ORDERED that until the Divestiture Clinic Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Divestiture Clinic Assets and Divestiture Clinics are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, to minimize any risk of loss of competitive potential of the Divestiture Clinic Assets and Divestiture Clinics, to operate the Divestiture Clinic Assets and Divestiture Clinics in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Clinic Assets and Divestiture Clinics, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Clinic Assets and Divestiture Clinics (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Clinic Assets and Divestiture Clinics; and

B. Not terminate the Dialysis Business of the Divestiture Clinics, and shall conduct or cause to be conducted the Dialysis Business of the Divestiture Clinics in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Divestiture Clinics.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Clinic Assets and consistent with the purposes of the Orders.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Clinic Assets or Divestiture Clinics, or as required by law, rule or regulation.

B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph VII.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.

C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Richard Shermer of R. Shermer & Co. as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VIII or the Section relating to the Monitor in the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI, and file a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not

opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

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

IX. Divestiture Trustee

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 the Divestiture Clinic Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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

D. Not later than 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 relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission

determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Clinic Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. 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 Section IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section IX.

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

X. Prior Approval

IT IS FURTHERED ORDERED that Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Clinic, within the 6 months prior to the date of such proposed acquisition, within the State of Utah;

B. Acquire any ownership interest in any Person that owns any interest in or operates a Clinic within the State of Utah, *provided, however*, Respondents are not required to obtain the prior approval of the Commission if the only Clinic ownership interest is a Clinic owned or operated by Respondents within the State of Utah; and

C. Enter into any contract for Respondents to participate in the management or Dialysis Business of a Clinic located in within the State of Utah;

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction, opening, or participation in the management of new facilities.

Provided further, however, that if Respondents propose to acquire any ownership interest in any Person that owns any interest in or operates Clinics within both the State of Utah and other states, including if such an acquisition requires a Hart-Scott-Rodino premerger notification, this Section applies only to the Clinics within the State of Utah.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and each Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the relevant Divestiture Date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit:

a. Interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Sections II, IV, and VI;

b. Annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and

c. Additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented and plan to implement to comply with each paragraph of the Orders.

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov*; provided, however,* that Respondents need only file electronic copies of the interim reports required by Paragraph XI.B.1 (a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent

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

A. The proposed dissolution of DaVita Inc. or Total Renal Care Inc., respectively;

B. The proposed acquisition, merger, or consolidation of DaVita Inc. or Total Renal Care Inc., respectively; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

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 and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the 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 the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

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

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the

Dialysis Business related to each of the Divestiture Clinics and Divestiture Clinic Assets at least equivalent in all material respects to the manner in which the Dialysis Business was operated prior to the Acquisition.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

NONPUBLIC APPENDIX I

Divestiture Agreements

APPENDIX II

Excluded Assets

1. All cash, cash equivalents, and short term investments of cash, securities and other instruments;

2. Accounts receivable and rights to bill (including all proceeds thereof) for all services delivered or performed and products provided in connection the business of a Clinic before a Clinic is divested to an Acquirer or which remain outstanding and unpaid before a Clinic is divested to an Acquirer;

3. General ledgers and accounting records of University of Utah;

4. Income tax refunds and tax deposits due to Respondents;

5. Unbilled costs and fees, recoupments, claims, demands, deposits, rebates, and bad debt recovery claims against any Payor including Medicare, arising before a Clinic is divested to an Acquirer;

6. Rights to the names "DaVita" and "University of Utah" and any variation of those names (unless otherwise licensed to an Acquirer pursuant to the Order) and other copyrights, trademarks, trade names, service marks, and logos relating to the "DaVita" and "University of Utah" names;

7. Insurance policies and all benefits and claims thereunder;

8. Rights in connection with and assets of University Health Plans;

9. Minute books, personnel records, (other than governing body minute books of a Clinic), tax returns, and other corporate books and records;

10. Any inter-company balances due to or from Respondents or its affiliates;

11. All employee benefits plans;

12. All writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information is necessary to the operation of a Clinic;

13. All DaVita or University of Utah software;

14. DaVita and University of Utah e-mail addresses, websites, and domain names;

15. Office equipment and furniture that (a) is not, in the ordinary course of business, physically located at any University of Utah Clinic, (b) is shared with Clinics other than the Divestiture Clinics, and (c) is not necessary to the operation of a Divestiture Clinics;

16. All assets of (i) University Hospitals and Clinics; and (ii) the evaluation and maintenance clinic, primary care provider, and hospital assets in the University of Utah's hospital building, including computers and furniture;

17. Licensed intangible property;

18. University of Utah Policies and Procedures, including medical protocols, subject to the licensing provisions in this Order;

19. Strategic planning documents that (a) related to the operation of a Clinic other than a Divestiture Clinic and (b) are not located on the premises of a Divestiture Clinic;

20. Telephone numbers that cannot be transferred;

21. Utility accounts for telephone, television, waste disposal, gas, and electrical services;

22. Rights under agreements with suppliers that do not relate exclusively to any Divestiture Clinic, that are not assignable even if the University and Respondent approve such assignment, or for which Acquirer has not elected to take assignment;

23. All employer numbers, national provider identification numbers, payer identification numbers, payer licenses, business licenses, or fire clearances issued to the University for any University Clinic, except for the University's Medicare and Medicaid provider numbers and CLIA Certificates;

24. Acute dialysis services agreements;

25. Servers, domains, data storage services, software licenses, and vehicles belonging to the University that do not relate exclusively to any Divestiture Clinic;

26. Business operations and other services provided by the University;

27. Purchase orders placed by the University; and

28. Computer hardware, telecommunications systems and equipment, and information systems equipment that Acquirer has elected not to take.

29. Assets of the University that are not transferring to DaVita under the Asset Purchase Agreement between Total Renal Care, Inc., a corporation owned by DaVita, Inc. and the University of Utah.

CONCURRING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON

Today, the Commission announces a consent order to settle allegations that the proposed acquisition of the dialysis business of the University of Utah Health ("University") by Total Renal Care, Inc., a wholly-owned subsidiary of DaVita Inc. ("DaVita"), may substantially lessen competition in the market for outpatient dialysis services in the greater Provo, Utah area. I support the outcome but believe that two aspects of the consent order warrant discussion so that my support is not misconstrued. Those two sets of provisions relate to prior approval and non- compete agreements. I then highlight a third provision – a ban on no-poach agreements – in light of the ongoing dialogue regarding whether antitrust enforcement adequately protects competition for labor inputs.

Prior Approval and Non-Compete Agreement Provisions

First, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah. The Commission rescinded the 1995 Policy Statement Concerning Prior Approval and Prior Notice ("1995 Policy") on July 21, 2021. I dissented from this rescission for three reasons: the 1995 Policy was put in place to prevent resource-intensive and vindictive litigation; it preserved the use of prior approval provisions in

appropriate circumstances; and the majority did not provide new guidance explaining how these provisions would be used following rescission of the 1995 Policy.[1]

Because I believe the 1995 Policy provided sound guidance on the appropriate use of prior approval provisions, I will assess the propriety of the prior approval provision in this matter against that touchstone. The 1995 Policy noted that prior approval is most likely appropriate where there is a credible risk that a company engaged in an anticompetitive merger would attempt the same or approximately the same merger in the future.[2] DaVita has engaged in a pattern of acquiring independent dialysis facilities;[3] many of these acquisitions fall below HSR thresholds and consequently escape premerger review,[4] including this proposed acquisition. There is some evidence that this pattern of sub-HSR acquisitions has led to higher prices and lower service levels in the dialysis field.[5] It is for this reason that I have encouraged the Commission on previous occasions to study this industry.[6]

1Oral Remarks of Commissioner Christine S. Wilson, Open Commission Meeting on July 21, 2021 at 8-11 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf. See also Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf.

2 Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745, 39746 (Aug. 3, 1995), https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

3 Paul J. Eliason et al., How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry, 135 QUARTERLY J. ECON. 221, 235 (2020) (showing how the acquisitions of independent facilities have contributed to DaVita's overall growth).

4 Thomas Wollmann, How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274) ("In short, the FTC blocks nearly all reportable facility acquisitions resulting duopoly and monopoly. In sharp contrast, the dashed line reflects exempt facility acquisitions. These ownership changes witness effectively no enforcement actions, regardless of simulated HHI change. This includes dozens of facility acquisitions involving ΔHHI > 2,000, several of which involve ΔHHI near 5,000.").

5 Eliason et al., supra note 3, at 223 ("We find that acquired facilities alter their treatments in ways that increase reimbursements and decrease costs. For instance, facilities capture higher payments from Medicare by increasing the amount of drugs they administer to patients, for which Medicare paid providers a fixed per-unit rate during our study period. … On the cost side, large chains replace high-skill nurses with lower-skill technicians at the facilities they acquire, reducing labor expenses. Facilities also increase the patient load of each employee by 11.7% and increase the number of patients treated at each dialysis station by 4.5%, stretching resources and potentially reducing the quality of care received by patients.").

6 See, e.g., Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (February 11, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566385/statement_by_commissioners_wilson_and_chopra_re_hsr_6b.pdf#:~:text=Statement%20of%20Commissioner%20Christine%20S.%20Wilson%2C%20Joined%20by,that%20drive%20content%20curation%20and%20targeted%20advertising%20practices.

Against this backdrop, I believe a prior approval provision is appropriate here. Specifically, there is a credible risk that DaVita will attempt to acquire additional dialysis facilities in the same general area in which divestiture has been ordered. But to be clear, my vote in favor of this consent should not be construed as support for the liberal use of prior approval provisions foreshadowed by the Commission's majority when it rescinded the 1995 Policy.

Second, the order contains provisions that prohibit DaVita from enforcing non-compete agreements in the University of Utah nephrologists' medical director contracts.[7] Some commentators have suggested that non-compete provisions should be banned, and some of my current and former colleagues on the Commission have expressed sympathy for that view.[8]

While I disagree with that perspective,[9] I have concluded that the provisions limiting the effect of non-competes in this matter are necessary to achieve an effective remedy. Specifically, the operations of a dialysis facility must occur under the auspices of a nephrologist; indeed, without a nephrologist, a dialysis clinic cannot operate. Nephrologists are in short supply,[10] and the inability of a facility owner to retain or replace a licensed nephrologist could serve as a barrier to entry or, in this case, preclude the buyer from continuing to compete in the market. Moreover, a

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7 Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of DaVita, Inc. and Total Renal Care, Inc., No. 211-0013 (October 25, 2021), ("[The Order] prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist ….").

8 Letter from Chair Lina M. Khan to Chair Cicilline and Ranking Member Buck at 2 (Sept. 28, 2021), https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-20210928-SD005.pdf ("The FTC has heard concerns about noncompete clauses at its open meetings, and the Commission recently opened a docket to solicit public comment on the prevalence and effects of contracts that may harm fair competition. As we pursue this work, I am committed to considering the Commission's full range of tools, including enforcement and rulemaking."); New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery at FTC Workshop on Non-Compete Clauses in the Workplace at 1 (Jan. 9, 2020), https://www ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf ("I also want to thank the advocates and academics— including those participating today—who have raised awareness about and contributed both research and new ideas to the discussion concerning non-compete provisions in employment contracts. State attorneys general and their staff have also been at the forefront of this issue by investigating and initiating legal action to end unjustified and anticompetitive non-compete clauses in employment contracts."); Letter from Commissioner Rohit Chopra to Assistant Attorney General Makan Delrahim at 3 (Sept. 18, 2019), https://www ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf ("A rulemaking proceeding that defines when a non-compete clause is unlawful is far superior than case-by-case adjudication."); Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, (posted by the Fed. Trade Comm'n on July 21, 2021), https://www.regulations.gov/document/FTC-2021-0036-0001.

9 Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 9-12, (Sept. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf.

10 Muhammad U. Sharif et al., The global nephrology workforce: emerging threats and potential solutions!, 9 CLINICAL KIDNEY J. 11, 13 (2016), https://www.ncbi nlm nih.gov/pmc/articles/PMC4720191/ ("These facts would suggest that the current nephrology workforce [in the U.S.] should increase in order to compensate for the expected growth in patient numbers. Unfortunately, the opposite appears to be the case.").

repeal of non-competes to effectuate a remedy is not novel: past consent orders have included provisions that prohibit merging parties from enforcing non-competes to aid divestiture buyers in hiring employees.[11] For these reasons, I support the provisions pertaining to non-competes in this matter – but my acquiescence to these provisions should not be construed as support for a sweeping condemnation of non-competes more generally.

Ban on No-Poach Agreements

The order contains an anti-no-poach provision that prevents DaVita from entering into any agreement that would restrict the divestiture buyer from soliciting DaVita's employees. I highlight this provision because some critics have asserted that antitrust enforcement ignores competition for labor as an input.[12] I believe that modern antitrust enforcement does, in fact, police the market for unlawful practices impacting competition for labor.[13] Naked no-poach agreements are per se illegal under the antitrust laws, and have been subject to enforcement accordingly.[14]

With respect to the instant matter, DaVita and its former CEO were recently indicted for agreeing with competitors to refrain from recruiting one another's employees.[15] In a past consent order, where respondents had entered into no-poach agreements, provisions explicitly prohibiting

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11See, e.g., Decision and Order, Gallo et al. No. 191-0110 at VI.A.4 (April 5, 2021), https://www.ftc.gov/system/files/documents/cases/gallo-cbi_decision_and_order_final_201107.pdf ("Remove any impediments within the control of Respondents that may deter relevant Divestiture Business Employees from accepting employment with the Acquirer, including removal of any non-compete…"); Decision and Order, Stryker et al., No. 201-0014 at VI.B.3 (Dec. 17, 2020), https://www ftc.gov/system/files/documents/cases/2010014c4728 strykerwrightorder.pdf ("Remove any impediments within the control of Respondents that may deter Implant Business Employees from accepting employment with the Acquirer, including removal of any non-compete…"); Decision and Order, Arko Holdings et al., No. 201-0041 at VI.B.3 (Oct. 7, 2020), https://www.ftc.gov/system/files/documents/cases/c-4726_201_0041_arko_empire_order.pdf ("Remove any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with an Acquirer …"). This consent does contain a new twist on our approach to non-competes. Specifically, DaVita may not enforce non-competes to the extent they prevent competitors or potential competitors from obtaining the services of a nephrologist, which will allow potential competitors to launch a competing dialysis clinic in Utah. Given my understanding of DaVita's business practices, the nephrologist shortage, and the historical industry context, I believe this remedy constitutes appropriate fencing-in relief.

12 Testimony of Eric A. Posner on Antitrust and Labor Markets at 2 (Sept. 28, 2021), https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-Wstate-PosnerE-20210928.pdf ("Yet, while thousands of antitrust cases have been brought over the years, hardly any have addressed labor market cartelization. The Justice Department and the Federal Trade Commission have reviewed thousands of mergers, approving some and rejecting others, but have not even once analyzed the labor market effects of a merger.").

13 Testimony of Commissioner Christine S. Wilson at the Hearing on Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker at 12-14, (Sept. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf.

14 DWP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

15 Indictment, United States v. DaVita Inc. et al., No. 1:21-cr-00229 (D. Colo. July 14, 2021).

these agreements have been included in an order.[16] I support the inclusion of an anti-no-poach provision in this order because of the relevant allegations against DaVita and to allow the Commission to pursue an order violation in the event that DaVita attempts to limit competition through anticompetitive no-poach agreements in the future.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") with DaVita, Inc., through its wholly-owned subsidiary, Total Renal Care, Inc. ("DaVita"). The proposed Consent Agreement is intended to remedy the anticompetitive effects that would likely result from DaVita's proposed acquisition ("Proposed Acquisition") of all dialysis clinics owed by the University of Utah ("University").

Pursuant to an Asset Purchase Agreement dated September 22, 2021, DaVita proposes to acquire all 18 dialysis clinics from the University in a non-HSR-reportable transaction. DaVita is the largest provider of dialysis services in the United States and the University is an academic and public research institution in the State of Utah. The 18 dialysis clinics extend from the southeast corner of Nevada to the southern part of Idaho. The Commission alleges in its Complaint 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, by reducing competition and increasing concentration in outpatient dialysis services provided in the Provo, Utah market.

The proposed Consent Agreement will remedy the alleged violations by preserving competition that would otherwise be eliminated by the Proposed Acquisition. Under the terms of the Consent Agreement, DaVita is required to divest three dialysis clinics to Sanderling Renal Services, Inc., ("SRS") and must provide SRS with transition services for one year. In addition, DaVita cannot: (1) enter into, or enforce, any non-compete agreements with physicians employed by the University that would restrict their ability to work at a clinic operated by a competitor of DaVita (except to prevent a medical director under a contract with DaVita from simultaneously

16 Press Release, Fed. Trade Comm'n, VieVu's Former Parent Company Safariland Agrees to Settle Charges That It Entered into Anticompetitive Agreements with Body-Worn Camera Systems Seller Axon (April 17, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/vievus-former-parent-company-safariland-agrees-settle-charges-it ("According to the complaint, the agreements barred Safariland from competing with Axon now and in the future on all of Axon's products, limited solicitation of customers and employees by either company, and stifled potential innovation or expansion by Safariland. … Under the proposed order, Safariland is required to obtain approval from the Commission before entering into any agreement with Axon that restricts competition between the two companies.").

serving as a medical director at a clinic operated by a competitor); (2) enter into any agreement that restricts SRS from soliciting DaVita's employees for hire; or (3) directly solicit patients who receive services from the divested clinics for two years. Finally, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah.

II. The Relevant Market and Competitive Effects

The Commission's Complaint alleges that the relevant line of commerce is the provision of outpatient dialysis services. Patients receiving dialysis services have end stage renal disease ("ESRD"), a chronic disease characterized by a near total loss of function of the kidneys and fatal if not treated. Many ESRD patients have no alternative to outpatient dialysis treatment because they are not viable home dialysis or transplant candidates (or they are waiting for a transplant for multiple years, during which time they must still receive dialysis treatment). Treatments are usually performed three times per week for sessions lasting between three and four hours. According to the United States Renal Data System, there were over 555,000 ESRD dialysis patients in the United States in 2018.

The Commission's Complaint also alleges that the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition is the greater Provo, Utah area. Specifically, the market is centered on Provo, Utah and extends north to Orem, Utah and south to Payson, Utah. The market is defined by the distance ESRD patients will travel to receive reoccurring treatments. Because ESRD patients are often suffering from multiple health problems and may require assistance traveling to and from the dialysis clinic, patients cannot travel long distances to receive treatment. Accordingly, most patients are unwilling or unable to travel more than 30 minutes or 30 miles for treatment, although travel times and distances may vary by location.

Dialysis providers seek to attract patients by competing on quality of services. To some extent, the providers also compete on price. Although Medicare eventually will cover all ESRD patients' dialysis costs, there is a 30-month transition period where commercially insured patients' costs are covered by their insurers, which compensate the providers at competitively negotiated rates.

In the greater Provo market, there are only three providers: The University (which has three clinics), DaVita (four clinics) and Fresenius Medical Care (one clinic). Therefore, the University and DaVita directly and substantially compete in the relevant market as the two largest providers, and DaVita would own seven of the eight clinics in the region. The Proposed Acquisition would eliminate competition between DaVita and The University in the relevant market for outpatient dialysis services, increasing the ability to unilaterally raise prices to third-party payers and decreasing the incentive to improve the quality of services provided to patients.

III. Entry

Entry into the outpatient dialysis services market in the greater Provo, Utah area would not be likely, timely, or sufficient in magnitude, character, and scope to deter or counteract the

anticompetitive effects of the Proposed Acquisition. The most significant barrier to entry is contracting a nephrologist with an established referral base to serve as the clinic's medical director. The Department of Health and Human Services requires that each dialysis clinic must have a nephrologist as a medical director. Locating a nephrologist is difficult because clinics typically enter into exclusive contractual arrangements with a nephrologist who is paid a medical director fee. Finding patients may also be difficult if the nephrologist does not have local ties, as most nephrologists typically refer their patients to the clinic where they serve as medical director. Moreover, the area itself must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry.

IV. The Agreement Containing Consent Order

Section II of the Proposed Order requires that DaVita divest the three University clinics in the greater Provo market to SRS, including all of the assets necessary for SRS to independently and successfully operate the clinics, which include, among other things, all leases for real property, all medical director contracts, and a license for each clinics' policies and procedures.

Section IV of the Proposed Order requires that DaVita provide transition services to SRS for up to one year, and Section V requires DaVita to provide assistance to SRS in hiring the employees at the divested clinics and to refrain from soliciting those employees for 180 days. In addition, Section V prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist, except to prevent a medical director under a contract with DaVita from simultaneously serving as a medical director at a clinic operated by a competitor. Section V also prohibits DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire.

Section VI of the Proposed Order, along with the Order to Maintain Assets, requires that DaVita take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the divested clinics and their assets. Section VIII provides for the appointment of a Monitor to oversee the divestiture.

Section X of the Proposed Order requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah. With regard to transactions involving clinics in multiple states, such prior approval only applies to the clinics in Utah.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

THE GOLUB CORPORATION, TOPS MARKETS CORPORATION, AND PROJECT P NEWCO HOLDINGS, INC.

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

Docket No. C-4753; File No. 211 0002
Complaint, November 5, 2021 – Decision, January 20, 2022

This consent order addresses the $772 million acquisition by The Golub Corporation of certain assets of Tops Markets Corporation. The complaint alleges that the Merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing a direct and substantial supermarket competitor in New York, Connecticut, Vermont, Massachusetts, New Hampshire, and Pennsylvania. The consent order requires Respondents to divest twelve supermarkets and related assets in eleven local geographic markets in New York and Vermont to C&S Wholesale Grocers.

Participants

For the *Commission*: *Lindsey Bohl, Jeff Dahnke, Guia Dixon, Paul Frangie, Jennifer Lee,* and *Jeanne Nichols.*

For the *Respondents*: *Jamillia Ferris, Michelle Yost Hale,* and *Scott Sher, Wilson Sonsini Goodrich & Rosati; Logan Breed* and *Ashley Howett, Hogan Lovells.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent The Golub Corporation ("Price Chopper"), a corporation subject to the jurisdiction of the Commission, agreed to merge with Respondent Tops Markets Corporation ("Tops"), a corporation subject to the jurisdiction of the Commission, becoming wholly-owned subsidiaries of Respondent Project P Newco Holdings, Inc. ("Holdco"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent The Golub Corporation ("Price Chopper") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York.

2. Respondent Price Chopper owns and operates supermarkets in Connecticut, Massachusetts, New Hampshire, New York, Pennsylvania, and Vermont under the Price Chopper, Market 32, and Market Bistro banners.

3. Respondent Tops is a corporation organized, existing, and doing business under and by virtue of the laws of State of Delaware, with its executive offices and principal place of business located at 1760 Wehrle Drive, Williamsville, New York 14221.

4. Respondent Tops owns and operates a supermarket chain under the Tops banner in New York, Pennsylvania, and Vermont.

5. Respondents Price Chopper and Tops own and operate supermarkets in each of the geographic markets relevant to this Complaint and compete and promote their businesses in these areas.

6. Respondents Price Chopper and Tops will become wholly-owned subsidiaries of Respondent Holdco after the Merger.

II. JURISDICTION

7. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

III. THE MERGER

8. Pursuant to an Agreement and Plan of Merger dated as of February 8, 2021, Price Chopper and Tops intend to combine their businesses through a merger ("the Merger"). The Merger will result in a combined company with nearly 300 supermarkets across six states.

IV. THE RELEVANT PRODUCT MARKET

9. The relevant line of commerce in which to analyze the Merger is the retail sale of food and other grocery products in supermarkets.

10. For purposes of this Complaint, the term "supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids;

pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.

11. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different items, typically referred to as stock-keeping units (SKUs), as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have approximately 10,000 square feet of selling space or more.

12. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets base their food and grocery prices primarily on the prices of food and grocery products sold at other nearby competing supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of retail stores—including convenience stores, specialty food stores, limited assortment stores, hard-discounters, and club stores—and do not typically set or change their food or grocery prices in response to prices at these types of stores.

13. Although retail stores other than supermarkets may also sell food and grocery products, these types of stores do not offer a supermarket's distinct set of products and services that provides consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping at other types of stores, or significantly increase grocery purchases at other types of stores, in response to a small but significant nontransitory price increase by supermarkets. The limited competition from other types of retail stores does not warrant their inclusion in a supermarket product market.

V. THE RELEVANT GEOGRAPHIC MARKETS

14. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers' grocery shopping occurs at stores located very close to where they live.

15. Respondents currently operate supermarkets under the Price Chopper / Market 32 and Tops banners within eight miles or less of each other in each of the relevant geographic markets. The primary trade areas of Respondents' banners in each of the relevant geographic markets overlap significantly.

16. The 11 geographic markets in which to assess the competitive effects of the Merger are localized areas in (1) Cooperstown, New York; (2) Cortland, New York; (3) Lake Placid, New York; (4) Norwich, New York; (5) Oneida, New York; (6) Owego, New York; (7) Plattsburgh, New York; (8) Rome, New York; (9) Rutland, Vermont; (10) Warrensburg, New York; and (11) Watertown, New York.

VI. MARKET CONCENTRATION

17. As seen in Exhibit A, the Merger would reduce the number of meaningful supermarket competitors from two to one in three relevant geographic markets, three to two in four relevant geographic markets, four to three in three relevant geographic markets, and five to four in one relevant geographic market. The Merger will result in highly concentrated markets in each of the eleven relevant geographic markets identified in Paragraph 16.

VII. ENTRY CONDITIONS

18. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the Merger. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for a supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

VIII. EFFECTS OF THE MERGER

19. The Merger, if consummated, is likely to substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic markets identified in Paragraph 16 in the following ways, among others:

a. By eliminating direct and substantial competition between Respondents Price Chopper and Tops;

b. By increasing the likelihood that Respondents Price Chopper and Tops will unilaterally exercise market power; and

c. By increasing the likelihood of, or facilitating, coordinated interaction between the remaining participants.

20. The ultimate effect of the Merger would be to increase the likelihood that the prices of food or groceries will increase, and that the quality and selection of food, groceries, or services will decrease, in the relevant geographic markets.

IX. VIOLATIONS CHARGED

21. The agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and the Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of November 2021, issues its complaint against said Respondents.

By the Commission.

EXHIBIT A

City	State	Merger Result
Cooperstown	**New York**	**2 to 1**
Cortland	**New York**	**4 to 3**
Lake Placid / Saranac Lake	**New York**	**3 to 2**
Norwich	**New York**	**3 to 2**
Oneida / Sherrill	**New York**	**3 to 2**
Owego	**New York**	**2 to 1**
Plattsburgh / Peru	**New York**	**5 to 4**
Rome	**New York**	**4 to 3**
Rutland	**Vermont**	**3 to 2**
Warrensburg	**New York**	**2 to 1**
Watertown	**New York**	**4 to 3**

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed merger of Respondent The Golub Corporation with Respondent Tops Markets Corporation whereby each such entity shall become a subsidiary of Respondent Project P Newco Holdings, Inc. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent The Golub Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308.

2. Respondent Tops Markets Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 1760 Wehrle Drive, Williamsville, New York 14221.

3. Respondent Project P Newco Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308.

4. The Commission has jurisdiction over the subject matter of this proceeding and of the 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 Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

A. "Decision and Order" means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter:

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

II. Asset Maintenance

IT IS FURTHER ORDERED that Respondents shall ensure that the Supermarket Assets relating to each Supermarket Business are operated and maintained in the ordinary course of business consistent with past practices until such assets are fully transferred to the Acquirer, and shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Supermarket Business and related Supermarket Assets, to minimize the risk of any loss of their competitive potential, to operate them in a manner consistent with applicable laws and regulations, and to prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear).

B. Not sell, transfer, encumber, or otherwise impair the Supermarket Business and related Supermarket Assets (other than in the manner prescribed in the Orders) or take any action that lessens their full economic viability, marketability, or competitiveness;

C. Not terminate the operations of the Supermarket Business and related Supermarket Assets, and shall conduct or cause to be conducted the operations of the Supermarket Business and related Supermarket Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, ongoing operations, marketability, and competitiveness of the Supermarket Business and related Supermarket Assets; and

D. Use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Supermarket Business and related Supermarket Assets.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that have been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Supermarket Assets and consistent with the purposes of the Orders.

III. Transitional Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Supermarket Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. At the option of Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the applicable Supermarket Assets to the Acquirer and (2) allow the Acquirer to operate the acquired Supermarket Business and Supermarket Assets in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Merger.

C. Respondents shall provide Transitional Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the applicable Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at no more than Direct Cost; and

3. For a time period sufficient to meet the requirements of this Paragraph, which shall be, at the option of the Acquirer, for up to 12 months after the applicable Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a request for prior approval to extend the term for providing Transitional Assistance as the Acquirer requests in order to achieve the purposes of the Orders.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transitional Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages

(including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents breach of the Divestiture Agreement.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until 90 days after the applicable Divestiture Date, Respondents shall cooperate with and assist the Acquirer of any of the Supermarket Assets to evaluate independently and offer employment to any Supermarket Employee.

B. Until 90 days after the applicable Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide a list of all Supermarket Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to privately interview any of the Supermarket Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Supermarket Employees;

3. Remove any impediments within the control of Respondents that may deter Supermarket Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Supermarket Employee who receives an offer of employment from the Acquirer;

   Provided, however, that nothing in the Orders shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Supermarket Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Supermarket Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Supermarket Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Supermarket Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise

interfere with the recruitment of any Supermarket Employee by the Acquirer.

C. Respondents shall not, for a period of one year following the applicable Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Section IV.

D. Respondent shall not enforce any non-compete provision or non-compete agreement against any individual who seeks or obtains a position with the Supermarket Business or does business with the Supermarket Business.

V. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall not (x) disclose (including to Respondents' employees) or (y) use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Supermarket Assets, Supermarket Business, or post-divestiture Supermarket Business; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under the Orders or a Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Supermarket Assets or Supermarket Business, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph V.A of this Order to Maintain Assets, Respondents shall limit such disclosure or use (1) only to the extent such

information is required, (2) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A, and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Section V and take necessary actions to ensure that their employees and other Persons comply with the terms of this Section V, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI. Consents and Authorizations; Acquirer Due Diligence

IT IS FURTHER ORDERED that Respondents shall:

A. Respondents shall obtain, no later than the applicable Divestiture Date and at their sole expense, all Consents from third parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of the relevant Supermarket Assets to the Acquirer and for the Acquirer to operate any aspect of the relevant Supermarket Business;

Provided, however:

1. Respondents may satisfy the requirement to obtain all Consents from third parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant third party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and

2. With respect to any Governmental Authorization relating to any Supermarket Assets that are not transferable, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the relevant Supermarket Assets under Respondents' Governmental Authorization pending the Acquirer's receipt of its own Governmental Authorization, and Respondents shall provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Authorization.

B. Respondents shall assist each potential Acquirer to conduct a due diligence investigation of the applicable Supermarket Assets and Supermarket Business, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording each Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Governmental Authorizations, Business Information, and other documents and data relating to the applicable Supermarket Business, with such rights of access to be

exercised in a manner that does not unreasonably interfere with the operations of Respondents.

VII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Larry Appel to serve as Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of this Section VII or Section VIII of the Decision and Order ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other

representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule as determined by Commission staff, and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of the Decision and Order, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that

arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VII.B.; or (b) receives Commission approval.

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

VIII. Divestiture Trustee

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 the Supermarket Assets as required by the Decision and Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or

otherwise convey these assets in a manner that satisfies the requirements of the Decision and Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Section shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with the Orders.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Not later than 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 the Decision and Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of the Orders.

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

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

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the

divestitures 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 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 the Decision and 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer that receives the prior approve of the Commission as required by the Decision and Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 the Decision and 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets required to be divested by the Decision and Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

G. 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.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by the Decision and Order.

IX. Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without the prior approval of the Commission, acquire, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Any ownership or leasehold interest in any facility that has operated as a Supermarket in a Relevant Area within 6 months prior to the date of such proposed acquisition; or

B. Any stock, share capital, equity, or other interest in any entity that owns any interest in or operates a Supermarket, or owned any interest in or operated a Supermarket in a Relevant Area within 6 months prior to such proposed acquisition.

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction or opening of new facilities

X. Additional Obligations

IT IS FURTHER ORDERED that Respondents shall neither enter into nor enforce any agreement that restricts the ability of any Person to operate a Supermarket at any location formerly owned or operated by Respondents in a Relevant Area.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Merger Date and of the Divestiture Date of the Supermarket Assets relating to each Supermarket Business no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after Respondents close on a Divestiture Agreement.

B. Respondents shall file verified written reports ("Compliance Reports") in accordance with the following:

1. Respondents shall submit Compliance Reports 30 days after this Order to Maintain Assets is issued and every 30 days thereafter until the Commission issues a Decision and Order in this matter, and additional Compliance Reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Orders. Conclusory

statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Orders.

3. Respondents shall retain all material written communications with each party identified in the Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The proposed dissolution of The Golub Corporation, Tops Markets Corporation, or Project P Newco Holdings, Inc.;

B. The proposed acquisition, merger, or consolidation of The Golub Corporation, Tops Markets Corporation, or Project P Newco Holdings, Inc.; or

C. Any other changes in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such changes may affect compliance obligations arising out of the Orders.

XIII. Access

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with the Orders, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with the Orders, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and

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

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Supermarket Business through its full transfer and delivery to Acquirer; to minimize any risk of loss of competitive potential for the Supermarket Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Supermarket Assets except for ordinary wear and tear.

XV. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed merger of Respondent The Golub Corporation with Respondent Tops Markets Corporation whereby each such entity shall become a subsidiary of Respondent Project P Newco Holdings, Inc. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent The Golub Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308.

2. Respondent Tops Markets Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 1760 Wehrle Drive, Williamsville, New York 14221.

3. Respondent Project P Newco Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308.

4. C&S Wholesale Grocers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Vermont with its executive offices and principal place of business located at 7 Corporate Drive, Keene, New Hampshire 03431.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents and the proceeding is in the public interest.

ORDER

I. Definitions

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

A. "Golub" means The Golub Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by The Golub Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Tops" means Tops Markets Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Tops Markets Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Holdco" means Project P Newco Holdings, Inc., its officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Project P Newco Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "C&S" means C&S Wholesale Grocers, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by C&S Wholesale Grocers, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Respondents" means Golub, Tops, and Holdco collectively.

F. "Acquirer" means:

1. C&S; or

2. Any other person that the Commission approves to acquire any of the Supermarket Assets pursuant to this Order.

G. "Business Information" means books, records, data, and information, wherever located and however stored, including documents, written information, graphic materials, and data and information in electronic format. Business Information includes books, records, data, and information relating to sales, marketing, logistics, products, pricing, promotions, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, vendors, research and development, registrations, licenses, and permits, and operations.

H. "Confidential Information" means all Business Information and knowledge of employees not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

I. "Consent" means an approval, consent, ratification, waiver, or other authorization.

J. "Contract" means an agreement, contract, lease, license agreement, consensual obligation, promise or undertaking with one or more third parties, whether written or oral and whether express or implied, and whether or not legally binding.

K. "Direct Cost" means the cost of labor, goods and materials, travel, and other expenditures. The cost of any labor included in Direct Cost shall not exceed the hours of labor provided times the then-current average hourly wage rate, including benefits, for the employee providing such labor.

L. "Divestiture Agreement" means:

1. The Second Amended and Restated Asset Purchase Agreement by and between GU Markets LLC, as Buyer, Tops Markets, LLC, as Seller with respect to Markets Store Locations and Tops PT, LLC, as Seller with respect to PT Store Locations, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Nonpublic Appendix A; or

2. Any agreement between Respondents (or a Divestiture Trustee appointed pursuant to Section IX of this Order) and an Acquirer to purchase the Supermarket Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

M. "Divestiture Date" means the date on which the assets relating to each Supermarket Business are divested. For example, the Divestiture Date in connection with the divestiture of the assets relating to the Cooperstown Supermarket Business would be the date on which the assets for that specific business are divested.

N. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

O. "Employee Information" means for each Supermarket Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The employee's base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for the last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

P. "Equipment" means all tangible personal property (other than inventories), including all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems, registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, parts, tools, supplies, and all other items of equipment or tangible personal property of any nature, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part, to the extent such warranty is transferrable, and all maintenance records and other related documents.

Q. "Governmental Authorization" means a Consent, license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.

R. "Intellectual Property" means all intellectual property, including: (1) commercial names, all assumed fictional business names, trade names, "doing business as" (d/b/a names), registered and unregistered trademarks, service marks and applications, and trade dress; (2) all patents, patent applications and inventions and discoveries that may be patentable; (3) all registered and unregistered copyrights in both published works and unpublished works; (4) all rights in mask works; (5) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; (6) and all rights in internet web sites and internet domain names presently used.

S. "Merger" means the proposed merger described in the Agreement and Plan of Merger by and among (1) The Golub Corporation, (2) The Golub Stockholders Set Forth in Appendix A Hereto, (3) Tops Markets Corporation, (4) The Tops

Stockholders Set Forth in Appendix B Hereto, (5) Project P Newco Holdings, Inc., (6) TMC Merger Sub, Inc., (7) Pines Merger Sub, Inc., (8) Shareholders Representative Services LLC, Solely in its Capacity as the Tops Stockholders Representative, and (9) Shareholder Representative Services LLC, Solely in its Capacity as the Golub Stockholders Representative, Dated as of February 8, 2021.

T. "Merger Date" means the date the Respondents consummate the Merger.

U. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

V. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.

W. "Relevant Area" means any of these counties in New York: Chenango, Clinton, Cortland, Franklin, Jefferson, Oneida, Otsego, Tioga, or Warren; or Rutland County in Vermont.

X. "Retained Assets" means the assets identified on Exhibit B of this Order.

Y. "Retained Intellectual Property" means any owned or licensed (as licensor or licensee) Intellectual Property (not included in the Retained Assets) relating to both the operation of the Supermarket Business and any other business owned by Tops prior to the Merger.

Z. "Supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.

AA. "Supermarket Assets" means all of Respondents' rights, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, used in, or relating to the Supermarket Business, including:

1. All real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together

with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. All Equipment;

3. At the Acquirer's option, any or all inventories;

4. All accounts receivable;

5. All Intellectual Property;

6. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

7. All Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;

8. All Business Information; and

9. All intangible rights and property, including going concern value, goodwill, and telephone and telecopy listings;

Provided, however, that the Supermarket Assets need not include the (x) Retained Assets or (y) Retained Intellectual Property.

BB. "Supermarket Business" means the Cooperstown Supermarket Business, Cortland Supermarket Business, Norwich Supermarket Business, Owego Supermarket Business, Peru Supermarket Business, Rome Supermarket Business, Rutland Supermarket Business, Saranac Lake Supermarket Business, Sherrill Supermarket Business, Warrensburg Supermarket Business, Watertown Supermarket Business, and Watertown II Supermarket Business defined in Appendix C of this Order.

CC. "Supermarket Employee" means each full-time, part-time, or contract individual employed by Tops whose job responsibilities relate or related to the Supermarket Business at any time after February 8, 2021.

DD. "Transitional Assistance" means services and support as required by the Acquirer to facilitate the transfer of the Supermarket Business and operation of the Supermarket Assets, including services and support related to payroll, employee benefits, accounting, information technology systems, back-office and front-office systems (including inventory and price management), distribution, warehousing, and use of trademarks or trade names for transitional purposes.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Supermarket Assets, as ongoing businesses, absolutely and in good faith, to C&S as follows:

1. The assets relating to at least 2 of the Supermarket Businesses identified on Appendix C no later than January 17, 2022;

2. The assets relating to at least 4 of the Supermarket Businesses identified on Appendix C no later than January 24, 2022;

3. The assets relating to at least 6 of the Supermarket Businesses identified on Appendix C no later than January 31, 2022;

4. The assets relating to at least 8 of the Supermarket Businesses identified on Appendix C no later than February 7, 2022;

5. The assets relating to at least 10 of the Supermarket Businesses identified on Appendix C no later than February 14, 2022; and

6. The assets relating to all of the Supermarket Businesses identified on Appendix C no later than February 21, 2022.

Provided, *however*, that, if within 12 months after issuing the Order, the Commission determines, in consultation with the Acquirer and the Monitor, should one be appointed, that the Acquirer needs one or more Retained Assets to operate any of the Supermarket Assets in a manner that achieves the purposes of the Order, Respondents shall divest, absolutely and in good faith, such needed Retained Assets to the Acquirer; and

Provided further, *however,* that if Business Information relating to any of the Supermarket Assets includes information (1) that also relates to other retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Supermarket Assets or (2) where Respondents have a legal obligation to retain the original copies, then Respondents may provide copies of the Business Information (with redactions as appropriate) and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes;

B. If Respondents have divested any of the Supermarket Assets to C&S 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:

1. C&S is not acceptable as the acquirer of the applicable Supermarket Assets, then Respondents shall rescind the divestiture within 5 days of notification, and shall divest such Supermarket Assets no later than 180 days from the date this Order is issued, as ongoing businesses, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture to C&S was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to modify the manner of divestiture of the Supermarket Assets as the Commission may determine is necessary to satisfy the requirements of this Order.

C. Respondents shall grant a license to the Acquirer under any Retained Intellectual Property that is needed for the Acquirer to operate the Supermarket Business.

D. Respondents shall obtain, no later than the applicable Divestiture Date and at their sole expense, all Consents from third parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of the relevant Supermarket Assets to the Acquirer and for the Acquirer to operate any aspect of the relevant Supermarket Business;

Provided, however:

1. Respondents may satisfy the requirement to obtain all Consents from third parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant third party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and

2. With respect to any Governmental Authorization relating to any Supermarket Assets that are not transferable, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the relevant Supermarket Assets under Respondents' Governmental Authorization pending the Acquirer's receipt of its own Governmental Authorization, and Respondents shall provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Authorization.

E. Respondents shall assist each potential Acquirer to conduct a due diligence investigation of the applicable Supermarket Assets and Supermarket Business, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording each Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts,

Governmental Authorizations, Business Information, and other documents and data relating to the applicable Supermarket Business, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

III. Divestiture Agreement

IT IS FURTHER ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order;

Provided, however, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transitional Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Supermarket Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. At the option of Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the applicable Supermarket Assets to the Acquirer and (2) allow the Acquirer to operate the acquired Supermarket Business and Supermarket Assets in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Merger.

C. Respondents shall provide Transitional Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the applicable Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at no more than Direct Cost; and

3. For a time period sufficient to meet the requirements of this Paragraph, which shall be, at the option of the Acquirer, for up to 12 months after the applicable Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a request for prior approval to extend the term for providing Transitional Assistance as the Acquirer requests in order to achieve the purposes of this Order.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transitional Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents breach of the Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 90 days after the applicable Divestiture Date, Respondents shall cooperate with and assist the Acquirer of any of the Supermarket Assets to evaluate independently and offer employment to any Supermarket Employee.

B. Until 90 days after the applicable Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide a list of all Supermarket Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to privately interview any of the Supermarket Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Supermarket Employees;

3. Remove any impediments within the control of Respondents that may deter Supermarket Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the

Acquirer, and shall not make any counteroffer to a Supermarket Employee who receives an offer of employment from the Acquirer;

Provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Supermarket Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Supermarket Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Supermarket Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Supermarket Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Supermarket Employee by the Acquirer.

C. Respondents shall not, for a period of one year following the applicable Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Section V.

D. Respondent shall not enforce any non-compete provision or non-compete agreement against any individual who seeks or obtains a position with the Supermarket Business or does business with the Supermarket Business.

VI. Asset Maintenance

IT IS FURTHER ORDERED that Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Supermarket Assets relating to each Supermarket

Business are operated and maintained in the ordinary course of business consistent with past practices until such assets are fully transferred to the Acquirer, and shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Supermarket Business and related Supermarket Assets, to minimize the risk of any loss of their competitive potential, to operate them in a manner consistent with applicable laws and regulations, and to prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear).

B. Not sell, transfer, encumber, or otherwise impair the Supermarket Business and related Supermarket Assets (other than in the manner prescribed in this Order and the Order to Maintain Assets) or take any action that lessens their full economic viability, marketability, or competitiveness;

C. Not terminate the operations of the Supermarket Business and related Supermarket Assets, and shall conduct or cause to be conducted the operations of the Supermarket Business and related Supermarket Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, ongoing operations, marketability, and competitiveness of the Supermarket Business and related Supermarket Assets; and

D. Use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Supermarket Business and related Supermarket Assets.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that have been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Supermarket Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall not (x) disclose (including to Respondents' employees) or (y) use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Supermarket Assets, Supermarket Business, or post-divestiture Supermarket Business; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under this Order, the Order to Maintain Assets, or a Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Supermarket Assets or Supermarket Business, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph VII.A of this Order, Respondents shall limit such disclosure or use (1) only to the extent such information is required, (2) only to those employees or Persons who require such information for the purposes permitted under Paragraph VII.A., and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Section VII and take necessary actions to ensure that their employees and other Persons comply with the terms of this Section VII, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Larry Appel to serve as Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of this Section VIII or Section __ of the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of this Order in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in this Order, Respondents and the Monitor shall comply with this Order.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in this Order;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with this Order on a schedule as determined by Commission staff, and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of this Order, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under this Order, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities;

and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to this Order;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under this Order, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to this Order; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under this Order, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with this Order.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of this Order. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission

of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B.; or (b) receives Commission approval.

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

IX. Divestiture Trustee

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 the Supermarket Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Section shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Not later than 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. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

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

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

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer that receives the prior approve of the Commission as required by this Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

G. 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.

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

X. Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without the prior approval of the Commission, acquire, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Any ownership or leasehold interest in any facility that has operated as a Supermarket in a Relevant Area within 6 months prior to the date of such proposed acquisition; or

B. Any stock, share capital, equity, or other interest in any entity that owns any interest in or operates a Supermarket, or owned any interest in or operated a Supermarket in a Relevant Area within 6 months prior to such proposed acquisition.

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction or opening of new facilities.

XI. Additional Obligations

IT IS FURTHER ORDERED that Respondents shall neither enter into nor enforce any agreement that restricts the ability of any Person to operate a Supermarket at any location formerly owned or operated by Respondents in a Relevant Area.

XII. Acquirer

IT IS FURTHER ORDERED that:

A. For a period of:

1. 3 years after the Divestiture Date, C&S or any other Acquirer shall not sell, license, or otherwise convey, through subsidiaries or otherwise, without the prior approval of the Commission, any Supermarket that was divested pursuant to Section II to any Person; and

2. 7 years after the term of Paragraph XII.A.1. ends, C&S or any other Acquirer shall not sell, license, or convey, through subsidiaries or otherwise, without the prior approval of the Commission, a Supermarket that was divested pursuant to Section II to any Person who owns, or within 6 months prior to such sale date, owned, directly, or indirectly, through subsidiaries or otherwise, a leasehold, ownership interest, or any other interest in whole or in part, in a Supermarket located in the same Relevant Area as the divested Supermarket;

Provided, however, C&S is not required to obtain prior approval of the Commission under this Paragraph XII.A. for a change of control, merger, reorganization, or sale of all or substantially all of its business.

B. C&S shall neither enter into nor enforce any agreement that restricts the ability of any Person to operate a Supermarket at any location formerly owned or operated by C&S in a Relevant Area.

XIII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Merger Date and of the Divestiture Date of the Supermarket Assets relating to each Supermarket Business no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after Respondents close on a Divestiture Agreement.

B. Respondents shall file verified written reports ("Compliance Reports") in accordance with the following:

1. Respondents shall submit:

   a. Interim Compliance Reports 30 days after this Order is issued and every 30 days thereafter until Respondents have fully complied with the provisions of Sections II and IV of this Order;

   b. Annual Compliance Reports one year after the date this Order is issued and annually thereafter for the next nine years on the anniversary of that date; and

   c. Additional Compliance Reports as the Commission or its staff may request.

2. Each Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of this Order.

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in each Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under this Order during the period covered by such Compliance Report. Respondents shall provide copies of these documents to Commission staff upon request.

C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XIV. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The proposed dissolution of The Golub Corporation, Tops Markets Corporation, or Project P Newco Holdings, Inc.;

B. The proposed acquisition, merger, or consolidation of The Golub Corporation, Tops Markets Corporation, or Project P Newco Holdings, Inc.; or

C. Any other changes in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such changes may affect compliance obligations arising out of the Order.

XV. Access

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and

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

XVI. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and to ensure the Acquirer can operate the Supermarket Business in a manner equivalent in all material respects to the manner in which Respondents operated the Supermarket Business prior to the Merger.

XVII. Term

IT IS FURTHER ORDERED that this Order shall terminate on January 20, 2032.

By the Commission.

Nonpublic Appendix A

Divestiture Agreement

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

Appendix B

Retained Assets

- Corporate or regional offices
- Cash, cash equivalents, accounts, notes receivable, except for till cash
- Inventory as agreed between Respondents and the Acquirer
- Assets not stored at a location of a Supermarket Business or not used exclusively in the Supermarket Busines, including, without limitation, any and all of Respondent Tops' Medicare, Medicaid and other provider or supplier numbers and registrations that are not exclusive and unique to pharmacy and which are being, or could be used by Respondent Tops' pharmacies not subject to the merger agreement with Acquirer
- All contracts as agreed between Respondents and the Acquirer
- All trade names and trademarks used corporate-wide, and website content, domain names, or e-mail addresses that contain such trade names or trademarks
- Proprietary software, security codes located on any hardware of Respondent Tops or associated with any computer systems, network systems, point of sale (POS) systems, and any other software systems of Respondent Tops

- Signage, banners, display, and other assets containing, displaying or otherwise bearing any of Respondent Tops' intellectual property
- Minute books and organizational documents and financial and business records relating to the retained business operations of Respondent Tops
- Equity securities of Respondent Tops
- Rights under the documents and agreement governing the Merger
- Motor vehicles, including trucks and trailers
- Leased equipment and vendor-owned equipment as agreed between Respondents and the Acquirer
- Parcel pick-up equipment
- Tax returns of Respondent Tops and other documents related to Respondent Tops' taxes
- Tax assets or attributes of Respondent Tops, including tax refunds and prepayments
- Refunds and rebates owed to Respondent Tops

Appendix C

State	City	Business	Store Number	Description
NY	Cooperstown (Otsego County)	Cooperstown Supermarket Business	Tops 568	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 5 Commons Drive, Rt. 28 Cooperstown, New York 13326.

State	City	Business	Store Number	Description
NY	Cortland (Cortland County)	Cortland Supermarket Business	Tops 517	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 3932 State Route 281, Cortland, New York 13045.
NY	Norwich (Chenango County)	Norwich Supermarket Business	Tops 569	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 54 East Main Street, Norwich, New York 13815.
NY	Owego (Tioga County)	Owego Supermarket Business	Tops 579	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 1145 Rt. 17-C, Owego, New York 13827.
NY	Peru (Clinton County)	Peru Supermarket Business	Tops 713	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 2 Gorman Way, Suite #1, Peru, New York 12972.
NY	Rome (Oneida County)	Rome Supermarket Business	Tops 587	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 217 Erie Boulevard West, Rome, New York 13440.
NY	Saranac Lake (Franklin County)	Saranac Lake Supermarket Business	Tops 707	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 156 Church Street, Saranac Lake, New York 12983.

State	City	Business	Store Number	Description
NY	Sherrill (Oneida County)	Oneida Supermarket Business	Tops 364	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 87 East State Street, Sherrill, New York 13461.
NY	Warrensburg (Warren County)	Warrensburg Supermarket Business	Tops 701	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 3836 Main Street, Warrensburg, New York 12885.
NY	Watertown (Jefferson County)	Watertown Supermarket Business	Tops 589	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 22050 Seaway Shopping Center, Watertown, New York 13601.
NY	Watertown (Jefferson County)	Watertown II Supermarket Business	Tops 597	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 1330 Washington Street, Watertown, New York 13601.
VT	Rutland (Rutland County)	Rutland Supermarket Business	Tops 740	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 14 N. Main Street, Rutland, Vermont 05701.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from The Golub Corporation, which operates Price Chopper, Market 32, and Market Bistro stores (collectively, "Golub") and Tops Markets Corporation ("Tops") (collectively, the "Respondents"). Pursuant to an Agreement and Plan of Merger dated February 8, 2021, Golub and Tops intend to combine their businesses through a merger ("the Merger"). The Merger will result in a combined company with nearly 300 supermarkets across six states. The purpose of the Consent Agreement is to remedy the anticompetitive effects that otherwise would result from the Merger. Under the terms of the proposed Decision and Order ("Order"), Respondents are required to divest twelve supermarkets and related assets in eleven local geographic markets (collectively, the "relevant markets") in New York and Vermont to a Commission-approved buyer, C&S Wholesale Grocers ("C&S"). The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture store in the normal course of business through the date the store is ultimately divested to C&S. The Commission also issued the Order to Maintain Assets.

The Commission's Complaint alleges that the Merger, 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, by removing a direct and substantial supermarket competitor in each of the eleven relevant markets. The elimination of this competition would result in significant competitive harm; specifically, absent a remedy, the Merger would allow the merged firm to increase prices above competitive levels, unilaterally or through coordinated interaction among the remaining market participants. Similarly, there is significant risk that the merged firm may decrease quality and service aspects of its stores below competitive levels. The proposed Order would remedy the alleged violations by requiring divestitures to replace competition that otherwise would be lost in the relevant markets because of the Merger.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or finalize the proposed Order.

II. THE RESPONDENTS

Respondent Golub owns and operates 131 grocery stores under the Price Chopper, Market 32, and Market Bistro banners. The Golub stores are located in New York, Connecticut, Vermont, Massachusetts, New Hampshire, and Pennsylvania.

Respondent Tops owns and operates a supermarket chain with 162 stores under the Tops banner in New York, Pennsylvania, and Vermont.

III. RETAIL SALE OF FOOD AND OTHER GROCERY PRODUCTS IN SUPERMARKETS

The Merger presents substantial antitrust concerns for the retail sale of food and other grocery products in supermarkets. Supermarkets are traditional full-line retail grocery stores that sell food and non-food products that customers regularly consume at home—including, but not limited to, fresh produce and meat, dairy products, frozen foods, beverages, bakery goods, dry groceries, household products, detergents, and health and beauty products. Supermarkets also provide service options that enhance the shopping experience, including deli, butcher, seafood, bakery, and floral counters. This broad set of products and services provides consumers with a "one-stop shopping" experience by enabling them to shop in a single store for all of their food and grocery needs. The ability to offer consumers one-stop shopping is the critical difference between supermarkets and other food retailers.

The relevant product market includes supermarkets within "hypermarkets" such as Walmart Supercenters. Hypermarkets also sell an array of products not found in traditional supermarkets. Like conventional supermarkets, however, hypermarkets contain bakeries, delis, dairy, produce, fresh meat, and sufficient product offerings to enable customers to purchase all of their weekly grocery requirements in a single shopping visit.

Other types of retailers, such as hard discounters, limited assortment stores, natural and organic markets, ethnic specialty stores, and club stores, also sell food and grocery items. These types of retailers are not in the relevant product market because they offer a more limited range of products and services than supermarkets and because they appeal to a distinct customer type. Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets.[1] Consistent with prior Commission precedent, the Commission has excluded these other types of retailers from the relevant product market.[2]

The relevant geographic markets in which to analyze the effects of the Merger are localized areas in which Respondents' supermarkets compete. Most of Respondents' overlapping supermarkets raising concerns are within approximately eight miles or less of each other. The contours of the relevant geographic markets depend on factors such as population density, traffic

1 That is, supermarket shoppers would be unlikely to switch to one of these other types of retailers in response to a small but significant nontransitory increase in price or "SSNIP" by a hypothetical supermarket monopolist. See U.S. DOJ and FTC Horizontal Merger Guidelines § 4.1.1 (2010).

2 See, e.g., Koninklijke Ahold N.V./ Delhaize Group, Docket C-4588 (Jul. 22, 2016); Cerberus Institutional Partners, L.P./Safeway, Inc., Docket C-4504 (Jul. 2, 2015); Bi-Lo Holdings, LLC/Delhaize America, LLC, Docket C-4440 (Feb. 25, 2014); AB Acquisition, LLC, Docket C-4424 (Dec. 23, 2013); Koninklijke Ahold N.V./Safeway Inc., Docket C-4367 (Aug. 17, 2012); Shaw's/Star Markets, Docket C-3934 (Jun. 28, 1999); Kroger/Fred Meyer, Docket C-3917 (Jan. 10, 2000); Albertson's/American Stores, Docket C–3986 (Jun. 22, 1999); Ahold/Giant, Docket C-3861 (Apr. 5, 1999); Albertson's/Buttrey, Docket C-3838 (Dec. 8, 1998); Jitney-Jungle Stores of America, Inc., Docket C-3784 (Jan. 30, 1998). But see Wal-Mart/Supermercados Amigo, Docket C-4066 (Nov. 21, 2002) (the Commission's complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

patterns, and other specific characteristics of each market. Where the Respondents' supermarkets are located in rural areas, the relevant geographic areas are larger than areas where Respondents' supermarkets are located in more densely populated cities.

Absent relief, of the eleven geographic markets, the Merger would result in a merger-to-monopoly in three markets and a merger-to-duopoly in four markets. In the remaining markets, the Merger would reduce the number of market participants from four to three in three markets and from five to four in one market.[3] Each relevant market would be highly concentrated following the Merger.

The Merger would also eliminate substantial competition between Golub and Tops and would increase the ability and incentive of the combined company to raise prices unilaterally after the Merger. The fact that few supermarket competitors will remain in each of these areas also increases the likelihood of competitive harm through coordinated interaction. The Merger would also decrease incentives to compete on non-price factors, such as service levels, convenience, and quality.

New entry or expansion in the relevant markets is unlikely to deter or counteract the anticompetitive effects of the Merger. Even if a prospective entrant existed, the entrant must secure an economically-viable location, obtain the necessary permits and governmental approvals, build its retail establishment or renovate an existing building, and open to customers before it could begin operating and serve as a relevant competitive constraint. As a result, new entry sufficient to achieve a significant market impact and act as a competitive constraint is unlikely to occur in a timely manner.

IV. THE PROPOSED ORDER AND THE ORDER TO MAINTAIN ASSETS

The proposed Order and the Order to Maintain Assets remedy the likely anticompetitive effects in the relevant markets. The proposed Order, which requires the divestiture of Tops supermarkets in each relevant market to a Commission-approved upfront buyer, C&S, will restore fully the competition that otherwise would be eliminated in these markets as a result of the Merger.

The proposed buyer appears to be a suitable purchaser that is well-positioned to enter the relevant markets through the divested stores and prevent the increase in market concentration and likely competitive harm that otherwise would have resulted from the Merger. The supermarkets currently owned by C&S are all located outside the relevant geographic markets in which it is purchasing divested stores.

C&S is the largest private wholesale grocery supply company and is the eleventh largest company in America. C&S has owned and operated retail stores in the past, including in certain of the relevant markets. C&S recently expanded its retail operations with the acquisition of eleven Piggly Wiggly Midwest retail stores, and hired a former retail grocery executive with significant retail experience to lead retail efforts. C&S has sufficient financing to fund the acquisition and

3 See Exhibit A.

operate the business. C&S also has sufficient distribution and supply capabilities through its wholesale business, which can efficiently supply the twelve stores.

The proposed Order requires Respondents to divest the twelve Tops stores and related assets as ongoing businesses to C&S on a rolling basis, beginning by January 17, 2022, and continuing (two stores per week) for six weeks. The proposed Order also contains additional provisions designed to ensure the adequacy of the proposed relief. For example, the proposed Order and the Order to Maintain Assets require Respondents to continue operating and maintaining the divestiture stores in the normal course of business until the date that each store is sold to C&S. If, at the time before the proposed Order is made final, the Commission determines that C&S is not an acceptable buyer, Respondents must rescind the divestiture(s) and divest the assets to a different buyer that receives the Commission's prior approval. The proposed Order imposes other terms, including the obligation to provide Transition Assistance to C&S as may be needed, an obligation to facilitate C&S's interviewing and hiring of employees, and the appointment of a Monitor to oversee the Respondents' compliance with the requirements of the proposed Order and Order to Maintain Assets. The proposed Order requires the Respondents to receive the Commission's prior approval, for a period of ten years, to acquire any interest in a supermarket that has operated or is operating in the counties in which the relevant markets are located. Finally, the proposed Order also prohibits the Respondents from entering into or enforcing agreements to restrict a new owner from operating a supermarket at any store Respondents may sell in these areas.

The proposed Order also contains a ten-year prior approval provision relating to C&S, which prohibits C&S from selling acquired stores for a period of three years after the Order is issued, except to an acquirer that receives the prior approval of the Commission. The initial three-year period is followed by an additional seven-year period during which C&S is required to receive prior approval from the Commission to sell an acquired store to a buyer that operates one or more supermarkets in the same county. Similar to the prohibition on Respondents, the proposed Order also prohibits C&S from entering into or enforcing certain restrictive covenants in any of relevant markets for the duration of the Order.

* * *

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.

Complaint

IN THE MATTER OF

NVIDIA CORPORATION, SOFTBANK GROUP CORPORATION, AND ARM, LTD.

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9404; File No. 211 0015
Complaint, December 2, 2021 – Decision, February 11, 2022

This case addresses the $40 billion acquisition by Nvidia Corporation of certain assets of Arm, Ltd. The complaint alleges that the merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by significantly reducing competition in the markets for DPU SmartNICs, High-Level Automotive ADAS Central Compute SoCs, and Arm-Based Datacenter CPUs for Cloud Computing Service Providers. The order dismisses the Complaint because Respondents terminated their share purchase agreement and that Nvidia has withdrew its Hart-Scott-Rodino Notification and Report Forms for the proposed transaction.

Participants

For the *Commission*: *Cem Akleman, Taylor Alexander, Amanda Butler, Maria Cirincione, Michael Franchak, Joshua Goodman, Kelly Horne, Sean Hughto, Merrick Pastore, Blake Risenmay, Lisa Rothfarb, Lily Rudy, Stephen Santulli, Aylin Skroejer,* and *Heidi Smucker.*

For the *Respondents*: *Joshua Holian, Latham & Watkins LLP; Jeff Jaeckel, Morrison & Forrester LLP; Logan Breed, Hogan Lovells US LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Nvidia Corporation ("Nvidia"), Softbank Group Corporation ("Softbank"), and Arm Ltd. ("Arm") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

NATURE OF THE CASE

1. Nvidia is one of the world's largest and most valuable computing companies. Nvidia proposes to acquire Arm, the world's largest and most significant licensor of designs and architectures for computer processors, in a deal valued at more than $40 billion (the "Proposed Acquisition"). If consummated, the Proposed Acquisition would allow the combined firm to use

its control of Arm to harm Nvidia's rivals in ways that substantially lessen competition— including innovation, price, and feature competition—in multiple markets.

2. Arm develops and licenses central processing unit ("CPU") designs and architectures ("Arm Processor Technology"). Arm Processor Technology consists of specific designs for CPUs that Arm develops and licenses to others and a CPU instruction set architecture that Arm licenses to others who want to develop their own specific CPU designs. As part of the Arm Processor Technology business, Arm also provides customers with corresponding services, support, and ancillary products. Through the combination of its advanced technology and neutral licensing business model, Arm has become a de facto industry standard for CPU processor technology contained in billions of computer chips worldwide. According to Nvidia's CEO, Arm is "the world's most popular computing platform."

3. Arm Processor Technology is at the foundation of many innovative products of our modern digital age, including nearly every smartphone on the market, advanced driver assistance features in recent and upcoming cars, web servers that can provide significantly better cost performance over the most comparable non-Arm servers, and many other examples. In these products, Arm Processor Technology is a critical input. The wide deployment of Arm's Processor Technology has fostered a vibrant ecosystem of software and hardware developers, software, and devices.

4. Arm does not make or sell computer chips ("chips") or chip-based devices. Rather, Arm licenses Arm Processor Technology, also referred to in the industry as CPU intellectual property or "IP," using an industry-described neutral, open licensing approach. Arm is often dubbed the "Switzerland" of the semiconductor industry for this approach. Arm partners with its licensees to promote and support Arm's technologies, even as those partners compete with each other to sell chips and devices relying on Arm Processor Technology in downstream markets (the "Downstream Markets"). Arm's partnerships with its licensees regularly result in Arm receiving sensitive business information from its licensees. The fact that Arm does not itself compete in the Downstream Markets gives its partners a high level of trust in Arm as a critical input supplier that will not exploit its control over those inputs to gain a competitive advantage against its partners.

5. Unlike Arm, Nvidia supplies and markets finished chips and devices. Nvidia is best known as the dominant supplier of standalone graphics processing units ("GPUs") for personal computers ("PCs") and datacenters, which are computing facilities with large numbers of server computers. GPUs are widely used for artificial intelligence ("AI") processing and graphics processing, among other computational tasks.

6. For years, Nvidia has licensed Arm's Processor Technology to create a wide range of computing products, many of which compete with products of other Arm licensees. For example, Nvidia and its competitors alike use Arm Processor Technology to create chips for advanced driver assistance systems for passenger cars. Nvidia and other companies also develop additional categories of Arm-based products, including advanced networking products and datacenter CPUs, among other products. While Nvidia's designs for standalone GPUs do not incorporate Arm Processor Technology, Nvidia integrates or plans to integrate its GPU technology

with Arm Processor Technology in certain products, such as its chips for advanced driver assistance systems for passenger cars.

7. The Proposed Acquisition will substantially lessen competition in multiple markets because it will create a combined firm that has both the ability and the incentive to use its control of Arm to diminish competition by undermining Nvidia's rivals.

8. Post-Acquisition, Nvidia will have the ability to disadvantage its rivals through its control of Arm through various mechanisms, including by manipulating levers such as Arm's pricing, the terms and timing of access to Arm's Processor Technology (including withholding or delaying access), Arm's technological developments and features, and Arm's provision of service and support, among other mechanisms.

9. Post-Acquisition, Nvidia will have strong incentives to harm its Arm-reliant rivals. In markets in which Nvidia competes using Arm Processor Technology, the profits on additional sales that Nvidia would earn as a chip supplier are generally higher than the profits that Arm would earn from licensing its Processor Technology to Nvidia's rivals. Here, this relationship gives Nvidia a strong economic incentive to preference winning business for its own downstream products over licensing Arm Processor Technology or providing the same level of support, access, and investment to its own rivals after the Proposed Acquisition.

10. In addition to the harm Nvidia can directly inflict on its rivals, aligning Arm with Nvidia will likely result in further harms due to a critical loss of trust in Arm by its own licensees, and overall investment and innovation in the Arm ecosystem will likely be reduced. Today, for example, Arm's licensees—including Nvidia's rivals—share competitively sensitive information with Arm. Recognizing that Nvidia would be able to misuse this information for Nvidia's own competitive purposes, Nvidia's rivals will be less likely to share competitively sensitive information with Arm if the Proposed Acquisition closes. Innovation and other procompetitive actions that otherwise would have occurred through the open sharing of information with Arm will be chilled.

11. The Proposed Acquisition also will likely further harm innovation because, today, Arm regularly receives innovative ideas from its licensees across the semiconductor industry and pursues new technological developments that it believes will yield the most benefit to its business. But Nvidia would be less likely to dedicate Arm's resources toward otherwise beneficial innovative developments of Arm Processor Technology that would harm Nvidia.

12. These effects are likely to be felt throughout the computing industry. Among the markets affected, the Proposed Acquisition is likely to substantially lessen competition in key emerging and quickly-developing markets for products used in datacenters, including for networking and central processing, and in advanced driver assistance systems that are increasingly used in the automotive industry.

JURISDICTION

13. Respondents Nvidia, Arm, and Softbank are each "corporations" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

14. Respondents are engaged in activities in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

15. The Proposed Acquisition constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

RESPONDENTS AND THE PROPOSED ACQUISITION

16. Respondent Nvidia is a publicly-traded Delaware corporation, headquartered in Santa Clara, California, and founded in 1993. Its total revenues in the fiscal year ended January 31, 2021 were $16.68 billion. Nvidia develops and markets microprocessor products and associated software. Nvidia is the leading global supplier of standalone GPUs and has consistently maintained its position as the dominant supplier of such products. Nvidia also develops and markets chips, devices, and associated software for other applications, including advanced networking products, advanced driver assistance systems, datacenter CPUs, and other product lines.

17. Respondent Arm is a corporation, headquartered in Cambridge, United Kingdom, and founded in 1990. Arm's total revenues in 2020 were $1.86 billion. Arm is currently owned by SoftBank, which acquired Arm in 2016. Arm develops semiconductor processor technology, licenses it to chip designers, and provides related service and support. Arm describes itself as [redacted] As of January 2020, Arm had over [redacted] licensees.

18. Respondent Softbank is a corporation, headquartered in Tokyo, Japan, and established in 1986. Softbank owns Arm. Softbank operates as a strategic investment holding company, aiming to invest in "a diverse group of companies with outstanding technologies or business models in their respective fields." As of March 31, 2021, Softbank counted 335 subsidiaries and affiliates among its group companies. Softbank's net sales in fiscal year 2020 were 5,204.4 billion yen (approximately $47 billion). Softbank began exploring the sale of Arm in [redacted]. In June 2020, Arm's CEO described the company in an email to a Softbank board member as [redacted]

19. Ultimately, Softbank and affiliated entities entered into a Share Purchase Agreement to sell Arm to Nvidia on September 13, 2020. The deal was valued at $40 billion at signing. Due to increases in the value of Nvidia's stock since then, it is now valued at over $50 billion.

20. Before the merging parties entered into the Share Purchase Agreement, the merging parties and industry analysts recognized that the Proposed Acquisition was likely to face significant antitrust scrutiny. In recognition of this problem, Nvidia agreed to pay Arm's owner, Softbank, a $1.25 billion fee if the transaction terminates after a failure to obtain antitrust approvals.

BACKGROUND

21. This case is about Nvidia's proposed takeover of Arm. Arm Processor Technology is incorporated in billions of chips and devices sold today—including products from Nvidia's competitors as well as Nvidia itself. If the Proposed Acquisition were allowed to proceed, Nvidia would gain control of Arm's Processor Technology, a critical input that currently enables these competitors to compete vigorously with Nvidia. Nvidia will have the ability and incentive to use its control of Arm's Processor Technology to undermine its competitors, reducing competition and ultimately resulting in reduced product quality, reduced innovation, higher prices, and less choice, harming the millions of Americans who benefit from products that incorporate Arm's Processor Technology.

I. Arm and Its Neutral Licensing Model

22. Arm licenses Arm Processor Technology to more than a thousand licensees. These range from innovative startups who have yet to make their first sale to large, established technology companies. Many of Arm's licensees, including Nvidia, are "fabless" semiconductor companies. This means that they design and market computer chips (or products containing chips) but outsource the physical manufacturing of these chips to specialized manufacturers.

23. Arm achieved its status as a foundational technology for so many innovative products because of its neutral licensing business model that fosters trust, collaboration, and engagement between Arm and its licensees. As Arm's longtime chief architect has explained, [redacted].

24. Arm's licensing model is based on upfront license fees and royalties. Arm offers two basic categories of technology licenses: architectural licenses and implementation licenses. Architectural licenses grant holders the right to create their own Arm-based CPU designs using Arm's instruction set architecture ("ISA"). Implementation licenses grant holders the right to use Arm's own specific CPU designs in their products. Arm's business model is based on its current commercial incentives and has contributed substantially to the growth, innovation, and success of Arm and the Arm ecosystem.

25. Arm typically profits when its licensees sell more units. Thus, Arm has an incentive to expand the usage of Arm Processor Technology under its royalty-based model. Arm therefore devotes considerable effort to enabling its licensees to succeed. According to Arm's president, [redacted]

26. Arm actively solicits input from its licensees for enhancing Arm's ISA and implementation designs. Arm also collaborates with licensees on the development of major features. Licensees regularly suggest new features to Arm, expecting that if Arm agrees to implement their suggestion, Arm will incorporate the feature in a manner that permits the new feature's proponent to benefit, while also generally making the improvement available to other licensees. This joint innovation and research and development benefits the computing industry and, ultimately, consumers.

27. Licensees routinely share confidential and commercially sensitive information with Arm when collaborating. Licensees share information such as strategic plans, project timelines and development schedules, manufacturing process plans, use cases, customer requirements, and product bugs or challenges. This type of information sharing depends on trust, enables licensees to bring better products to market faster, and is critical to Arm's success and history of innovation.

28. Arm also collaborates and works with licensees to develop, produce, troubleshoot, and implement the licensees' Arm-based products. For instance, Arm may advise licensees that a particular technical decision is unlikely to succeed, thereby steering the licensee away from a costly error. Arm also helps its licensees by explaining aspects of the Arm architecture and resolving technical difficulties.

29. In tandem with collaborating with licensees on product innovation and development, Arm also dedicates time, effort, and resources to promoting the adoption of Arm-based products in Downstream Markets that include multiple licensees' products. Arm interacts with its licensees' customers to understand their markets, explain Arm's capabilities and benefits, and help sell licensees' products. Arm's actions to promote its licensees' Arm-based products today involve supporting and promoting the products of multiple licensees who themselves are competitors.

II. Computer Processors

30. There are different types of computer processors. According to Nvidia, three of the most important are central processing units ("CPUs"), graphics processing units ("GPUs"), and data processing units ("DPUs"). Nvidia's CEO has described the CPU, GPU, and DPU as "the three most important," "central," "fundamental" technologies in a computer.

31. CPUs are processors that execute the primary computing instructions for electronic computing devices such as laptops, smartphones, datacenter servers, and chips supporting advanced driver assistance features in a passenger vehicle. When one or more CPUs are combined on a single chip with additional circuitry for performing other functions of a computer system, such as memory or co-processors, the resulting chip is sometimes termed a "system-on-a-chip" or "SoC." CPUs may consist of one or more CPU "cores," which are the individual processing units within a CPU chip. Multiple cores may be combined into one multi- core "CPU" chip or SoC. At times, however, the terms "cores" and "CPUs" are used interchangeably in the industry.

32. CPUs are based on an instruction set architecture ("ISA"). CPU ISAs include the Arm ISA, the x86 ISA, the RISC-V ISA, and the MIPS ISA, among others.

33. Software written for use by CPUs based on one ISA is generally not natively compatible with CPUs based on a different ISA. Each ISA has its own ecosystem of associated and natively compatible software, hardware, developers, and users. An ecosystem is generally more attractive if it has more software, hardware, developers, and users for any given computing market.

34. The x86 ISA has predominantly been deployed in CPUs for laptops, desktops, and servers. Intel created the x86 ISA, and Intel and AMD are the only two suppliers of x86 CPUs. Historically, the x86 ISA has not been licensable, and Intel and AMD have designed and marketed their own chips based on the x86 ISA. In 2021, Intel indicated that it planned to make some x86 technology available for license by customers of its chip manufacturing plants under certain circumstances. [redacted] involves limitations, including the apparent requirement to use Intel manufacturing plants and relying on a potentially competing chip supplier, Intel, for a critical input.

35. RISC-V is a free, open-source ISA that researchers at the University of California, Berkeley first developed. RISC-V was released to the public in 2011. Development of the RISC-V ISA is managed by a nonprofit foundation. The RISC-V ISA has predominantly been deployed in less complex applications, such as for low-end, embedded processors that do not run external software applications—for instance, processors found in relatively simple 'Internet of Things' devices like 'smart' doorbells or other 'smart' appliances. Many Arm licensees view the RISC-V technology and software ecosystem as inferior to Arm Processor Technology and the Arm ecosystem for many applications.

36. MIPS is an ISA that MIPS Computer Systems developed and that Wave Computing owns today. The MIPS architecture is declining in relevance and Wave Computing has announced that it will no longer develop MIPS in the future.

37. CPUs based on the Arm ISA are found in billions of chips worldwide, making Arm "the world's most popular computing platform" and [redacted] according to Nvidia. Arm-based CPUs, which are known in particular for their low power consumption, are found in the vast majority of smartphones, tablets, and other low- powered computing devices.

38. Arm-based CPUs also are increasingly found in laptop and desktop personal computers (PCs), and in datacenter servers. For example, in 2020, Apple began switching its entire line of Mac laptops and desktops from Intel x86 CPUs to an Arm-based SoC that Apple designed (called the "M1"). When Apple launched the M1, it emphasized its high performance and low power consumption, describing it as "the world's best CPU performance per watt," enabling significant computing performance increases "all while enabling battery life up to 2x longer than previous-generation Macs." Arm-based CPUs from chip suppliers such as MediaTek and Qualcomm are also deployed in laptops, and [redacted]. Similarly, large cloud service providers, such as [redacted] are now deploying or planning to deploy Arm- based

CPUs in datacenter servers. Because cloud datacenters often consume large amounts of electricity, the lower power consumption of Arm-based CPUs is seen as particularly attractive.

39. Most of the chip suppliers competing to supply SoCs for high-level automotive advanced driver assistance systems (ADAS) use Arm-based chip designs, including Nvidia. High-Level ADAS systems for passenger vehicles offer computer-assisted driving functions, such as automated lane changing, lane keeping, highway entrance and exit, and collision prevention, as discussed below.

40. Some computing devices also contain one or more GPUs to assist in certain tasks. As the name suggests, GPUs were originally developed to perform specific graphics tasks in applications such as video games. However, because GPUs excel more generally at parallel processing tasks, GPUs are now deployed in many other applications including in datacenters for accelerating tasks like machine learning algorithms (a type of artificial intelligence processing). Nvidia also integrates or plans to integrate its GPUs into other devices, such as its ADAS SoCs. GPUs do not run on their own without a host CPU. Nvidia anticipates GPUs to be central in "modern AI — the next era of computing — with the GPU acting as the brain of computers, robots and self-driving cars that can perceive and understand the world."

41. DPUs or DPU SmartNICs (also referred to as infrastructure processing units ("IPUs")) are an important emerging category of networking devices designed for datacenters and other networked environments. As Nvidia describes it, "The DPU places a 'computer in front of the computer' for each server, delivering separate, secure infrastructure provisioning that is isolated from the server's application domain." More specifically, a DPU is a network interface device that incorporates software-programmable CPU cores for offloading and isolating networking, security, virtualization, and other datacenter support tasks from the server's main (or "host") CPU. By isolating these tasks away from the host CPU, DPUs provide added security and free up the host CPU to focus on running users' desired applications, rather than datacenter infrastructure functions. Nvidia, in its internal documents, refers to DPUs as one of the "three pillars" or the "holy trinity" of computing, along with CPUs and GPUs, and Nvidia believes that eventually every server will incorporate a DPU. Nvidia's DPUs rely on Arm Processor Technology, as do those of most other competitors.

III. Nvidia and Its Arm-Based Products Today

42. Nvidia is one of the largest and most valuable chip suppliers in the world. Nvidia competes in a wide range of computing markets today and expects to compete in more markets in the future.

43. Nvidia has been an Arm licensee for many years. During that time, Nvidia has successfully developed and sold chips that incorporate Arm-based designs that Nvidia developed itself using an architectural license from Arm as well as chips that incorporate Arm-based designs that Nvidia obtained from Arm via implementation licenses.

44. Nvidia can already receive the benefits of Arm Processor Technology without acquiring Arm. Nvidia has invested in the Arm ecosystem over many years and continually

developed innovative, cutting-edge products by combining Arm Processor Technology with Nvidia's proprietary technology. For example:

a. Nvidia's Orin product is an Arm-based SoC for High-Level advanced driver assistance systems (ADAS) that is "the new mega brain of the software-defined vehicle," capable of "power[ing] all the intelligent computing functions inside vehicles."

b. Nvidia's Grace product is an Arm-based CPU that Nvidia views as the "basic building block of the modern data center." According to Nvidia, this product is capable of "deliver[ing] 10x the performance of today's fastest servers on the most complex AI and high performance computing workloads."

c. Nvidia's Bluefield-3 product is an Arm-based DPU SmartNIC that "delivers the most powerful software-defined networking, storage and cybersecurity acceleration capabilities available for data centers," with processing equivalent to "up to 300 CPU cores, [thereby] freeing up valuable CPU cycles to run business- critical applications."

d. Nvidia makes other Arm-based computing products, including chips for video gaming consoles, high-performance "Internet of Things" industrial devices, and more.

45. Nvidia committed to developing a wide variety of Arm-based products long before pursuing this Proposed Acquisition. On September 14, 2020, Nvidia's CEO told investors (in a public investor call announcing the Proposed Acquisition) that "last year"—before Softbank had even offered Arm for sale—Nvidia had already "decided [for datacenters] that we would adopt and support the Arm architecture for the full NVIDIA stack, and that was a giant commitment." "The day we decided to do that," he continued, "we realized this is going to be for as long as we shall live. And the reason for that is because once you start supporting the ecosystem, you can't back out."

IV. The Proposed Acquisition Will Result in an Anticompetitive Change in Incentives

46. Prior to the Proposed Acquisition, Arm's incentive has been to expand broadly the use of Arm Processor Technology because Arm typically profits when its licensees sell more units. To that end, Arm partners with its licensees to develop competitive products. This collaboration includes development of major features of Arm Processor Technology, support for licensees' own efforts to innovate using Arm Processor Technology, and promotion (and other sales help) for its licensees as they compete to sell their products. In short, Arm's incentives as an independent firm cause it to encourage the success of Arm licensees in the Downstream Markets.

47. Nvidia's incentives are starkly different than Arm's. Nvidia competes to sell its products against many of Arm's other licensees. Nvidia makes profits when it makes a sale and loses profits when another Arm licensee makes a sale in its place.

48. After the Proposed Acquisition, the combined firm will not have Arm's same premerger incentive to enable its licensees' success in the Downstream Markets. Instead, the combined firm will have the incentive to engage in foreclosure strategies. Foreclosure strategies involve withholding a critical input from rivals, delaying or degrading access to the input (including delaying or degrading service and support), unfavorably changing the terms on which the input is made available to rivals, or otherwise using the critical input to raise their costs or disadvantage them. In each relevant market at issue in this case, Nvidia already has a strategic imperative to win sales from its rivals, and Nvidia's profits on additional sales in the downstream market are likely to be larger than the profits from continuing to neutrally license Arm's Processor Technology or to provide the same level of support, access, and investment to licensees. Moreover, because of the evolving nature of computing markets, Nvidia's incentives to use Arm to harm its rivals are amplified by the benefits of preventing innovations in Arm Processor Technology that could lead to greater future competition against Nvidia, including competition with Nvidia's GPU business.

49. Arm employees recognize the problematic change in incentives that the Proposed Acquisition will cause. For example, in response to the Proposed Acquisition, Arm employees asked (or predicted licensees would ask) questions highlighting the basic conflicts of interest associated with Nvidia buying Arm, such as:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

50. Arm's CEO likewise has recognized that [redacted] He further recognized that [redacted]

51. Nvidia insiders also recognized the anticompetitive change in incentives. For example, insiders asked:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

52. Nvidia insiders also [redacted]. For example, a Bank of America Securities analyst noted "[a]ny potential deal could face intense and prolonged regulatory scrutiny given ARM's currently neutral position as a technology enabler for the entire semis industry including many of [Nvidia's] competitors." An analyst from another large investment firm wrote: "[T]here could be a myriad of conflict of interest issues whereby [Nvidia] could have access to competitor strategies/technologies in a variety of [Nvidia] markets, notably Auto and perhaps to an increasing extent, datacenter."

53. Post-Acquisition, the combined firm will also have the ability to harm Nvidia's Arm-reliant rivals. There are numerous full or partial foreclosure strategies that it can use to disadvantage its rivals—sometimes without the rival ever knowing the strategy was executed.

RELEVANT MARKETS AND ANTICOMPETITIVE EFFECTS

54. The Proposed Acquisition is likely to substantially lessen competition in multiple relevant antitrust markets, resulting in reduced innovation and more expensive or lower quality products.

55. The Proposed Acquisition will result in a combined firm with the ability and incentive to use foreclosure strategies involving a critical input to undermine its rivals in one or more relevant markets, and the Acquisition will not produce cognizable procompetitive effects.

56. The transaction is likely to substantially lessen competition in relevant antitrust markets for DPU SmartNICs, High-Level Automotive ADAS Central Compute SoCs, and Arm-Based Datacenter CPUs for Cloud Computing Service Providers.

57. In addition, the transaction is likely to harm competition by giving Nvidia access to the competitively sensitive information of Arm's licensees and by decreasing the incentive for Arm to pursue innovations in its Processor Technology that are perceived to conflict with Nvidia's business interests.

I. DPU SmartNICs are a Relevant Product Market

58. DPU SmartNICs are a relevant product market for evaluating the likely competitive effects of the Proposed Acquisition. The corresponding relevant geographic market is worldwide.

59. DPU SmartNICs are network interface devices that incorporate software-programmable CPU cores for offloading and isolating processing tasks related to networking, security, virtualization, and other datacenter support services from the server's main CPU (also called the "host" CPU). DPU SmartNICs increase server compute efficiency and security.

60. The DPU SmartNIC market is nascent but growing rapidly.

61. Nvidia is a significant, aggressive, and rapidly growing participant in this market with its Arm-based Bluefield product line.

62. Nvidia competes against several other companies currently vying to supply DPU SmartNIC solutions, including Pensando, [redacted] Xilinx, Broadcom, Marvell, and Intel. All of these suppliers use Arm-based designs for DPU SmartNIC products, including Intel, despite its unfettered access to the x86 architecture.

63. There are no commercially reasonable interchangeable substitutes for DPU SmartNICs. For example, Network Interface Controllers (NICs) that lack software- programmable CPU cores are not reasonably interchangeable substitutes. These products are part of a spectrum of network devices that range from "basic" NICs with no offload capabilities to more advanced NICs that also perform some networking acceleration processing tasks but lack software-programmable CPU cores. DPU SmartNICs have distinct features and functionality compared to such products. For instance, DPU SmartNICs allow valuable network security features by isolating

computing workloads to protect applications running on the main server CPU from attacks. DPU SmartNICs also have distinct (and higher) prices compared to other NIC products.

II. The Proposed Acquisition is Likely to Harm Competition for DPU SmartNICs

64. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Nvidia's rivals in the market for DPU SmartNICs.

65. After the Proposed Acquisition, the combined firm would have the ability to harm Nvidia's rivals for DPU SmartNICs. Arm Processor Technology is a critical input for DPU SmartNIC products. Virtually all major DPU SmartNIC suppliers, including Nvidia and its direct competitors, incorporate Arm Processor Technology and rely on the Arm architecture as a critical component in their products. According to Nvidia's own definition, DPUs include "[a]n industry-standard, high-performance, software-programmable, multi-core CPU, ***typically based on the widely used Arm architecture*** " (emphasis added).

66. DPU SmartNICs depend on Arm Processor Technology for multiple reasons, including, but not limited to:

a. Arm Processor Technology offers the ability to build high-performance CPU cores that are customizable and scalable.

b. Arm-based cores offer the necessary high performance without the cost of increased power usage. Efficient power usage is critical for DPU SmartNIC applications because these applications often have power constraints.

c. Significant investments have been made in Arm-compliant software, which would be costly and risky to reinvent. Arm has developed and delivered on a vibrant roadmap, which has sparked the development of a rich set of tools and applications comprising the Arm ecosystem.

d. Arm provides broad support for product development and improvement. Arm collaborates with and provides assistance to its partners on the development and deployment of DPU SmartNICs, including on design, features, production, testing, marketing, sales, and other activities.

67. There are no close substitutes for Arm Processor Technology for DPU SmartNICs. Even if there were a close alternative to Arm, switching, in and of itself, is a large cost to impose on Arm's customers. Such architectural switches are time and resource intensive and expensive.

68. Other CPU architectures are not close alternatives to Arm for DPU SmartNICs. MIPS is an ISA whose use in the computing industry has been declining and which lacks a vibrant ecosystem, especially compared to Arm. RISC-V lacks the performance, support, and advanced software ecosystem that characterize Arm. x86 CPUs are not well suited for DPU SmartNIC

applications. Even Intel, the company that introduced and owns the x86 CPU ISA, is using Arm Processor Technology in certain Intel DPU SmartNIC products.

69. The Proposed Acquisition would give the combined firm the ability to use foreclosure strategies to disadvantage rivals in the market for DPU SmartNICs through a variety of mechanisms, including by controlling Arm's pricing, the terms and timing of access to its Processor Technology, its technological development and features, and its provision of services and support, among other mechanisms. Arm already has such abilities today, but it does not have the incentive to use such mechanisms to undermine Nvidia's rivals.

70. The Proposed Acquisition also would give the combined firm the incentive to use foreclosure strategies to harm Nvidia's DPU SmartNIC rivals. Nvidia already views winning the DPU SmartNIC market as a key strategic priority. As Nvidia's CEO put it in one email, [redacted]

71. Nvidia's dedication makes good sense. The DPU SmartNIC market is expected to grow rapidly into a multi-billion dollar market as the DPU SmartNIC takes its place as what Nvidia views as the third pillar in datacenters next to CPUs and GPUs.

72. Post-Acquisition, the combined firm would likely have a substantial incentive to engage in foreclosure strategies because profits from additional sales of DPU SmartNICs would be higher than any foregone proceeds of licensing Arm Processor Technology to Nvidia's DPU SmartNIC rivals.

73. Current competition with Arm licensees has already forced Nvidia to lower its DPU SmartNIC prices and drives Nvidia to improve its product. [redacted] Internal business documents confirm Nvidia's Bluefield [redacted]. Internal documents also show that [redacted].

74. The Proposed Acquisition will create a firm with the incentive and ability to harm rivals in the DPU SmartNIC market using foreclosure strategies. Consequently, the Proposed Acquisition is likely to result in a substantial lessening of competition in the DPU SmartNIC market leading to reduced innovation and more expensive or lower quality products.

75. DPU SmartNICs are a relevant antitrust market. The anticompetitive effects of the Proposed Acquisition alleged in the paragraphs above are also likely to occur in any relevant antitrust market that contains DPU SmartNICs.

III. High-Level Automotive Advanced Driver Assistance System Central Compute SoCs are a Relevant Product Market

76. High-Level Advanced Driver Assistance System ("ADAS") Central Compute SoCs ("High-Level ADAS market") are a relevant product market for evaluating the competitive effects of the Proposed Acquisition. The corresponding relevant geographic market is worldwide.

77. The level of automation in a given vehicle is generally categorized using an industry-wide standard set by SAE International, a professional standard setting organization in the mobility industry. SAE specifies six levels of automation for a given vehicle, ranging from L0 (minimal driver assistance such as lane departure and blind spot warnings) to L5 (a fully automated vehicle driving itself with no restrictions).

78. High-Level ADAS refers to SAE Levels 2 through Level 3, including the industry-recognized "L2+" or "advanced L2" level, which refers to the most advanced L2 capabilities. Within High-Level ADAS, L2+ and L3 are especially important for future competition, as automakers are now developing competing solutions incorporating L2+/L3 features for release in the coming years. High-Level ADAS provides advanced, computerized driving assistance along with various automated features that still require the driver to participate in driving the car (at L2) or to remain ready to take control of the car at a moment's notice (at L3). L2 ADAS typically incorporates features such as using automated lane centering, acceleration, and braking technologies simultaneously, while keeping a human driver in ultimate control of the vehicle. L3 ADAS typically incorporates L2 capabilities as well as higher-level functions capable of location-to-location routing monitored by the automated system when certain traffic conditions are met. While the car is in ultimate control at the L3 level, the driver must be ready to take back control on short notice. High-Level ADAS systems rely on SoCs that provides the required performance, power efficiency, and programmability to enable the system to run features specific to High-Level ADAS. This complaint refers to SoCs that handle the compute workload necessary to enable the features of High-Level ADAS as "Central Compute SoCs." Market participants may refer to these high-performance ADAS SoCs by a number of names, including "central compute," "brain of the system," and "features" SoCs.

79. High-Level ADAS systems may also incorporate other chips besides the Central Compute SoC. Other chips within High-Level ADAS systems, such as those used for discrete sensor processing (e.g., the Front View Camera), generally do not have to be as high performing or as highly programmable as those used for Central Compute processing. As such, Central Compute SoCs have distinct competitive conditions compared to other chips used for other purposes within High-Level ADAS systems. Therefore, chips for other purposes within High-Level ADAS systems, such as discrete sensor processing, are not included in the relevant market.

80. The Entry-Level (L0/L1) ADAS category is generally characterized by more competitors, lower performance requirements, and lower prices. These Entry-Level systems generally require a lower level of chip performance than High-Level ADAS. Competition for supplying chips for Entry-Level ADAS systems is therefore not included in the relevant market.

81. The Fully Autonomous (L4/L5) category is at an earlier stage of development, and it is not yet technologically viable to implement Fully Autonomous private passenger vehicles on a commercial scale. The Fully Autonomous category is generally characterized by uncertain, though likely higher, performance requirements, additional competitors exclusively focused on developing Fully Autonomous solutions (rather than ADAS), and distinct opportunities wholly separate from High-Level ADAS opportunities. Additionally, the Fully Autonomous category is likely to initially focus on commercial vehicles, such as "robotaxis," rather than private passenger vehicles. In contrast, High-Level ADAS opportunities are generally for private passenger vehicles. Competition for supplying chips for Fully Autonomous (L4/L5) systems is therefore not included in the relevant market.

82. The market for High-Level ADAS Central Compute SoCs consists mainly of competitors selling Arm-based chips. Nvidia competes head-to-head against these other chipmakers who rely on Arm Processor Technology, including Qualcomm and Renesas. These companies all sell High-Level ADAS Central Compute SoCs to automakers or automotive suppliers. [redacted]. The only significant chip supplier that Nvidia competes against for High-Level ADAS Central Compute SoCs that does not use Arm Processor Technology for the CPU function in its ADAS SoC is Mobileye, which uses chips based on the MIPS ISA.

IV. The Proposed Acquisition is Likely to Harm Competition for High-Level Automotive Advanced Driver Assistance System Central Compute SoCs

83. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Nvidia's rivals in the market for High- Level ADAS Central Compute SoCs.

84. After the Proposed Acquisition, the combined firm would have the ability to harm Nvidia's rivals for High-Level ADAS Central Compute SoCs. Arm Processor Technology is a critical input for most competitors in this market. Arm-based SoCs are well-suited to high-performance workloads, while consuming relatively little power, which is important given the limited available power in automobiles. In addition, Arm-based SoCs are highly programmable and support extensive third-party software ecosystems. These are features that many automakers require for their High-Level ADAS Central Compute SoCs.

85. Customers rely on Arm to such a degree that Arm considers itself the [redacted] for L2+ ADAS, and industry participants have acknowledged that the automotive industry is reliant on Arm for ADAS development. Arm has developed a product line of its Processor Technology targeted specifically for automotive end uses, including ADAS, under the "Automotive Enhanced" label, with the goal of [redacted]

86. Other ISAs are not close substitutes for Arm for automotive applications. x86-based CPUs are generally not used for High-Level ADAS. Not even Intel's automotive subsidiary, Mobileye, uses x86-based CPUs for High-Level ADAS. Nor does any significant competitor for

High-Level ADAS today use RISC-V-based CPUs. RISC-V-based CPUs generally do not have the level of technical performance that High-Level ADAS system designers require, and, as a less mature architecture, they lack a comparable ecosystem and [redacted]. Finally, MIPS, which Intel's Mobileye division uses, is not a viable future architecture for High-Level ADAS chips from other competitors. [redacted] And, the owner of MIPS is expected to phase out the MIPS architecture completely. Thus, while Mobileye currently competes for High Level ADAS Central Compute SoCs with a MIPS-based solution, MIPS is not a viable future architecture for High-Level ADAS for other competitors.

87. The Proposed Acquisition would give the combined firm the ability to foreclose, raise rivals' costs, or otherwise disadvantage rivals in the market for High-Level ADAS Central Compute SoCs through a variety of mechanisms, including by controlling Arm's Processor Technology with respect to its pricing, the terms and timing of access, technological development and features, and provision of services and support, among other mechanisms. Arm already has such abilities today, but it does not have the incentive to use such mechanisms to harm Nvidia's rivals.

88. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm Nvidia's High-Level ADAS Central Compute SoC rivals.

89. Nvidia views winning this growing market as a strategic priority. The market is expected to grow exponentially over the next decade. Projections from a variety of sources, [redacted] indicate that the High-Level ADAS market, while currently small in terms of cars on the road, will grow significantly by 2030. Further, success in this market may provide an installed base that can facilitate successful chip vendors' transition into becoming preferred suppliers for Fully Autonomous vehicle solutions once those become technically feasible for deployment in passenger vehicles.

90. Post-Acquisition, the combined firm would likely have a substantial incentive to engage in foreclosure strategies because profits from additional sales of High-Level ADAS Central Compute SoCs would be higher than any foregone proceeds of licensing Arm Processor Technology to Nvidia's High-Level ADAS rivals.

91. Indeed, within the High-Level ADAS Central Compute SoC market, Nvidia has already competed closely against Arm-based competitors for valuable business opportunities at some of the world's largest automakers. Nvidia will have the incentive to harm Arm-reliant High-Level ADAS rivals as opposed to working collaboratively with them to help them succeed, as Arm does today, because Nvidia competes closely against these rivals for major business opportunities in High-Level ADAS.

92. The Proposed Acquisition will create a firm with the incentive and ability to harm rivals in the High-Level ADAS market using foreclosure strategies. Consequently, the Proposed Acquisition is likely to result in a substantial lessening of competition in the High-Level ADAS market leading to reduced innovation and more expensive or lower quality products.

93. High-Level ADAS Central Compute SoCs are a relevant antitrust market. However, the anticompetitive effects of the Proposed Acquisition alleged in the paragraphs above are likely to occur under any market definition that contains High-Level ADAS Central Compute SoCs.

V. Arm-Based Datacenter CPUs for Cloud Computing Service Providers is a Relevant Product Market

94. Arm-based datacenter CPUs for cloud computing service providers (including customized Arm CPU chips, or "ASICs") is a relevant product market for assessing the effects of the Proposed Transaction. The corresponding relevant geographic market is worldwide.

95. Datacenters consist of large numbers of server computers. Arm-based datacenter CPU technology is a new and emerging technology that leverages Arm's Processor Technology to meet the performance, power efficiency, and customizability needs of modern datacenters providing cloud computing services.

96. "Cloud computing" refers to the increasingly popular computing business model in which large datacenter operators provide computing services remotely and/or directly offer computing resources for rent, as well as provide other support services to customers who can then run applications, host websites, or perform other computing tasks on the leased remote servers—i.e., "the cloud." Cloud service providers ("CSPs") make their computers and associated services available for a price to many different types of computing customers in the general public, including individuals, businesses, and other organizations. CSPs are distinct from enterprise datacenter operators. Enterprise datacenters typically involve businesses, government agencies, or other organizations who operate their own on-premises server computers, while cloud computer service providers typically offer their customers off-premise, remote computing resources and services whose usage the customer can purchase incrementally. In general, cloud computing is growing, and datacenters overall are in transition from the traditional computing model provided by on-premises enterprise servers to a model in which many computer services are cloud-based.

97. In the past, Arm-based CPUs were perceived as not having powerful enough performance to serve as datacenter server CPUs. As a result, datacenter CPUs have been historically dominated by x86-based products offered by Intel Corporation and AMD.

98. But after many years of research and development, innovation, and investment by Arm and Arm's licensees, datacenter CPUs using Arm Processor Technology have emerged as a distinct and highly attractive product offering capable of powering servers for CSPs. Arm-based CPUs now offer server-class compute performance, while also offering low costs per CPU core, high power efficiency, and a high degree of customizability. These attributes are particularly well-suited to the demands of cloud computing.

99. x86-based datacenter CPUs are more distant competitors to Arm-based datacenter CPUs and are thus properly excluded from the relevant product market. Arm-based datacenter CPUs are distinct from x86-based datacenter CPUs. Because the most fundamental "language" of the CPUs, the Instruction Set Architecture, differs between Arm-based CPUs and x86-based CPUs,

these products cannot directly replace one another without significant costs, because they "speak" different "languages." As a result, they also have different associated ecosystems. Arm- based CPUs also typically have greater power efficiency and customizability. Power efficiency is an important product attribute for CSPs because electricity consumption is one of the largest costs for large datacenters and a better environmental footprint is also desirable. Greater customizability in chip design is also valuable to CSPs. Arm-based datacenters CPUs also have distinct prices, typically a significantly lower price per core than relevant x86-based CPUs.

100. Because there are numerous practical distinctions between the needs and capabilities of CSPs and operators of traditional on-premises datacenters at businesses or other organizations, the relevant product market is properly defined as Arm-based datacenter CPUs for CSPs. In particular, the large scale of CSPs' datacenters particularly benefit from the performance, power efficiency, and customizability advantages of Arm-based CPUs. And these CSPs' control over their large-scale datacenters and many computing workloads also makes them well-positioned to overcome the hurdle of ensuring that existing and new software is written to be both compatible and optimized for use with the Arm ISA. Further, Nvidia and other chip suppliers have the ability to easily identify CSP customers, and, through individual negotiations with CSPs, the combined firm would have the ability to engage in price discrimination for CSP customers.

101. Companies designing Arm-based datacenter CPUs today include Marvell, Ampere Computing, and Nvidia. Some CSPs, such as Amazon Web Services, also design their own Arm-based datacenter CPUs.

VI. The Proposed Acquisition Would Harm Competition for Arm-Based Datacenter CPUs for Cloud Computing Service Providers

102. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Nvidia's rivals in the market for Arm- based datacenter CPUs for CSPs.

103. The Proposed Acquisition would give the combined firm the ability to use foreclosure strategies to disadvantage rivals in the market for Arm-based datacenter CPUs for CSPs through a variety of mechanisms, including by controlling Arm's pricing, the terms and timing of access to its Arm Processor Technology, its technological development and features, and its provision of services and support, among other mechanisms. Arm already has such abilities today, but it does not have the incentive to use such mechanisms to undermine Nvidia's rivals.

104. Arm already has the ability to control whether licensees can produce Arm-based CPUs given its ownership of Arm Processor Technology. But, as with other markets, licensees rely on Arm as a trusted partner to develop and license Processor Technology on a neutral basis and to collaborate and provide support to bring new products to market. Indeed, Arm's support is so important that merely discontinuing it could result in licensees bringing inferior products to market, or licensees' products failing altogether.

105. The Proposed Acquisition would give the combined firm the incentive to use foreclosure strategies to impair the ability of Nvidia's rivals to compete in the market for Arm-based Datacenter CPUs for CSPs.

106. This market is a strategic priority for Nvidia. Nvidia views datacenters as core to its business and future, and espouses the importance of all three "pillars" of computing for datacenters—the CPU, the GPU, and DPU. In April 2021, Nvidia announced its plans to launch an Arm-based datacenter CPU product, called "Grace," which it has touted as the "basic building block of the modern datacenter." Nvidia also seeks to sell customized Arm-based datacenter CPUs to CSPs in the future. Nvidia's announcement of Grace came as multiple CSPs were deploying or planning to deploy Arm-based datacenter CPUs from other sources, [redacted].

107. Nvidia already can provide all three "pillars" of datacenter computing today because it has developed its own Arm-based datacenter CPU, "Grace," and it has the capability to design additional Arm-based CPUs, including custom and semi-custom designs, using its Arm license. Indeed, Nvidia told investors in 2021 that, "With Grace, NVIDIA has a 3-chip strategy with GPU, DPU and now CPU."

108. One of the rationales of the Proposed Acquisition was that the acquisition would [redacted]. As Nvidia's CEO wrote to his Board of Directors regarding Arm, [redacted] Further emphasizing the relevance of Arm-based CPUs for CSPs to Nvidia's goals, Nvidia's CEO noted in a December 2020 email that [redacted] But as a licensee of Arm, Nvidia can already supply such chips on equal footing with Arm's other licensees today. [redacted].

109. Post-Acquisition, the combined firm would likely have a substantial incentive to engage in foreclosure strategies because profits from selling additional Arm-based CPUs to CSPs would be higher than any foregone proceeds of licensing Arm Processor Technology to Nvidia's CPU rivals.

110. The Proposed Acquisition will create a firm with the incentive and ability to harm rivals in the market for Arm-based datacenter CPUs used by CSPs through foreclosure strategies. Consequently, the Proposed Acquisition is likely to result in a substantial lessening of competition in the market for Arm-based datacenter CPUs for CSPs, leading to reduced innovation, and more expensive or lower quality products.

111. Arm-based datacenter CPUs for CSPs is a relevant antitrust market. The anticompetitive effects of the Proposed Acquisition alleged in the paragraphs above are likely to occur in any relevant antitrust market that contains Arm-based datacenter CPUs for CSPs.

VII. The Proposed Acquisition Will Harm Competition By Providing Nvidia with Access to Rivals' Competitively Sensitive Information

112. The Proposed Acquisition will result in an additional substantial lessening of competition due to a critical loss of trust in Arm and its ecosystem. Today, Arm's licensees—including Nvidia's rivals—routinely share competitively sensitive information with Arm. Licensees rely on Arm for support in developing, designing, testing, debugging, troubleshooting, maintaining, and improving their products. As part of this collaborative relationship, Nvidia's rivals routinely share a broad spectrum of competitively sensitive information with Arm. Indeed, effective collaboration between Arm and its licensees often depends on this information sharing because of the competitive importance of innovation, feature competition, and fast time-to- market in the technology industry. Arm licensees are willing to share their competitively sensitive information with Arm because Arm is a neutral partner, not a rival chipmaker.

113. Nvidia's ownership of Arm would fundamentally upend Arm's status as a neutral partner and, at the same time, enable Nvidia to obtain access to its rivals' competitively sensitive information. With the benefit of its rivals' secrets, Nvidia could adjust its activities to undermine competition and harm customers. Recognizing that Nvidia would be able to misuse this otherwise unobtainable information, Nvidia's rivals will likely curtail their highly productive information sharing with Arm and otherwise refrain from making the same procompetitive contributions that they would have absent Nvidia's access to their information. Nvidia's potential misuse of competitively sensitive information and the related chilling effect on collaboration among Arm and its licensees is a further anticompetitive effect of the Proposed Acquisition, and is likely to result in reduced innovation, and more expensive or lower quality products regardless of whether Arm engages in foreclosure strategies.

VIII. The Proposed Acquisition Will Further Harm Innovation By Skewing the Path of Arm Processor Technology Development

114. In addition to the harms to innovation that will result from the foreclosure strategies and the access to competitively sensitive information described above, the Proposed Acquisition is likely to lead to an additional substantial lessening of competition by eliminating innovations that Arm would have pursued but for a conflict with Nvidia's interests.

115. Today, Arm develops its Processor Technology based on input from its licensees and its analysis of the marketplace. Its roadmap for development thus reflects the input of the Arm ecosystem. Absent the transaction, innovation will continue in this direction.

116. But because the transaction would put Nvidia in charge of Arm's Processor Technology roadmap and future development, the merged firm would have less incentive to develop or enable otherwise beneficial new features or innovations if Nvidia determines they are likely to harm Nvidia. The innovation interests of Nvidia are not synonymous with the Arm ecosystem, but the transaction will inevitably skew innovation in the direction of Nvidia's interests. As one Arm executive observed about Nvidia's proposed takeover of Arm, [redacted]

117. Nvidia would have the ability and incentive to ensure that Arm does not develop features or innovations that could threaten its downstream businesses, including its GPU business. For example, in some contexts, CPUs and GPUs compete with each other as alternative processors for handling evolving computing workloads, and Nvidia, for instance, actively markets its GPUs for AI inferencing workloads, which some CPUs, including Arm-based CPUs, also perform. In recent years, Arm expended substantial efforts to add certain built-in AI processing functionality directly into its CPU technology. The development of on-chip AI functions and innovations for CPUs and SoCs that are not tied to Nvidia's proprietary hardware or software is not likely to be in Nvidia's interest.

118. Consequently, innovation is likely to be harmed since Nvidia is unlikely to undertake or permit substantial efforts at attempting CPU innovations that could threaten demand for Nvidia's chips, including GPUs. Post-Acquisition, Nvidia would have the incentive to channel Arm's innovation activities in directions that ensure Arm's CPU technology does not pose any threats to its own chip businesses, including its GPU-centric computing business.

ABSENCE OF ADDITIONAL FACTORS

119. Respondents cannot demonstrate that entry or expansion of products in the Relevant Markets that do not incorporate Arm Processor Technology would be timely, likely, or sufficient to reverse the anticompetitive effects of the Proposed Acquisition.

120. Respondents cannot demonstrate that the Proposed Acquisition would likely generate verifiable, cognizable, merger-specific efficiencies that would reverse the likely competitive harm from the Proposed Acquisition. [redacted]. Thus, regardless of the Proposed Acquisition, Nvidia has and will continue to have access to all Arm Processor Technology, and it can continue to innovate and develop Arm-based products, as it was already planning to do, and as many other companies, including Nvidia's competitors, also do. Indeed, as one Arm executive observed, in response to a report about the potential for the Proposed Acquisition by Nvidia, "The only thing Nvidia can't do without owning Arm is deny the technology to others."

VIOLATION

COUNT I – ILLEGAL ACQUISITION

121. The allegations above in paragraphs 1 to 120 are incorporated by reference as though fully set forth.

122. The Proposed Acquisition, if consummated, would be likely to lessen competition substantially in interstate trade and commerce in the Relevant Markets throughout the country. If the Proposed Acquisition were to proceed, it would result in substantial harm to competition, including as a result of the combined firm's ability and incentive to disadvantage rival suppliers of downstream products in the Relevant Markets, the chilling effect on innovation induced by the combined firm's access to its rivals' competitively sensitive information supplied to Arm, and the

combined firm's ability and incentive to stifle innovations that are unfriendly to its business interests.

123. The Proposed Acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and is an unfair method of competition that violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the ninth day of August, 2022, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary 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 and the Clayton 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 you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. 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 pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days

of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. A prohibition against any transaction between Nvidia and Arm that combines their businesses, except as may be approved by the Commission.

2. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, businesses, with the ability to offer such products and services as Nvidia and Arm were offering and planning to offer prior to the Acquisition.

3. A requirement that, for a period of time, Nvidia and Arm provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses with any other company.

4. A requirement to file periodic compliance reports with the Commission.

5. Requiring that Respondents' compliance with the order may be monitored at Respondents' expense by an independent monitor, for a term to be determined by the Commission.

6. Any other relief appropriate to correct or remedy the anticompetitive effects of the Acquisition or to restore Arm as an independent business.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this second day of December, 2021.

By the Commission.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss Complaint. The Joint Motion states that Respondents NVIDIA Corporation, Softbank Group Corp., and Arm Ltd. have terminated their share purchase agreement and that NVIDIA has withdrawn its Hart-Scott-Rodino Notification and Report Forms for the proposed transaction. Having considered the Joint Motion, we have determined that it should be granted. Accordingly,

IT IS HEREBY ORDERED THAT the Joint Motion to Dismiss Complaint, dated February 8, 2022, is **GRANTED**, and the Complaint in this proceeding is dismissed without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

LOCKHEED MARTIN CORPORATION,
AND
AEROJET ROCKETDYNE HOLDINGS, INC.

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9405; File No. 211 0052
Complaint, January 25, 2022 – Decision, February 15, 2022

This case addresses the $4.4 billion acquisition by Lockheed Martin Corporation of certain assets of Aerojet Rocketdyne Holdings, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by significantly reducing competition in the market for missile rounds and/or missile systems, missile defense kill vehicles ("KVs"), and/or hypersonic cruise missiles in the United States. The order dismisses the Complaint because Lockheed Martin Corporation terminated the Merger Agreement and withdrew its Hart-Scott-Rodino Notification and Report Forms for the proposed acquisition.

Participants

For the *Commission*: *Lisa DeMarchi Sleigh, Yan Gao, M. Hasan Aijaz, Andrew Heimert, Jaqueline Mendel, Catherine M. Sanchez, James Southworth, Christine Tasso,* and *R. Tyler Sanborn.*

For the *Respondents*: *Jon B. Dubrow* and *Lisa Rumin, McDermott Will & Emery LLP; Edith Ramirez* and *Chuck Loughlin, Hogan Lovells LLP; Meghan Rissmiller* and *Bruce McCulloch, Freshfields Bruckhaus Deringer US LLP; Lee K. Van Voorhis, Jenner & Block LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Lockheed Martin Corporation ("Lockheed"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Aerojet Rocketdyne Holdings, Inc. ("Aerojet"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such 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, 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. Lockheed, the world's largest defense contractor, proposes to acquire Aerojet, the last significant independent, and, in some instances sole, U.S. supplier of several critical missile propulsion products used as inputs in multiple weapon systems, for $4.4 billion (the "Proposed

Acquisition"). If permitted, the Proposed Acquisition would allow the combined firm to use its control of Aerojet to harm Lockheed's rivals in ways that would substantially lessen competition in multiple markets for products critical to the national defense.

2. The United States Department of Defense ("DoD" or the "Department") depends on prime contractors such as Lockheed to design, develop, and produce the weapon systems it requires to defend the United States. Under DoD's acquisition system, a prime contractor is responsible for sourcing all necessary systems, subsystems, and components either internally or through sub-contracts with qualified outside suppliers.

3. Lockheed currently competes against other firms, including Raytheon Technologies, Inc. ("Raytheon"), Northrop Grumman Corporation ("Northrop" or "NG"), and The Boeing Company ("Boeing"), for prime contracts to design, develop, and produce, all-up missile rounds and/or missile systems ("missiles"), missile defense kill vehicles ("KVs"), and/or hypersonic cruise missiles ("HCMs") (collectively, the "Relevant Products" and the "Relevant Markets") for DoD. The competition among prime contractors for these important weapon systems has provided benefits to DoD, including lower costs, enhanced quality, and greater innovation.

4. After conducting an independent review of the Proposed Acquisition, DoD, the sole customer for the Relevant Products, has "concluded [redacted]

5. Aerojet is a premier provider of multiple critical inputs to the Relevant Products, including solid propellant rocket motors ("SRMs") for missile propulsion, divert-and-attitude control systems ("DACS") that provide the fast and precise maneuvering capabilities for the KVs used to intercept hostile ballistic missile threats, and air-breathing hypersonic propulsion systems, including, but not limited to, the supersonic combustion ramjets ("scramjets") that power HCMs (collectively, "Critical Propulsion Technologies").

6. As a Lockheed executive summarized in Executive Talking Points about the Proposed Acquisition, "propulsion is an absolutely critical element for all future advanced missiles." This executive further explained, [redacted]

7. Aerojet is the only independent, and, in some instances sole, significant U.S. supplier of the Critical Propulsion Technologies. [redacted]

8. Lockheed believed that the Proposed Acquisition [redacted] whereas, if Lockheed did not pursue the acquisition, [redacted]

9. The Proposed Acquisition would reduce competition because it will provide Lockheed with the ability and incentive to foreclose access to, or raise its rivals' cost for, the Critical Propulsion Technologies. Without access to these essential inputs, Lockheed's competitors (and future potential competitors) would be seriously disadvantaged—if not completely foreclosed—from competing for upcoming DoD prime contracts in the Relevant Markets. Short of refusing to sell or increasing the price of its in-house propulsion products, a combined Lockheed-Aerojet could use multiple other mechanisms to disadvantage its competitors that rely on these critical inputs to design, develop, and produce the Relevant Products, such as making adverse personnel assignments and/or scheduling, investment, or design decisions.

10. Today, as a neutral merchant supplier, Aerojet has the incentive to (and in fact does) compete to supply the Critical Propulsion Technologies to all potential customers. When a prime contract is up for bid, Aerojet currently possesses an incentive to support as many potential prime contractors as possible to maximize the probability that Aerojet will be the supplier of choice for the winning prime contractor.

11. Before agreeing to purchase Aerojet, Lockheed sought unsuccessfully to prevent Aerojet from supplying Critical Propulsion Technologies to other prime contractors on a number of occasions. [redacted]. This is not the first time Lockheed made such an attempt. [redacted]

12. If Lockheed acquires Aerojet, the combined firm will no longer have the same incentive to support its rival prime contractors. For example, post-acquisition, Lockheed would earn substantially more by winning a DoD prime contract for a Relevant Product than it would from the sale of Critical Propulsion Technologies to a rival that won the prime contract. Because Lockheed will earn more if it wins the prime contract, it will have an increased incentive to refuse to sell to, or otherwise disadvantage (e.g., by failing to provide pre-acquisition levels of pricing, support, access, or research investment) its rival defense prime contractors in order to shift future prime missile contracts to Lockheed.

13. The Proposed Acquisition will likely result in a decrease in certain research and development ("R&D") investment and innovation in the design, development, and production of missile propulsion systems. Today, Aerojet collaborates closely and shares innovative ideas with all its major customers, including, but not limited to, Lockheed, Raytheon, Boeing, and Northrop. Similarly, Aerojet invests its own resources in R&D to support competing propulsion concepts advanced by multiple prime contractors for a given missile program. Given Aerojet currently is generally agnostic as to which prime wins a given contract (provided Aerojet is the supplier for the winner), Aerojet invests in technologies that it expects will yield the most benefit to its propulsion business without regard to the identity of the prime contractor. Post-acquisition, however, a combined Lockheed-Aerojet will no longer possess the same incentives with respect to R&D. Post-acquisition, the combined firm will earn more if Lockheed wins the prime contract, and therefore, would have a diminished incentive to devote its resources toward otherwise beneficial, innovative R&D that would advantage Lockheed's rivals or diminish sales of competing Lockheed Relevant Products, ultimately inhibiting DoD's capability to defend the nation.

14. A further anticompetitive effect of the Proposed Acquisition is that it presents new opportunities, and heightens the incentives, for Lockheed to misuse the competitively sensitive, non-public information of rival primes and propulsion suppliers in at least two ways. First, by acquiring Aerojet, Lockheed will gain access to competitively sensitive, non-public information about its rivals' competing missile, KV, or HCM systems to which Aerojet was privy in its role as a supplier of the Critical Propulsion Technologies to those rival primes. If such information is shared, whether intentionally or unintentionally, with Lockheed personnel working on a competing prime proposal, the information exchange could reduce competition for the relevant program. Going forward, rival primes may also be inhibited from sharing necessary information with the former Aerojet propulsion business because they risk the loss of their proprietary information to Lockheed. Second, Lockheed, in its current role as purchaser of Critical Propulsion Technologies, is likely to be privy to competitively sensitive, non-public information relating to Aerojet's only SRM rival, Northrop. Post-acquisition, Lockheed would have an incentive that it did not previously have to exploit that proprietary Northrop information to gain an advantage for its newly acquired in-house propulsion business and to disadvantage Northrop in future SRM competitions. Preventing such potential anticompetitive exchanges of information is necessary to maintain effective competition in the Relevant Markets to ensure that innovation, price, and/or performance for these important U.S. military systems is not negatively impacted.

15. The Proposed Acquisition will substantially lessen competition in all Relevant Markets, likely impacting multiple consequential current and future missile procurement programs. If the Proposed Acquisition is consummated, it will likely result in less innovation by Lockheed and other prime competitors, possible exit by Lockheed's prime competitors, increased barriers to entry in the downstream Relevant Markets, and higher cost and/or lower quality product for DoD.

16. There are no countervailing factors sufficient to offset the likelihood of competitive harm from the Proposed Acquisition. Neither new entry nor expansion by existing market

participants will be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition.

17. Nor can Respondents demonstrate substantiated, verifiable, cognizable, and merger-specific efficiencies that would offset the Proposed Acquisition's likely significant anticompetitive effects in the Relevant Markets.

RESPONDENTS AND THE PROPOSED ACQUISITION

18. Respondent Lockheed is a Maryland corporation headquartered at 6801 Rockledge Drive, Bethesda, Maryland 20817. The largest defense contractor in the world, Lockheed reported net sales of over $65 billion in 2020, approximately 74 percent of which were from sales to the U.S. Government. Lockheed employs approximately 110,000 people, with the vast majority located in the United States. Lockheed's business is organized into four segments: Aeronautics, Missiles and Fire Control, Rotary and Mission Systems, and Space. At least three of its business segments (Aeronautics, Missile and Fire Control, and Space) research, design, develop, integrate, produce, and/or sustain various classified and unclassified advanced missiles and missile defense systems, including missiles, KVs, and HCMs.

19. Respondent Aerojet is a Delaware corporation headquartered at 222 N. Pacific Coast Highway, Suite 500, El Segundo, California 90245. Aerojet is an aerospace and defense company that specializes in researching, developing, and manufacturing advanced power, propulsion, and armament systems. A major portion of Aerojet's business is devoted to developing and producing liquid and solid rocket propulsion systems for defense and civil space applications. Aerojet is also a leader in developing cutting-edge hypersonic propulsion technologies, including air-breathing hypersonic propulsion systems and solid propellant boost motors for hypersonic weapon systems. Aerojet reported net sales of over $2 billion in 2020, approximately 96 percent of which were sales made, directly or indirectly, to the U.S. Government, including to the military services, the Missile Defense Agency ("MDA"), and the National Aeronautics and Space Administration. As a tier-one subcontractor, Aerojet usually is a direct supplier to a prime contractor customer such as Lockheed. Aerojet considers its remaining performance obligations, or "backlog," to be a key metric of its financial performance. In October 2021, Aerojet's backlog totaled approximately $7 billion and its funded backlog (amounts for which funding has been authorized by a customer and purchase order received), totaled approximately $3.2 billion.

20. Pursuant to an Agreement and Plan of Merger dated December 20, 2020, Lockheed agreed to acquire 100 percent of the issued and outstanding voting securities of Aerojet for approximately $4.4 billion.

JURISDICTION

21. Respondents, and each of their relevant operating entities and subsidiaries are, and at all relevant times have been, engaged in commerce and in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

22. The Proposed Acquisition is subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

INDUSTRY BACKGROUND

23. The Relevant Products are defense-specific products for which DoD is generally the sole customer. DoD's process for buying a new weapon system is lengthy, highly complex, governed by multiple sets of regulations, and involves numerous decision makers. Each new weapon system must go through a formal three-step process, which includes (1) identifying the specific military requirements for the new weapon system; (2) planning, programming, budgeting, and execution; and (3) determining how the weapon system will be developed and acquired. This weapon system procurement program—from initial concept to full production of the weapon system—occurs over a number of years.

24. Under the DoD acquisition system, the weapon system integrator or "prime contractor" is typically responsible for designing the new weapon system, assessing the trade-offs inherent in potential designs, maturing the enabling technologies, and planning development, production, and sustainment programs to achieve an operational weapon that meets DoD's performance, cost, and schedule requirements. Because of the enormous complexity of modern weapon systems, only a small number of firms possess the necessary mix of technical, managerial, and industrial capabilities to act as a prime contractor for most DoD acquisition programs for any of the Relevant Products. In the acquisition phase, some common factors that DoD considers before awarding a competitive prime contract include technical capability, cost/price, schedule risk, and the bidders' past performance on similar programs.

25. The prime contractor is, in turn, responsible for selecting subcontractors to manufacture components of the integrated weapon system. These sub-components can vary greatly in complexity and importance. For the Relevant Products, the propulsion provider is a major subcontractor of particular importance because the propulsion sub-system is one of the critical discriminator technologies that determines the weapon system's performance. Propulsion subcontractor evaluations can be based on a multitude of factors including, but not limited to, capabilities, price, performance, past performance/reputation, risk, and delivery schedule. As a result, the design and development of a propulsion sub-system entails a close and lengthy collaboration, including the sharing of significant amounts of proprietary, competitively sensitive information, between the input supplier and the prime throughout the entire length of the acquisition program.

26. The U.S. missile industry is highly concentrated up and down the supply chain. In most cases, there are at most four firms that possess sufficient experience and expertise in designing, developing, and producing missile systems to serve as prime contractors for the Relevant Products: Lockheed, Raytheon, Boeing, and, in some instances, Northrop. There are at most two firms that can competitively supply the Critical Propulsion Technologies to the prime contractors: Aerojet and Northrop.

THE RELEVANT ANTITRUST MARKETS

27. The Proposed Acquisition is likely to lessen competition substantially in multiple relevant product markets, including the design, development, and production of missiles, KVs, and HCMs in the United States.

I. The Relevant Product Markets are the Design, Development, and Production of Missiles, KVs, and HCMs

a. The Design, Development, and Production of Missiles is a Relevant Product Market

28. The first relevant product market in which to analyze the Proposed Acquisition is no broader than the design, development, and production of missiles. A missile is a self-propelled, guided munition that flies through or above the atmosphere to strike a target. Missiles are advanced weapon systems that provide essential national defense capabilities that no other weapon system is as capable of providing.

29. The U.S. military depends on many different missiles to accomplish various specific missions. There are three broad categories of missiles: strategic, tactical, and missile defense interceptors ("MDIs"). U.S. military strategic missiles include nuclear-armed ballistic and cruise missiles intended to achieve strategic nuclear deterrence. These missiles are designed to strike strategic targets at very long ranges. U.S. military tactical missiles are conventional, typically shorter-range weapons used to engage individual military targets to gain tactical advantage on the battlefield. MDIs are specialized missiles designed to intercept and destroy incoming ballistic missile threats.

30. Missiles contain several components that can vary depending on the mission-specific purpose for which the missile is designed. All missiles, however, contain four principle sub-systems: airframe, guidance and control, armament, and propulsion.

31. Most missiles employed by the U.S. military use SRMs for propulsion. The U.S. military also employs a small number of missiles, called "cruise missiles," that use air-breathing jet engines instead of SRMs for primary propulsion. Cruise missiles, which travel at sub-sonic speeds, are not substitutes in most cases for SRM-powered missiles that can travel at high supersonic and even hypersonic (above Mach 5) speeds.

32. Missiles have different characteristics and operational capabilities than other weapon systems employed by the U.S. military. Other munitions—such as gravity bombs, ammunition, mortar rounds, and naval gun rounds—are not close substitutes for most missile applications because they differ substantially from missiles in terms of cost, performance characteristics, and operational capabilities. For example, missiles are uniquely suited to certain missions such as intercepting fast-moving targets, including hostile aircraft and missiles. Missiles also may permit engagement of targets at greater range than other weapon systems, which allows the U.S. military to strike targets while remaining outside of the effective range of enemy counter-fire weapons.

33. The U.S. military has not, and likely would not, switch to any substitute product in response to a small but significant and non-transitory increase in the price of any given missile.

34. The design, development, and production of missiles for the U.S. military is a line of commerce and a relevant product market within the meaning of the Clayton Act.

b. The Design, Development, and Production of KVs is a Relevant Product Market

35. The second relevant product market in which to analyze the Proposed Acquisition is no broader than design, development, and production of KVs. KVs are essential subsystems of the MDIs used in U.S. ballistic missile defense programs. The U.S. Ballistic Missile Defense System consists of technology deployed to counter ballistic missile threats using either the force of a direct collision or an explosive warhead to destroy the enemy missile before it reaches its intended target. Since ballistic missiles have different ranges, speeds, size, and performance characteristics, the Ballistic Missile Defense System utilizes a layered approach that provides multiple opportunities to destroy missiles and their warheads at different altitudes along their flight trajectories. DoD relies on multiple MDI systems to execute this layered approach for missile defense.

36. In most U.S. missile defense systems, the MDI consists of one or more SRM-powered boost stage(s) that propel the interceptor through the earth's atmosphere and a KV that is designed to destroy or neutralize the incoming threat. Launched on the front end of the interceptor, the KV detaches from the interceptor's final booster stage once the interceptor is in range of its intended target, seeks its target, and maneuvers to intercept it. KVs are typically "hit-to-kill" weapons, meaning that they aim to eliminate the threat by using only the kinetic energy produced by physically colliding with the target.

37. There are no substitutes for KVs. All of the ballistic missile defense systems deployed or under advanced development by DoD's MDA and U.S. military services depend on KVs. As a result, DoD has not, and likely would not, switch to any substitute product in response to a small but significant and non-transitory increase in the price of any given KV.

38. The design, development, and production of KVs for the U.S. military is a line of commerce and a relevant product market within the meaning of the Clayton Act.

c. The Design, Development, and Production of HCMs is a Relevant Product Market

39. The third relevant product market in which to analyze the Proposed Acquisition is no broader than design, development, and production of HCMs. A HCM is a hypersonic strike missile powered by an air-breathing hypersonic propulsion system, namely a scramjet engine. The unclassified HCMs currently under development are air-launched cruise missiles that use SRM-powered boost stages to accelerate the HCMs to a sufficiently high speed (approximately Mach 3) at which point scramjet sustainer engines take over to propel the HCMs to their intended targets at hypersonic speeds of Mach 5 or greater.

40. The development and near-term deployment of hypersonic weapon systems is one of the highest national security priorities for DoD, due, in part, to the need to match or deter the threats posed by recent advances in these technologies by potential adversaries of the United States. HCMs are one type of hypersonic weapon that DoD is interested in developing because they would provide the U.S. military with important capabilities that would enhance its ability to strike rapidly targets in highly contested environments. Specifically, HCMs would provide significant advantages over current cruise missiles in terms of speed to target and survivability to attack well-defended targets. Consequently, Lockheed and other major U.S. defense contractors are prioritizing the acquisition and development of hypersonic technologies to capture anticipated future business in high growth markets for hypersonic weapon systems, including HCMs.

41. Lockheed, Raytheon, and Boeing have each won contracts to develop HCMs for the U.S. military and are competing, or likely to compete, for future U.S. military HCM programs. DoD's Defense Advanced Research Projects Agency awarded Lockheed and Raytheon dual prime contracts to develop competing prototype HCM flight vehicles for the Hypersonic Air-breathing Weapon Concept program. A U.S. Air Force program, Southern Cross Integrated Flight Research Experiment ("SCIFiRE"), also seeks to develop a HCM that can be launched from ground-attack fighter aircraft. The SCIFiRE program is in study phase now, and Lockheed, Boeing, and Raytheon were each awarded SCIFiRE preliminary development contracts in 2021. [redacted]. In addition to these two unclassified programs, there are other future HCM programs under consideration by various branches of the U.S. military. Aerojet is one of only two competitive suppliers of the scramjets necessary to develop successfully HCMs for the U.S. military.

42. The U.S. military likely would not switch to any substitute product in response to a small but significant and non-transitory increase in the price of any HCM.

43. The design, development, and production of HCMs for the U.S. military is a line of commerce and a relevant product market within the meaning of the Clayton Act.

II. The Relevant Geographic Market is the United States

44. The relevant geographic area in which to analyze the effects of the Proposed Acquisition on competition in each of the Relevant Product markets is the United States.

45. The Relevant Products are purchased almost solely by DoD, which decides which companies are acceptable suppliers and then funds the development and procurement of these weapons through appropriations made by Congress. As a result of federal law, national security, and other considerations, DoD is unlikely to turn to any foreign producers in the face of a small but significant and non-transitory price increase by domestic suppliers of missiles, KVs, or HCMs.

46. For legal, political, economic, practical, and national security reasons, U.S. military prime contractors are unlikely to turn to any foreign producers in the face of a small but significant and non-transitory price increase by domestic suppliers of SRMs, DACS, or scramjets.

47. The United States is a relevant geographic market within the meaning of the Clayton Act.

ANTICOMPETITIVE EFFECTS

48. The Proposed Acquisition of Aerojet—the last independent domestic missile propulsion supplier (and one of only two significant domestic suppliers)—by a leading supplier of missiles, KVs, and HCMs to the U.S. military is likely to substantially lessen competition for procurements of these products, which are critical to the national security interests of the United States, 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.

49. As a result of the Proposed Acquisition, Lockheed would gain the ability and incentive to deny or degrade competitors' access to Critical Propulsion Technologies, which would increase rivals' costs for these inputs or otherwise disadvantage Lockheed's competitors. The U.S. Government, in turn, would be harmed because the cost of the Relevant Products would likely increase, innovation would be lessened, and quality would be reduced.

50. The U.S. missile industry is highly concentrated up and down the supply chain, and it has unique characteristics that make it difficult—if not impossible—for prime contractors to switch to alternative suppliers for Critical Propulsion Technologies. The presence of only two (at most) upstream suppliers and four significant participants (Lockheed, Raytheon, Northrop, and Boeing) in the downstream markets demonstrates the extent to which the Relevant Markets and the related upstream propulsion markets are highly concentrated. The effect of foreclosure by the combined firm following the acquisition would thus only increase or entrench market concentration.

51. Per DoD policy, DoD independently assessed the impact of the Proposed Acquisition [redacted] and concluded that the transaction [redacted]

52. Lockheed feared such foreclosure risk to itself were one of its competing primes to acquire Aerojet. For example, one Lockheed businessperson concluded, [redacted] Another Lockheed executive similarly observed, [redacted] That defensive rationale for the Proposed Acquisition itself substantiates the criticality of the propulsion products Aerojet supplies and validates the concerns that control

of these essential inputs could be wielded effectively to lessen competition by other suppliers of the Relevant Products.

53. Through its acquisition of Aerojet, Lockheed would gain the ability to foreclose, raise costs for, or otherwise disadvantage, its prime contract rivals that rely on Aerojet's Critical Propulsion Technologies to compete effectively in the Relevant Markets. Switching propulsion suppliers is prohibitively expensive, and Aerojet's current customers therefore cannot easily switch to Northrop, the only remaining U.S propulsion supplier of SRMs and scramjets, for existing programs. Moreover, there is no other proven alternative U.S. supplier of DACS to which KV producers could turn. Nor can primes practicably turn to foreign suppliers for propulsion products for DoD programs.

54. The Proposed Acquisition will necessarily alter the combined firm's incentives to supply Critical Propulsion Technologies to Lockheed's prime contractor rivals. Currently, Aerojet has the incentive to supply all potential primes seeking to win DoD contracts in the Relevant Markets to maximize Aerojet's probability of being the Critical Propulsion Technology sub-contractor for the winning prime. Post-acquisition, however, Lockheed's incentive will change because the total profits earned as a prime for a major weapon system almost always outweigh any foregone profits from supplying propulsion inputs to a rival prime. As a result, Lockheed would have a strong post-acquisition incentive to monitor, identify, and disadvantage potential threats to its current missile, KV, and HCM programs, as well as future competitive bids.

55. In many instances, Lockheed will have the ability to lessen competition by withholding Critical Propulsion Technologies from Lockheed's rivals post-acquisition. DoD's ongoing NGI program embodies the extreme vulnerability of Lockheed's rivals post-acquisition. The NGI program is a significant capability upgrade to the United States' primary homeland defense against attack from hostile intercontinental ballistic missiles. For the NGI program, every prime involved relies on Aerojet, which is the sole supplier of the critical DACS component for this important missile defense system. The NGI program alone represents total potential future revenues for the prime contractor of up to $18 billion over the expected life of the program.

56. Because a weapon system procurement program—from initial concept to full production of the weapon system—occurs over a number of years, there are numerous opportunities for a prime contractor that controls a necessary input to partially foreclose its rivals' access to the input. Before awarding a prime contract, DoD assesses a number of factors of each potential prime's bid, including technical merits of the design, the technical capability of the prime and its partners, cost/price, schedule risk, and the bidders' past performance on similar programs. There are numerous mechanisms by which Lockheed could handicap a competitor's performance with respect to each of these factors through a variety of foreclosure strategies for each of the Critical Propulsion Technologies, including:

a. affecting the price of the technology;

b. affecting the quality of the technology;

c. affecting the quality of the engineering team for the technology;

d. affecting the schedule associated with the technology; or

e. affecting the contract terms for the technology.

57. These partial foreclosure mechanisms are less detectable and harder to deter than total foreclosure, especially given the often unique design and complex development pathway for each of the Critical Propulsion Technologies. A given acquisition program for a Relevant Product may have dozens of development milestones, each of which is vulnerable to myriad foreclosure strategies that Lockheed could employ to degrade or delay the performance of a competing prime contractor. Partial foreclosure by the merged firm appears highly likely, given that Lockheed's competitors in the downstream Relevant Markets cannot compete effectively without access to Aerojet's best experts, technology, and timely delivery commitments.

58. Apart from complete or partial foreclosure, a combined Lockheed-Aerojet could also raise its rivals' costs for Critical Propulsion Technologies. Propulsion often comprises a significant portion of the Relevant Product's total bill of materials, which leaves competing primes vulnerable should Lockheed increase the price for the Critical Propulsion Technologies. If Lockheed were to increase the price of Aerojet input products for its prime rivals post-transaction, competition could be lessened in a number of ways: the competing prime could be forced to raise the prices of the downstream Relevant Product to account for increased input costs; it could decide not to compete at all in light of its higher cost position; or foreclosed rivals could have fewer discretionary dollars to invest to win future programs, which, in turn, would decrease competitive pressure on Lockheed. In addition, by gaining insight into a key cost component of a rival's anticipated bid, Lockheed may be able to be incrementally less aggressive with respect to its own bid.

59. The Proposed Acquisition may also impact R&D and innovation. Lockheed, Aerojet, and other defense contractors currently compete on the basis of innovation, often making decisions to allocate company-sponsored or internal research and development ("IRAD") funds from one project or program to another based on the expected return the company can earn on its IRAD investment. Currently, an independent Aerojet has the incentive to direct IRAD investment based on the potential return the funds would generate regardless of which prime it is supporting. Indeed, Aerojet currently maximizes its probability of becoming the winning bidder's supplier by supporting as many competing bidders as possible. The Proposed Acquisition would alter this dynamic, however, as the combined firm would be incentivized to allocate Aerojet investment dollars for the combined firm's benefit alone, to the detriment of Lockheed's downstream rivals who have long relied on an independent Aerojet's IRAD investments to increase the competitiveness of their prime contract proposals.

60. The Proposed Acquisition also increases the likelihood of the acquisition, transfer, misuse, and/or mishandling of competitively sensitive, non-public information. Such an exchange of competitively sensitive information could, in turn, negatively impact current and/or future competitions for the Relevant Products. Primes and their propulsion sub-contractors, through their collaboration for the competitive pursuit of a given program, often exchange sensitive information about technological advancements, cost, schedule, and business strategies, among other things. The Proposed Acquisition will give Lockheed access to competitively sensitive business

information of rival primes that Aerojet acquired as a supplier of Critical Propulsion Technologies to rival primes. In contrast to an independent Aerojet, Lockheed would have an incentive to exploit its access to its rivals' proprietary information to gain an advantage in competitions against those rival primes. The Proposed Acquisition also creates the risk that proprietary, competitively sensitive information relating to Northrop's SRM business—Aerojet's only SRM rival—could be unwittingly, or purposefully, transferred to the formerly independent Aerojet, which could disadvantage Northrop in future competitions against Lockheed's newly acquired SRM business.

61. The Proposed Acquisition would increase entry barriers into the design, development, and production of each of the Relevant Products, making future entry even less likely, timely, and sufficient. If Lockheed were to foreclose supply of the Critical Propulsion Technologies to a potential new downstream entrant post-acquisition, the putative new entrant would likely face substantial development delays as it would need to seek out an alternative propulsion input supplier—if one existed. In the alternative, the new entrant would face the difficult prospect of having to first enter into the design, development, and production of the relevant input product(s)—i.e., Critical Propulsion Technologies—before it could subsequently enter into the downstream market for one of more of the Relevant Products.

The Proposed Acquisition is Likely to Harm Competition in the Design, Development, and Production of Missiles for the U.S. Military

62. Lockheed is the largest supplier of missiles to the U.S. military, serving as a prime contractor for various strategic, tactical, and MDI missile programs. The Proposed Acquisition would provide a combined Lockheed-Aerojet with the ability and incentive to foreclose or otherwise disadvantage Lockheed's prime contractor missile rivals, resulting in competitive harm to the market for the design, development, and production of missiles for the U.S. military, which could inhibit DoD's capability to defend the nation.

63. Lockheed accounts for approximately [redacted] of all dollar sales of tactical missiles, at least [redacted] percent of all dollar sales of strategic missiles, and at least [redacted] percent of all dollar sales of MDIs to the U.S. military. Lockheed is the prime contractor for multiple current U.S. military missile programs, including the U.S. Navy's Fleet Ballistic Missile strategic missile system, as well as several tactical missiles, including, among others, Javelin, Hellfire, Guided Multiple Launch Rocket System, Long-Range Anti-Ship Missile, Joint Air to Ground Missile, and Joint Air-to-Surface Standoff Missile. Lockheed also is the prime contractor for the Terminal High Altitude Area Defense ("THAAD") and Patriot Advanced Capability ("PAC-3") MDIs. Lockheed has been awarded development contracts for the NGI MDI program, as well as for several hypersonic missile and hypersonic missile technology demonstrator programs, including Conventional Prompt Strike, Long Range Hypersonic Weapon, Air-Launched Rapid Response Weapon, Operational Fires, and Tactical Boost Glide.

64. The relevant market is highly concentrated, with Lockheed competing primarily against three other firms: Raytheon, Boeing, and Northrop to design, develop, and produce missiles for the U.S. military. Raytheon is the second largest missile supplier to the U.S. military, and its key missile programs include several tactical missiles, such as the Advanced Medium-Range Air-

to-Air Missile, AIM-9X, Rolling Airframe Missile/SeaRAM, Griffin, and Standard Missile ("SM")-2 and SM-6. Raytheon also supplies the SM-3 and SM-6 families of MDIs, as well as a next-generation strategic cruise missile—the Long-Range Stand-Off Weapon. Northrop manufactures one tactical missile: the medium-range air-to-ground Advanced Anti-Radiation Guided Missile. Northrop has also been awarded a sole-source prime contract for the development of the Ground-Based Strategic Defense strategic missile program, and, along with partner Raytheon, a development contract for the NGI missile defense interceptor program (Lockheed was awarded a competing contract). Boeing is the prime contractor for MDA's Ground-based Midcourse Defense ("GMD") program and the Harpoon tactical anti-ship missile.

65. The design of a missile's propulsion system is driven by the specific performance requirements and technical constraints imposed by the missile's intended mission(s). Selecting the optimal propulsion design is a complex task that requires extensive collaboration between the engineering teams of the missile prime contractor and the propulsion subcontractor. Modern missiles are designed around one of three types of propulsion systems: rockets, turbojets, and ramjets/scramjets. Each of these engines has different advantages and disadvantages that must be weighed to select the optimal propulsion technology for a given missile design. Most missiles employ SRMs because they produce high specific thrust.

66. SRMs are used to provide the primary propulsion for the vast majority of U.S. military missiles. The U.S. military currently fields approximately forty missile designs that use SRMs. At a basic level, a SRM is a cylindrical casing filled with solid propellant that, when ignited, expels hot gases through a nozzle to produce thrust. A typical composite solid propellant used for SRMs is a mixture of ammonium perchlorate (oxidizer) and aluminum (fuel) mixed in a binder with other ingredients. This mixture is cast in the motor case, and, when cured, produces a rubbery solid propellant that can be stored relatively safely until the motor is employed. SRMs are differentiated products that are specially designed for a particular missile and can vary greatly in size and power, depending on the platform. Tactical missiles usually require the smallest motors—ranging in size from about 3 inches up to about 24 inches in diameter. Strategic missiles employ larger SRMs of over 40 inches in diameter. MDIs use SRMs that generally fall somewhere in between—ranging in size from 10-inch diameter to over 40-inch diameter (in the case of the Ground-Based Interceptor).

67. SRMs are an essential input to almost all current and upcoming U.S. military missile programs. And all current missile prime contractors, as well as any potential future competitors for future U.S. military missile programs, depend on SRMs for current or future missiles. There is no substitute product that can be used in place of SRMs for missile propulsion. SRMs have important advantages over other technologies for missile applications, including, but not limited to, the ability to store the missile safely in a launch-ready state for extended periods of time until needed. For safety and convenience in handling, among other reasons, SRMs have replaced liquid propellant rocket engines for primary propulsion in modern U.S. missiles. Because of differences in technological capability and cost, missile prime contractors would not substitute to any other technology in place of SRMs, in the event of a small but significant increase in prices for SRMs.

68. The Proposed Acquisition will give Lockheed control over a critical input for most missiles—Aerojet's SRM design, development, and production capabilities. The design, development, and production of high performance SRMs for U.S. military missiles is highly complex and requires specialized skills, as engineers must carefully balance performance against various constraints, such as cost, weight, volume, pressure, and temperature.

69. Over the past two decades, the number of U.S. companies manufacturing SRMs has consolidated from six to only two: Aerojet and Northrop. This duopoly accounts for over 90 percent of SRM sales in the United States. The only other firm selling a significant number of SRMs in the United States is Nammo Raufoss ("Nammo"), a Norwegian company that sells small tactical SRMs to Raytheon for its AMRAAM, Evolved Sea Sparrow, and Naval Strike missiles. Unique circumstances prompted Raytheon's selection of Nammo as a propulsion provider for these missile systems. Nammo is not a competitive supplier of SRMs for most U.S. missile programs, and the company's U.S. presence and capabilities are extremely limited. Further, as a foreign supplier, Nammo is not preferred by the U.S. Government, especially for critical next-generation and all classified programs. Nammo also lacks the breadth of experience and capabilities Aerojet and Northrop possess across all sizes of SRMs.

70. The Proposed Acquisition follows other acquisitions of SRM suppliers by missile prime contractors. Northrop acquired Orbital ATK, the only other significant U.S. manufacturer of SRMs in 2018. Indeed, Lockheed's rationale, in part, for the Proposed Acquisition was that it presented a [redacted]

71. Aerojet and Northrop compete by constantly looking for innovative ways to increase SRM performance or lower the cost of their production. For example, Aerojet is researching new technologies to [redacted].

72. For some missiles, there may be no close substitutes for Aerojet's SRMs. Even if there were, switching, in and of itself, would impose a large cost on Aerojet's SRM customers. Where Northrop offers a competitive alternative, partial or complete foreclosure by Lockheed would likely still result in competitive harm, because in those situations, Northrop could use its increased leverage as the customer's only option available to extract higher prices for its SRMs.

73. The Proposed Acquisition would give the combined firm the ability to foreclose missile system prime contractor competitors by denying them access to Aerojet's SRMs or by making pricing, personnel, scheduling, investment, design, and other decisions that disadvantage those competitors.

74. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm Lockheed's missile prime contractor competitors. Lockheed views missiles as a core product area and an engine of future profit growth. Post-acquisition, Lockheed would have a substantial incentive to engage in foreclosure strategies that give Lockheed an

advantage in competing for a new missile prime contract because the expected profits from winning such a bid typically far exceed the foregone profits from supplying Aerojet SRMs to rival prime contractor bidders.

75. If Lockheed were to withhold effective access to its in-house Aerojet SRMs post-acquisition, or increase the price of those SRMs, to its prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their missile systems, decide not to compete, or invest less aggressively to win missile programs, which, in turn, would decrease or eliminate competitive pressure on Lockheed, leading to an increase in price and/or decrease in quality or innovation.

II. The Proposed Acquisition is Likely to Harm Competition in the Design, Development, and Production of KVs

76. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Lockheed's rivals in the market for the design, development, and production of KVs for the MDA and U.S. military. By acquiring Aerojet, Lockheed would gain control over the only established and proven supplier of DACS, a critical input for KVs.

77. Historically, three firms have competed to design, develop, and produce KVs for U.S. missile defense systems: Lockheed, Raytheon, and Boeing. Lockheed supplies the KVs for the THAAD system and has won development contracts for other KVs, including the multiple kill vehicle ("MKV") and Multi Object Kill Vehicle ("MOKV") programs. Raytheon produces the current KVs used on the GMD and SM-3 missile defense systems and has won contracts relating to other KVs, including MKV and MOKV. Boeing is the prime contractor for the current GMD system and has experience developing other KVs, including designs for the Redesigned Kill Vehicle, MKV, and MOKV programs. Each of these competitors, or potential competitors, in turn, depend on Aerojet for DACS, which are a critical input to a KV.

78. DACS are advanced, high performance propulsion systems used to provide fast and precise maneuvering capabilities for KVs. DACS use divert thrusters, which create forceful pulses to quickly and accurately change the KV's trajectory with respect to the target, and smaller attitude control thrusters, which provide very low thrust to make finer pitch, roll, and yaw adjustments to maintain or adjust the KV's orientation.

79. DACS can be designed to utilize either solid or liquid propellant depending on the requirements of the specific missile defense system. Solid DACS ("SDACS") are favored for certain applications, such as deployment on U.S. Navy ships, because the propulsion system is safer to store and maintain. Liquid DACS ("LDACS"), however, can provide higher performance that may be required for a specific KV mission profile. In heritage SDACS, the solid propellant would continuously burn in a single pulse once ignited. Aerojet developed innovative technologies, however, such as throttling solid propellant DACS ("TDACS") or extinguishing solid propellant DACS ("EDACS" or "extinguishing TDACS") that are able to narrow the performance gap between SDACS and LDACS.

80. There is no substitute for DACS, which are an essential component of most KV designs.

81. Aerojet is the only current supplier of DACS for U.S. missile defense programs. Aerojet also possesses the most advanced DACS technology and development know-how of any potential U.S. supplier, gained through its performance on multiple past and present DACS programs. Aerojet provides the LDACS used for Raytheon's exo-atmospheric kill vehicle as well as for Lockheed's THAAD KV. Aerojet also supplies the TDACS for Raytheon's SM-3 Block IB KV and high divert TDACS for Raytheon's SM-3 Block IIA KV. Orbital ATK (which Northrop acquired in 2018) is the only other company that has supplied DACS for U.S. missile defense programs. Orbital ATK supplied a simple design SDACS for Raytheon's SM-3 Block IA until 2014. Aerojet displaced Orbital ATK as a DACS supplier for the SM-3 Block IB and Block IIA programs, and Northrop is [redacted]. As a result, Northrop is relying on Aerojet—rather than in-house Orbital ATK DACS technology—to supply DACS for Northrop's entry in the competition to develop the NGI.

82. Aerojet is currently supporting all of the prime contractors currently competing or preparing to compete for forthcoming missile defense programs. Aerojet supported all three prime contractor teams (Lockheed, Boeing, and Northrop/Raytheon) that competed for initial development contracts for MDA's NGI program. All three teams submitted design proposals based on Aerojet DACS for the KVs. In March 2021, MDA awarded dual contracts to Lockheed and the Northrop/Raytheon team with an estimated combined maximum value of $1.6 billion through fiscal year 2022. The timing on a final down-select to one prime contractor has not been announced but is anticipated to occur [redacted].

83. In addition, Lockheed's rivals will require Aerojet DACS technology and support for future DoD programs intended to defend against attacks by hypersonic missiles, including, but not limited to, MDA's Glide Phase Interceptor program. In November 2021, MDA awarded Lockheed, Northrop, and Raytheon contracts for the accelerated concept design phase of the program, which is aimed at developing MDIs designed for deployment on U.S. Navy Aegis Ballistic Missile Defense destroyers to counter hypersonic weapons during their glide phase of flight. All of these firms will likely require Aerojet's DACS technology for their designs.

84. The Proposed Acquisition would give the combined firm the ability to foreclose rival KV competitors by denying them access to Aerojet's essential DACS technology or by making pricing, personnel, scheduling, investment, design, or other decisions that disadvantage those competitors.

85. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm competing KV suppliers. Post-acquisition, Lockheed would have a substantial incentive to engage in foreclosure strategies that give Lockheed an advantage in competing for a prime contract for a new missile defense system utilizing KVs because the expected profits from winning such a bid typically far exceed the foregone profits from supplying DACS to the winning bidder.

86. If Lockheed were to withhold effective access to its in-house Aerojet DACS technology post-acquisition, or increase the price of those DACS, to its prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their KV or missile defense systems, decide not to compete, or invest less aggressively to win missile defense system programs, which, in turn, would decrease competitive pressure on Lockheed, leading to an increase in price and/or decrease in quality or innovation.

III. The Proposed Acquisition is Likely to Harm Competition in the Design, Development, and Production of HCMs

87. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Lockheed's rivals in the market for the design, development, and production of HCMs for the U.S. military.

88. Scramjets, also referred to as "dual mode ramjets," are an essential enabling technology for development of HCMs. There is no substitute product that could be used in place of a scramjet in current or future U.S. military HCM development programs.

89. A scramjet is a type of air-breathing jet engine. Unlike rocket motors, air-breathing jet engines draw upon oxygen in the atmosphere for combustion, eliminating the need to carry oxidizer in addition to fuel. As a result, air-breathing engines are more efficient than rocket motors, enabling a missile powered by an air-breathing engine potentially to travel longer distances. Scramjets are a critical enabling technology for HCMs and other potential future reusable hypersonic vehicles because the air-breathing turbojet engines that power current subsonic cruise missiles are incapable of propelling a vehicle to hypersonic speeds.

90. A scramjet is a technologically advanced type of high-performance ramjet engine. A ramjet uses the high pressure generated by the vehicle's forward motion to compress incoming air, eliminating the turbines used in a conventional turbojet engine. A ramjet engine slows the incoming air to subsonic speed before it enters the combustor where liquid fuel is injected into the airflow and ignited to produce additional thrust. In a scramjet engine, however, the airflow travels at supersonic speed through the combustion chamber—a design that poses several significant technical challenges. Scramjets are the only air-breathing engines capable of propelling a missile to hypersonic speeds in excess of Mach 5.

91. Not only is scramjet technology necessary to produce an HCM, but the designs of the scramjet engine and the missile or other flight vehicle are tightly integrated and interdependent. Simply put, as one Lockheed executive indicated, the [redacted] The necessity for close collaboration between the propulsion provider and missile prime contractor heightens the potential for competitive harm to result from the Proposed Acquisition, as it would increase the volume of competitively sensitive, non-public information that must be shared and amplify Lockheed's ability to undermine its rivals' efforts through foreclosure strategies.

92. Aerojet and Northrop are the only two viable suppliers of scramjets for U.S. military HCM applications. Aerojet and Northrop have both gained extensive technical knowledge and expertise through their participation on several current and past DoD programs. The development of hypersonic propulsion technologies requires specialized expertise and technology, including the development of advanced materials technology and special analytical tools. Both companies have achieved successful flight tests of scramjet-powered hypersonic flight vehicles. No other U.S. company has scramjet development experience and capabilities commensurate with Aerojet and Northrop.

93. Three prime contractors (Lockheed, Raytheon, and Boeing) are currently developing HCMs, and they all rely on Aerojet or Northrop scramjet engines to support their efforts. These primes are in a race to develop HCMs and to position favorably their companies to secure lucrative potential future production contracts for the missiles.

94. [redacted].

95. The Proposed Acquisition would give the combined firm the ability to foreclose Boeing and other future rival HCM competitors by denying them access to Aerojet's scramjet technology or by making pricing, personnel, scheduling, investment, design, and other decisions that disadvantage Boeing or other competitors.

96. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm competing HCM suppliers. Post-acquisition, Lockheed would have a substantial incentive to engage in foreclosure strategies that give Lockheed an advantage in competing for an HCM prime contract because the expected profits from winning such a bid would exceed the foregone profits from supplying scramjets to the winning bidder.

97. If Lockheed were to withhold effective access to Aerojet's scramjet technology, or increase the price of those scramjets, to Lockheed's prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their HCMs, decide not to compete, or invest less aggressively to win future HCM programs, which, in turn, would decrease or eliminate competitive pressure on Lockheed, leading to an increase in price and/or decrease in quality or innovation.

LACK OF COUNTERVAILING FACTORS

98. Respondents cannot demonstrate that entry or expansion of products in the Relevant Markets that would not rely upon Critical Propulsion Technologies would be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of

the Proposed Acquisition. Respondents also cannot demonstrate the entry of substitutes for Aerojet's Critical Propulsion Technologies would be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. Successful entry into the design, development, and production of each of the Relevant Products, as well as to each of the Critical Propulsion Technologies, would be difficult, time consuming, and costly. Entry requires specialized know-how, advanced technology, skilled engineers, and specialized equipment and facilities.

99. Respondents cannot demonstrate substantiated, verifiable, cognizable, and merger-specific efficiencies that would offset the Proposed Acquisition's likely significant anticompetitive effects in the Relevant Markets. Nor can Respondents demonstrate that any elimination of double marginalization would offset the harm of this anticompetitive acquisition.

VIOLATIONS CHARGED

COUNT I – ILLEGAL AGREEMENT

100. The allegations of Paragraphs 1 through 99 above are incorporated by reference as though fully set forth.

101. The Acquisition Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

102. The allegations of Paragraphs 1 through 99 above are incorporated by reference as though fully set forth.

103. The Proposed Acquisition, if consummated, may substantially lessen competition in the Relevant Markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the sixteenth day of June, 2022, at 10 a.m. EST, is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary 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 and the Clayton 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 this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C.

53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. 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 pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the Relevant Markets, with the ability to offer such products and services as Lockheed and Aerojet were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Respondents that combines their businesses in the Relevant Markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Respondents provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the Relevant Markets with any other company operating in the Relevant Markets

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Aerojet as a viable, independent competitor in the Relevant Markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-fifth day of January, 2022.

By the Commission.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss Complaint. The Joint Motion states that Respondent Lockheed Martin Corporation has terminated the Merger Agreement and withdrawn its Hart-Scott-Rodino Notification and Report Forms for the proposed acquisition. Having considered the Joint Motion, we have determined that it should be granted. Accordingly,

IT IS HEREBY ORDERED THAT the Joint Motion to Dismiss Complaint, dated February 14, 2022, is **GRANTED**, and the Complaint in this proceeding is dismissed without prejudice.

By the Commission.

Final Order

Exhibit A

State	City	Merger Result	Divested Store(s)
NY	Cooperstown (Otsego County)	2 to 1	Tops 568
NY	Cortland (Cortland County)	4 to 3	Tops 517
NY	Lake Placid/Saranac Lake (Franklin County)	3 to 2	Tops 707
NY	Norwich (Chenango County)	3 to 2	Tops 569
NY	Oneida/Sherrill (Oneida County)	3 to 2	Tops 364
NY	Owego (Tioga County)	2 to 1	Tops 579
NY	Plattsburgh/Peru (Clinton County)	5 to 4	Tops 713
NY	Rome (Oneida County)	4 to 3	Tops 587
NY	Warrensburg (Warren County)	2 to 1	Tops 701
NY	Watertown (Jefferson County)	4 to 3	Tops 597, Tops 589
VT	Rutland (Rutland County)	3 to 2	Tops 740

Complaint

IN THE MATTER OF

ALTRIA GROUP, INC.
AND
JUUL LABS, INC.

COMPLAINT AND INITIAL DECISION IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, SECTION 1 OF THE SHERMAN ACT, AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9393; File No. 191 0075
Complaint, April 1, 2020 – Initial Decision, February 15, 2022

This case addresses the $12.8 billion acquisition by Altria Group, Inc. of certain assets of JUUL Labs, Inc. The complaint alleges that Respondents violated Section 1 of the Sherman Act, Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act by significantly reducing competition in the market for closed-system e-cigarettes in the United States. In his Initial Decision filed on February 15, 2022, the administrative law judge found that the evidence failed to prove a reasonable probability that the Transaction would substantially lessen competition in the future and dismissed the Complaint. On February 16, 2022, Complaint Counsel filed a notice of appeal to the Initial Decision.

Participants

For the *Commission*: *James Abell, Michael Blevins, Erik Herron, Frances Anne Johnson, Joonsuk Lee, Meredith Levert, Michael Lovinger, David Morris,* and *Kit Rogers.*

For the *Respondents*: *Debbie Feinstein* and *Justin Hedge, Arnold & Porter Kaye Scholer LLP; Michael Sibarium, Pillsbury Winthrop Shaw Pittman LLP; Jeremy Calsyn, Cleary Gottlieb Steen & Hamilton LLP.*

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 Altria Group, Inc. ("Altria"), a corporation, and JUUL Labs, Inc. ("JLI"), a corporation, hereinafter sometimes referred to as "Respondents," have executed agreements in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, Section 5 of the FTC 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 by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. This action concerns a series of agreements between Altria and JLI, whereby Altria ceased to compete in the U.S. market for closed-system electronic cigarettes ("the relevant

market") in return for a substantial ownership interest in JLI, by far the dominant player in that market. Electronic cigarettes ("e-cigarettes") are devices that deliver nicotine to a user by vaporizing a liquid nicotine solution; in the case of closed-system e-cigarettes, the liquid is contained in a pre-filled, sealed cartridge. Faced with declining sales of traditional cigarettes and a shift in consumer demand toward alternative nicotine products, for years Altria had viewed participation in the relevant market as a strategic priority essential to its long-term survival. Altria entered the relevant market through its subsidiary Nu Mark in 2013 and continued to invest heavily in the category. By mid-2017, its MarkTen e-cigarette had achieved the second-highest market share.

2. JLI entered the relevant market in 2015, and experienced modest growth until mid-2017, when it began rapidly overtaking its competitors, including Altria. JLI's meteoric rise stunned Altria and upended the entire e-cigarette market: by the end of 2017, JLI's market share had surpassed those of all other e-cigarette manufacturers, including Altria.

3. JLI's rise presented Altria with a new threat on two fronts: it stood in the way of Altria's goal of leading the e-cigarette category and threatened to disrupt Altria's lucrative traditional cigarette business. Altria reacted to this threat by pursuing a dual- track strategy: on the one hand it would endeavor to compete aggressively against JLI, including through price promotions and product innovation; at the same time, it sought to eliminate the threat by acquiring JLI. Altria made repeated overtures to JLI about a potential acquisition or partnership, but negotiations dragged, and meanwhile Altria continued to compete aggressively. In February 2018, it introduced MarkTen Elite, a pod-based e-cigarette that closely resembled JLI's product in appearance and structure. Although JLI continued to dominate the relevant market, in mid-2018, Altria told the investment community that its own products were driving growth and gaining traction among consumers.

4. Negotiations between Altria and JLI intensified in the summer of 2018, and the future of Altria's e-cigarette business emerged as a key point of contention. During negotiations, JLI insisted, and Altria recognized, that Altria's exit from the e- cigarette market was a non-negotiable condition for any deal. When Altria sought to weaken or remove any obligation to exit that market, JLI conveyed that any such attempt was completely unacceptable. After negotiations had stalled temporarily, Altria reaffirmed its willingness to accede to JLI's demand in early October 2018. With that commitment secured, negotiations resumed. At that time, JLI dominated the relevant market with a market share of approximately 70%, and Altria was anticipating an increasingly negative impact on both its e-cigarette and its traditional cigarette businesses due in part to JLI's growth.

5. In order to meet JLI's demand that Altria cease to compete in the e- cigarette market, Altria began taking steps to withdraw its e-cigarettes from the relevant market, including pulling its MarkTen Elite product from the market in October 2018, and then, after five years of continuous operation, announcing on December 7, 2018, its decision to wind down the remainder of its e-cigarette business. At the same time, [redacted]. Less than two weeks later, Respondents reached a deal.

6. On December 20, 2018, Respondents announced that they had executed a Purchase Agreement and a number of related agreements (together, "the Transaction"). Under the Purchase Agreement, Altria purchased a 35% non-voting stake in JLI, which Altria could convert to a voting stake upon receiving HSR approval. In addition, Respondents executed a Relationship Agreement, which contained a non-compete provision ("the Non-Compete") restricting Altria from competing in the relevant market; a Services Agreement, whereby Altria agreed to provide a variety of support services for JLI; an Intellectual Property License Agreement licensing Altria's e-cigarette intellectual property to JLI; and a Voting Agreement providing Altria representation on JLI's board of directors following the conversion of its shares. Pending HSR approval, the Transaction provided Altria the right to appoint one of its executives to a non-voting "observer" position on JLI's board.

7. Altria's investment in JLI and its nearly simultaneous decision to exit the relevant market in order to meet JLI's demands not only eliminated its existing e- cigarette products from the market but also, through the Non-Compete, halted its ongoing innovation efforts toward developing a new and improved portfolio of products. Thus, consumers lost the benefit of current and future head-to-head competition between Altria and JLI, and between Altria and other competitors. As JLI summarized in a set of draft talking points for the announcement of the Transaction: [redacted]

8. By securing Altria's exit from the relevant market, the Transaction eliminated a threat to JLI's market dominance. Respondents further ensured that dominance by agreeing that Altria would throw behind JLI its extensive resources, including its distribution capabilities and its premier shelf space at retailers.

9. After executing the Transaction, Altria appointed its Chief Growth Officer as its observer on the JLI board of directors. Following that executive's departure from Altria to become Chief Executive Officer of JLI, Altria appointed its Chief Financial Officer and Vice Chairman to fill the observer position.

10. Neither the entry of new producers, nor repositioning by existing producers, would be timely, likely, or sufficient to counteract the anticompetitive effects of Altria's agreement to exit the relevant market. Entry or repositioning would require extensive time and capital expenditure related to the development or acquisition of a product, as well as to securing the approval of a product by the U.S. Food & Drug Administration (FDA) through a complex, lengthy, and expensive regulatory process.

11. Respondents cannot show that the Transaction resulted in cognizable efficiencies sufficient to outweigh the competitive harm caused by Altria's agreement to exit the relevant market. Nor can they point to pro-competitive benefits that could not have been achieved through less restrictive means. In fact, much of the collaboration was restructured in January 2020 to eliminate the marketing aspects of the collaboration, further reducing the scope of theoretical benefits from the agreements.

12. Respondents' conduct has illegally restrained competition in the relevant market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, as amended, 15 U.S.C. § 45(a).

13. The Transaction has also substantially lessened competition in the relevant market in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

II. JURISDICTION

14. At all times relevant, Respondents Altria and JLI have each been, and are each now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

15. At all times relevant, the acts and practices of Respondents Altria and JLI, including the acts and practices alleged in this complaint, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

16. The Transaction constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

17. Respondent Altria Group, Inc. is a holding company incorporated in Virginia and headquartered at 6601 West Broad Street, Richmond, Virginia 23230. Through a number of subsidiaries, Altria is engaged in the manufacture, sale and distribution of cigarettes, cigars, pipe tobacco, and smokeless tobacco products. Prior to the discontinuation of its entire product line in December 2018, Altria's Nu Mark subsidiary was engaged in the manufacture and sale of "innovative tobacco" products, which included e-cigarettes sold under the brand names MarkTen and Green Smoke. In 2018, Altria generated over $25 billion in net revenues.

18. Respondent JUUL Labs, Inc., a Delaware corporation, is headquartered at 560 20th Street, San Francisco, California 94107. JLI is the leading manufacturer of pod- based e-cigarettes, generating over $1 billion in sales in 2018.

IV. THE TRANSACTION

19. As referenced in Paragraph 6 herein, on December 20, 2018, Respondents initiated a series of transactions granting Altria a 35% non-voting equity interest in JLI in exchange for a $12.8 billion all-cash investment. This investment did not require a notification under the Hart-Scott-Rodino Act. Respondents' Purchase Agreement incorporates various ancillary agreements, including a Services Agreement, a Relationship Agreement, a Voting Agreement, and an Intellectual Property License Agreement.

20. The Transaction valued JLI at roughly $38 billion, more than double JLI's reported value less than seven months earlier, speaking to JLI's commercial success. JLI distributed the

vast majority of Altria's cash payment to its shareholders and employees, including its two largest shareholders, [redacted], and its CEO Kevin Burns.

21. On February 4, 2019, Respondents filed for HSR clearance to convert Altria's interest into voting securities (the "Antitrust Conversion") and to grant Altria permission to appoint three (of nine) members of JLI's board of directors as specified in the Voting Agreement.

22. The Relationship Agreement includes the Non-Compete, which states in the relevant part:

> [Altria] shall not . . . directly or indirectly (1) own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor business; (2) take actions with the purpose of preparing to engage in the e-Vapor Business, including through engaging in or sponsoring research and development activities; or (3) Beneficially Own any equity interest in any Person, other than an aggregate of not more than four and nine-tenths percent (4.9%) of the equity interests of any Person which is publicly listed on a national stock exchange, that engages directly or indirectly in the e-Vapor Business (other than (x) as a result of [Altria's] Beneficial Ownership of Shares or (y) engagement in, or sponsorship of, research and development activities not directed toward the e-Vapor Business and not undertaken with the purpose of developing or commercializing technology or products in the e-Vapor Business) Notwithstanding the foregoing, (x) the [Altria] and its Subsidiaries and controlled Affiliates may engage in the business relating to (I) its Green Smoke, MarkTen (or Solaris, which is the non-U.S. equivalent brand of MarkTen) and MarkTen Elite brands, in each case, as such business is presently conducted, subject to Section 4.1 of the Purchase Agreement, and (II) for a period of sixty (60) days commencing on the date of this Agreement, certain research and development activities pursuant to existing agreements with third parties that are in the process of being discontinued . . . .

At the time the Non-Compete was signed, Altria had, over the preceding two months, removed all of its e-cigarette products from the market. In effect, Altria committed to shut down its own e-vapor business and participate in that business exclusively through JLI.

23. Though it was later amended, under the initial Services Agreement, Altria agreed to provide certain services to JLI, divided between Initial and Extended Services. The Initial Services included leasing convenience store shelf space to JLI, regulatory consulting, and distribution support; the Extended Services included direct marketing support and sales services. Under the terms of the Relationship Agreement, the Non- Compete went into effect early in 2019 when Altria began to perform Extended Services. The Services Agreement had an initial six-year term, subject to early termination by mutual consent or in case of material breach, bankruptcy, or insolvency. If the Services Agreement expired, Altria could discontinue the Non-Compete, at which point it would lose its right to appoint JLI board members and its pre-emptive right to maintain its 35% stake in the company, but would regain its ability to compete in the market against JLI.

24. The Intellectual Property License Agreement grants JLI a broad, non-exclusive, irrevocable license to Altria's e-cigarette intellectual property portfolio.

25. On January 30, 2020, Respondents announced amendments to their agreement, including an Amended Purchase Agreement, an Amended Relationship Agreement, an Amended Services Agreement, and a Revised Voting Agreement.

26. Under the Revised Voting Agreement, after the Antitrust Conversion, Altria will instead have the right to (1) appoint two (of nine) JLI directors; (2) nominate one (of three) JLI independent directors; (3) appoint one (of four) members of a Nominating Committee (who would have the right to veto independent director nominations); (4) appoint two (of five) members and the chair of a new Litigation Oversight Committee (which would have responsibility for managing litigation involving both Altria and JLI, i.e., "Joint Litigation Matters"); and (5) appoint one (of three) members of a Litigation Subcommittee (which would have authority, by unanimous vote, to change JLI's senior outside counsel responsible for Joint Litigation Matters). The Revised Voting Agreement would further grant JLI's CEO (1) a board seat, (2) a seat on the Litigation Oversight Committee, and (3) a seat on the Litigation Subcommittee.

27. The Amended Relationship Agreement gives Altria the option to be released from the Non-Compete if JLI is prohibited by federal law from selling vaping products in the United States for at least a year or if Altria's internal valuation of the carrying value of its investment falls below 10% of its initial value of $12.8 billion.

28. The Amended Services Agreement eliminates all services except for regulatory support services. The amendment was effective at signing except as regards to Altria's provision of retail shelf space to JLI, which service terminates after March 31, 2020.

V. INDUSTRY BACKGROUND

A. Altria Recognized the Need to Invest in E-cigarettes

29. In the mid-2010s, there was an increased focus on alternative nicotine products, among which e-cigarettes became the fastest-growing category. Altria and the other major cigarette producers repeatedly acknowledged the need to invest and compete in the relevant market, and start-ups such as JLI and NJOY entered as well.

30. Altria entered the market with its MarkTen e-cigarette in 2013, and over the next several years spent well over $100 million acquiring other existing e-cigarette platforms in order to augment its portfolio. [redacted], Altria [redacted] a pod-based product and began marketing it in February 2018 as MarkTen Elite.

31. Altria management emphasized the importance of the e-vapor category during investor presentations and through internal incentive compensation plans. For example, in February 2018, Altria's then-COO (and current CEO) Howard Willard explained, "Nu Mark's goal is to lead the U.S. e-vapor category with a portfolio of superior, potentially reduced-risk products that . . . generate cigarette-like margins at scale."

32. JLI, then a subsidiary (subsequently spun-off) of PAX Labs, Inc., entered the relevant market in 2015 with a closed-system e-cigarette in a discreet "pod-based" format, roughly

the size and shape of a USB drive. JLI's "JUUL" product quickly gained traction among consumers, and by the end of 2017, it had surpassed Altria and secured the largest share of the relevant market.

B. The PMTA Process for E-cigarettes

33. Under the FDA's regulatory framework, a manufacturer of a new tobacco product, including an e-cigarette, must submit to the FDA a Premarket Tobacco Product Application ("PMTA") and receive the FDA's approval before marketing that product. An e-cigarette that was on the market prior to August 8, 2016 may remain on the market, but the manufacturer of that product must file a PMTA by May 12, 2020 in order to continue marketing it, and must remove the product in the event the PMTA is denied. An e-cigarette that was not on the market prior to August 8, 2016 cannot be marketed until it receives PMTA approval. At the time Respondents executed the Transaction, the deadline for an in-market applicant to file its PMTA was August 8, 2022.

34. Preparing a PMTA requires a significant amount of resources—time, personnel, and money, which can range from several hundreds of thousands to multiple millions of dollars per product.

35. The FDA announced on January 2, 2020 that it had finalized a new enforcement policy prohibiting all non-tobacco/non-menthol flavors for cartridge-based e-cigarettes until a PMTA authorization, which went into effect on February 6, 2020. In a related but separate action, Congress raised the federal minimum age to purchase all tobacco products (including e-cigarettes) from 18 to 21 in December 2019.

VI. THE RELEVANT MARKET

36. The relevant product market for the purposes of this action is closed- system e-cigarettes. A hypothetical monopolist in this relevant market would find it profitable to impose at least a small but significant and non-transitory increase in price ("SSNIP").

37. E-cigarettes are battery-powered devices that vaporize a liquid solution containing nicotine (an "e-liquid"). There are two broad categories of e-cigarette: closed- system and open-tank. Closed-system e-cigarettes consist of a device housing a battery and a heating mechanism, and sealed cartridges or pods that are pre-filled with e-liquid. Examples of closed-system devices include cigalikes, which are similar to traditional cigarettes in size and shape, and pod-based products, such as JUUL or MarkTen Elite, which look like USB drives. Subsequent to the FDA flavor ban that went into effect February 2020, closed-system pods and cartridges are available only in tobacco and menthol flavors.

38. By contrast, open-tank e-cigarettes incorporate refillable tanks that customers manually fill with e-liquid. Because customers are able to select from (and mix together) a wide assortment of e-liquids, open-tank e-cigarettes allow a more customizable experience whereby users can experiment with different flavors and nicotine strengths. In addition, unlike with closed

systems, users can customize the individual components of an open-tank system, such as the battery, heating coil, and atomizer (which houses the heating coil).

39. Closed-system e-cigarettes are largely sold in different channels than open-tank products, and open-tank customers tend to seek a different experience than closed-system customers. The vast majority of closed-system e-cigarettes are sold through the multi-outlet channel, which consists primarily of convenience stores. Convenience stores offer a limited range of e-cigarette products, focusing on the highest- velocity brands. In contrast, open-tank e-cigarettes are sold almost exclusively at dedicated vape shops, retail outlets that typically carry an extensive selection of e-liquids and parts for open-tank products and offer a high level of customer service.

40. Respondents considered their respective JLI and MarkTen product lines to be direct competitors with each other and with other closed-system e-cigarette products and set prices based on competition with each other and with other closed-system products. Respondents further acknowledged that their closed-system e-cigarette products did not compete as closely with open-tank products.

41. There are no reasonable substitutes for closed-system e-cigarettes. Closed-system e-cigarettes appeal to consumers because they are discreet due to their small size, and convenient due to their self-contained, ready-to-use format. Open-tank e- cigarettes are not an adequate substitute for closed-system e-cigarettes because they are larger, more complex, and require more manual operation by the user. Open-tank e- cigarettes generally appeal to a different customer type, one that appreciates their complexity and customizable nature.

42. The relevant geographic market is no broader than the United States. Because of the FDA's PMTA requirements, foreign firms cannot import e-cigarettes into the United States without prior FDA approval.

VII. MARKET STRUCTURE

43. At the time of Altria's exit, the relevant market was already highly concentrated. Following Altria's exit, it became even more concentrated.

44. The federal antitrust agencies, consistent with the Merger Guidelines and federal court decisions, measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of each firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumably illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

45. In the U.S. market for closed-system e-cigarettes, the Transaction resulted in a post-Transaction HHI exceeding 2,500, with an increase in HHI of more than 200. Thus, the Transaction resulted in concentration that establishes a presumption of competitive harm in the relevant market.

VIII. ANTICOMPETITIVE EFFECTS

A. Altria Agreed to Withdraw from Current and Future Competition in Exchange for the Opportunity to Share in JLI's Dominant Position

46. During the negotiations between Respondents, JLI's executives made clear their position that Altria could not remain a competitor in the relevant market if there was to be a deal:

- Mr. Danaher, JLI's former CFO, testified: [redacted]
- Mr. Burns, the former CEO of JLI, testified: [redacted]
- Mr. Valani, a JLI Board Director, testified: [redacted]

47. On July 30, 2018, in advance of a meeting between Respondents' lead negotiators, Nick Pritzker, a JLI Board member, emailed Howard Willard, the Altria CEO, an opening term sheet for discussions. The term sheet included the following key provision:

[redacted].

48. [redacted]. Continued competition from Altria's e-cigarette products was the only option clearly off the table. [redacted]

49. On August 1, 2018, Respondents' negotiators met at the Park Hyatt Hotel in Washington, DC to discuss terms. The attendees of this meeting consisted of the lead negotiators for each side: Nick Pritzker and Riaz Valani, two members of JLI's Board of Directors, Kevin

Burns, JLI's CEO, Howard Willard, Altria's CEO, and Billy Gifford, Altria's CFO. No attorneys were present from either side at this meeting.

50. After this meeting, Altria's top executives understood that ceasing to compete in the e-cigarette business might be a condition for reaching a deal with JLI. Altria's draft talking points dated August 5, 2018, for Mr. Willard to use on a call with JLI, noted that [redacted]

51. In another version of its draft talking points, also dated August 5, 2018, Altria stated more broadly that, [redacted]

52. When Altria sought to modify JLI's proposed non-compete term, JLI responded negatively and reiterated its demands. On August 9, 2018, Billy Gifford sent over a markup of the term sheet to Nick Pritzker, Riaz Valani, and Kevin Burns that was [redacted].

53. During the August 9, 2018 meeting of the JLI Board of Directors, the Board [redacted]

54. On August 15, 2018, Riaz Valani of JLI met with Dinny Devitre, one of Altria's Board Members, at Mr. Devitre's office in New York. The purpose of this discussion was [redacted]. In connection with this discussion, JLI delivered a blunt message to Altria: [redacted]

55. After negotiations between Respondents were suspended temporarily, Altria's executives knew that they had to reaffirm their commitment to meeting JLI's demands if they were to restart talks successfully. On October 5, 2018, Altria's Howard Willard sent Nick Pritzker, Riaz Valani, and Kevin Burns a letter assuring them that:

> [redacted].

Upon receiving this letter, Kevin Burns forwarded it to JLI's Chief Legal Officer with a simple note: [redacted] The concessions contained in this letter helped to restart the stalled

negotiations. Soon after, Altria began to take key steps that would facilitate a possible wind down of the Nu Mark business.

56. On October 25, 2018, Altria announced that it was temporarily halting its MarkTen Elite business, ostensibly out of concern that pod-based systems and non- traditional flavors could be contributing to youth usage. A few days later, Altria and JLI, which was the largest seller of a pod-based system and non-traditional flavors, agreed to basic deal terms, which included Altria not competing in the e-cigarette market.

57. Altria sought to put MarkTen Elite [redacted]

58. On December 7, 2018, after five years of continuous participation in the e- cigarette market, Altria announced its decision to wind down its remaining e-cigarette business, including its MarkTen cig-a-like.

59. On December 9, 2018, Murray Garnick, Altria's General Counsel, emailed Jerry Masoudi, Chief Legal Officer at JLI to discuss the deal. [redacted]

60. On December 20, 2018, less than two weeks after Altria announced its decision to discontinue its e-cigarette operations, Respondents executed the Transaction whereby Altria invested $12.8 billion and in return, JLI issued stock to Altria amounting to a 35% ownership stake in the company.

61. [redacted]. The Transaction also closed routes to other potential acquisitions or partnerships through which Altria might have participated in the relevant market. As JLI summarized in a set of draft talking points for the announcement of the Transaction: [redacted]

B. Respondents' Conduct Caused Harm to Competition

62. Respondents' conduct as alleged herein had the purpose, capacity, tendency, and effect of restraining competition unreasonably, and the Transaction substantially lessened competition, in the U.S. market for closed-system e-cigarettes, in the following ways, among others:

a. Eliminating Altria's MarkTen products from the relevant market, thereby eliminating current and future price competition between Respondents, in particular promotional activity to create awareness and drive sales;

b. Eliminating current and future innovation competition between Respondents; and

c. Eliminating current and future competition between Respondents for shelf space at retailers through rebates and other incentives.

63. Altria's agreement to exit the relevant market eliminated one of JLI's most dangerous rivals. As a large, well-established, and well-funded company with long- standing relationships and significant shelf space with retailers nationwide, Altria had the resources and infrastructure to drive sales and compete aggressively. For example, Altria used its extensive distribution network to expand its distribution of MarkTen Elite [redacted].

64. Before the shut-down of Nu Mark, Respondents relied on price promotions to drive trial and grow sales of their respective e-cigarette products. In addition, each monitored the other's pricing in setting its own strategy. Altria's decision to pull its MarkTen products brought this price competition to an end.

65. In addition to price competition, Respondents competed through product innovation, including device features and e-liquid formulations. For example, it was JLI's success that prompted Altria to acquire and further develop various pod-based e- cigarettes (including Elite), and to commit significant resources toward developing e- liquid formulations with nicotine salts and higher nicotine concentrations.

66. In the fall of 2018, as a hedge against the risk that a deal with JLI might fall through, [redacted].

67. Altria leveraged its ownership of leading brands across multiple tobacco categories in order to secure substantial and favorable shelf space at retailers throughout the United States. In 2018, for example, to JLI's alarm, Altria launched a major campaign to secure shelf space for its innovative tobacco products (including e- cigarettes), offering retailers product discounts, slotting fees, and fixture payments. After the Transaction, instead of competing for shelf space, Altria leased its shelf space to JLI, effectively replacing its own MarkTen products with JLI's Juul product.

68. Before committing to the Transaction, Altria had every intention of remaining in the relevant market for the long term. Altria's documents and executive statements repeatedly evince their recognition that e-cigarettes were the future of the tobacco industry and their absolute commitment to participate in that future. For example:

- Mr. Joseph Murillo, Altria's former SVP of Regulatory Affairs, testified: [redacted]

[redacted]

- Mr. Martin Barrington, Altria's former CEO, stated to investors: "So we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products."

- Mr. Howard Willard, Altria's current CEO, in an interview with the Wall Street Journal, stated: "At a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core business, if you don't invest in the new areas you potentially put your ability to deliver that financial result at risk."

69. Instead of continuing to pursue its ambitions in the relevant market through competition, including aggressive price promotions, product development, and incentives for shelf space, Altria sought a short cut to market leadership by investing in its competitor. Altria agreed to abandon its long-standing and significant efforts at current and future competition in exchange for a significant share of JLI's profits resulting from a significantly less competitive marketplace.

IX. LACK OF COUNTERVAILING FACTORS

70. Respondents cannot demonstrate that entry into the relevant market by new competitors or expansion by existing competitors would be timely, likely, or sufficient to offset the anticompetitive effects of the conduct alleged above.

71. The entry of new competitors into the relevant market is unlikely because the regulatory approval process is exceptionally time-consuming and expensive. Respondents themselves estimate that preparing a PMTA for an e-cigarette would require [redacted]. No manufacturer has achieved PMTA approval for an e-cigarette product, but Philip Morris International, a multi-national tobacco manufacturer, submitted a PMTA application for its iQOS heat- not-burn ("HNB") device (which is comparable to an e-cigarette in technical complexity) in May 2017 and received approval two years later in April 2019. Altria estimated [redacted]. Respondents' internal documents suggest that these figures may significantly underestimate the costs of the PMTA process.

72. In addition to achieving regulatory approval, a new entrant would need to: (1) develop or acquire a product; (2) manufacture the product at quality and scale; (3) sell the product; (4) develop a distribution system; and (5) develop a marketing plan, including a plan to secure shelf space in retail outlets.

73. Existing closed-system e-cigarette competitors cannot effectively replace the lost competition because: (1) they lack Altria's brand strength to secure favorable shelf space at retailers; (2) they lack the substantial resources Altria had at its disposal to commit to e-cigarette research and development as well as to pursuing regulatory approval; and/or (3) the FDA's

enforcement of restrictions on e-liquid flavors has negatively impacted the competitive presence of closed-system competitors other than JLI, who had voluntarily discontinued its flavors earlier.

74. Nor are open-tank e-cigarette manufacturers likely to replace the lost competition, in part because the impending PMTA deadline will likely cause many of them to shut down, and because they are largely sold in the separate "vape shop" sales channel and would not likely be able to expand rapidly into convenience stores, where closed-system e-cigarettes are typically sold.

75. Respondents cannot demonstrate cognizable efficiencies that would be sufficient to rebut the presumption that the Transaction substantially lessened competition in the relevant market.

76. Nor can Respondents demonstrate pro-competitive benefits of the Transaction that could not have been achieved through alternative means that would have been less restrictive on competition than the conduct alleged above.

X. VIOLATIONS

Count I—Illegal Agreement

77. The allegations of Paragraphs 1 through 76 are incorporated by reference as though fully set forth.

78. The conduct alleged herein amounts to an agreement whereby Altria agreed not to compete in the U.S. e-cigarette market now or in the future, in return for a substantial ownership stake in the market leader. This agreement unreasonably restrained trade in the U.S. market for e-cigarettes. The effects of this agreement will continue in the absence of appropriate relief.

79. Respondents' conduct constitutes a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and thus constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, under rule of reason analysis.

Count II—Illegal Acquisition

80. The allegations of Paragraphs 1 through 76 are incorporated by reference as though fully set forth.

81. The Transaction, in which Altria received a substantial ownership stake in JLI and for the purposes of which Altria withdrew its existing e-cigarettes from the market and halted its innovation on future products, substantially lessened competition in the U.S. market for e-cigarettes. Altria now seeks to convert its non-voting securities into voting securities and place two Board Members of the JLI Board in place of its current Board Observer.

82. The Transaction violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and thus constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to Respondents that the 5th day of January, 2021, is hereby fixed as the date, and 10:00am as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, 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 the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of the Federal Trade Commission Rules of Practice.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by Respondents. 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., Washington DC 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 five days of receiving the answer of Respondents, 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 Respondents have violated or are violating Section 5 of the FTC Act, as amended, Section 1 of the Sherman Act, and/or Section 7 of the Clayton Act, as amended,

the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including but not limited to:

1. Relief that restores Respondents' incentives to compete in the relevant market, including, as appropriate, divestiture of Altria's equity stake in JLI, rescission of Altria's purchase of that stake, and/or any other relief.

2. The voiding of all agreements related to the Transaction, including the Non-Compete agreement and the Services Agreement between Altria and JLI, as well as a prohibition against any future non-compete agreements between Respondents, except with prior approval by the Commission.

3. A prohibition against any transaction between Altria and JLI that combines their businesses in the relevant market, except with prior approval by the Commission.

4. A prohibition against any officer or director of either Respondent serving on the other Respondent's board of directors or attending its meetings.

5. A requirement that, for a period of time, Altria and JLI provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating therein.

6. A requirement to file periodic compliance reports with the Commission.

7. Requiring that Respondents' compliance with the order may be monitored at Respondents' expense by an independent monitor, for a term to be determined by the Commission.

8. Any other relief appropriate to correct or remedy the anticompetitive effects of the Transaction or of any or all of the conduct alleged in this complaint.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, DC, this 1st day of April, 2020.

By the Commission.

INITIAL DECISION

I. INTRODUCTION

A. Summary of the Case

The Complaint in this case, issued by the Federal Trade Commission ("FTC" or "Commission") on April 1, 2020, alleges that Altria Group, Inc. ("Altria") and JUUL Labs, Inc. ("JLI") (collectively, "Respondents") have executed agreements in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45 ("Count I"), and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 ("Count II").[1]

Count I of the Complaint alleges an agreement whereby Altria agreed not to compete in the alleged United States electronic cigarette ("e-cigarette") market "now or in the future," in return for an ownership interest in JLI. Complaint ¶ 78. More specifically, the Complaint alleges that, during negotiations between Altria and JLI for Altria to take an ownership interest in JLI, JLI demanded that Altria "exit" the e-cigarette market as a "condition for any deal" and that "[i]n order to meet JLI's demand . . . Altria began taking steps to withdraw its e-cigarettes" from the alleged relevant market. Complaint ¶¶ 4-5, 77. The Complaint further alleges that as part of the investment transaction that Respondents completed on December 20, 2018 (the "Transaction"), Respondents agreed to a non-compete provision that, with certain exceptions, prevented Altria from competing in the alleged relevant market for the period of time post-Transaction during which Altria provided JLI with certain support services. Complaint ¶¶ 5-6, 22, 77. The Complaint charges that the foregoing agreement of Respondents unreasonably restrained trade in the alleged relevant market, "under a rule of reason analysis." Complaint ¶¶ 4-6, 12, 77-79.

Count II of the Complaint alleges that the Transaction, through which Altria obtained a 35 percent interest in JLI in exchange for a $12.8 billion investment in JLI, is unlawful under Section 7 of the Clayton Act. Complaint ¶¶ 6, 13, 80. More particularly, the Complaint alleges that Altria withdrew its e-cigarette products from the alleged market for the purpose of the Transaction and that this withdrawal of products from the market, as well as the non-compete provision restricting Altria's future competition, "substantially lessened competition" in the alleged relevant market. Complaint ¶ 81; *see also id.* ¶¶ 13, 19, 22, 80, 82.

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1 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). Section 11 of the Clayton Act vests jurisdiction in the FTC to determine the legality of a corporate acquisition under Section 7. 15 U.S.C. § 21(b); In re R.R. Donnelley & Sons Co., 1995 FTC LEXIS 450, at *11 (July 21, 1995). Corporations are included within the definition of "persons" that are subject to jurisdiction under the Clayton Act, 15 U.S.C. § 12(a), and the FTC Act, 15 U.S.C. § 44. Respondents are both corporations, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. F. 1-2. Respondents' sales of e-cigarettes are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. F. 3, 4, 10. Thus, the Commission has jurisdiction over Respondents and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act and Sections 7 and 11 of the Clayton Act, 15 U.S.C. § 18, 21(b).

On July 27, 2020, Respondents each filed an answer to the Complaint, together with asserted affirmative and other defenses ("Answer"). Respondents each deny entering into any unlawful agreement. Answer of JLI ¶¶ 4-6, 77-79; Answer of Altria, ¶ 4-6, 77-79. Respondents specifically aver that there was no agreement that Altria would withdraw products and that Altria made these decisions for independent reasons related to those products. Answer of JLI at 2-3; Answer of Altria at 1-2. Respondents further deny that the alleged agreement unlawfully restrained trade. Answer of JLI ¶ 12; Answer of Altria ¶ 12. Respondent Altria asserted sixteen affirmative and other defenses, including that FTC proceedings violate the United States Constitution. Answer of Altria pp. 20-22. Respondent JLI raised eighteen affirmative and other defenses, which are largely similar to those raised by Altria. Answer of JLI pp. 15-18.

Upon full consideration of the entire record, and as explained more fully below, the evidence fails to prove the alleged agreement between Respondents for Altria to remove its then-existing e-cigarette products from the market in exchange for entering into the Transaction with JLI. In addition, the evidence fails to prove that the non-compete provision, agreed to as part of the Transaction, unreasonably restrained future competition from Altria in the alleged e-cigarette market. Accordingly, the evidence fails to sustain the alleged violation of Section 1 of the Sherman Act, or Section 5 of the FTC Act, and Count I must therefore be DISMISSED.

Furthermore, upon full consideration of the entire record, and as explained more fully below, the evidence fails to demonstrate that either the removal of Altria's products, or the non-compete provision has substantially harmed or is reasonably likely to substantially harm competition in the alleged e-cigarette market. Thus, the evidence fails to sustain the claim that the Transaction has substantially lessened competition in the alleged e-cigarette market. Accordingly, the evidence fails to sustain the alleged violation of Section 7 of the Clayton Act, and Count II must therefore be DISMISSED.

Based on the foregoing, the entirety of the Complaint will be DISMISSED.

B. Procedural Background

The evidentiary hearing in this matter, which began on June 2, 2021, was conducted over 13 days, and was completed on June 23, 2021. Thereafter, the parties submitted post-trial briefs, proposed findings of fact, and replies to each other's briefs and proposed findings of fact.[2]

2 Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order . . . ." 16 C.F.R. § 3.51(a). The last replies to proposed findings of fact and conclusions and reply briefs were filed on October 13, 2021. Seventy days from the last filings would have been December 22, 2021. Absent an order pursuant to Rule 3.51, the Initial Decision was to be filed on or before December 22, 2021. Based on the voluminous and complex record in this matter, an Order was issued finding good cause for extending the time period for filing the Initial Decision by 30 days. By Order of the Commission issued January 18, 2022, good cause was found to further extend the deadline for filing the Initial Decision to February 17, 2022. Accordingly, issuance of the in camera version of this Initial Decision by February 17, 2022 is in compliance with Commission Rule 3.51(a).

The record in this matter consists of the testimony of a total of 37 witnesses, presented live or by deposition. Over 2,480 exhibits were also admitted into evidence.[3] Individuals referenced in this Initial Decision include current and/or former employees of Respondents, other e-cigarette manufacturers, and direct purchasers of e-cigarettes.

This Initial Decision is based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. The briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties, and all contentions and arguments therein were thoroughly reviewed and considered. Proposed findings of fact submitted by the parties that were not accepted 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 merits of the case. Similarly, legal contentions and arguments of the parties that are not addressed in this Initial Decision were rejected, because they lacked support in fact or law, were not material, or were otherwise lacking in merit.

Ruling upon a decision of the Interstate Commerce Commission, and interpreting language in the Administrative Procedure Act ("APA") that is almost identical to language in Commission Rule 3.51(c)(1), the United States Supreme Court held that "[b]y the express terms of [that Act], the Commission is 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). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 82 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company's exceptions, even if only some of the exceptions were discussed, and stating that "[m]ore than that is not demanded by the [APA] and would place a severe burden upon the agency"). Issues of fact or law that do not affect the result in a case are not fairly deemed "material," for purposes of Section 557(c)(3)(A) of the APA, 5 U.S.C. § 557(c)(3)(A), or Rule

3 Pursuant to Commission Rule 3.45(b), several orders were issued in this case granting in camera treatment to material, after finding, in accordance with the Rule, that its public disclosure would likely result in a clearly defined, serious injury to the entity requesting in camera treatment or that the material constituted "sensitive personal information," as that term is defined in Commission Rule 3.45(b). In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted in camera treatment, the hearing went into an in camera session. Commission Rule 3.45(a) allows the Administrative Law Judge ("ALJ") "to grant in camera treatment for information at the time it is offered into evidence subject to a later determination by the [administrative] law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions." In re Bristol-Myers Co., 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). As the Commission later reaffirmed in another leading case on in camera treatment, since "in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior in camera rulings at the time of publication of decisions." In re General Foods Corp., 1980 FTC LEXIS 99, at *12 n.7 (March 10, 1980). Thus, in instances where a document or trial testimony had been given in camera treatment, but the portion of the material cited to in this Initial Decision does not in fact merit in camera treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the ALJ "may disclose such in camera material to the extent necessary for the proper disposition of the proceeding"). Where in camera information is used in this Initial Decision, it is indicated in bold font and braces ("{ }") in the in camera version and is redacted from the public version of the Initial Decision, in accordance with Commission Rule 3.45(e). 16 C.F.R. § 3.45(e).

3.51(c)(1) of the Commission's Rules of Practice, 16 C.F.R. § 3.51(c)(1), notwithstanding that there may be allegations or evidence presented on such issues. Rather, "a fact is only material if its resolution will affect the outcome" of the case. *Lenning v. Commer. Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001) (summary judgment case). *See also Timpa v. Dillard*, 20 F.4th 1020, 1028 (5th Cir. 2021) (stating in a summary judgment case that "[a] fact is 'material' if it 'might affect the outcome of the suit under the governing law'") (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Furthermore, the Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 1983 FTC LEXIS 17, at *566-67 (Nov. 2, 1983). In addition, all expert opinion evidence submitted in this case has been fully reviewed and considered. Except as expressly relied on or adopted in this Initial Decision, such opinions have been rejected, as either unreliable, unsupported by the facts, or unnecessary to the findings and conclusions herein.

Under Commission Rule 3.51(c)(1), "[a]n 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); *see In re Chicago Bridge & Iron Co.*, 2005 FTC LEXIS 215, at **8 n.23 (Jan. 6, 2005), *aff'd, Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 n.5 (5th Cir. 2008). The parties' burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act, and case law. Pursuant to Commission Rule 3.43(a), "[c]ounsel 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, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes '. . . the traditional preponderance-of-the evidence standard.'" *In re Rambus, Inc.*, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)), *rev'd on other grounds*, 522 F.3d 456 (D.C. Cir. 2008).

Under the APA, an Administrative Law Judge ("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." 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."[4]

4 References to the record are abbreviated as follows:

PX – Complaint Counsel's Exhibit
RX – Respondents' Exhibit
JX – Joint Exhibit
Tr. – Transcript of testimony before the Administrative Law Judge
Dep. – Transcript of Deposition
IHT – Transcript of Investigational Hearing
CCB – Complaint Counsel's Post-Trial Brief
CCRB – Complaint Counsel's Post-Trial Reply Brief

II. ANALYSIS

A. Summary of Relevant Background Facts

1. The Parties

Respondent Altria Group, Inc. ("Altria") is a for-profit corporation with its principal place of business in Richmond, Virginia. F. 1. Altria, a holding company, is the parent company of Philip Morris USA Inc., which is the largest cigarette company in the United States of America ("United States" or "U.S."). F. 4-5. Altria's operating subsidiaries are primarily engaged in the manufacture and sale of tobacco products in the United States. F. 7. From 2012 to 2018, Altria had an active operating company called Nu Mark LLC ("Nu Mark"), through which Altria developed and sold in the United States what are referred to as "innovative tobacco products," including electronic cigarettes ("e-cigarettes"). F. 8.

Respondent JUUL Labs, Inc. ("JLI") is a for-profit corporation with its principal place of business in Washington, D.C. F. 2. JLI manufactures and sells an e-cigarette known as "JUUL" (or "Juul"). F. 10.

2. E-cigarette Industry

a. Background

An e-cigarette is an electronic device that aerosolizes nicotine-containing liquid ("e-liquid") using heat generated by a battery. F. 15. When a consumer puffs on the device to inhale, the air flow passes over a puff sensor, which tells the sensor to communicate with the battery to release a charge. F. 18. The charge then heats a coil that is saturated in e-liquid. F. 18. The e-liquid is atomized (vaporized), and vapor is inhaled by the consumer. F. 18. The terms "e-cigarettes" and "e-vapor" can be used interchangeably, and e-cigarette products can also be referred to as e-vapor products. F. 16.

There are two main types of e-cigarettes: open tank e-cigarettes and closed system e-cigarettes. F. 28. Open system devices consist of a battery, an e-liquid tank, a heating coil, and an atomizer. F. 36. Open system devices include a reservoir that a user can refill with an e-liquid of their choosing. F. 37. Open system e-cigarettes have the largest batteries of the various e-vapor product types, allowing them to generate more power, which produces larger plumes of vapor. F. 38.

Closed system e-cigarettes, also called closed systems, are comprised of a battery and a container that comes prefilled with liquid that contains nicotine. F. 29. Cig-a-likes and pod-based

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CCFF – Complaint Counsel's Proposed Findings of Fact
CCRRFF – Complaint Counsel's Reply to Respondents' Proposed Findings of Fact
RB – Respondents' Post-Trial Brief
RRB – Respondents' Post-Trial Reply Brief
RFF – Respondents' Proposed Findings of Fact
RRCCFF – Respondents' Reply to Complaint Counsel's Proposed Findings of Fact

e-cigarettes (also referred to as pod products or pods) are closed tank systems. F. 30. A cig-a-like is narrow and tubular in shape, similar to a traditional cigarette, and is designed to emulate the look of a cigarette. F. 31. Pod products can vary in form. F. 34. Some pod products are rectangular. F. 34. Some pod products look like a USB flash drive or thumb drive. F. 34.

b. E-vapor Industry Participants

i. Altria/Nu Mark

Altria established its Nu Mark operating company in 2012 with the goal of developing and marketing innovative tobacco products, including e-cigarette products. F. 44. Nu Mark launched its first e-cigarette in 2013. F. 46, 57. The products sold by Altria in the United States included: (1) the MarkTen cig-a-like line of products, known as the MarkTen; the MarkTen XL,[5] which was a longer version of MarkTen; and the MarkTen Bold (collectively, "MarkTen" or "cig-a-likes"); and (2) the MarkTen Elite (referred to as "MarkTen Elite" or "Elite"), a pod-based e-cigarette.[6] F. 57-75.

On October 25, 2018, Altria announced that it was withdrawing its pod products from the market and discontinuing all non-traditional flavored cig-a-likes.[7] F. 649. On December 7, 2018, Altria announced it was discontinuing all Nu Mark e-vapor products, including the MarkTen line of cig-a-likes. F. 687. Nu Mark is closed as a business and no longer exists as an entity. F. 697.

ii. JLI

What is now known as JLI was founded in 2007 by Adam Bowen and James Monsees, two former graduate students at Stanford University. F. 76. JLI was originally incorporated as PLOOM, Inc. in 2007. F. 76. It was later renamed Pax Labs, Inc. F. 76. On June 30, 2017, Pax Labs renamed itself Juul Labs, Inc., and spun off certain assets and employees and other non-nicotine vaporizer products into a new company, Pax Labs, Inc. F. 76. JLI, operating under the name Pax Labs, launched JUUL in 2015. F. 77. JLI continues to sell JUUL today. F. 10.

iii. Reynolds

Reynolds American, Inc. ("Reynolds") participates in the e-vapor industry through a subsidiary, RJR Vapor Company. F. 80, 82. Reynolds is the second-largest tobacco company in the United States after Altria. F. 81. Reynolds currently sells four e-cigarettes under the "Vuse" brand: Vuse Solo, Vuse Ciro, Vuse Vibe, which are cig-a-likes, and Vuse Alto, which is a pod product. F. 82, 84, 86.

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5 Nu Mark also sold a version of Mark Ten XL, mostly through e-commerce, under the brand Green Smoke. F. 64-65.

6 Nu Mark also sold a limited number of a pod-product called Apex in ten states, only through e-commerce. F. 74-75.

7 "Non-traditional flavors" is defined as all flavors other than tobacco, menthol, or mint. F. 621.

iv. ITG

ITG Brands, LLC ("ITG"), the third largest tobacco company in the United States, sells an e-cigarette product line under the brand name "blu," all of which are closed system e-cigarettes. F. 88, 91. ITG sells three types of closed system e-cigarettes: the *my*blu pod-based e-cigarette; the blu Plus+ cig-a-like; and the single-use blu Disposable, which is a cig-a-like. F. 92. ITG introduced the *my*blu pod product in 2017. F. 93.

v. JTI

Japan Tobacco Inc. ("JTI") is a tobacco company that sells the Logic e-cigarette brand, which is a closed system product. F. 95-96. The Logic brand includes Logic Pro and Logic Power. F. 97. Logic also sells a pod-based product called Logic Compact. F. 97.

vi. NJOY

NJOY, LLC ("NJOY") is a privately held manufacturer of e-cigarettes, which is not affiliated with any traditional tobacco company. F. 99-100. NJOY currently sells a closed system pod product with a rechargeable battery called the NJOY Ace, launched by November 2018, and a closed system disposable cig-a-like called the NJOY Daily. F. 101-102. In 2018, NJOY also sold three cig-a-likes, with the names, Loop, PFT, and King. F. 103.

c. Rise of Pod-based Products and JUUL

Following the introduction of e-vapor products in the United States in the late 2000s, the category grew rapidly starting in 2011 as more convenience stores and tobacco shops began carrying the products. F. 19. In 2013, large tobacco companies, such as Reynolds and Altria, began acquiring and scaling up e-cigarette brands, fueling further growth. F. 20. In 2017 and 2018, the e-vapor category of tobacco products grew rapidly, specifically pod-based products, which was driven almost entirely by JLI's pod-based product, JUUL. F. 22-24. In December 2017, sales of JUUL overtook the then category leader, Reynolds' Vuse, which had led the category in 2016. F. 78. In 2018, JUUL was the best-selling e-cigarette in the United States and the market leader. F. 25.

With the rapid rise of e-cigarettes and the decline of traditional cigarette use, traditional tobacco companies invested heavily in e-cigarettes and other next-generation tobacco products as a key driver of future growth. F. 26-27.

3. The Challenged Transaction and Alleged Unlawful Agreement

As noted in the Introduction, the Complaint in this case includes two counts – Count I, alleging an unlawful agreement between Respondents, in violation of Section 1 of the Sherman Act, and Count II, alleging an unlawful transaction in violation of Section 7 of the Clayton Act. The counts have some factual and analytical overlap, as described below.

At issue in the Section 7 claim is a transaction executed on December 20, 2018 by Altria and JLI (the "Transaction") pursuant to which Altria invested $12.8 billion in JLI in exchange for a 35 percent economic interest in JLI. F. 13, 949. In summary, in exchange for the investment, the Transaction provided Altria with the right to obtain voting shares and appoint one-third of JLI's directors (upon clearance of the Transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") antitrust review process);[8] imposed some restrictions on JLI's sale rights; and imposed some restrictions preventing Altria from acquiring control of JLI. F. 949. The executed final documents (the "Transaction Documents") included, among other documents, a "Relationship Agreement" and a "Services Agreement." F. 948, 950-951. A material part of Complaint Counsel's claim as to the anticompetitive effects of the Transaction is a non-compete provision, contained in the Relationship Agreement, through which Altria agreed "not to, directly or indirectly[,] . . . own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business" for a period of six-years from the closing date, unless extended, to be concurrent with the expiration of the term of the related Services Agreement, under which Altria agreed to provide JLI with regulatory assistance, among other services. F. 951-953. As detailed further *infra*, Complaint Counsel contends that the non-compete provision has resulted in anticompetitive effects by eliminating future competition from Altria.

The non-compete provision in the Relationship Agreement is also alleged to be an illegal agreement in violation of Section 1 of the Sherman Act. Furthermore, Complaint Counsel contends that Respondents had an additional, unwritten, "side" agreement for Altria to cease competing with its then-existing products, manifested in (1) Altria's withdrawal of Elite and cessation of related development work on or about October 25, 2018; and (2) Altria's withdrawal of its MarkTen cig-a-likes and closing of its Nu Mark subsidiary on or about December 7, 2018. Collectively, Complaint Counsel characterizes the non-compete provision in the Relationship Agreement and the alleged agreement to withdraw Altria's e-vapor products and close Nu Mark, allegedly formed during the negotiations preceding the Transaction, as an anticompetitive agreement for Altria to "exit" the e-vapor market. Complaint Counsel claims that alleged anticompetitive effects from Altria's withdrawing its then-existing products, prior to the Transaction, also constitute anticompetitive effects of the Transaction.

4. Regulation of E-vapor Products

a. The Deeming Rule

The sale of e-cigarettes in the United States is regulated by the United States Food and Drug Administration (the "FDA"), as detailed in section III.H. of the Facts and summarized below.

Pursuant to statutory authority under the Tobacco Control Act, in 2016, the FDA issued a regulation that has come to be known as the "Deeming Rule." *See* 81 Fed. Reg. 28,974 (May 10,

8 Under the HSR Act, parties to certain large mergers and acquisitions must file premerger notification and wait for government review. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period. https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review.

2016). F. 195. The FDA declared that all e-vapor products (other than accessories) that met the Tobacco Control Act's definition of a "tobacco product" were subject to the FDA's authority under the Act, effective August 8, 2016. F. 195. Pursuant to the Deeming Rule, any e-vapor product that was not marketed legally as of February 15, 2007, is considered a "new tobacco product" subject to the requirement of FDA premarket review and approval. F. 196. The premarket tobacco product application is referred to as a PMTA. F. 193, 197. The FDA announced in connection with the publication of the Deeming Rule that the FDA would delay enforcement for several years for those products that were on the market as of August 8, 2016, to give manufacturers adequate time to prepare their PMTAs. F. 198. The deadline by which e-vapor manufacturers were to submit their PMTAs for their products on the market evolved, but ultimately was September 8, 2020. F. 249-254.

Because of the Deeming Rule, while manufacturers could acquire (or sell) product lines that existed as of August 8, 2016, they could not introduce new products into the market without going through the PMTA process. F. 199-200. Any new tobacco product that is required to have premarket authorization by the FDA and does not have such authorization is considered an adulterated product. F. 207. Introducing adulterated products into the market is prohibited by statute and violations of this prohibition can result in both civil and criminal penalties. F. 207.

The FDA did not provide clear guidance under the Deeming Rule as to what changes a manufacturer could or could not make to a product without obtaining premarket authorization through the PMTA process, which created some uncertainty in the industry. F. 201. In connection with guidance issued for vape shops in January 2017, the FDA stated that "[m]odifying a product would generally result in a new tobacco product" requiring premarket authorization from the FDA. F. 202.

By requiring all existing e-cigarette manufacturers to secure PMTA approval from the FDA in order to keep their products on the market and effectively "freezing" the e-cigarette product offerings to those that existed on August 8, 2016, the Deeming Rule fundamentally shaped the e-vapor industry. F. 199.

b. Continuum of Risk

In July 2017, the FDA announced "a new comprehensive plan for tobacco and nicotine regulation that [would] serve as a multi-year roadmap to better protect kids and significantly reduce tobacco-related disease and death." F. 208. This was a significant policy announcement by the FDA. F. 208. The centerpiece of the FDA's new regulatory approach was a recognition that nicotine is delivered through products that represent a "continuum of risk" and is most harmful when delivered through smoke particles in combustible cigarettes. F. 209, 211. The objective of the policy was to try to move people down the continuum of risk, by helping smokers "migrate" from combustible products to noncombustible tobacco products. F. 210, 212.

On July 27, 2017, the FDA issued a statement indicating that it would tighten restrictions on cigarettes, while working to facilitate the success of innovative reduced-risk products, such as e-vapor, that could convert adult smokers away from combustible cigarettes and thereby promote overall public health. F. 213. The FDA statement noted that policies to "help smokers quit

cigarettes" must also "protect kids" and that the FDA would therefore be assessing those two goals together, including by seeking input on the role that flavors in e-cigarettes "play in attracting youth and may play in helping some smokers switch to potentially less harmful forms of nicotine delivery." F. 214.

c. PMTA Process

The PMTA process is an expensive, time-consuming process, described as "not dissimilar to . . . the process of getting a new [pharmaceutical] drug or a medical device on the market." F. 215. The details of this process are set forth in section III.H.4. of the Facts and summarized below.

To obtain FDA authorization for an e-vapor product pursuant to a PMTA, a manufacturer must demonstrate that the product is "appropriate for the protection of the public health." F. 216 (21 U.S.C. § 387j(c)(2)(A)). In determining whether a manufacturer has met this standard, the Tobacco Control Act requires the FDA to weigh: (1) "the risks and benefits to the population as a whole, including users and nonusers of tobacco products"; (2) the "likelihood that existing users of tobacco products will stop using such products"; and (3) the "likelihood that those who do not use tobacco products will start using such products." F. 218 (21 U.S.C. § 387g(a)(3) (B)(i)). The manufacturer must demonstrate that the product: (1) "reduce[s] the constituents of harm that smokers are taking in when they're smoking"; (2) "reduce[s] the risk" relative to other tobacco products; and (3) will actually "convert" smokers to e-vapor without having undue unintended effects on the non-tobacco-using population. F. 219. The standards for successfully obtaining a PMTA are rigorous. F. 220.

Demonstrating the potential for an e-vapor product to convert adult smokers away from combustible cigarettes is a necessary part of demonstrating that the product meets the "appropriate for the protection of public health" standard required for FDA approval. F. 219, 224, 263-265. It is not sufficient, in demonstrating conversion potential, to show that smokers are using both e-vapor and traditional cigarettes. F. 270. That is because, as Dr. William Gardner, a lead scientist in regulatory affairs at Altria explained, "unless consumers actually switch to the product, there is no reduction of risk." F. 270 ("They're just maintaining their cigarette consumption but adding something to it.").

The PMTA process requires a manufacturer to submit voluminous information. F. 221, 227; *see also* F. 226. The manufacturer must submit "full reports of all information," including that which is "known" or "should reasonably be known" to the applicant, "concerning investigations which have been made to show the health risks of such tobacco product and whether such tobacco product presents less risk than other tobacco products." F. 222 (21 U.S.C. § 387j(b)(1)(A)). In addition, manufacturers must produce, among other things, "a full statement of the components, ingredients, . . . and . . . principles of operation"; "a full description of the methods used in, and the facilities . . . used for, the manufacture" of the product; "samples of such tobacco product"; and "specimens of the labeling proposed to be used." F. 223. (21 U.S.C. § 387j(b)(1)(B), (C), (E), (F)). There is also a catchall provision requiring manufacturers to produce "such other information relevant to the subject matter of the application as the [FDA] may require." F. 223.

The product testing required for a PMTA takes "a significant amount of time and is a process that cannot be sped-up." F. 228. A PMTA requires completing multiple scientific studies, which generally cannot begin until a manufacturer has reached "design lock," meaning that it has achieved a design for the new product that is not going to change. F. 229. Design changes can cause delay and require repeating previous studies. F. 229. After a manufacturer has reached design lock in the development process, it takes approximately two years of scientific research to prepare a PMTA. F. 232; *see also* F. 233-234. After a manufacturer submits a PMTA, it takes years for the FDA to review the application and determine whether to approve the product. F. 257. Before the September 2020 deadline, the FDA received at least a half million PMTAs for e-vapor products. F. 259. Some of these applications have been pending for over two years. F. 259. As of the time of trial, no e-vapor product had been approved. F. 259.[9]

Conducting years of scientific studies for a PMTA is a significant expense. F. 235. Manufacturers must submit a PMTA for each product or stock keeping unit ("SKU") and the application can cost approximately $5 to $8 million per SKU. F. 236. Because product lines with different flavors and nicotine strengths can have ten or more SKUs, a PMTA for a single product line can cost from $50 to $100 million. F. 236. The PMTAs for JLI's JUUL products cost over $100 million. F. 240. According to Altria's internal cost estimates, PMTAs would cost $89 to $104 million combined for the MarkTen cig-a-like products and $42 to $50 million combined for Elite and an improved Elite. F. 241. Other e-cigarette manufacturers that have submitted PMTAs report spending tens of millions of dollars. F. 237-239.

With the foregoing as background, the Analysis next turns to a determination of the relevant market.

B. Relevant Market

Count I of the Complaint alleges that Respondents entered into an agreement that unreasonably restrained trade in the United States market for e-cigarettes and that the agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Section 1 of the Sherman Act. *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999).[10] Under Section 1 of the Sherman Act, the evidence must prove that there was an agreement that "unreasonably restrained trade in the relevant market." *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011). Count II of the Complaint alleges that the Transaction violates Section 7 of the Clayton Act. Section 7 prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18. The first step in evaluating whether an acquisition may substantially lessen competition in any "line of commerce" in any "section of the country" is to determine the "line of commerce" and the "section of the

9 On October 12, 2021, the FDA announced the first authorization of an e-cigarette product pursuant to a PMTA, which authorized Reynolds' Vuse Solo cig-a-like device and tobacco flavored cartridges. F. 261.

10 It is thus appropriate to rely on Sherman Act jurisprudence in determining whether the challenged conduct violates Section 5 of the FTC Act. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 32 (D.C. Cir. 2005).

country"; in other words, to determine the relevant product market and the relevant geographic market. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N. D. Cal. 2004). Thus, both counts require a determination of the relevant market.[11]

"The 'relevant product market' identifies the product and services with which the defendants' products compete," while "the 'relevant geographic market' identifies the geographic area in which the defendants compete in marketing their products or services." *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009). Complaint Counsel bears "the burden of proving a relevant market within which anticompetitive effects are likely . . . ." *Id.*

1. Geographic Market

As stipulated by the parties, the relevant geographic market in this case is the United States. F. 171.

2. Product Market

The relevant product market alleged in the Complaint is closed system e-cigarettes. Complaint ¶ 36. Complaint Counsel asserts that closed system e-cigarettes are distinct from open tank systems and that the closed system e-cigarettes market includes both cig-a-likes and pod-based products. Respondents do not dispute that open tank systems are distinct from closed system e-vapor products. RRCCFF 351-83. Instead, Respondents assert that cig-a-likes and pod-based devices are not close substitutes for each other and should not be lumped together into a single product market. As explained below, the relevant product market in this case is a closed system e-cigarettes market that includes both cig-a-likes and pod-based products.

a. Legal Standards

A relevant product market consists 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). "Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability – actual or potential – to take significant amounts of business away from each other." *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012).

Case law identifies and relies on "practical indicia" of market definition such as industry or public recognition of the market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). *See, e.g., FTC v. Staples*, 970 F. Supp. 1066, 1075-80 (D.D.C. 1997); *FTC v. Cardinal*

11 The Complaint expressly alleges a Section 1 violation based upon a rule of reason analysis, Complaint ¶ 79, and Complaint Counsel confirms in its post-trial brief that it does not rely on a per se theory, CCB at 58 n.17. Accordingly, the relevant market must be assessed for purposes of the Section 1 claim, as well as the Section 7 claim. Realcomp, 635 F.3d at 825 (stating that under a rule of reason analysis, courts "engage in a thorough analysis of the relevant market and the effects of the restraint in that market").

Health, 12 F. Supp. 2d 34, 46-48 (D.D.C. 1998); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 159-64 (D.D.C. 2000).

Market definition must "take into account the realities of competition." *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008). Ordinary course of business documents reveal the contours of competition from the perspective of the parties, who may be presumed to "have accurate perceptions of economic realities." *Whole Foods*, 548 F.3d at 1045 (concurring op.) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986)). Thus, in determining the relevant product market, courts pay "close attention to the defendants' ordinary course of business documents." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 (D.D.C. 2011).

Courts may also rely on testimony from experts in the field of economics to support a relevant product market. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017); *FTC v. Sysco Corp*., 113 F. Supp. 3d 1, 33 (D.D.C. 2015). Complaint Counsel's expert witness, Dr. Dov Rothman, conducted the hypothetical monopolist test described in the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") and determined that open tank e-cigarettes and other alternative nicotine products are not in the relevant product market because they are not close enough substitutes to prevent a hypothetical monopolist from profitably imposing a small but significant and non-transitory increase in prices ("SSNIP") on one or more of the merged firm's products. PX5000 (Rothman Expert Report ¶¶ 78-82). Dr. Rothman did not analyze whether pods and cig-a-likes could constitute distinct markets within a closed system e-cigarette market. PX7048 (Rothman Trial Dep. at 14, 128); *see also* Murphy Tr. 3114 (explaining that Dr. Rothman "didn't do anything [in his initial report] dealing with the question of whether it was appropriate to think about a smaller market or, equivalently, whether it was important to think about differential rates of substitution between pod-based and cigalikes"). Dr. Rothman's hypothetical monopolist test is not probative of the extent to which consumers will substitute from pods to cig-a-likes or vice-versa. RX1217 (Murphy Expert Report ¶¶ 100-06). While Complaint Counsel's expert witness' opinion supports the uncontested proposition that open system products are not in the relevant product market, the opinion does not address whether cig-a-likes and pods are in the same relevant market. Therefore, based on the evidence contained in the record, only practical indicia and ordinary course of business documents will be evaluated to determine the contours of the relevant product market.

b. *Brown Shoe* Practical Indicia and Ordinary Course of Business Documents

The "practical indicia" identified by the Supreme Court in *Brown Shoe* and Respondents' ordinary course of business documents support the conclusion that the relevant product market in the instant case is closed system e-cigarettes, which encompasses both cig-a-likes and pod-based products.

i. Products' Peculiar Characteristics

Cig-a-likes and pod-based products are both closed system e-vapor products. F. 30. They share distinct product features, provide similar user experiences, and offer similar ease of use and

convenience. F. 106-107. Cig-a-likes and pod-based products are both comprised of a battery and a container that comes prefilled with liquid that contains nicotine. F. 113-114. The factory-sealed e-liquids that are used in cig-a-likes and pod-based products have similar chemical characteristics; some may, or may not, contain nicotine salts; and the liquids can have an array of nicotine strengths and can come in a variety of options in terms of flavors. F. 113, 115-117. Battery power influences the amount of vapor that is produced in a puff when a user inhales the product. F. 119. The size or strength of the batteries used in cig-a-likes and pod-based products depends on the particular product. Generally, pod-based products are larger than cig-a-likes, which means they can use larger and more effective batteries. F. 118. However, the Vuse Vibe, a cig-a-like within Reynolds' Vuse product line, has the largest capacity cartridge and the longest-lasting battery. F. 121.

One clearly distinguishable product feature between cig-a-likes and pod-based products is shape. Cig-a-likes are typically round (or cylindrical) and look similar to cigarettes. F. 31, 123-124. Pod-based products are typically rectangular and look similar to a USB thumb drive or flash drive. F. 34, 125-127.

ii. Distinct Customers

The difference in shape between cig-a-likes and pods is far more than just an aesthetic issue. F. 128. Cig-a-likes' resemblance to a traditional cigarette means that the cig-a-like form carries some of the stigmas associated with smoking a cigarette. F. 129. Cig-a-like consumers are generally older and want a product that looks and feels similar to a cigarette. F. 130. Pods are used more by the "younger adult cohorts" who want something that looks different than a cigarette. F. 131.

iii. Specialized Vendors

Cig-a-likes and pod-based products are sold through the same market channels, primarily through the multi-outlet convenience channel, which includes conventional convenience stores, supermarkets, and various other outlets where cigarettes are sold. F. 132. In many instances, cig-a-likes and pod-based products are displayed in convenience stores on adjacent shelves. F. 135. *See also* F. 134 (Nu Mark's 2018 three-year strategic plan included a plan for future merchandising shelf space showing both its pod-based Elite and its MarkTen cig-a-likes displayed on adjacent shelves.).

iv. Distinct Prices and Sensitivity to Price Changes

In evaluating the *Brown Shoe* factors of "distinct pricing" and "sensitivity to price changes," evidence of the development of "pricing and business strategy with [a particular] market and those competitors in mind" is "strong evidence" of the relevant product market. *H&R Block*, 833 F. Supp. 2d at 51, 53. *See, e.g.*, *Swedish Match*, 131 F. Supp. 2d at 165 (holding that the product market for loose leaf tobacco did not include moist snuff because, among other factors, "loose leaf pricing is determined upon the basis of competition with other loose leaf products, not moist snuff"); *FTC v. Coca Cola Co.*, 641 F. Supp. 1128, 1133 (D.D.C. 1986) (stating that evidence that soda concentrate companies "make pricing and marketing decisions based primarily on comparisons with rival carbonated soft drink products, with little if any concern about possible

competition from other beverages," shows that carbonated soft drinks is a relevant product market).

As summarized below, the evidence shows that when JLI and Altria, as well as other e-cigarette sellers, assessed their competitive landscape, they focused on all competitive closed system e-cigarette products, including both cig-a-likes and pod-based products. F. 137-166. Numerous JLI documents show that before Altria launched MarkTen Elite, its first pod-based product, in early 2018, JLI tracked Altria's e-cigarette business, which consisted solely of cig-a-likes at that time, including market shares, prices, and product characteristics, and considered MarkTen cig-a-likes to be a significant competitor. F. 137-150. After Altria launched MarkTen Elite in February 2018, JLI continued to track MarkTen cig-a-like products and often did not distinguish between the two Altria products. F. 142-145. For example, in several 2018 documents shared with investors, JLI compared its JUUL product with both MarkTen cig-a-likes and the MarkTen pod product. F. 144, 149. Furthermore, JLI has viewed as its primary competitors all other major closed system e-cigarettes – not only pod-based products, but also cig-a-likes. F. 137-145. For example, a 2018 JLI investor presentation included a slide tracking "competitive [product] launches," which listed both cig-a-likes (*e.g.*, MarkTen Bold, Vuse Ciro, and Blu Plus) and pod-based products. F. 149.

Similarly, Altria, which before 2018 did not have any pod-based products, viewed cig-a-likes and pod-based products as competing in the same market. F. 152-158. For example, the market share figures Altria presented to its Board of Directors in February 2017, before MarkTen Elite or Vuse Alto were introduced, included JUUL's pod-based products and Vuse and MarkTen cig-a-likes. F. 154. A three-year strategic plan draft that was sent to Altria's Chief Executive Officer ("CEO") in February 2018 compared the pricing for the MarkTen Elite pod-based product against both the JUUL pod-based product and two cig-a-likes in a single chart. F. 157.

Other closed system e-cigarette producers also consider the market for closed system e-cigarettes to encompass both cig-a-likes and pod-based products. F. 159-166. Reynolds views the competitive set for its Vuse cig-a-like products as including both pods and cig-a-like products and views the competitive set for its Vuse pod-based products as the other pod-based and cig-a-like products that are on the market. F. 159-160. NJOY also views cig-a-likes as competing with pod products, in that they compete for the same customers, adult smokers and adult vapers who frequent the convenience store channel. F. 164.

However, although manufacturers of e-cigarettes viewed cig-a-likes and pod-based products as competing in the same market, they typically do not decide how to price their pod products by comparison to cig-a-likes, or decide how to price their cig-a-likes by comparison to pod products. F. 151, 162-163, 165-166. According to Bob Robbins, JLI's Chief Growth Officer, JLI never changed its pricing or its promotions of JUUL, a pod-based product, "as a result of cig-a-like competition." F. 151. Similarly, Reynolds adopts different pricing decisions for its pod-based products and its cig-a-likes. F. 162. [redacted] F. 163.

v. Industry or Public Recognition of the Submarket as a Separate Economic Entity

In evaluating industry or public recognition of the submarket as a separate economic entity, courts pay "close attention to the defendants' ordinary course of business documents" because they "reveal the contours of competition from the perspective of the parties," who "may be presumed to have accurate perceptions of economic realities." *Aetna*, 240 F. Supp. 3d at 21; *see also H&R Block*, 833 F. Supp. 2d at 52-53 (concluding that the merging parties' documents were "strong evidence" of the relevant product market); *Coca-Cola*, 641 F. Supp. at 1132 (observing that market definition "is a matter of business reality – a matter of how the market is perceived by those who strive for profit in it"). Numerous ordinary course of business documents of Respondents consistently show that both Altria and JLI tracked market shares, sales volumes, and other key competitive metrics in an overall closed system e-cigarette market that included both cig-a-likes and pod-based products. *E.g.*, F. 137-150, 153-158.

In addition, the non-compete provision of the Relationship Agreement to which Altria agreed as part of the Transaction, prohibits Altria from competing in the "e-Vapor business." F. 170. As defined in the Relationship Agreement, the "e-Vapor business" includes both cig-a-like and pod products. F. 170.

The FDA's regulatory provisions governing e-cigarettes, which the FDA sometimes refers to as electronic nicotine delivery systems ("ENDS"), show public recognition of a closed system e-cigarette market that includes both cig-a-likes and pod-based products. As defined by the FDA, ENDS encompasses "all e-vapor products." F. 17, 168. The FDA's definition of "a closed e-cigarette is an e-cigarette that includes an e-liquid reservoir that is not refillable, such as a disposable cigalike, or that uses e-liquid contained in replaceable cartridges or pods that are not intended to be refillable." F. 167. The FDA's flavor ban, which went into effect in February 2020, removed non-tobacco, non-menthol flavors from closed system e-cigarettes and applied to both cig-a-likes and pod-based products equally. F. 169.

3. Conclusion

The differences in the shapes of the devices is significant in that pods appeal to different customers (younger consumers). However, considering the facts that the parties to the Transaction defined "e-Vapor business" to include both cig-a-like and pod products and that the FDA's regulations of ENDS applies to both cig-a-likes and pods, the greater weight of the evidence favors finding a single market that consists of both cig-a-likes and pod-based products. While the rising popularity of pods means that pods' share in this market is increasing (discussed *infra*), this does not dictate a conclusion that pods and cig-a-likes are not in the same product market. For the above stated reasons, the relevant market in this case is the sale in the United States of closed system e-cigarettes, which encompasses both cig-a-likes and pod-based products.

C. Summary of Relevant Chronology

1. April 2017 – April 2018

a. Launch of Elite

As detailed in the Facts, section III.I., and summarized below, Altria acquired Elite in February 2018 in order to compete with pod-based e-vapor products, whose sales and market share were growing quickly, while cig-a-likes had rapidly declining sales and market share.

i. Acquisition of Elite

Between 2016 and the end of 2017, sales of pod products increased by over 600 percent, driven largely by JUUL. F. 294. At the same time, sales of cig-a-likes, which were Nu Mark's only e-vapor products at the time, were contracting, with volume dropping by some 5,800,000 units in 2017 compared to the prior year. F. 294-295. The share of cig-a-likes in the e-vapor market, which exceeded 70 percent in January 2016, dropped to 36 percent by January 2018, while the share of pod-based products grew to 58 percent in that same time period. F. 293, 524. By mid-November 2017, Altria's budget projections for 2018 predicted that the pod-based market segment would grow by 55 million units sold in the multi-outlet convenience channel, compared to the latest estimate for 2017, and that sales of cig-a-like products and open system products would collectively decline by 25 million units, due to the growth in sales of pod products. F. 699.

By November 2017, JUUL was growing rapidly in both volume and market share and was the fastest growing product in the e-vapor category. F. 700. In December 2017, sales of JUUL overtook the then category leader, Reynolds' Vuse, which had led the category in 2016. F. 78, 85. The lack of a pod product was a significant gap in Nu Mark's portfolio. F. 296. As explained by Craig Schwartz, then Nu Mark's Senior Vice President of Operations, the cig-a-like category was "declining very quickly. The pod business was growing exponentially, driven by JUUL. And . . . [Altria was] getting [its] butt kicked week in and week out." F. 296. However, to market an e-vapor product legally under the Deeming Rule, the product had to have been on the market prior to August 8, 2016. F. 196, 199-200. Altria could not, in 2017, develop and bring to market a pod-based product of its own. F. 297. In order to sell a pod product to compete with JUUL, Altria would have to acquire a pod product that had been on the market prior to August 8, 2016. F. 297.

In the spring of 2017, Altria launched what it called "Project Mule," which was a project for pursuing potential acquisitions of pod-based products. F. 298. Altria's strategy & business development ("S&BD") group, working with Jody Begley, then head of Nu Mark, identified six potential pod products and associated companies that were considered for potential acquisition: the k-stick, by Kangertech; Bo, by J Well; Cync, by Vape Forward, NEX Elite, by Smoore Shenzhen Technology ("Smoore"); My, by Von Erl; and Juul, by Pax Labs (which later became JLI). F. 299. S&BD concluded based on its research that only two of the six companies presented attractive options for acquisition, JUUL and Von Erl, with Pax Labs' JUUL being the number one choice, followed by Von Erl. F. 299.

In 2017, Altria viewed JLI, then known as Pax Labs, as the most promising acquisition in the burgeoning market for pod-based devices. F. 299, 703. In April 2017, Altria had an initial discussion with JLI about a possible acquisition; however, the parties did not progress past the exploratory phase. F. 301. In the spring of 2017, S&BD submitted an investment proposal to Von Erl. F. 302. However, Von Erl made a deal with another company. F. 302.[12]

Based on marketplace and consumer dynamics, Altria concluded that there was an urgent need to compete beyond the cig-a-like category and to compete in the pod-based product space. F. 310. Thus, in late June 2017, the e-vapor product team at Nu Mark began to explore a possible investment in NEX Elite, a product developed and manufactured by a Chinese company called Smoore, which S&BD had previously considered but had not included as a potentially attractive acquisition option. F. 303. Nu Mark completed a deal to license the exclusive right to commercialize NEX Elite from Smoore in late October 2017, for a sum of $500,000. F. 304.

Nu Mark's 2018 three-year strategic plan depended heavily on Nu Mark's having successful pod-based products. F. 315. Nu Mark hoped to sell 11 million units of pod products in 2018 and anticipated that by 2019, pod products would account for the majority of its volume, while cig-a-like volume rapidly declined. F. 315. The plan further assumed that, with strong pod sales, Nu Mark's overall sales volume would grow by between 20 to 30 percent year over year. F. 315. Based on the assumptions in Nu Mark's 2018 three-year strategic plan, Nu Mark projected it would lose $70 million in 2018, followed by a $24 million loss in 2019, before hopefully turning a profit in 2020. F. 316.

ii. Rollout of Elite

After Altria acquired rights to Elite in October 2017, Nu Mark worked to launch Elite as quickly as possible. F. 309. Nu Mark originally targeted a May/June 2018 launch for Elite, but at the urging of management, Nu Mark's operations team developed plans to accelerate the launch from May to February 2018. F. 312. Elite was launched on February 26, 2018. F. 329. Normally, commercializing a product can take a year or more. F. 311. Altria brought Elite to market with "exceptional speed," with only a four-month period between obtaining a license to sell Elite and its retail launch. F. 313. Altria's launch of Elite was well-funded because the company wanted to get Elite out on the market as quickly and effectively as possible. F. 330.

The launch of Elite was complicated by Elite's pervasive leaking. Although leaking was common to many pod-based e-cigarettes, leaking issues "were certainly worse with some [products] than others" and, in comparison with other pod products, Elite's leaking was "much more pervasive." F. 484, 490. JLI's Joseph O'Hara, Director of Regulatory Strategy, recalled that the day Elite launched, he ordered "a large number of samples, and when those samples arrived to [him], every single one of those samples was leaking in the packaging, as well as whenever [he] tried to use them, they would then leak . . . in [his] mouth." F. 487. A consumer opening an Elite package "would see literally fluid inside the pod in the package . . . . And in some cases, the leaking

12 Von Erl was acquired by Imperial, the corporate owner of ITG, which subsequently relaunched Von Erl's products under a new brand name, myBlu. F. 302.

was so bad" it could be seen "on the outside of the carton" that had been used to ship the products to the retail store. F. 488. A March 2018 Altria document reported that two employees and two other individuals purchased eleven packs of Elite products and out of those eleven packs, seven had at least one pod that leaked, and leaked more than a couple of drops. The document further reported that three of the four people that purchased Elite "also reported liquid dripping into their mouths when using the product." F. 489. One study referenced in an April 2018 internal Nu Mark e-vapor update showed that at times, over 40 percent of Elite's pods leaked. F. 486.

The leaking issue, while eventually addressed (F. 503-518), adversely affected Elite's reputation in the market with retailers and consumers. F. 492-501. Consumers were "turned off by the fact" that Elite pods were leaking. F. 498. Altria received complaints from consumers and retailers regarding the leaking pods. F. 492. Some wholesalers and retailers expressed concern that Elite was "defective." F. 494. First impressions of a product are important and Elite's leaking was unhelpful in trying to get Elite "off the ground." F. 495. As Begley explained, "it's hard to undo [consumers'] first perception of the brand." F. 496. If a consumer purchases a product that "leaks heavily . . . they aren't likely to repurchase that product." F. 497; *see also* F. 496 ("Pod leakage [is] a very primary constraint. If the pods aren't themselves functioning properly, you won't have promotional effectiveness."). In July 2018, JLI had concluded that Elite's "excessive leakage ha[d] significantly (perhaps irreparably) damaged the brand." F. 501.

iii. Promotions and Sales Performance of Elite

Altria invested in significant promotions to sell Elite. F. 335. The goal of the promotions was to incentivize a "trial" – to get consumers to try the device in the hope that they would return for pods, akin to the razor/razor blade model. F. 336. These promotions included bundling the device and a pack of pods together for a single discounted price, including one such promotion that effectively gave away the device for free. F. 337-340. Another promotion was a store intercept program in which Altria employees physically went to stores and handed out $10-off coupons for Elite to consumers. F. 341. Because the coupons could be used together with the device bundle promotion, a consumer could get both the pods and the battery device for free. F. 341. There was also a clerk incentive program, whereby if a clerk at a store sold 25 devices, the clerk could receive $500 for the employees of the store. F. 342. Nu Mark did not pay out the $500 incentive very often. F. 342.

Where promotions worked to incentivize some sales, ending the promotions tended to substantially decrease sales. F. 345. Moreover, promotions for devices and pods failed to be followed by an increase in sales of additional pods, which indicates that consumers were not adopting the product. F. 346-347. For example, an $8.99 bundle promotion for a device and any pod ran at retailer Sheetz from May 20, 2018 until September 30, 2018, which lead to a spike in device sales at Sheetz. However, there was no corresponding rise in sales of pods. F. 346. Pod sales are an important indicator of future product success because they indicate that consumers are continuing to use the product. F. 347.

After its first eight weeks on the market, Nu Mark was selling 7.2 Elite pods per week per Sheetz store which, with two pods to a pack, translates to roughly a pack sold every other day. F. 352. In May 2018, Nu Mark was selling just one Elite pack every other day at Sheetz. F. 352. In

this regard, as William ("Billy") Gifford, Altria's CEO, testified, Elite's initial performance was "nothing compared to what you would expect when you're trying to disrupt the consumer and trying to get a consolidated group of consumers to engage with the brand . . . ." F. 351. At 7-Eleven, Altria's largest retailer, only about 20 percent of stores were reordering Elite after the first four to six weeks after its launch. F. 353, 359. By June 2018, more than half of 7-Eleven stores carrying Elite "had yet to sell a single pod." F. 354. Scott Myers, then an Altria Regional Vice President, found Elite to be the "worst" performing product rollout that he had worked on in his 24 years of experience with Altria. F. 362.

b. PMTA Concerns

i. Conversion Potential

Conversion potential is the potential of an e-vapor product to convert adult smokers away from combustible cigarettes and is an important factor that the FDA considers when determining whether to approve a premarket tobacco product application for an e-vapor product. F. 219, 263-265. As explained by Dr. Gardner, proof of conversion potential is "necessary to demonstrate" that an e-vapor product meets the "appropriate for the protection of public health" standard for FDA approval. F. 265. "[I]f adult smokers don't convert to the product, you're not reducing harm to the population and to the adult smokers," and from a regulatory perspective, "the product had no reason for being in the market." F. 266. Conversion potential is related to nicotine satisfaction. F. 267. Smokers who are looking to switch to an e-vapor product need the product to provide nicotine satisfaction. F. 267.

By early 2015, it was clear to Nu Mark's leadership, including Joe Murillo, then President and General Manager of Nu Mark, that "cig-a-like products were not going to be of sufficiently deep and broad appeal . . . to convert large numbers of [smokers]." F. 291. For many smokers and vapers, cig-a-likes were underpowered and ineffective at delivering sufficient nicotine satisfaction. F. 292. A six-week home use test undertaken for Elite in late 2017 indicated that Altria's pod-based product also was not offering the necessary nicotine satisfaction to be adopted by cigarette users. The home use test showed that consumers were not replacing smoking sessions with Elite in statistically significant numbers, and that Elite did not perform as well with consumers seeking the smoking sensation, as opposed to vaping. F. 323-324, 327-328.

In addition, low sales rate is an indication that the product does not have the potential to convert smokers. F. 415. Sales data "tells you . . . what the adult smokers are actually doing in the market with their money." F. 414. "If consumers don't like [a product], they're not going to convert." F. 415. As noted above, cig-a-like sales were in steep decline, and Elite's rollout sales were disappointing, raising doubt about the ability of those products to convert smokers.

ii. Technical Problems with Products

Testing on the MarkTen cig-a-like in 2017 indicated that the battery in the device had a tendency to overheat, causing what is referred to as "dry puffing." F. 398-399. Dry puffing is a phenomenon that occurs when a closed system's cartridge begins to run out of e-liquid at the end

of its life. F. 394. The remaining e-liquid overheats, which results in the generation of aldehydes, particularly formaldehyde, a carcinogen. F. 394-396.

Dry puffing does not present an acute health risk. F. 400. However, the discovery of dry puffing with the MarkTen cig-a-like did create a regulatory concern within Altria as to whether the dry puffing issue would hinder Altria's ability to obtain FDA approval for the MarkTen cig-a-likes. F. 400. Although the FDA has not specified a numerical level for formaldehyde that is acceptable for e-vapor products, there must be a showing of reduced risk compared to conventional cigarettes, and it would be difficult to demonstrate risk reduction if the levels of formaldehyde in the e-vapor product were similar to cigarettes. F. 397. Altria determined that fixing the MarkTen cig-a-like's dry puff issue would require making fairly significant changes to the product and that Altria would therefore have to delay its planned PMTA filing pending these changes. F. 401. As of March 2018, Altria's regulatory group described the status as "delayed – date TBD." F. 401.

When Altria acquired rights to commercialize Elite in the fall of 2017, Elite lacked dry puff prevention technology, and therefore, Elite had the potential for formaldehyde generation. F. 411. ("Elite . . . was missing the temperature control feature that [Altria] had come to deeply appreciate was critical to reducing formation of certain constituents that are of concern, including formaldehyde."). Initial scientific testing of Elite's formulations conducted in December 2017 indicated that some "devices delivered low aerosol mass and high formaldehyde results." F. 412. In addition, in early 2018, Altria determined that a half-dozen components of Elite would need to be replaced, which led Altria to "conceptualize" a redesigned version of the product. F. 385. The version of Elite that was to incorporate certain fixes to the version of Elite that was launched in 2018 was referred to internally at Altria as Elite 2.0. This contemplated changed version of Elite would also require a PMTA. F.386, 388. In March 2018, Altria knew that Elite, both the version then on the market, and the future version, needed to be modified and redesigned, and that this would delay PMTA work and a PMTA filing. F. 389.

c. April and May 2018 Discussions between Altria and JLI

After Altria's unsuccessful initial acquisition approach to JLI in April 2017, Altria and JLI had additional exploratory discussions. F. 301, 721-728. Prior to April 2018, these discussions were general and unstructured, with a focus on Altria's learning more about JLI's business and understanding how a deal might be structured to work together. F. 729.

In the spring of 2018, Altria and JLI began discussing potential deal structures. F. 730. Altria typically wants control of a company when it negotiates an acquisition. F. 731. By April 2018, Altria was prepared to accept less than 100 percent control, and negotiations in April and May 2018 were focused on whether Altria would acquire a majority of JLI's domestic business. F. 732-752. JLI was not willing to enter a transaction where Altria had control of JLI, or a path to control. F. 751. JLI was also concerned as to "how cumbersome" it would be to divide JLI into domestic and international companies and whether "the value of the international company [would] be diminished in a transaction where the two were split." F. 752.

Moreover, during the April and May 2018 time period, JLI and Altria were "not very close" on their views of JLI's valuation. F. 750. *See also* F. 738, 745-746, 749. Around the April 2018

time period, JLI's revenue was growing by approximately 30 percent per month. F. 750. JLI believed that Altria's valuations of JLI "always seemed to be a little bit behind the curve." F. 750. By the time Altria would propose a number, "the value of JUUL had jumped ahead of that" number. F. 750. By May 30, 2018, Altria was proposing a series of upfront and milestone payments, totaling up to $11 billion, in exchange for 50.1 percent of JLI. F. 749.

JLI understood from the outset of discussions with Altria that a transaction such as that being contemplated by JLI and Altria would be closely scrutinized by regulatory agencies. F. 741. Altria and JLI negotiators did not have any discussions about what Altria would do with its then-existing e-cigarette products until after Altria moved away from seeking to purchase 100% of JLI and toward a partial acquisition. F. 732, 735. In April 2018, the parties planned that JLI's and Altria's respective antitrust counsel "would discuss and develop a plan with respect to seeking and obtaining regulatory approval for the majority investment, including the treatment of any competitive products owned by Altria." F. 740.

Ultimately, while there was some "back and forth" during the April and May 2018 time period, the effort was "not really leading anywhere." F. 743. The next substantive effort to negotiate a deal did not occur until late July 2018, which is discussed below.

2. May 2018 – August 2018 Internal Assessments of Nu Mark

As explained in II.C.1 above, cig-a-like sales were declining, Altria's only pod product had a poor rollout, and Altria's PMTA prospects were delayed while it addressed technical problems with its e-vapor products. Whether Altria could demonstrate that its products had conversion potential also put Altria's PMTA prospects in jeopardy. Accordingly, beginning in the spring of 2018, Altria undertook a detailed assessment of its products in hopes of discovering how to turn the Nu Mark business around. The results, detailed in sections III.K.1. and 2. of the Facts and summarized below, were discouraging.

a. Corporate Restructuring

In May 2018, Howard Willard became Altria's CEO and restructured its leadership. F. 526, 528, 530, 536-538. Willard restructured the company into two divisions, core tobacco and innovative products. F. 528. For the innovative products division, Willard hoped "to change [Altria's] approach on innovation to have a better chance to fulfill [its] aspiration of being the . . . leader in noncombustible reduced-risk products." F. 527. Willard appointed Brian Quigley, who had previously run Altria's smokeless tobacco business, as the new CEO of Nu Mark. F. 530. Quigley's task was to "go in and assess the strengths and, frankly, the weaknesses of the Nu Mark business and to make an assessment in his judgment on whether or not there were opportunities to make adjustments that would deliver greater success." F. 531. Willard believed that if there were opportunities to turn Nu Mark around, Quigley would likely be well positioned to identify them. F. 532. Quigley understood that he was taking over a business that was "struggling and underperforming," and that his directive was to figure out what was wrong and to come up with "the best plan" that he could to "turn around" Nu Mark. F. 534.

Willard also appointed K.C. Crosthwaite as Chief Growth Officer and tasked him with building and acquiring the competencies, technologies and talent that Altria would need to achieve its innovative products aspiration. F. 536. On the regulatory side, because commercializing new products was contingent on FDA approval and to coordinate regulatory strategy with the scientific agenda, Willard moved Altria's Regulatory Sciences division under the supervision of Murray Garnick, Altria's General Counsel and head of Regulatory Affairs. F. 537. Willard wanted Garnick to determine the views of the scientific experts about the potential for Nu Mark's products to ultimately get approved by the FDA. F. 538.

b. May 2018

Soon after undertaking his assessment of Nu Mark's products, Quigley experienced a "Eureka" moment precipitated by the findings of Altria's scientists: Nu Mark's products lacked the nicotine salts[13] they needed to deliver nicotine satisfaction, as detailed in section III.J.4. of the Facts and summarized below.

Quigley began working to understand Nu Mark's challenges by meeting with the existing Nu Mark leadership team to get their perspective on the business' challenges. F. 535. Based on those meetings, Quigley determined that Nu Mark "did not yet fully understand what was wrong with the business." F. 535. Quigley also met with Altria's scientists, whose insights made clear that Nu Mark's products were lacking what they needed to be competitive. F. 470, 474-475. At that time, Dr. Gerd Kobal, head of Altria's "sensomics" group, was conducting an analysis of nicotine salts and their effect on nicotine absorption and satisfaction. F. 439, 471-472.

Dr. Kobal's analysis demonstrated that nicotine salts, by lowering a product's pH, prevent nicotine from escaping into the mouth and throat before it can reach the deep lung where nicotine is absorbed most effectively. F. 432-433, 439-440. With that newfound knowledge, Altria's scientists reached a consensus that nicotine salts are, as they contemporaneously described it, "required for a satisfying and relaxing E-vapor experience," akin to the experience of smoking a cigarette, and that "all newly developed e-vapor products, regardless of nicotine content, should utilize nicotine salt technology." F. 441, 444.

Dr. Kobal's analysis also showed that JUUL possessed the ideal formulation of nicotine salts, allowing it to mimic the nicotine delivery of a cigarette. F. 473. Nu Mark's products did not – most of its products, including Elite, had no nicotine salts at all – and their high pH caused a "significant amount of nicotine loss." F. 445, 448, 458. MarkTen Bold, a cig-a-like and Nu Mark's only product with any salts, had only 1 percent acid, while JUUL had 4 percent. F. 458, 461. Altria found that, as a result of not having the right formulation of nicotine salts, only half of MarkTen Bold's nicotine reached the lung. F. 463. As explained by Richard Jupe, Vice President of Product

13 The addition of organic acids to a nicotine solution produces nicotine salts. F. 431. The addition of nicotine salts brings down the pH (a measure of acidity) of the nicotine in the e-liquid. F. 432. The pH measure serves as a proxy for how nicotine is delivered to the lungs because the more acid one adds, the lower the pH of the liquid, and the more nicotine salts are created. F. 432. By introducing an acid to nicotine to make nicotine salts, the pH level starts to approach the level of a combustible cigarette. F. 432. Nicotine salts are intended to mimic the nicotine that comes from heating and burning leaf tobacco by delivering nicotine deeper into the lungs. F. 433.

Development at Altria, Dr. Kobal's research demonstrated that "the products that were in the [Nu Mark] portfolio, the products that were being worked on, [and] the products that were on the shelf were inadequate to achieve th[e] goal of converting smokers." F. 472.

In early June 2018, Dr. Kobal presented Quigley with his key findings, which Quigley and Jupe described as a "Eureka" moment. F. 438, 475. Quigley understood that Dr. Kobal and his team had alerted him to something "foundational" and had identified the root of the "problem with all of [Nu Mark's e-vapor] products." F. 477. At the same time, Quigley understood that despite the significance of these insights, there was no easy fix. As an initial matter, under the Deeming Rule's August 8, 2016 cut-off date, Altria believed it could not add nicotine salts to Elite and put the changed product on the market without first filing a PMTA and obtaining FDA approval, an expensive, time-consuming process that would take years. F. 482. Moreover, identifying the significance of nicotine salts was only the first step toward addressing the issue from a technical perspective. Altria still needed to determine what type of acid or acids was optimal and the right ratio of those acids in combination with the right ratio of the nicotine. F. 478. The scientists also needed to account for the acids' effect on the flavor system and to ensure that any contemplated salts formula would not degrade product components. F. 480. In light of Altria's critical gaps in this area, Quigley wrote to Dr. Kobal and Jupe that it was "important [to] right size expectations for the current products." F. 554.

c. June 2018

In June 2018, following Willard's reorganization of Altria, the new leadership held a series of meetings. Leadership concluded, based on the findings of Altria's scientists, that Nu Mark's products were fundamentally flawed and that the business was in dire need of change. On June 18, 2018, Quigley held a daylong strategy session with his team. F. 543-544. Quigley outlined a new strategy for Nu Mark, based on what he learned from his discussions with the scientists: build a portfolio centered on providing immediate nicotine satisfaction. F. 545-547. Quigley "wanted to make . . . clear to everybody" that "at the end of the day, if you didn't have the immediate nicotine satisfaction, you would not be successful." F. 546.

Three days later, on June 21 and 22, 2018, the most senior leaders from across Altria convened to conduct a broader organizational review known as a Level Setting Meeting. F. 548. The presentations made by Quigley, Jupe, and Murillo at the Level Setting Meeting identified the weakness of both Altria's innovative process and product pipeline. F. 552-554, 556, 558-560. Quigley's presentation explained to senior leadership what Dr. Kobal had explained to him – that is, the scientists' determination that nicotine salts are required to provide nicotine satisfaction to adult tobacco consumers. F. 552-553. Drawing on his previous experience in the diaper industry, Quigley compared an e-vapor product that fails to deliver nicotine satisfaction to a diaper that leaks. "You could add Velcro tabs and you can make them pull up and make them more comfortable." F. 476. As Quigley explained to his colleagues at the Level Setting Meeting, "if your diaper is leaking, no one is going to come back and buy your diaper." F. 476. At the Level Setting Meeting, Quigley also highlighted the various challenges facing Nu Mark and what changes needed to be made. F. 552-557. Quigley's presentation addressed Nu Mark's "overarching gaps," driven by a lack of "clear understanding of how best to deliver nicotine satisfaction." F.

552. Quigley explained that Nu Mark needed to "ground all efforts in nicotine satisfaction first." F. 553. Quigley also conveyed that Altria was not "structured appropriately" to innovate and needed to "think more like a technology company" and develop "different capabilities and different processes." F. 556.

Jupe's presentation at the Level Setting Meeting also highlighted a number of challenges facing Nu Mark's existing products, including that: Elite would not be able to compete without "higher level nicotine offerings"; MarkTen Bold would not be able to convert adult smokers without a reformulated e-liquid capable of delivering nicotine satisfaction; and MarkTen cig-a-like's PMTA was a nonstarter without a new battery to prevent dry puffing. F. 558.

The presentation at the Level Setting Meeting by Murillo, Altria's Senior Vice President of Regulatory Affairs, covered Nu Mark's challenges from a regulatory perspective. Murillo's presentation conveyed that Altria needed to "embrace what it means to be regulated and be realistic about the FDA's approach"; and that Altria needed to "completely re-set [Nu Mark's] product and filing plans." F. 559-560. As Murillo explained at trial, Altria employees needed to stop "running around like chickens with [their] heads cut off trying to find products in the vapor space that could be successful" and instead return to "first principles" and recognize that the company could not "just . . . throw products against the wall and see which ones stick and fix them later." F. 560.

Murillo described the discussion at the Level Setting Meeting as "sobering," and recalled that "some people were dismayed." F. 562. Quigley recalled that, following the presentations, Willard "stood up and just said, this is a lot of information to process." F. 562. Willard recalled that the information provided "represented a fairly dire view of the likelihood of many of [Altria's] products getting FDA approval." F. 562.

d. July 2018

As part of the internal assessment of Nu Mark's products, in the summer of 2018, Garnick, head of the Regulatory Affairs Group, was also meeting regularly with Altria's regulatory scientists to gain a better understanding of the prospects for regulatory approval of Nu Mark's portfolio of products. F. 539-541. Garnick discovered that there was no one "on the science team" who believed that any of Altria's products could receive FDA approval. F. 541. As a result of his meetings with the scientists in the summer of 2018, Garnick "developed a view that Altria should pull its e-vapor products from the market." F. 542 (explaining that "it would cost a lot of money to create a new version [of each product] that would get a PMTA. And for every product, then, we would have to file two PMTAs, one to keep the current product on the market and one to introduce a new product." Furthermore, "[n]one of the products on the market were effective in converting smokers.").

On July 12, 2018, shortly after the June Level Setting Meeting, Garnick began working with his regulatory team to put together a presentation for the August Board meeting that would bring these problems to the Directors' attention. F. 568-569. The slide presentation, the first draft of which was completed on July 15, 2018, set forth the substantive information provided by Altria's scientists and regulatory experts. F. 570 ("July 15 Draft Board Presentation"). This presentation for the Board meeting to be held in August of 2018 identified "key concerns" with

each of Nu Mark's products and concluded that each product failed to meet the requirements for obtaining regulatory approval. F. 572 (MarkTen cig-a-like); F. 573 (Elite); F. 574 (Apex). For instance, as to Elite, the July 15 Draft Board Presentation conveyed that the product could not satisfy three of the four criteria necessary to obtain PMTA approval: manufacturing, risk reduction, and adult smoker conversion. F. 573. Elite's prospects as to the fourth criterion, no unintended consequences, were identified as uncertain because of the FDA's concerns regarding underage use of pod devices. F. 573. Elite overall had "three strikes and a question mark," which reflected Murillo's view that Elite "had very, very low prospects of success for a PMTA as it stood." F. 573. As to the MarkTen cig-a-like, the July 15 Draft Board Presentation conveyed that the product could not satisfy two of the four criteria necessary to obtain PMTA approval: risk reduction and adult smoker conversion. F. 572.

e. August 2018

Quigley convened a meeting with Altria's senior management, which was held on August 3, 2018, to update leadership on Nu Mark's current year performance ("August 3 Meeting"). F. 575. He explained that Nu Mark's portfolio "lacked quality pod products" and "products that provide immediate nicotine satisfaction." F. 576. Quigley also conveyed that Elite "did not have the . . . levels of nicotine that adult smokers would be looking for." F. 580. As a result, Quigley advised the group that Nu Mark was "limited to competing . . . in the cig-a-like segment," which was "very small" and "not meaningful in terms of what was driving change in the tobacco landscape." F. 578. Willard recalled that at the August 3 Meeting, Quigley explained that the only e-vapor products that Nu Mark had at that point in time that were at all competitive were MarkTen cig-a-likes, "and while that might seem like a bright spot, [Altria] saw that the cigalike category was plummeting in share, and so if that was a bright spot, it was a very dim bright spot." F. 579.

To redirect Nu Mark going forward, Quigley proposed what he termed his "bridge plan." F. 584. Under Quigley's bridge plan, Nu Mark would continue to lose money for the foreseeable future with its in-market products, with the hope of "achiev[ing] leadership" with newly developed, FDA-approved products some seven years later, or, as noted in his presentation, by 2025. F. 584. Quigley understood that he was proposing a "risky approach" and that his plan was a "long shot." F. 585. Willard recalled that Quigley conveyed that "in the short run," Nu Mark could not "do much better" than it was doing at that time, and that a plan that looked to 2025 was the "best [he could] do." F. 586.

After Quigley's presentation at the August 3 Meeting, Gifford asked whether Altria should consider pulling Elite from the market. F. 587. Gifford observed at the time that Altria was losing money and the products did not have the nicotine they needed and questioned why Altria was continuing to lose money on this business. F. 587. Gifford testified that, given the state of Nu Mark's business and its portfolio, he believed Altria "really needed to assess whether [it] needed to free up those people and financial resources and invest them elsewhere." F. 587. Gifford's questions made sense to Quigley in light of "the fundamental business gaps" Quigley had highlighted. F. 588.

A few weeks later, on August 23, 2018, Garnick presented to Altria's Board the assessment of Nu Mark's regulatory prospects that the Regulatory Affairs team had begun preparing in early July 2018 in conjunction with Altria's scientists ("August 23 Board Meeting"). F. 590. The presentation at the August 23 Board Meeting conveyed that the Mark Ten cig-a-like could not satisfy two of the four criteria necessary to obtain PMTA approval: meaningful risk reduction and adult smoker conversion, and the Mark Ten Elite could not satisfy three of the four criteria necessary to obtain PMTA approval: manufacturing, risk reduction, and adult smoker conversion. F. 593-594.

Garnick spoke with Willard in advance of the August 23, 2018 Board Meeting about how "the Board needed to know the facts about what [Garnick] had found in his regulatory review." F. 595. Both Garnick and Willard anticipated "that some of the Board [might] be unhappy that we hadn't had a better outcome," but believed that the Board needed to be apprised of the scientists' assessment of Nu Mark's regulatory prospects. F. 595.

3. Late July 2018 – August 2018 Negotiations between JLI and Altria

As detailed in sections III.L.5. and L.6. of the Facts, and summarized below, during August 2018, Altria and JLI restarted discussions of a possible investment, beginning with a proposed term sheet, but discussions reached an impasse at the end of the month over issues related to valuation, payment terms, and corporate control. Before addressing these negotiations in more detail, a few background facts are necessary.

The primary negotiators for Altria were senior executives Howard Willard, Billy Gifford, Murray Garnick, and K.C. Crosthwaite. F. 704. During the time of the negotiations: Willard was Altria's Chief Operating Officer ("COO"), and, as of May 2018, Altria's Chairman and CEO; Gifford was Altria's Chief Financial Officer ("CFO"), and as of May 2018, Altria's Vice Chairman; Garnick was Executive Vice President and General Counsel of Altria and also the leader of Altria's Regulatory Affairs division (since July 2017) and Regulatory Sciences division (since June 2018); and Crosthwaite was Altria's Chief Growth Officer, as of June 2018, after being President and CEO of Altria subsidiary Philip Morris USA. F. 705-708.

The primary negotiators for JLI were Nicholas Pritzker, Riaz Valani, and Kevin Burns. F. 715. Pritzker is an investor in JLI through his family investment entities and a member of its Board of Directors. F. 716. Valani is one of the original investors in the company that is now JLI, through Valani's venture capital business, Global Asset Capital, and is also on JLI's Board. F. 717. At the time of the negotiations, Burns was CEO of JLI. F. 717.

JLI's lead negotiators most frequently interacted with Willard, Gifford, and Garnick, with Willard and Gifford being the primary points of contact. F. 709. Altria Board member Dinyar Devitre was a trusted acquaintance of Valani, who acted principally as a facilitator for negotiations. F. 710.

a. July 30, 2018 Term Sheet

By July 2018, Altria realized that JLI was unlikely to agree to a deal with Altria that allowed a pathway for Altria to gain control of JLI. F. 760. Therefore, Altria was prepared to accept a minority investment in JLI and was contemplating a $13 billion investment for a 49.9 percent stake in JLI's U.S. business. F. 755.

On July 30, 2018, JLI sent a term sheet to Altria summarizing terms for a potential transaction ("July 30 Term Sheet"). F. 761. This term sheet, the first term sheet exchanged between JLI and Altria, contemplated that Altria would purchase 45 percent of JLI's U.S. business in exchange for five percent of the voting power. F.762-763. Altria would obtain voting power via converting its initial non-voting stock, "upon receipt of Antitrust Clearance." F. 763. Altria's Gifford found the ownership and control terms in JLI's July 30 Term Sheet "appalling," explaining that "you give all of this money to get an economic interest and you really only have 5 percent of the say." F. 764.

The July 30 Term Sheet included two provisions that addressed how Altria's e-vapor product portfolio would be handled after the contemplated transaction took place. F. 765. The first of these provisions proposed steps for obtaining HSR clearance (or "antitrust clearance") for the transaction from the FTC. F. 765. The second of these provisions proposed a non-compete provision for Altria, with an exception carved out for MarkTen cig-a-likes and MarkTen Elite during the period of antitrust review and clearance. F. 765.

i. Antitrust Clearance Matters

The July 30 Term Sheet addressed the treatment of Altria's e-vapor products in connection with regulatory approval for the contemplated transaction in a section devoted to "Antitrust Clearance Matters." F. 766. This section outlined that any contemplated transaction would require both parties to use "reasonable best efforts to seek Antitrust Clearance for a period of at least nine months after the Purchase" and to "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." F. 771. The section further stated:

Promptly and in no event later than nine months following the Purchase, subject to the license [granted to JLI for Altria's non-trademark intellectual property in e-vapor], [Altria] will divest (or if divestiture is not reasonably practicable, contribute at no cost to [JLI] and if such a contribution is not reasonably practicable, then cease to operate), all [Altria] assets relating to the Field[14] in the U.S., including all electronic nicotine delivery systems and products it acquired, developed, or has under development. F. 766.

JLI believed that how the contemplated transaction addressed Altria's existing products would be scrutinized by the FTC and expected that the treatment of Altria's e-vapor products post-

14 For purposes of the parties' negotiations, the "Field" was defined as "vapor-based electronic nicotine delivery systems." F. 766 n.42.

transaction was a process that "would be overseen by the FTC." F. 770, 778. As Pritzker explained, it was expected that the FTC "would likely require a divestiture" of Altria's existing products. F. 770; *see also* F. 742 (Pritzker's "assumption [was that] the FTC would most likely require divestiture" of any competitive products of Altria's.). It was important for JLI to obtain assurances from Altria that "at the end of the FTC process, if the FTC required anything of Altria, even something that was concessionary in nature, like a potential divesting of products, that [Altria] would agree to those things" and that Altria would not be able to "walk away from the deal because of concessionary requirements." F. 772. JLI "needed to make sure that Altria would, in fact, be willing to sell those products in the marketplace for whatever they could get for those products at the requirement of the FTC or anything else the FTC would require, for that matter." F. 772. The divestiture/contribution/"cease to operate" provision was not intended to describe something Altria would do, or was required to do, prior to entering into any transaction with JLI. F. 773.

JLI's Valani further explained, with regard to the divest/contribute/"cease to operate" language, "it was important to JLI that if . . . [Altria] were to be a material equity holder" in JLI, that Altria not also sell products of its own to compete with JLI because, if the transaction went forward, Altria "would be privy to a lot of detailed commercial product and technology information that . . . could prejudice JLI." F. 769.

ii. Altria Support Obligations/Non-compete Provision

The July 30 Term Sheet contained a proposed non-compete provision in a section outlining Altria's "Support Obligations." This section detailed various support services that JLI proposed Altria would provide to JLI, such as regulatory assistance with JLI's PMTAs. F. 774. Under the non-compete proposal, Altria would agree, "for so long as it owns at least 5% of [JLI's] outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture or contribution as described above)." F. 775. The exception carved out from the non-compete provision for MarkTen and Elite is at times referred to as the "carve-out."

JLI proposed the non-compete provision because, in providing the contemplated support services to JLI, Altria would be privy to JLI's technology, trade secrets, data, and other business information that would work to the detriment of JUUL if Altria were to apply that information to Altria's own product portfolio. F. 776. Because the potential transaction contemplated Altria's having access to JLI's proprietary information or data, it would be "unacceptable" to JLI for Altria to be in a position to use such information to compete against JLI. F. 770.

JLI was not "worried about competition from MarkTen or MarkTen Elite as [the products] were at that time," but was "concerned about changes" that Altria might make to improve those products, using JLI's information. F. 781. As Pritzker explained, JLI feared that Altria would "use information [it was] getting from [JLI] to be able to enhance [its] product or develop new products that would be injurious to [JLI's] business." F. 780. JLI's concern was "how Altria might use information that it would obtain from JUUL after the transaction in order to use JUUL's data and trade secrets against JUUL." F. 781. The goal of having a carve-out in the non-compete provision for MarkTen and Elite prior to their divestiture or contribution was to keep those products on the

market until the FTC could review the transaction and determine how those products would be handled. F. 777-779.

JLI and Altria negotiators met on August 1, 2018 to discuss some of the most important terms and assess whether there was enough common ground to move forward with negotiations for a transaction ("August 1 Meeting"). F. 782-783. According to participants in that meeting, the focus was on the issues of ownership and control. F. 784-788. Altria was particularly displeased by JLI's proposal in the July 30 Term Sheet to provide five percent voting power for a 45 percent economic interest. F. 786. This was a "huge sticking point," according to Gifford. F. 785. As Pritzker described it, Altria's "goal was to acquire [JLI] completely at some point" and at the August 1 Meeting, JLI made "clear that that was not going to be possible." F. 786.

The record does not indicate that JLI and Altria discussed the divestiture/contribution/ "cease to operate" provision or the non-compete provision at the August 1 Meeting. *See* F. 787-788. The provision also appeared in a term sheet sent by JLI to Altria on August 4, 2018. F. 789, 792. That term sheet was intended to try to address Altria's concerns regarding control, with JLI offering to increase Altria's voting power to 15 percent and to allow Altria a non-voting observer to JLI's Board prior to HSR clearance. F. 790-791.

b. August 9, 2018 Term Sheet

On August 9, 2018, Altria sent JLI Altria's first proposed term sheet ("August 9 Term Sheet"), which was a mark-up of the term sheet JLI had provided on August 4, 2018. F. 808. Altria maintained the proposal to purchase a 45 percent stake in JLI's U.S. business, but increased Altria's proposed voting power from 15 percent to 35 percent. F. 791, 809.

Altria's August 9 Term Sheet retained JLI's language that both parties would use "reasonable best efforts to seek Antitrust Clearance" and "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC" in connection with changes in Altria's e-vapor business. F. 810. However, Altria struck the entire divestiture/contribution/"cease to operate" provision that had been in the July 30 and August 4 Term Sheets. F. 810. In its place, Altria proposed to exclusively license its e-vapor assets to JLI, upon HSR approval. F. 811. With respect to the non-compete provision, Altria proposed to expand the carve-out beyond existing products to also encompass products under development, prior to the contemplated licensing to JLI. F. 812.

On August 15, 2018, Altria's Devitre, who had been meeting with JLI's Valani, transmitted to Willard and Gifford a two-page bulleted list of JLI's issues to be discussed at a planned meeting of the parties in San Francisco, California on August 18. F. 814. The list covered eight topics, mostly related to control and governance. F. 816. For example, JLI identified as "unacceptable" Altria's proposed right of first refusal on additional stock issuances by JLI, Altria's proposal for 35 percent discretionary voting right and up to 45 percent voting power, Altria's proposed composition of seats on JLI's Board of Directors, and Altria's proposed valuation calculation. F. 816.

JLI's list of issues also identified as "not acceptable" Altria's revisions to the antitrust clearance provisions and the non-compete provision. F. 817. JLI objected to Altria's proposal to

expand the carve-out from the non-compete provision, beyond existing products to also encompass products under development, prior to the contemplated licensing to JLI. F. 817. JLI also objected to Altria's having stricken "the commitment to divest MarkTen." F. 817. Notably, JLI's list of issues did not include any objection or other mention of Altria's having stricken the "cease to operate" language from the July 30 and August 4 Term Sheets. F. 818.

Explaining its objections to Altria's revisions to the antitrust clearance provisions and the non-compete provision, JLI wrote: "We understood that you (and your successors and current and future affiliates) would not compete against us in vapor in the US and that JUUL would be the vehicle for all vapor assets." F. 817. Valani explained that JLI "did not feel like it was appropriate, natural, normal under any circumstances for a party that had access to all of our proprietary information to be . . . competing in markets, particularly in situations where they could use our own information for their own benefit." F. 819.

Altria and JLI, together with their respective outside legal counsel, met on August 18, 2018. F. 820. Notes for opening remarks to be given by Willard at the meeting, prepared for Willard by Altria's outside counsel, explained Altria's revisions to the antitrust clearance provisions and the non-compete provision as driven by antitrust considerations, rather than substantive disagreement with JLI. F. 821. The prepared remarks stated: "Upon receiving antitrust approval, we would contribute MarkTen to [JLI] and become subject to a robust non-compete that makes [JLI] our exclusive e-vapor play. We can't agree to these terms under antitrust laws prior to receiving HSR approval, which was driving our clarifications in the term sheet." F. 821. The record does not demonstrate that Willard delivered these remarks at the meeting.

Willard did not recall the treatment of Altria's e-vapor products being a topic of the discussion among the principals at the August 18, 2018 meeting. F. 825. Altria and JLI discussed voting power and whether the potential investment would be for JLI's domestic business only or would also include JLI's international business. F. 824. Pritzker remained concerned that splitting JLI into domestic and international businesses for purposes of the transaction would "create a mountain of problems for the company in the future." F. 824.

c. August 19, 2018 Term Sheet

By mid-August 2018, Altria and JLI arrived at an understanding with regard to the antitrust clearance and non-compete issues for the potential transaction. As Garnick, Altria's counsel, explained: "there was a recognition that after HSR approval, [Altria] would be on [JLI's] Board and . . . they didn't want us also to be competitors." F. 826. By mid-August 2018, there was a "resolution that [Altria] would remain in the market with our e-vapor products until we obtained HSR approval . . . and then when we obtained HSR approval, [Altria] would contribute our e-vapor products to" JLI. F. 826.

Garnick further explained, "once [Altria] fully understood what [JLI's] position was and the reason for it, we could understand it and we had some agreement, some sympathy for it, and that's why we thought we could live with a carve-out provision [from the non-compete] that allowed us to stay in the market until we got HSR approval and, at that point, we would get board

seats, we would have more operational involvement into [JLI], and that would be an appropriate time for us to contribute our e-vapor products to [JLI]." F. 827.

On August 19, 2018, JLI sent proposed revisions to Altria's August 9 Term Sheet ("August 19 Term Sheet"). F. 828. JLI proposed that Altria would purchase a 45 percent stake in JLI's U.S. business and receive 20 percent of the voting power, which was a decrease from the 35 percent Altria had proposed in its August 9 Term Sheet. F. 829.

With respect to the treatment of Altria's existing e-vapor business, JLI proposed that Altria would contribute its e-vapor assets to JLI, at no cost to JLI, upon receiving antitrust clearance of the transaction, but in the event regulatory approval was not obtained within nine months following the transaction, Altria would divest the assets within six months thereafter. F. 831. The August 19 Term Sheet did not state or contemplate that Altria would cease to operate its existing e-vapor business, either before or after HSR clearance. F. 832. Nothing in the August 19 Term Sheet suggested that Altria would, or was expected to, take any action with regard to its e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. F. 833.

Regarding the non-compete provision, JLI struck Altria's attempt to expand the carve-out beyond Altria's existing e-vapor products to include products under development. F. 835. JLI proposed instead that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." F. 835.

Based on JLI's August 19 Term Sheet, Altria concluded that JLI "had no problem with [Altria's] continuing to compete against them with the products we currently had on the market. What they wanted, though, is for that to stop once we got HSR approval and . . . participated on their Board." F. 837.

On August 22, 2018, counsel for Altria and JLI circulated a joint issues list, with each party identifying its positions on the terms of the August 19 Term Sheet. F. 838. The list showed a consensus on the proposed contribution/divestiture procedure, described above. F. 839. With respect to the proposed non-compete provision and the carve-out, the list reflected a consensus that, as provided under the August 19 Term Sheet, MarkTen cig-a-likes and MarkTen Elite would be exempted and could stay on the market until contribution or divestiture in connection with the HSR clearance process. F. 840. In addition, Altria decided to accept JLI's position on the scope of the carve-out, having determined that JLI's concern that Altria could use inside information to compete against JUUL in the future was not unreasonable. F. 841.

d. Late August 2018 Impasse

Notwithstanding the apparent consensus between Altria and JLI on the antitrust clearance and non-compete terms for a potential future transaction, other issues remained to be negotiated. The parties' principals and outside counsel met to try to resolve outstanding issues on August 27, 2018. F. 846.

Altria's Board did not want Altria to agree to a simultaneous sign-and-close structure, but instead wanted to wait for antitrust approval of the transaction before transferring payment to JLI. F. 843. Under a sign-and-close deal structure, Altria would purchase non-voting shares of JLI that would convert to voting shares upon HSR clearance, as opposed to providing a smaller upfront investment pending antitrust review or purchasing voting shares outright following HSR clearance. F. 844-845. At the August 27 meeting, Altria indicated that it would not agree to a sign-and-close structure, but instead wanted to pay JLI after HSR approval. JLI indicated that this was unacceptable. F. 848. As Valani explained, JLI insisted on the sign-and-close structure because it would be "really difficult" for JLI "to enter into a transaction and then wait nine months or more" to find out if it would receive the full investment. JLI "was going to raise capital from somewhere, and if it wasn't Altria, it would have been financial investors." F. 849. Agreeing to wait until HSR clearance before receiving Altria's investment would "foreclose any other options" and leave JLI "in limbo with a lot of explaining to do, in terms of how this is all supposed to work, [which] felt like a very tenuous position" for JLI to be in. F. 849. JLI did not want to "bear the risk, and that was that." F. 849.

JLI and Altria also remained very far apart on what a reasonable price would be, in part because Altria wanted to exclude the international company from the potential transaction. F. 850. In addition, JLI was concerned that a 45 percent interest was too close to a majority interest and that Altria might devise a way to obtain a controlling position. F. 850.

In summary, the August 27, 2018 meeting did not go well. F. 847. By late August 2018, JLI and Altria were at an impasse, and negotiations broke down. F. 848. On August 28, 2018, the JLI Board concluded that, "in light of the wholly unsatisfactory nature of recent discussions with [Altria]," the negotiations were "highly unlikely to result in an investment by, or strategic relationship with, [Altria]." F. 850. On September 8, 2018, JLI's Strategic Committee, composed of Pritzker and Valani, informed the JLI Board that "[the Committee] was frustrated with the progress that was being made with Altria" and recommended to the Board that discussions with Altria cease. F. 857. The Strategic Committee was concerned about the differences between JLI and Altria on valuation, the distraction to the company, and the risk that the fact of the existence of the negotiations would leak and potentially harm JLI's reputation. F. 857.

Accepting the recommendation of the Strategic Committee, on September 8, 2018, the Board directed that JLI "cease discussions of an investment or strategic relationship" with Altria. F. 858. The Board noted, among other reasons, that JLI's "prospects for future growth and further increases in valuation (independent of any transaction with Altria), . . . were not adequately reflected in the [Altria] investment offer." F. 858. By September 11, 2018, JLI had decided to pursue different financing than the Altria investment, and Pritzker "wanted to just get that done and move on." F. 861. JLI's Valani notified Altria's Devitre that JLI was focused on a tender offer and not interested in additional discussions with Altria. F. 859-861.

At the end of August and into September 2018, Gifford, Altria's then Vice Chairman, believed that a potential deal with JLI "was off." F. 856. In September 2018, although Altria had some occasional internal discussions about the possibility of restarting negotiations with JLI, there were no substantive negotiations between Altria and JLI during this period, no terms sheets

exchanged, and no meetings held between JLI and Altria. F. 854-855. Because of the impasse, negotiations remained stagnant through September and into October of 2018, and there were no further substantive negotiations until Willard sent a letter to JLI on October 5, 2018. F. 865.

4. September 2018

Each September, Altria customarily begins putting together its plans for the upcoming year, and did so in September 2018. F. 598. By this time, having received the results of the detailed assessments of Nu Mark's e-vapor products, summarized in section II.C.2. above, Altria had concluded that "many of the existing Nu Mark products – actually, all of the existing Nu Mark products" – had failed to be successful in the marketplace and that a "different approach" was needed. F. 599. Moreover, as summarized in section II.C.3.d. above, negotiations with JLI broke down at the end of August 2018 and JLI had advised Altria that it was pursuing another investment opportunity. Against this backdrop, Altria made a number of decisions in September 2018, including the decision to discontinue Elite, as summarized below.

a. Decision to Establish Growth Teams

In September 2018, Altria decided to establish what Altria called "Growth Teams." F. 600. The Growth Teams would be the culmination of the 100-day review of Nu Mark's e-vapor portfolio that had started in May 2018. F. 634.

The Growth Teams were designed to be small teams of individuals that would "start from scratch" and be empowered to move quickly to try to develop new "satisfying, innovative products." F. 601, 634. The goal was to develop new products that had the potential to "leapfrog the JUUL product," which was at the time the superior product in the marketplace. F. 602. "Leapfrog products" are traditionally viewed as products that are not just "a little bit better" than the products that are out in the marketplace, but are "so much better that they become a break-through leader" when introduced on the market. F. 602. Altria understood that any new product that the Growth Teams might develop was many years away from being in the market, including because of the time required to complete the PMTA and go through the FDA approval process. F. 603.

The decision to transition to Growth Teams showed that Altria had little to no confidence in Nu Mark's then-existing e-vapor portfolio. F. 599-600. As Willard explained:

> [U]ltimately, we decided that, really, none of the MarkTen products had a reasonable likelihood of future success as measured by adult smoker conversion or profitability or, frankly, even being able to stay on the market, and we decided to take a different approach, which was . . . [to] take everything we had learned, start over again with what we called growth teams, and acknowledge that it was probably going to be . . . five or six years before the products that were designed by those teams . . . could go on the market . . . . And so we decided that the growth teams [were] a long shot, it was going to be slow, but that was the best path forward.

F. 600.

Putting the Growth Teams plan into place was a substantial undertaking that would require identifying the best internal personnel to staff the teams and finding replacements for those employees in their prior roles at Altria. F. 604. In order to fund and focus on the Growth Teams, Altria "would have to stop other work." F. 606. On September 10, 2018, Altria's regulatory team took an inventory of ongoing projects for the purpose of transitioning to Growth Teams. F. 607. Quigley undertook a similar effort to determine what Nu Mark work needed to continue and what work would stop, which the Growth Teams would "then pick up going forward on vapor product development." F. 607. In response to a September 14, 2018 email inquiry from Garnick as to whether Altria should stop work on the PMTA for Elite as part of the transition to Growth Teams, Quigley replied, "We should stop ALL work around the [Elite] pmta." F. 608-609. On September 17, 2018, Willard approved a plan to establish the Growth Teams and discontinue all work on Elite. F. 610.

According to Garnick, Altria would not have "pulled the trigger" on transitioning to Growth Teams "if [Altria] thought that the JUUL deal was going to go ahead." F. 610.

b. September 12, 2018 Letter from the FDA

As set forth above, Altria's decision to stop work on Elite and transition to developing a leapfrog product through the establishment of Growth Teams was the result of a detailed internal assessment of Elite's weakness in terms of nicotine satisfaction and potential for regulatory approval. On September 12, 2018, Altria received a letter from the FDA (the "September 12 Letter" or "FDA Letter") that triggered a set of additional considerations for Altria in assessing the future of Elite.

After making several public warnings in the spring of 2018 about youth vaping (*see* F. 271-274), on September 12, 2018, the FDA sent a letter to Altria, along with four other e-vapor manufacturers including JLI, and made a simultaneous public statement demanding that the manufacturers take "bold action" to address the youth vaping crisis. F. 275. In its letter to Altria, the FDA noted that an earlier enforcement "blitz" of retailers revealed "the illegal sale of MarkTen products to minors." F. 280. The FDA advised Altria that it was reconsidering its exercise of enforcement discretion in connection with the Deeming Rule, *i.e.*, the FDA was raising the possibility that all e-vapor products, including those on the market before August 8, 2016, would need to be removed unless and until they received PMTA authorization. F. 281. The FDA letter asked Altria to meet with the Commissioner of the FDA and to respond in writing to the letter within 60 days with "a detailed plan . . . to address and mitigate widespread use by minors." F. 282. Among other potential actions, the FDA listed "removing flavored products from the market until those products can be reviewed by the FDA" as something Altria could consider as part of its plan. F. 282. In an accompanying public statement, the FDA Commissioner called for manufacturers "to respond with forceful plans . . . or face regulatory consequences," and reiterated that the FDA might utilize its "civil and criminal enforcement tools." F. 278-279.

Altria viewed the FDA Letter and public statement as cause for concern. As Willard explained, the September 12 Letter was "from [Altria's] most important regulator," and the message conveyed was "you're part of the problem, and I expect you to contribute to fixing it. I expect you to do it quickly and completely." F. 283-284. To Willard, the FDA's statements were

"pretty threatening." F. 284. Murillo viewed the FDA announcement that it was reevaluating its compliance policy regarding closed system products as very important and believed that the letter "cast a pall over the vapor category." F. 285.

c. Decision to Discontinue Elite and Non-traditional E-cigarette Flavors

Shortly after receiving the FDA's September 12 Letter, Altria's senior leadership began to discuss the possibility of pulling Elite from the market. F. 611. As Garnick explained, Elite and the non-traditional flavored MarkTen cig-a-like products already were not "converting smokers, they were losing money, and they wouldn't get a PMTA." The FDA's September 12 Letter provided Altria with another reason to discontinue these products. F. 611.

From September 25 to 27, 2018, Altria's leadership team gathered for Altria's annual planning meeting at its off-site facility in Montana, known as the Ranch ("September Ranch Meeting"). F. 613. By the time of the September Ranch Meeting, there was agreement among Altria's and Nu Mark's leaders that pulling pod products and non-traditional flavors from the market were ways that the company should and would respond to the FDA's concerns. F. 614. As summarized in a slide presented by Quigley at the September Ranch Meeting, Altria's leadership had decided "in response to FDA," that Altria would "remove Elite & Apex from the Marketplace;"[15] and remove non-traditional flavored cig-a-like products (defined as all flavors other than tobacco, menthol, or mint). F. 620-621. Willard agreed with this decision, although he was also driven by concern about whether Altria's pod products could demonstrate the necessary criteria to obtain PMTA approval, including conversion potential. F. 623. Murillo thought that removing pods and non-traditional flavors was the right decision in response to the FDA, explaining that he "thought it was really important to take [the FDA's] concern very, very seriously." F. 622.

At the September Ranch Meeting, Altria leadership continued to talk about how to move forward with the Growth Teams. Quigley explained in his presentation that Nu Mark lacked the "internal development capabilities and processes required to lead in innovative products," including the "nicotine science and insights . . . to develop a product that [could] win and effectively switch smokers." F. 624. Quigley further explained that the company needed to "implement a different structure and operating model," *i.e.,* the Growth Teams. F. 624.

At the September Ranch Meeting, Quigley also proposed downsizing Nu Mark. F. 625. As Gifford explained, if Altria was going to continue investing in Nu Mark, including by funding the Growth Teams, Altria needed to determine a way to "free up some financial resources and people resources." F. 625.

15 During the September Ranch Meeting, Altria concluded that Apex, another pod product, was even less promising than Elite. F. 615. Apex's "large," "baton" like shape was seen as too "clunky." F. 616. Nu Mark "never really built out a [PMTA] plan for Apex." F. 618.

5. October 2018

Beginning in October 2018, Altria's strategy for its e-vapor business, post-Elite, consisted of two simultaneous paths: internal growth teams that would work to try to develop a leapfrog product and growth by acquisition of an interest in JLI. F. 866.

In an October 5, 2018 call, Altria leadership advised the Board of the decision made at the September Ranch Meeting. F. 630. According to October 4, 2018 notes prepared by Garnick for the call, Altria leadership told the Board that Altria would tell the FDA Commissioner, at a scheduled October 18, 2018 meeting, that Altria was "seriously considering unliterally [sic] taking off Mark Ten Elite from the market" and that Altria would be unilaterally "removing from the market all flavor e-vapor products other than tobacco, menthol, and mint." F. 630. Leadership explained to the Board that Altria "did not have an evapor product that was a Juul fighter or free of regulatory problems" and told the Board that Altria should take this "bold step" of discontinuing these products "regardless of" the possibility of a future deal with JLI. F. 630. Also on October 5, 2018, Willard sent a letter to JLI, which Altria saw as "one last effort" to re-engage JLI, based on a different deal structure, summarized below ("October 5 Letter"). F. 868. According to the October 4, 2018 notes referenced above, Altria leadership advised the Board that it was "not terribly optimistic" about reaching out to JLI, "but [thought it was] worth a final try." Garnick expected that JLI would not re-engage, and Altria was "fully prepared for that." F. 869.

a. Announcement of the Growth Teams

On October 5, 2018, Altria officially announced the launch of the Growth Teams. F. 632. Willard circulated a company-wide memo, explaining that Altria had "spent the past 100 days doing a deep situation analysis" of Nu Mark's business and determined that a "change in direction [was] necessary." F. 633. The Growth Teams, which were to be housed outside Nu Mark, would take over innovative product development work. F. 635. Originally, Quigley proposed that Nu Mark run the Growth Teams, but Altria decided instead to staff the teams with "different people who [had] a fresh perspective." F. 634. Roughly 60 Nu Mark employees would be terminated or transferred as part of the Growth Teams strategy. F. 636.

Recruiting outside talent with innovation experience had been challenging for Altria for a number of years. F. 642. To help lead the Growth Teams, in October 2018, Altria hired Bassiouni Khalid as Senior Vice President of Innovative Product Development. F. 641. However, Khalid was terminated when, within a few days of hiring Khalid, Altria learned that Khalid had falsified his resume and references. F. 643. Hiring a replacement person with the correct expertise, who was willing to move to Altria's headquarters in Richmond, Virginia, proved difficult. F. 645. Altria placed its Vice President of Product Development, Richard Jupe, in charge of the Growth Teams. F. 644. Jupe's background is not in developing innovative products or electronic-based products; he is a physicist whose primary experience is in the design and manufacturing of combustible cigarettes. F. 644.

After the October 5, 2018 announcement of the Growth Teams, the Growth Teams began to work and had "free rein" to determine the direction of e-vapor product development, unconstrained by budget. F. 637-638. However, Altria "didn't even have a product concept in

mind," for the leapfrog product Altria hoped to develop. F. 639. "The idea was to bring some of our best scientists together . . . and come up with a product concept." F. 639 ("It was a bunch of people in a room saying, okay, think of something.").

b. Resumption of Talks between Altria and JLI

The alternative deal structure that Altria offered in its October 5 Letter to JLI reflected a number of concessions to JLI. Altria proposed to acquire a 35% economic and voting interest in the entirety of JLI. F. 870. Previously, Altria had proposed acquiring a 45% interest of only JLI's U.S. business. F. 870. Altria's offer of an investment that would encompass JLI's entire company, rather than only JLI's U.S. business, caused JLI to be more optimistic that Altria and JLI could reach an agreement on value. F. 872. The October 5 Letter also proposed that Altria would make the full investment at closing, as JLI had wanted, at which time Altria would receive non-voting shares, with the parties cooperating to seek regulatory approval to convert those shares into voting shares. F. 870. Furthermore, Altria would agree to a standstill to prevent Altria from acquiring additional shares or control of JLI following the investment, which addressed JLI's concerns about Altria gaining control of JLI. F. 870, 875. In short, the October 5 Letter proposed terms related to deal structure and control that were "particularly important to JLI" and that were "significantly different than the last deal" Altria and JLI had been discussing. F. 873. After receiving the October 5 Letter, "for the first time in the entire time that [JLI and Altria had] been talking," Pritzker believed that the parties "had the outline of a transaction that might be possible." F. 879.

The October 5 Letter did not reflect any changes in Altria's or JLI's positions with respect to the non-compete provision the parties had previously discussed. In the October 5 Letter, Altria proposed to agree that, after the contemplated transaction, Altria "and its current and future subsidiaries will not compete, in a manner consistent with [the parties'] previous discussions, in the U.S. e-vapor market" during the period that Altria would be providing support services to JLI, which was a proposed initial six-year period, with successive three-year extensions by mutual agreement. F. 876-877. JLI understood Willard's reference in the October 5 Letter to "our previous discussions" concerning the proposed non-compete provision to mean "consistent with [the] prior draft of the term sheets," the most recent of which was the August 19 Term Sheet sent by JLI. F. 878. The non-compete provision proposed in that term sheet contemplated that MarkTen cig-a-likes and Elite would remain on the market, exempt from the non-compete terms, until the assets were divested or contributed in connection with the antitrust review process. F. 835.

On October 12, 2018, Pritzker informed Altria's Willard that JLI was amenable to the terms proposed in the October 5 Letter. F. 881. On October 15, 2018, Altria sent JLI a revised version of the August 19 Term Sheet, reflecting the terms Altria proposed in the October 5 Letter ("October 15 Term Sheet"). F. 883. Regarding treatment of Altria's existing products, the Antitrust Clearance Matters section of the October 15 Term Sheet proposed that Altria would contribute its e-vapor products to JLI "upon receipt of antitrust clearance," or "if necessary to obtain Antitrust Clearance," Altria would divest them. F. 885.

The non-compete provision proposed in the October 15 Term Sheet provided, consistent with the August 19 Term Sheet, that Altria would not compete with JLI, including by developing

new e-vapor products, but that Altria could continue with its then-existing e-vapor business until the contemplated transaction cleared HSR review. F. 891. Altria also revised the non-compete provision to propose that the provision would "terminate upon the termination of the" time period in which Altria would be providing support services to JLI. F. 892.

c. FDA Meeting and Announcement of Withdrawal of Products

On October 18, 2018, Altria met with the then-Commissioner of the FDA, Dr. Scott Gottlieb, to discuss the FDA's September 12 Letter and Altria's planned response. F. 646. At the meeting, Altria informed the FDA of its intention to withdraw both its pod products and its non-traditional cig-a-like flavors from the market. F. 646.

On October 25, 2018, Altria sent its formal response to the FDA's September 12 Letter, in a letter that the company made public that same day ("October 25 Letter"). F. 648. Altria also announced that it would withdraw all of its pod products from the market and discontinue all non-traditional cig-a-like flavors. F. 649-650. Altria stated that although it did not believe it had a "current issue with youth access to or use of [its] pod-based products," it did "not want to risk contributing to the issue" with a product that was not converting adult smokers. F. 649.

After sending it to the FDA, Altria publicly released the October 25 Letter to the FDA "as part of a collection of information related to [its third quarter] earnings call." F. 651. After Altria's October 25 Letter to the FDA was released publicly, Willard forwarded the letter to JLI's Pritzker, Valani, and Burns. F. 896. The evidence fails to demonstrate that Altria discussed with JLI its decision to withdraw pod and non-traditional flavored cig-a-like products before sending its October 25 Letter to the FDA or that JLI had any advance notice that Altria was going to take the actions announced in the October 25 Letter. Rather, the unrebutted testimony is to the contrary, that Altria did not in fact discuss its decision with JLI prior to sending the October 25 Letter to the FDA, and that JLI did not in fact have advance notice. F. 897-899.

Altria anticipated that JLI would be unhappy with Altria's October 25 Letter to the FDA, particularly because the letter said that Altria "believed that pod products substantially contributed to the youth epidemic." F.900. JLI witnesses testified that they were surprised by Altria's actions. F. 902. Valani viewed the letter as a "hostile action towards JUUL." F. 902. As Pritzker described it, Altria's move was not expected or welcomed by JLI:

> I was and JUUL was perfectly happy to have those products stay on the market until an FTC decision. We were expecting it. We thought it was appropriate for the FTC to – to determine what should become of them and expected that it would be divestiture. We thought it was an FTC matter and not something for – for a premature action. So it was not welcomed. I thought it would complicate things. F. 903.

Pritzker further explained that he was "surprised" that Altria had withdrawn the products "unilaterally" because:

> [Altria] never seemed to mind divesting those products as part of – of what I thought to be agreed-upon strategy in which they would stay on the market, there would be a regulatory

process, and I ultimately expected that [Altria] would not take them off the market. They'd be expected to divest them so that they remained in the market. F. 904.

On October 25, 2018, after JLI had received Altria's October 25 Letter to the FDA, Altria's Willard and Gifford spoke to JLI's Pritzker, Valani, and Burns by telephone. F. 905. Altria was unsure that JLI would be willing to continue negotiating with Altria after the October 25 Letter. F. 907. During that telephone call, Willard conveyed that Altria was still interested in making a deal with JLI. F. 905. Pritzker remained skeptical that Altria was sincere about making a deal, including because Altria's "unilaterally taking products off the market" was "complicating" any deal and "seemed inconsistent" with the parties' conversations that those assets would be operated until Altria "sold them or [was] required to sell them" in connection with a regulatory review. F. 906. Pritzker testified: "I never wanted a unilateral withdrawal of the products." F. 906.

d. October 28 and 30 Term Sheets

Notwithstanding Altria's October 25 Letter to the FDA, JLI was willing to continue negotiating with Altria. F. 908.

On October 28, 2018, Altria attorneys met with JLI attorneys. JLI's outside counsel circulated a revised term sheet ("October 28 Term Sheet"), which contained essentially the same structure as the October 15 Term Sheet with respect to the treatment of Altria's existing e-vapor assets. F. 908-909. The October 28 Term Sheet maintained the proposal that Altria offer to divest its e-vapor assets "if necessary to obtain Antitrust Clearance," and if those assets were not otherwise transferred to a third party, to contribute such assets to JLI upon receipt of antitrust clearance. F. 909. The non-compete provision of the October 28 Term Sheet maintained from prior term sheets the explicit carve-out for "MarkTen and MarkTen Elite prior to their contribution or divestiture" in connection with the antitrust clearance process. F. 911.

The October 28 Term Sheet also accepted Altria's proposal to delay filing for HSR review, as provided in the October 15 Term Sheet, but changed the filing deadline to be a date certain of July 15, 2020, in order to accommodate an agreement Altria had with Philip Morris International ("PMI").[16] F. 910. *See* F. 886-890.[17] Such delay in seeking antitrust clearance also "push[ed] back

16 PMI is an international company that manufactures and sells various nicotine containing products, including e-cigarettes. In 2008, PMI split from its former parent, Altria, with PMI focusing on international markets and Altria focusing on the U.S. markets. F. 72 n.40.

17 The October 15 Term Sheet provided that Altria would "elect the time (not to exceed two years from closing of the Purchase) when the parties initiate the HSR clearance process." F. 886. Altria added this term to make sure that it could divest or contribute its e-vapor portfolio, if requested by the FTC to obtain antitrust clearance, without potentially impacting a preexisting agreement with PMI. F. 886. There had been an issue whether an agreement between Altria and PMI known as the E-Vapor Joint Research, Development and Technology Sharing Agreement ("JRDTA") restricted Altria's ability to divest or contribute its e-vapor products to a third party during the term of the agreement. F. 887-888. The JRDTA was set to expire on July 15, 2020, unless the parties negotiated an extension. F. 889. Allowing Altria to delay HSR filing until July 2020 "avoid[ed]" any potential issue with the PMI agreement and allowed Altria to divest or contribute its existing products. F. 890.

the date when [Altria] would be on [JLI's] board," which, in Garnick's view, "was fine with JLI . . . ." F. 919.

After a meeting among the negotiators on October 29, 2018, the prospects of a deal appeared sufficiently promising that Altria and JLI decided to "allow attorneys to start putting together the full documentation and [to] negotiate the remaining open issues and the fine details of the agreement." F. 913-914. On October 30, 2018, JLI's outside legal counsel circulated a final term sheet, which was expressly non-binding ("October 30 Final Term Sheet"). F. 916.

The October 30 Final Term Sheet maintained the same structure for treatment of Altria's existing e-vapor products as the October 28 Term Sheet, which was that Altria would either contribute or divest its existing products as part of the HSR clearance process. The non-compete provision remained unchanged from the October 28 Term Sheet, including its exemption for "MarkTen and MarkTen Elite prior to their contribution or divestiture" as part of the HSR clearance process. F. 917. The proposed delay in HSR filing to a deadline of July 15, 2020 was acceptable to both Altria and JLI. F. 918.

With respect to support services to be provided by Altria to JLI, the October 28 Term Sheet and the October 30 Final Term Sheet, as did the October 15 Term Sheet, distinguished between two types of services that Altria could provide to JLI after the closing of the transaction. F. 920. Some services that were anticipated to be provided by Altria to JLI could be provided immediately upon closing the transaction, including Altria's supporting, consulting, and assisting JLI in obtaining PMTA approval for JLI's products. F. 921. Other services anticipated to be provided after closing the transaction were referred to as enhanced services ("Enhanced Services"). F. 922. Enhanced Services included assisting with JLI's marketing; assisting with JLI's "efforts to gain distribution, display and in-store support"; and providing JLI with access to Altria's "best in class infrastructure (including distribution)." F. 922. Enhanced Services could not be provided so long as Altria and JLI remained competitors in the e-vapor category because of antitrust considerations. F. 922.

6. November – December 2018

a. Negotiations between Altria and JLI

A deal between Altria and JLI was not certain in November 2018. F. 931. In November 2018, Altria began due diligence, which is "always" a very important step in any transaction. F. 930-931. Due diligence took "at least a month." F. 932. From the beginning of November 2018 until the closing of the Transaction on December 20, 2018, Altria and JLI exchanged draft transaction documents. F. 933.

Several issues arose in December 2018. As of December 8, 2018, the parties were seeking to close the deal by December 21, 2018 and identified "10 or so outstanding issues" that still needed to be resolved. F. 940. On December 15, 2018, an issue arose regarding what Altria perceived to be an effort by JLI to dilute Altria's share position by half a billion dollars. F. 945. Contemporaneous text messages between Willard and Devitre show Devitre stating that the dilution issue was a "critical" one on which Altria "should not give in." Willard responded, that if

JLI did not "give," "the deal will not proceed." F. 945. Furthermore, an "eleventh-hour" issue arose as to valuation of JLI, related to the dilution issue, that Willard described in a text message as "an impasse." F. 947.

b. December 7, 2018 Withdrawal of Cig-a-likes

On December 7, 2018, Willard sent an internal email to Altria employees announcing that the company would be discontinuing "production and distribution of all MarkTen and Green Smoke e-vapor products" (cig-a-likes) and the company issued a public press release saying the same ("December 7 Announcement"). F. 687. Unrebutted testimony from principals of JLI shows that JLI did not receive any prior notice of Altria's December 7 Announcement, and that no one at JLI had requested that Altria take that action. F. 938-939.

In the course of Altria's annual budget process in the fall of 2018, Altria realized that both of the simultaneous pathways Altria was pursuing to grow its e-vapor business – developing a leapfrog product through the Growth Teams or making an investment in JLI – would require a substantial financial commitment. F. 655. Altria anticipated that each Growth Team would cost approximately $30 million per year, and Altria was prepared to allocate more money if necessary. F. 657. If Altria completed an investment deal with JLI, Altria "needed to find about $500 million in cost savings [per year] to pay for it." F. 658. Gifford believed, "as the financial person," that Altria "needed to . . . free up the resources to fund the growth teams, or make the decision to fund . . . [the] interest related to an investment." F. 659.

Nu Mark had consistently lost money. From 2014 to 2017, Nu Mark lost $600 million. F. 661. In its 2017 three-year strategic plan, Nu Mark had predicted that it would likely lose $33 million in 2018. F. 672. In fact, Nu Mark lost $101 million in the first nine months of 2018. F. 675. As of December 3, 2018, Nu Mark was projected to lose $235 million over the next three years. F. 680.

Moreover, cig-a-likes were a rapidly declining market. As Gifford and Begley advised the Altria Board in May 2018, pods were on a stark upward trajectory, while the cig-a-like share of the e-vapor market was "plummeting," from in excess of 70 percent share in January 2016 to 36 percent in January 2018. F. 524. Shortly before Altria discontinued MarkTen in December 2018, cig-a-like cartridge volume had fallen to less than 19 percent of the total volume of e-cigarette cartridges sold. F. 963. This dramatic shift away from cig-a-likes to pods is particularly significant for Altria because 90 percent of its sales of e-cigarettes in 2018 were cig-a-likes. F. 181, 974.

Altria was willing to accept losses to make a long-term investment in e-vapor, but, as Begley explained, "there had to be a reasonable path to profitability at some point in the future." F. 679. Every year that Begley was the CEO of Nu Mark, the point in the future at which Nu Mark hoped that it would break even or make a profit was pushed out further. F. 669. In 2015, Nu Mark predicted that it would become profitable in 2017. F. 670. In 2016, Altria pushed its profitability projection for Nu Mark to 2018. F. 671. In its 2017 three-year strategic plan, Nu Mark had predicted that it would likely lose $33 million in 2018 and Nu Mark's 2017 plan "pushed out another year" the estimated break-even point to 2019. F. 672. By February of 2018, Nu Mark was estimating that it would potentially turn a profit in 2020. F. 674. The fact that projections for when

Nu Mark would break even and turn a profit were repeatedly pushed out in time was "troubling" to Gifford, as the CFO of Altria. F. 673.

Altria also had regulatory concerns with respect to Nu Mark's products, which in December 2018 consisted of tobacco, menthol and mint-flavored cig-a-likes. In the summer of 2018, a portfolio assessment team within Altria rated each of Nu Mark's cig-a-like products as having limited conversion potential, which must be demonstrated for FDA approval. F. 567. By the summer of 2018, Altria's scientists advised that "no one thinks we can get a PMTA on current Mark Ten product[s]." F. 541. The MarkTen cig-a-likes that lacked nicotine salts were rated as having "low" conversion potential. F. 567. MarkTen Bold was rated as having "low to medium" conversion potential, with the caveat that it was in a declining product format and did not have the "optimal ratio of nicotine and salts" to "provide expected nicotine satisfaction." F. 567. In addition, MarkTen Bold had high pH, meaning that it was losing approximately half of its nicotine into the mouth and throat region. F. 463. A smoker trying MarkTen Bold would have to take anywhere from "25 to 30 puffs to really get closer" to the nicotine satisfaction of a conventional cigarette. F. 468.

Moreover, Altria still did not have a clear fix for the MarkTen cig-a-like's dry-puffing issue that would enable FDA approval of the cig-a-likes. Altria had determined in March 2018 that fixing the MarkTen cig-a-like's dry puffing issue would require "fairly significant . . . changes" to be made to the product, including the battery. F. 401, 403. In late November 2018, Altria learned that the new BVR 2.8 battery that Altria was developing for dry puff prevention in its cig-a-likes was "generating a relatively significant percentage less aerosol" resulting in "mass degradation." F. 682. Altria's scientists discovered that there were problems with the cig-a-like's wicking rate,[18] which had decreased with the new BVR 2.8 battery, and with the cartridge, which needed to be heat treated (known as "annealing") in order for the dry puff prevention technology to work properly. F. 683. Altria scientists worked to resolve the issues that arose regarding the BVR 2.8 battery, but were unable to do so, and they were ultimately unsure that they had any dry puff prevention fix that could be submitted for a PMTA. F. 684-686.

In summary, as explained by Willard, "[Altria] was making hard decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products." F. 692. As Altria's Chief Growth Officer Crosthwaite testified, Altria decided it "would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform." F. 692.

c. Closing of Transaction and Final Documents

Ultimately, Altria and JLI reached an agreement on all terms, and on December 20, 2018, Altria and JLI executed final transaction documents. F. 947-948. The final documents included a

18 Wicking rate is the "rate at which the liquid reache[s] the heater" which then results in the aerosol mass. (Gardner (Altria) Tr. 2573-74).

"Purchase Agreement," a "Relationship Agreement," a "Services Agreement," and a "Voting Agreement." F. 948 (collectively, the "Transaction Documents").

Pursuant to the Transaction, Altria invested $12.8 billion dollars in JLI in exchange for a 35 percent economic interest, obtained the right to appoint one-third of JLI's directors pending HSR approval, imposed some restrictions on JLI's sale rights, and imposed some restrictions preventing Altria from acquiring control of JLI. F. 949. The Services Agreement requires Altria to provide JLI with regulatory assistance in connection with the preparation and filing of JLI's PMTAs, among other services. F. 950.

A non-compete provision is contained in the Relationship Agreement. F. 951. That provision, which remained unchanged in the course of the exchange of draft transaction documents in November and December 2018, binds Altria "not to, directly or indirectly, . . . own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business" while the Services Agreement remained in effect. F. 951, 954. Notwithstanding Altria's previous discontinuation of its e-vapor products, the non-compete provision maintained a carve-out for "business relating to . . . its Green Smoke, MarkTen and MarkTen Elite brands, . . . as such business is presently conducted," pending HSR approval. F. 951. The non-compete provision provides for a six-year initial term, making it set to expire on December 20, 2024 unless extended by the parties. F. 953.

Altria disbanded its e-cigarette Growth Teams upon closing the JLI Transaction because Altria was ceasing development work on e-cigarettes due to the Transaction. F. 696. As Garnick acknowledged, Altria would have continued to fund the Growth Teams had the JLI Transaction not occurred. F. 696.

Nu Mark as a business was shut down toward the end of 2018, and Nu Mark as an entity no longer exists. F. 697. Altria's Garnick confirmed in a January 2, 2019 email that going forward Altria would have no role in e-cigarettes and that Altria R&D would not relate to e-cigarettes. F. 698.

D. Count I – Unlawful Agreement

To sustain a claim under Section 1 of the Sherman Act, the evidence must prove that (1) "there was a contract, combination, or conspiracy – or, more simply, an agreement"; and, if so, (2) the agreement "unreasonably restrained trade in the relevant market." *Realcomp*, 635 F.3d at 824. With respect to the first element, Complaint Counsel alleges an agreement not to compete between Altria and JLI, consisting of two parts: (a) an agreement, allegedly reached during the parties' negotiations, requiring Altria to "exit" its then-existing e-vapor business as a condition of any future transaction; and (b) the written non-compete provision, included in the Relationship Agreement executed as part of the Transaction, which bars Altria from competing in the e-vapor market while providing services to JLI post-Transaction pursuant to the Services Agreement. CCB at 31.

It is undisputed that Respondents agreed to the non-compete provision, included as part of the executed Transaction Documents, and therefore, as to the non-compete provision, the evidence

proves an agreement, the first element of the Section 1 claim.[19] Whether Respondents also had an agreement to remove Altria's former e-vapor products from the market, *i.e.*, for Altria to "exit" its then-existing e-vapor business, is heavily disputed. Whether the evidence proves such an agreement is analyzed below.

1. Applicable Legal Principles

To establish an agreement forming an antitrust conspiracy, the evidence must prove that the alleged conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). Put another way, the evidence must prove "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). The term "agreement" "necessarily impl[ies] mutual consent." *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965).

An agreement may be demonstrated by direct or circumstantial evidence. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff'd,* 791 F.3d 290 (2d Cir. 2015); *In re McWane, Inc.*, 2013 WL 8364918, at *223 (F.T.C. May 1, 2013) (Initial Decision). "[C]ircumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action." *In re McWane, Inc.*, 2012 WL 5375161, at *6 (F.T.C. Aug. 9, 2012).

To determine whether an antitrust conspiracy exists, courts must consider the "totality of the evidence." *Apple*, 952 F. Supp. 2d at 689. Where an inference of conspiracy is equally consistent with an inference of independent conduct, "the evidence of conspiracy would not preponderate." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999). Thus, the inference of a conspiracy "must be more probable than the inference of independent action" in order to find a conspiracy. *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.14 (D.C. Cir. 1984). *See also Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 98 (2d Cir. 2018) ("[I]f the evidence is in equipoise, then summary judgment must be granted against the plaintiff. . . ."). At all times, "the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff," which, in the instant case, is the government. *Kreuzer*, 735 F.2d at 1488.

"The crucial question" in a Section 1 case "is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express[.]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)). With respect to the alleged agreement that Altria would exit its then-existing e-vapor business, the conduct at issue is Altria's removal of its e-vapor products from the market prior to the Transaction with JLI. This conduct, in turn, reflects two different business decisions at two separate points in time, both occurring before the Transaction:

19 Whether the non-compete provision unreasonably restrained trade in the relevant market is addressed in section II.E.2.b.ii., infra.

the decision to remove Elite and non-traditional cig-a-like flavors from the market, made internally on or about September 26, 2018 and announced publicly on October 25, 2018, and the decision announced on December 7, 2018 to withdraw Altria's remaining e-vapor products from the market, including MarkTen and Green Smoke cig-a-likes. Thus, the "crucial question" is whether these decisions of Altria's were independent business decisions or were the result of an agreement with JLI.

2. Analysis

The evidentiary record on the "crucial question" of whether Altria's decisions to remove its products from the market "stem[med] from independent decision or from an agreement," *Twombly*, has been thoroughly reviewed and considered. In summary, and explained more fully below, the evidence upon which Complaint Counsel relies is highly circumstantial. As an example, while Complaint Counsel contends that the alleged agreement is demonstrated through the parties' documents, what Complaint Counsel relies on are pieces of writings, sometimes snippets – often ambiguous, lacking in context, and unexplained – and asks that the inference of an agreement be drawn. In contrast, Altria has offered evidence that rebuts Complaint Counsel's requested inferences and has laid out alternative explanations for removing its products that are logical and supported by substantial, credible evidence, including contemporaneous documents. Based on the totality of the evidence, Complaint Counsel has failed to prove that Altria's conduct in removing its e-vapor products from the market stemmed from an agreement with JLI.

a. Negotiation Evidence

Complaint Counsel theorizes that Altria's withdrawing products from the market was to "follow through" on a pre-existing agreement between JLI and Altria, made during negotiations, that Altria would "exit the market," as part of a larger understanding that Altria would not compete with JLI after the contemplated transaction. CCB at 31. Complaint Counsel contends that JLI gave Altria multiple options to accomplish its exit from the market, and that JLI did not care which pathway Altria used to exit the market, so long as Altria ultimately did so. Respondents do not dispute that JLI and Altria contemplated that, in the event of a transaction, Altria would ultimately stop competing with e-vapor products. RRB at 2. As summarized in section II.C.3. above, if Altria were to make the investment in JLI, the parties contemplated that Altria would take seats on JLI's Board and also provide services to JLI that would give Altria access to sensitive and proprietary information. During the negotiation process, JLI was concerned that, for as long as Altria had access to JLI's trade secrets and operational strategy, Altria could use such proprietary information to compete with JLI. F. 770, 776, 780-781. Respondents contend that JLI did not demand, expect, or agree that anything would be done with Altria's e-vapor assets before the transaction or outside the antitrust review process that was to take place after the contemplated transaction was closed.

To support its conspiracy theory, Complaint Counsel relies principally on the July 30, 2018 term sheet ("July 30 Term Sheet") sent by JLI to Altria – the first term sheet exchanged between the parties – which proposed, in the section pertaining to Antitrust Clearance Matters, that after closing the contemplated transaction, Altria would, within nine months, "divest (or if divestiture is not reasonably practicable, contribute at no cost to [JLI] and if such a contribution is not

reasonably practicable, then cease to operate)" all of Altria's e-vapor assets. F. 766. Complaint Counsel's claim that the July 30 Term Sheet gave Altria three "options" to dispose of its e-vapor assets is rejected. Reasonably read, the provision proposed a ranked process for the treatment of Altria's existing e-vapor assets, in connection with the HSR clearance process, commencing first with the obligation for Altria to divest its existing e-vapor assets, if required by regulators. Then, in parentheses, the provision proposed as an alternative, only "if divestiture [were] not reasonably practicable," that Altria would "contribute" its products to JLI at no cost. Lastly, if contribution also were impracticable, the July 30 Term Sheet proposed as a last resort that Altria would "cease to operate" its e-vapor business within nine months following the transaction. In any event, the "cease to operate" language was removed as of the August 9, 2018 term sheet ("August 9 Term Sheet") and did not reappear. F. 795, 810.

Moreover, the totality of the negotiation history belies the assertion that JLI did not care how or when Altria disposed of its then-existing e-vapor products. As previously explained, JLI was concerned that the disposition of Altria's products would be handled properly and insisted on disposition as part of an antitrust review process. Among other material facts, JLI understood from the outset of discussions with Altria that a transaction such as that being contemplated by JLI and Altria "would be closely scrutinized by regulatory agencies, and that antitrust counsel would have to be brought in . . . to optimize the chance" for regulatory approval. F. 741. JLI's April 20, 2018 letter to Altria, which outlined general terms for a deal structure, directed that antitrust counsel be brought in for the purpose of establishing a plan for "seeking and obtaining regulatory approval" for an investment by Altria "including the treatment of any competitive products owned by Altria." F. 740. JLI expected that regulators would likely require a divestiture of existing products. F. 770; *see also* F. 742. Pritzker explained that it was important to JLI to obtain assurances from Altria that "at the end of the FTC process, if the FTC required anything of Altria, even something that was concessionary in nature, like a potential divesting of products, that [Altria] would agree to those things" and that Altria would "sell those products in the marketplace for whatever they could get for those products at the requirement of the FTC or anything else the FTC would require, for that matter." F. 772. Each term sheet exchanged between the parties expressly required such cooperation with the FTC in the event of a transaction. F. 771, 810, 830, 884.

Furthermore, in responding to Altria's August 9 Term Sheet, JLI objected to Altria's having removed the obligation "to divest" its e-vapor assets as "not acceptable," but was silent on the removal of the "cease to operate" language, F. 817-818, indicating JLI's indifference to the "cease to operate" language. JLI showed its preferred process in the August 19, 2018 term sheet to Altria ("August 19 Term Sheet"), in which JLI did not reinsert the "cease to operate" language and instead proposed that, after the transaction closed, Altria would cooperate with the antitrust clearance process and divest or contribute, its e-vapor products as required or permitted by antitrust regulators. F. 831-832. The August 19 Term Sheet also exempted Altria's then-existing e-vapor products from JLI's proposed non-compete provision, prior to divestiture or contribution, which supports the conclusion that JLI was not particularly concerned about competition from MarkTen and Elite as they existed at that time and intended for those products to stay on the market until divesture or contribution. F. 835.

The treatment of Altria's then-existing e-vapor products post-transaction that was contemplated by the August 19 Term Sheet – divestiture or contribution of the products, in accordance with regulatory review and sanction, and exemption of those products from any non-competition obligation, until such divestiture or contribution – remained essentially unchanged throughout the remainder of the parties' negotiations. F. 885, 891, 909, 911, 917. Thus, to the extent there was any "meeting of the minds" reached during the parties' negotiations, it is reflected in this structure. F. 839-840.

In addition, Altria's decision to withdraw its pod products from the market was not expected or welcomed by JLI. F. 903. As Pritzker explained:

> [JLI] was perfectly happy to have those products stay on the market until an FTC decision. We were expecting it. We thought it was appropriate for the FTC to – to determine what should become of them and expected that it would be divestiture. We thought it was an FTC matter and not something for – for a premature action. So it was not welcomed. I thought it would complicate things.

F. 903. JLI was not consulted, and had no knowledge, in advance of Altria's decisions to withdraw products from the market. F. 897-899, 938-939. Indeed, JLI was "surprised" by Altria's conduct in taking the products off the market "unilaterally" because, during negotiations, Altria "never seemed to mind divesting [its e-vapor] products" as part of what Pritzker believed was an agreed strategy by which those products "would stay on the market and there would be a regulatory process." F. 904. Pritzker did not expect Altria to "take them off the market. They'd be expected to divest them so that they remained in the market." F. 904. The foregoing facts are inconsistent with a conclusion that JLI demanded, contemplated, or agreed to Altria's conduct.

Complaint Counsel contends that it is sufficient for antitrust liability in the instant case to demonstrate that Respondents agreed that Altria would ultimately divest or contribute its e-vapor assets. Complaint Counsel asserts that it is immaterial that JLI did not know or agree to "exactly how and when Altria would comply" with JLI's alleged demand to "exit the market," and characterizes the terms for how Altria's existing products would be handled in connection with the contemplated transaction as mere "detail[s]" that do not need "to be worked out in order to prove that an agreement exists." CCB at 37.[20] However, the evidence must still prove an agreement. In addition, and more importantly, Complaint Counsel does not directly assert or clearly explain how

20 Complaint Counsel seemingly has abandoned what appeared to be its previous conspiracy theory, that JLI demanded that Altria stop selling its e-vapor products prior to any transaction, as a condition of negotiating or entering into a transaction at all. See Complaint ¶¶ 4, 5 (alleging that JLI demanded that Altria "exit from the e-cigarette market" as a "condition for any deal"; and that "[i]n order to meet JLI's demand that Altria cease to compete in the e-cigarette market, Altria began taking steps to withdraw its e-cigarettes from the relevant market"); Complaint Counsel's Opening Statement, Tr. 37 ("During deal negotiations, JUUL made it clear that it would only enter into a transaction if Altria agreed to stop competing in e-cigarettes now and in the future."); Remote Telephonic Prehearing Scheduling Conference, Tr. 12 (Aug. 3, 2020) ("The bottom line is this: Juul communicated and Altria knew that it had to get out of the e-cigarette business in order to complete its investment in Juul."). In any event, the evidence fails to prove such a pre-condition. Based on the negotiation evidence, it was always anticipated that the disposition of Altria's assets would not occur until after the contemplated transaction, as part of the process of obtaining antitrust approval for the transaction.

an agreement to submit a transaction for antitrust review and approval, whereby competitive products of one party would be disposed of, to the extent required or allowed by antitrust authorities, could be deemed an antitrust violation. Moreover, as shown above, how and when Altria would stop selling its existing products post-transaction were not irrelevant details. Rather, the terms were directly negotiated; language regarding ceasing to operate was rejected and not reinserted; and JLI clearly desired and expected that Altria would cooperate with the antitrust review process and that Altria's e-vapor assets would be disposed of in compliance with that process.

In summary, the negotiation evidence shows that Altria's conduct in withdrawing its products from the market was contrary to the desires, expectations, and understanding of JLI and is more consistent with a conclusion of unilateral conduct of Altria, than it is reflective of an agreement with JLI.

Finally, to support its conspiracy theory, Complaint Counsel cites pieces of certain documents exchanged between Respondents during the negotiation period (*see* CCB at 14-15). All of the cited evidence has been reviewed and considered and much of it has already been addressed in the Facts or in this Analysis. In brief, this evidence is not particularly probative – separately or combined – and is not entitled to significant weight. Only a few examples, addressed below, merit discussion.

Complaint Counsel points to a July 27, 2018 email to Pritzker from JLI's adviser at Goldman Sachs, Peter Gross, regarding potential terms to offer Altria, which included the statement, "I was under the impression that [Altria] would just shut down Mark 10." F. 759. Complaint Counsel omits Gross' immediate next sentence, which cautions Pritzker, "We don't want them thinking that they will receive any consideration for co[n]tributing it" to JLI. F. 759. In ascribing no value to Altria's e-vapor products, this statement is consistent with evidence that JLI regarded those products as uncompetitive and "terrible." F. 429, 939. Complaint Counsel also omits Pritzker's response to Gross, stating his belief that Altria "may need to sell [*i.e.*, divest] it," which is consistent with Pritzker's testimony at trial that he expected antitrust regulators would require Altria to divest its e-vapor products. F. 742, 770, 904. Moreover, Complaint Counsel asserts that Gross "had recently spoken directly" to Willard, prior to making the statement in his July 27, 2018 email to Pritzker, CCB at 14, but the inference that Gross got his "impression" from Willard is unsupported. Complaint Counsel acknowledges that the intended purpose of the call was to discuss valuation. *See* CCFF 673. Gross testified at his deposition that he had not heard from anyone, including Altria or JLI, that Altria was planning to "shut down" its e-vapor business. *See* PX7043 (Gross (Goldman Sachs)) Dep. at 35. Gross further testified that he had heard that Altria's products were inferior, and, from his standpoint advising on valuation, he wanted to avoid "Altria believing that they could" obtain a lower price by contributing those products to JLI. *Id.* at 36-38. Complaint Counsel did not call Gross to testify at trial.

Next, Complaint Counsel points to a statement in draft talking points, prepared for Willard for a telephone call with JLI scheduled for August 6, 2018. The draft talking points included, among other things, the statement that Altria had "come a long way" to accommodate JLI in negotiations, including by meeting JLI's proposed valuation, agreeing to a minority position

instead of a controlling one, and "[demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership]." F. 803 (brackets in original). Complaint Counsel fails to persuasively explain how this vague and ambiguous statement implies an improper agreement to dispose of Altria's e-vapor assets, including by "ceasing to operate" those assets. Innuendo carries little, if any, weight.

In addition, Complaint Counsel relies on the October 5, 2018 letter from Altria to JLI ("October 5 Letter") through which Altria sought to restart negotiations with JLI after the impasse over valuation and control that caused negotiations to break down at the end of August 2018. F. 846-849, 868. Complaint Counsel highlights Altria's proposal in the October 5 Letter that, in the event of a transaction, Altria would agree not to compete with JLI "in a manner consistent with our previous discussions, in the U.S. e-vapor market for any period, exclusive of the [antitrust clearance] transition period, during which [Altria] provides services." F. 877. Although the language in the letter is unclear, Complaint Counsel implies that this language was meant to refer to the "cease to operate" language or some other unspecified understanding. Complaint Counsel's suggested inference is unsupported and is rejected. JLI understood, reasonably and logically, that the language, "consistent with our previous discussions," meant "consistent with [the] prior draft of the term sheets," the most recent of which was the August 19 Term Sheet sent by JLI. F.878. The non-compete provision proposed in that term sheet contemplated that MarkTen cig-a-likes and Elite would remain on the market, exempt from the non-compete terms, until the assets were divested or contributed in connection with the antitrust review process. F. 835.

Complaint Counsel also points to evidence that a reference to Altria's "exiting" the e-vapor business was inserted into a portion of the October 15, 2018 term sheet ("October 15 Term Sheet"), which addressed the support services Altria would provide to JLI in the event of a transaction. The insertion was an introductory heading to one portion of the support services section, which stated in pertinent part: "Services provided upon earlier of (i) contribution described above or (ii) Richard [Altria] otherwise exiting the marketing and sale of products in the Field ('Contribution Date')." F. 893 (underline in original). The text that followed the heading referenced Altria's provision of certain marketing, distribution, and in-store support services. F. 893. The October 15 Term Sheet distinguished between two types of services that Altria could provide to JLI after the closing of the transaction. F. 920; *see also* F. 834 (August 19 Term Sheet). It was Altria's understanding that some services, such as Altria's supporting, consulting, and assisting JLI in obtaining PMTA approval for JLI's products, could be provided immediately upon closing the transaction; however, certain other services (referred to as "Enhanced Services"), such as assisting with JLI's marketing and distribution, could not, in compliance with antitrust law, be provided to JLI if Altria were a competitor of JLI's. F. 893, 921-923. Altria's in-house counsel, Garnick, explained that outside legal counsel added the underlined language "to ensure that [Altria was] protected and in compliance with the antitrust laws before . . . [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." F. 893. The inference that the insertion to the October 15 Term Sheet was referring, directly or indirectly, to a mutual understanding as to the disposition of Altria's then-existing e-vapor products is weak and unpersuasive.

b. Timeline Evidence

Complaint Counsel argues that Altria's actions to discontinue its e-cigarette products, when juxtaposed against certain points in the negotiations, support an inference that Altria withdrew MarkTen Elite and MarkTen cig-a-likes pursuant to an agreement with JLI to do so. CCB at 38-39. Complaint Counsel relies on *In re Urethane Antitrust Litigation*, 913 F. Supp. 2d 1145 (D. Kan. 2012). In that case, the court, in finding that triable issues of fact prevented summary judgment, relied in part on evidence of communications involving pricing and meetings among the defendant companies that occurred "at or near the time" of the joint price increases that were the subject of the alleged agreement. *Id.* at 1155. However, the court also relied on direct testimony of witnesses, including admissions, and circumstantial evidence that bolstered the direct evidence, including parallel conduct in imposing price increases, "suspect communications" between executives at the companies, and efforts to maintain secrecy among the alleged co-conspirators, none of which is asserted in the instant case. *Id.* at 1154-55.

In any event, as shown below, the chronology Complaint Counsel lays out fails to take into account important context for Altria's actions and instead merely juxtaposes negotiation events and business events, and then urges linkages that are not supported by evidence. In this regard, Complaint Counsel's chronology appears to be impermissibly "first assuming a conspiracy and then explaining the evidence accordingly." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000). "[W]here proof is lacking, . . . it is [not] fair or appropriate to fill in the blanks . . . to assist the government in winning its case." *McWane*, 2013 WL 8364918, at *289. Accordingly, the timeline evidence relied on by Complaint Counsel is entitled to, and is given, little weight.

Statement by Gifford at August 3, 2018 Altria Management Meeting

Complaint Counsel first asserts that, at an August 3, 2018 meeting among Altria's senior management ("August 3 Meeting"), Gifford "suggested . . . the possibility of withdrawing MarkTen Elite from the market." Complaint Counsel notes that this was "just four days" after JLI sent Altria the July 30 Term Sheet containing the "cease to operate" language, implying Gifford's comment was driven by that language. However, Complaint Counsel ignores material context for Gifford's comment. Quigley convened the August 3 Meeting of Altria senior management to update them on Nu Mark's performance for that year. F. 575. Quigley advised management at this meeting that Nu Mark "[l]ack[ed] quality pod products"; Elite had design flaws; Elite had not "proven to deliver broadly" "a satisfying, enjoyable nicotine experience"; Nu Mark's attempt at making Elite into "a quality and successful pod product had failed or was on its way to failure"; and Nu Mark would be "limited to competing" in the cig-a-like segment, which was declining. F. 576-581. To redirect Nu Mark going forward, Quigley proposed a "bridge plan," that contemplated Nu Mark developing an improved product that could obtain FDA approval and could be put on the market by 2025. F. 584. Against the foregoing backdrop, Gifford's inquiring whether Altria should consider pulling Elite from the market is reasonable. Gifford also noted at the August 3 Meeting that Altria was "losing money" and did not "have the nicotine we need," and questioned why Altria was "continuing to lose money on this piece of shit business." F. 587. Complaint Counsel also ignores that Quigley agreed it made sense for Gifford to raise the issue regarding Elite. F. 588.

Regardless, as of the August 3 Meeting, Quigley had a directive from Willard, who was responsible for such decisions, to continue to work on the Elite business, which is inconsistent with the theory that Gifford's comment shows that Altria was acting on an alleged demand from JLI to withdraw Elite from the market. F. 589.

August 10, 2018 decisions regarding Elite Gasket and Cig-a-like PMTA

Complaint Counsel contends that at an August 10, 2018 meeting, Altria decided to implement a new gasket to address Elite's leaking problem and to continue working on the PMTA for the MarkTen cig-a-like products. Complaint Counsel argues that these decisions were based upon Altria's having stricken the divest/contribute/"cease to operate" provision in Altria's August 9 Term Sheet sent to JLI. However, there is no evidence tying these events together. Moreover, the underlying premise – that senior leadership of a major company was erratically veering, over a matter of days, from planning to pull Elite from the market to pushing for continued investment in the product – based on positions taken in early term sheets – is unpersuasive, as inconsistent with common sense.

August 23, 2018 Board Meeting

Complaint Counsel argues that Respondents' negotiations in mid-August 2018, whereby JLI and Altria settled on a structure for divestment or contribution of Altria's then-existing products in the event of a future transaction (*see* F. 839-840), were the reasons for the contents of a slide presentation made at the August 23, 2018 Board Meeting ("August 23 Board Meeting"). Complaint Counsel argues that Altria leadership skewed the presentation to paint a negative picture of Nu Mark's products, ostensibly to mislead its own Board into agreeing to withdraw the products. This again suggests, implausibly, that Altria leadership veered back from supporting Nu Mark's products to plotting to remove them from the market in a span of days. The inference is unsupported and unpersuasive.

Complaint Counsel points to an August 14, 2018 email that Quigley sent to Crosthwaite upon reviewing a draft of the slide presentation at issue, stating that it was "clearly only the bad news version of the story" and inaccurate in its assessment of the cig-a-like business as declining. CCB at 40. Complaint Counsel ignores that Garnick began working with his regulatory team to put together a presentation for the August 23 Board Meeting on July 12, 2018, and that the first draft of the presentation was completed July 15, 2018 ("July 15 Draft Presentation"), which was weeks before Altria and JLI exchanged the first term sheet on July 30, 2018. F. 568, 570. Moreover, the relevant slides pertaining to concerns about Elite and MarkTen cig-a-likes did not materially change from the draft to the final presentation. F. 592. For example, both the draft presentation and the final presentation conveyed that Elite could not satisfy three of the four criteria necessary to obtain PMTA approval (manufacturing, risk reduction, and adult smoker conversion) and that MarkTen cig-a-likes could not satisfy two of the four criteria necessary to obtain PMTA approval (meaningful risk reduction and adult smoker conversion). F. 572-573, 593-594. These conclusions regarding Nu Mark products' problems and bleak regulatory prospects came from scientists and other technical experts in Altria's regulatory sciences division, who were not

involved in the Altria/JLI investment negotiations,[21] and the conclusions were also consistent with months' worth of internal investigation and inquiry. F. 539-567, 570-571. Furthermore, every Altria employee who was asked about the August 23 Board Presentation at trial or in a deposition affirmed that it was accurate, including Quigley. F. 597.

September and October 2018 actions regarding Elite

Complaint Counsel next argues that Altria's decision to withdraw Elite (as well as non-traditional cig-a-like flavors) from the market stemmed from the progress of negotiations with JLI that occurred in October of 2018. However, this argument is belied by the fact that senior leadership of Altria made the decision to withdraw all pods and non-traditional cig-a-like flavors from the market in September of 2018, after internal consideration of the September 12 Letter from the FDA, at a time when negotiations between JLI and Altria had broken down over issues of valuation and control, and not over proposed terms for post-transaction competition between JLI and Altria. F. 611, 614, 619-623, 842-850. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1034 (7th Cir. 2002) (attributing one party's actions to an agreement was "shaky" when those actions predated the alleged agreement).

As explained in section II.C.4., *supra*, by September of 2018, after a months-long process of review that began with the Level Setting Meeting in June of 2018, Altria concluded that Nu Mark's products had "failed to be successful in the marketplace," including because of the lack of nicotine salts, and that a "different approach" was needed. In September of 2018, having concluded that success with Elite was unlikely, Altria decided to establish Growth Teams, whose purpose would be to develop a product that had the potential to leapfrog JUUL. F. 600-602. For the purpose of funding and transitioning to Growth Teams, on September 10, 2018, Altria's regulatory team took an inventory of ongoing projects. F. 606-607. Based on that inventory, on September 17, 2018, Willard approved a plan to establish the Growth Teams and discontinue all work on Elite. F. 610. Thereafter, Altria's leadership team gathered for Altria's annual planning meeting from September 25 to 27, 2018, at Altria's off-site facility in Montana, known as the Ranch ("September Ranch Meeting"). F. 613. By the time of the September Ranch Meeting, there was agreement among Altria's and Nu Mark's leaders that pulling pod products and non-traditional flavors from the market were two ways that the company should and would respond to the FDA's concerns. F. 614. Altria leadership presented its decision to do so at the September Ranch Meeting. As summarized in a slide presented by Quigley at the meeting on September 26, 2018, Altria leadership decided "in response to [the] FDA," that Altria would "remove" its pod-based products Elite and Apex from the marketplace, as well as non-traditional flavored cig-a-like products (defined as all flavors other than tobacco, menthol, or mint). F. 620-621.

Complaint Counsel next argues that the fact that Altria did not publicly announce the decision to withdraw Elite (as well as non-traditional cig-a-like flavors) until October 25, 2018 implies a connection between the decision and negotiations between Altria and JLI that resumed

21 The fact that the same members of Altria senior leadership would be responsible for overseeing strategic decision making regarding the Nu Mark operating company and a high-level potential investment with JLI is not inherently suspicious and does not imply a conspiracy.

in early October 2018. Complaint Counsel asserts that Altria delayed the announcement until Altria was confident that negotiations with JLI were back on track. However, the implication that Altria's leadership would have changed course on its previous decision to withdraw Elite, had JLI not responded favorably to restarting negotiations, is unsupported in the record. Moreover, as Quigley explained, Altria management thought it would be inappropriate to announce the decision publicly before telling the FDA, which Altria did at an October 18, 2018 meeting with the FDA Commissioner. F. 646-647. In addition, Willard believed that the investment community was entitled to an explanation of Altria's plans, before a public announcement, and therefore timed the release of the public announcement to coincide with the third quarter earnings call, which took place on the morning of October 25, 2018. F. 652. These reasonable explanations conclusively rebut Complaint Counsel's suggested contrary inference.

December 7, 2018 Nu Mark Discontinuation Announcement

Complaint Counsel relies heavily on the fact that Altria announced the discontinuation of Nu Mark on December 7, 2018, two weeks before the Transaction was executed on December 20, 2018. Complaint Counsel argues that the evidence proves that Altria "took this course of action *because* of the JLI Transaction." CCB at 44 (emphasis in original). Complaint Counsel's argument is misplaced. In determining whether there was an agreement under Section 1, the issue is whether the discontinuation of Nu Mark stemmed from the alleged agreement to "exit the market," supposedly formed during the parties' negotiations. Whether Altria made its decision to discontinue Nu Mark "because of" the anticipated future transaction with Altria is a distinct issue, more appropriately addressed in the context of evaluating whether the discontinuation of Nu Mark should be considered a potential anticompetitive effect of the Transaction, for purposes of the Section 7 claim. *See* section II.E.2.b.i., *infra.*

c. Miscellaneous Circumstantial Evidence

i. Common Motive

Complaint Counsel argues that Altria's withdrawing its e-vapor products from the market, instead of divesting or contributing them after the Transaction was executed, "provided benefits" to both Altria and JLI. CCB at 45. Complaint Counsel analogizes evidence of a resulting benefit to each party to evidence of "common motive," a so-called "plus factor" that courts may look to as circumstantial evidence of an agreement between joint actors in a parallel conduct case. *See United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015). As this is not a parallel conduct case, it is unclear that "plus factors" have any application. *See In re Benco Dental Supply Co.*, 2019 WL 5419393, at *59 (F.T.C. Oct. 15, 2019) (Initial Decision) (holding that where evidence failed to prove parallel conduct, assessing "plus factors" was "arguably illogical," but addressing such factors "for the sake of completeness"). As in *Benco*, the so-called "plus factors" raised by Complaint Counsel will be addressed.

Complaint Counsel posits that Altria was motivated to withdraw its products because Altria wanted to take seats on JLI's Board of Directors, which pre-Transaction term sheets contemplated would not occur until the antitrust clearance process was completed and Altria's products were divested or contributed. *See, e.g.*, F. 763, 870. To support this theory, Complaint Counsel points

out that pre-Transaction term sheets contemplated that Altria could delay filing for antitrust clearance until July 15, 2020, which avoided potential complications arising from Altria's agreement with PMI (which was set to expire on that date). F. 889-890, 910. The final Purchase Agreement altered that timing to require both Altria and JLI to make their HSR filings within 90 days of the closing of the Transaction. F. 958. Complaint Counsel cites no evidence justifying a conclusion that Altria was anxious to take Board seats, much less justifying a further inference that Altria would discontinue product lines in order to expedite it. Moreover, the fact that the final Purchase Agreement required filing within 90 days is consistent with accounting for changed circumstances and does not imply Altria was motivated to expedite obtaining Board seats.

Complaint Counsel contends that JLI was motivated by wanting to receive the Enhanced Services that Altria was expected to provide after the contemplated transaction, which services were to be delayed until after Altria had divested or contributed its e-vapor assets pursuant to the anticipated antitrust clearance process. F. 921-922. Complaint Counsel asserts that JLI was eager for Altria to start providing these services, and that JLI saw the services as important benefits of the contemplated transaction. As noted previously, the services that were expected to be provided immediately upon closing of the contemplated transaction included Altria's supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. F. 921. The Enhanced Services, which were expected to be provided only after Altria was no longer selling its own e-vapor products, included assisting with JLI's marketing and assisting with JLI's efforts to gain distribution, display, and in-store support. F. 922.

The evidence does not support a conclusion that JLI was so "eager" for the contemplated Enhanced Services to begin, or that such services were so important, that JLI would be motivated to conspire with Altria to make it happen earlier rather than later. Moreover, contrary testimony rebuts Complaint Counsel's suggested inference. Pritzker testified that while the expected Enhanced Services were valuable, delaying the start of those services would not have been seen as a problem. F. 924. Pritzker further testified that it was important that Altria demonstrate during negotiations that they were prepared to provide the services, in the event of a transaction with JLI, but that the Enhanced Services were not "critical service[s]" and "when they started would not have been consequential" to him. F. 924. It was the regulatory services that were anticipated that would be "invaluable" to JLI, as PMTA approval is "literally existential" for JLI. F. 925. Complaint Counsel offers no basis for concluding that JLI was more motivated by, or would benefit more by, the Enhanced Services than the other anticipated support services.

ii. Action Contrary to Economic Interest

Complaint Counsel next contends that it was against Altria's unilateral economic interest to discontinue Nu Mark, absent a conspiracy, which is another "plus-factor" that may be considered as circumstantial evidence of conspiracy in a parallel conduct case. *Apple,* 952 F. Supp. 2d at 690.

Actions against unilateral interest by an alleged participant in a conspiracy means "conduct that would be irrational assuming that the defendant operated in a competitive market." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004). The challenged action "must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in

it." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999). *See also City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 572 (11th Cir. 1998) (describing actions against interest as "behavior [that] would not be reasonable or explicable (i.e. not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade"). Courts "must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest we be too quick to second-guess well-intentioned business judgments of all kinds." *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003). *See In re Citric Acid Litig.*, 191 F.3d 1090, 1101 (9th Cir. 1999) ("Courts have recognized that firms must have broad discretion to make decisions based on their judgments of what is best for them and that business judgments should not be second-guessed even where the evidence concerning the rationality of the challenged activities might be subject to reasonable dispute.").

Applying the foregoing standards, Complaint Counsel's argument is rejected. Complaint Counsel relies on evidence that Altria viewed market leadership in e-vapor as "critically important" in light of the decline of traditional, combustible cigarettes; that Altria was willing to incur short-term losses to achieve the leadership goal; that some industry participants were surprised by Altria's actions in withdrawing products; and that the investment community had surmised that Altria's December 7, 2018 announcement of the discontinuation of Nu Mark was connected to rumors of an upcoming deal with JLI. Such evidence does not justify a conclusion that it was economically irrational for Altria to discontinue its e-vapor products, or that no reasonable company would have done so. Moreover, as detailed in section II.K.5. of the Facts and summarized in section II.C.6.b. above, the evidence shows that at the time Altria discontinued Nu Mark, Nu Mark had been losing money for years and was projected to lose over $200 million in the next three years. Altria executives had concluded that there was no reasonable path to long-term profitability and that its products faced considerable barriers to obtaining PMTA approval. Such evidence weighs against a finding that it was against Altria's interest to discontinue Nu Mark, absent a prior agreement to do so.

iii. January 2020 Amendments to Transaction Documents

Complaint Counsel next relies on certain amendments that JLI and Altria made to the Transaction Documents in January 2020 ("January 20 Amendments"). Specifically, the January 20 Amendments allow Altria to be released from the terms of the Transaction's non-compete provision: (1) if JLI were "prohibited as a matter of federal law" from selling e-vapor products in the United States for at least 12 months, unless a PMTA had been pending for at least six months; or (2) if the "aggregate value" of Altria's shares in JLI were written down to $1.28 billion or less. F. 961. Complaint Counsel argues this shows that Altria would be competing on its own, but for the Transaction. As stated previously, however, the issue for purposes of proving the alleged agreement requiring Altria to exit its then-existing e-vapor business under Section 1 is whether Altria's discontinuing Nu Mark was in furtherance of, or pursuant to, an agreement, allegedly made during negotiations, that Altria would take such action. Whether Altria made its decision to discontinue Nu Mark "because of" the anticipated future transaction with Altria is a different issue, more appropriately addressed in the context of evaluating whether the discontinuation of Nu Mark should be considered a potential anticompetitive effect of the Transaction for purposes of the Section 7 claim. *See* section II.E.2.b.i., *infra.*

iv. Pretext

Complaint Counsel asserts that Respondents' proffered explanations for Altria's decisions to withdraw its e-vapor products are pretextual, and that proof of pretext supports an inference of conspiracy. However, as Complaint Counsel's cited case, *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011), makes clear, "'pretext' standing alone is not sufficient" to establish an agreement "but can only strengthen an inference of joint action that is otherwise in evidence." *Id.* at 585. This stems from the fact that a "plaintiff cannot make [its] case just by asking the [fact finder] to disbelieve the defendant's" evidence. *McWane*, 2013 WL 8364918, at *267 (*quoting In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)). Moreover, in *Rossi v. Standard Roofing*, 156 F.3d 452 (3d Cir. 1998) and *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469 (3d Cir. 1985), also cited by Complaint Counsel, there was direct evidence, and circumstantial evidence, apart from pretext evidence, that supported an inference of conspiracy. In the instant case, there is no direct evidence of the alleged agreement between JLI and Altria for Altria to cease selling its then-existing e-vapor products, including as a condition of any future transaction, and there is little, if any, circumstantial evidence meriting weight. Under these circumstances, Complaint Counsel's attempt to rely on supposed pretext as affirmative evidence of the alleged agreement is unjustified and is rejected.

At best, proof of "pretextual excuses" can constitute "circumstantial evidence that can disprove the likelihood of independent action." *Rossi*, 156 F.3d at 478; *see also Fragale & Sons*, 760 F.2d at 474 (stating that "evidence of pretext, if believed by [the fact finder], would disprove the likelihood of independent action"). In this context, Complaint Counsel, as the proponent of a factual finding of pretext, bears the burden of proving that Respondents' asserted reasons for withdrawing the products from the market are in fact false. 16 C.F.R. § 3.43(a) ("[T]he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto."). Similarly, Complaint Counsel has the ultimate burden of proving that Altria's withdrawing products from the market stems from the alleged agreement with JLI that it would do so, as opposed to independent action by Altria. As stated in *Kreuzer*, 735 F.2d at 1488, "the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff," which, in this case, is the government.

d. Likelihood of Independent Action/Pretext

As noted above, the "crucial question" in a Section 1 case "is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement.'" *Twombly*, 550 U.S. at 553 (citations omitted). "Where there is an independent business justification for a defendant's behavior, an inference of conspiracy is not easily drawn." *McWane*, 2013 WL 8364918, at *253. As addressed below, there is substantial credible evidence of Altria's independent decision making, based on demonstrated business reasons. This evidence, when weighed against the lack of evidence of the alleged agreement, is sufficient to rebut an inference that Altria's withdrawal of products from the market stemmed from an agreement with or demand by JLI that Altria do so; and Complaint Counsel's asserted evidence of pretext fails to effectively rebut that evidence.

i. Altria's Decision to Pull Elite and Non-Traditional Cig-a-like Flavors from the Market

As previously noted, Altria made two separate decisions at two separate points in time to remove its e-vapor products from the market. The first of these decisions, to discontinue Nu Mark's pod products and non-traditional cig-a-like flavors, was made in September 2018 and announced on October 25, 2018. As shown below, the evidence on Altria's decision to discontinue pod products and flavored cig-a-likes is at least as consistent with an independent business decision as with an agreement with JLI; and Complaint Counsel's argument that Altria's asserted reasons were pretextual is unsupported.

As detailed in section III.K.2. of the Facts and summarized in section II.C.2. above, as a result of the in-depth assessments that Altria's Quigley and Garnick had completed over the summer of 2018, Altria concluded that (1) Elite was a commercial failure with dim prospects of success given its lack of nicotine salts; and (2) Elite was unlikely to get FDA approval, due to its technical deficiencies and inability to convert smokers. Elite was not a successful product, never exceeding a one percent market share in cartridges, despite increasingly heavy promotional activity by Nu Mark, to the point that the company was practically giving the product away free. *See* sections III.I.4. and III.I.5. of the Facts.

One of the reasons for Elite's lack of competitiveness is that it lacked nicotine salts, the key ingredient to an e-vapor product's commercial success. F. 445-447, 455, 474-476. Quigley, who was not involved in the JLI negotiations, reported to senior management at the Level Setting Meeting in June 2018, the scientists' determination that nicotine salts are "required" to provide nicotine satisfaction. F. 553; *see also* F. 558 (presentation at the Level Setting Meeting by Jupe highlighting that Elite would not be able to compete successfully without higher nicotine levels). Senior leadership's recognition of these problems occurred before Altria received the first term sheet from JLI on July 30, 2018. Quigley again advised senior management in early August 2018 that Elite was not a competitive product because of its lack of nicotine salts. F. 576, 580.

Furthermore, Altria's scientists had concluded that Elite could not obtain FDA approval, which was another reason contributing to Altria's decision to pull its pod products from the market. Soon after Altria had acquired Elite, Altria realized that a number of changes would be needed, both to appeal to consumers and to receive regulatory approval.[22] F. 378-385, 411-412. Elite had design problems, including that it lacked dry puff prevention technology, contained nickel wire, and contained ABS plastic. F. 380-382. Because of design problems, Altria believed that the PMTA for Elite faced "increased application risk" and an "uncertain authorization outcome." F.

22 Altria was able to address the problem with leaking pods. Some of its fixes included training workers on how to assemble the devices and changing the way the pods were shipped from China. F. 504-505. In addition, Willard approved the production of Elite with a new gasket. F. 513. After approving the production of Elite with the new gasket, and after further discussions, Willard reversed his approval, and decided that the new gasket should not be implemented due to the regulatory risk it might create. F. 514. Willard's reversal as to implementation of the gasket change notwithstanding, the gasket change was implemented. F. 515. The new gasket reduced leaking in MarkTen Elite. F. 517-518. However, it did not remedy Elite's lack of nicotine satisfaction and Elite's issue with leaking "was not a primary factor in [Altria's] deciding to discontinue the product." F. 519-520.

378. By June 2018, senior management had been briefed on the magnitude of the problems with Elite, and shortly thereafter began preparing to inform the Board of these problems at the next scheduled Board meeting in August 2018. F. 552-563, 568-569. The final presentation to the Board on August 23, 2018 conveyed that Elite could not satisfy three of the four criteria necessary to obtain PMTA approval. F. 594. Garnick conveyed that the primary problem, shared by all of Nu Mark's products, was lack of smoker conversion. F. 596. The conclusions in the presentation regarding Nu Mark products' problems and regulatory prospects came from scientists and other technical experts in regulatory sciences, who were not involved in the Altria/JLI negotiations. F. 570-571, 575.

Finally, within hours of receiving the FDA's September 12, 2018 Letter, Altria's executives began to consider whether the company should discontinue certain products in response to the FDA letter, at a time when negotiations with JLI had stalled. F. 611, 848-852. Since April 2018, the FDA had been expressing greater concern that e-cigarettes, particularly pod products and non-traditional flavors, were "getting into kids' hands." F. 272. In its September 12, 2018 Letter, the FDA called for prompt action to address the FDA's concerns; required Altria to respond within 60 days with actions that Altria would take to address the FDA's concerns;[23] and specifically suggested that Altria remove flavored products from the market. F. 280-282.[24]

As a participant in a heavily regulated industry, Altria's relationship with its regulator is critical. F. 286. As Willard explained, "there were few things [Altria] took more seriously than" comments and guidance from the FDA because the "FDA had regulatory authority over the US tobacco business, and they ultimately decided which products could stay on the market, [and] which products had to be removed from the market." F. 286. Altria's incentive for taking significant steps to satisfy the FDA makes sense, undercutting Complaint Counsel's pretext argument. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 411 (2004) (Antitrust inquiries must "careful[ly] account" for "the pervasive federal and state regulation characteristic of [an] industry."). This context for Willard's decision, combined with the fact that JLI was not seeking that Altria withdraw its products from the market, not only rebuts

23 In support of its claim that Altria's asserted concern about the FDA Letter was pretextual, Complaint Counsel points to a document from early October 2018 in which Altria's General Counsel Murray Garnick recommended telling the Altria Board that Altria was "seriously considering unilaterally taking off MarkTen Elite from the market" due to the FDA's youth vaping concerns, and cited several reasons for taking the action at that time, including that it "gives [Altria] good cover and story for taking MarkTen Elite off market now." F. 630. As Garnick testified, he immediately followed up the "good cover" reference in that document with additional points that explained what he meant, including that Elite was "not a JUUL fighter and not worth [a] PMTA so [Altria would] have to take it off the market eventually; this is better context." F. 630-631. That Altria might not have wanted to publicly admit failure with regard to Elite is at least as likely as the innuendo urged by Complaint Counsel. Moreover, the implication that the "good cover" is a reference to "covering" for an agreement with JLI is belied by the fact that in the same document, Garnick wrote that discontinuing Elite was a "bold step" and "unilateral action" that Altria was taking "regardless of" a potential future investment in JLI. F. 630.

24 Subsequently, in January 2020, the FDA required all non-tobacco, non-menthol flavored cartridge-based e-cigarettes (such as fruit and mint-flavored pods and cig-a-likes) to be removed from the market until they receive PMTA approval. F. 289-290.

an inference of pretext but also supports the inference that Altria's decision stemmed from independent decision making rather than from a conspiracy with JLI.[25]

The timing of Altria's decision to pull the products also undermines any claim of pretext, and further supports an inference that Altria's decision stems from independent decision making based on demonstrated business reasons, and not from a demand by or agreement with JLI to do so. Altria made the decision to pull Elite at the September 26 Ranch Meeting, when negotiations with JLI had been broken down for a month. F. 619-621, 848-852. In addition, Altria anticipated that JLI would be unhappy with Altria's October 25 Letter to the FDA, F. 900, and, in fact, the evidence shows that JLI was "shocked" by the October 25 announcement. F. 902; *see also* F. 903-904. These facts are also inconsistent with an inference of a prior agreement to withdraw Elite.

In summary, the evidence regarding Altria's withdrawal of its non-traditional flavored cig-a-likes and pod products from the market is at least as consistent with a finding of independent action as with an inference of a conspiracy with JLI for Altria to take such action; and Complaint Counsel's argument that Altria's reasons were pretextual is rejected.

ii. Altria's Decision to Withdraw Remaining Cig-a-likes and Close Nu Mark

The second decision at issue was Altria's decision to withdraw its remaining cig-a-like products from the market, which Altria announced on December 7, 2018, and to close Nu Mark. F. 687-688, 697. Altria's announcement stated that the decision was motivated by the "current and expected financial performance [of these products], coupled with regulatory restrictions that burden [Altria's] ability to quickly improve these products." F. 691; *see also* F. 690. As shown below, the evidence fails to prove that Altria's reasons were pretextual and the evidence is at least as consistent with independent decision making by Altria as with an inference that, in withdrawing its cig-a-likes from the market and closing Nu Mark, Altria was complying with an agreement with or demand by JLI to do so.

Nu Mark incurred more than $700 million in losses when it was in operation and by December 2018, Altria was projecting at least another $235 million in losses for Nu Mark over the next three years with no expectation of growing volume. F. 661, 675, 680. Nu Mark's only remaining e-vapor products were traditional flavors in the cig-a-like segment, a segment that was in "free-fall," as described by Willard. F. 523. With only cig-a-like products and without a successful pod-based product, Nu Mark "had no chance of achieving [its financial projections]"

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25 In its October 25 Letter to the FDA, Altria announced that it would withdraw its pod products from the market, stating that although Altria did not believe it had a "current issue with youth access to or use of [its] pod-based products," it did "not want to risk contributing to the issue" with a product that was not converting adult smokers. F. 649. Complaint Counsel argues that it was pretext for Altria to claim its decision to pull Elite was related to concern about youth e-vapor usage because Altria later chose to invest in JLI, which markets JUUL. This argument does not account for the fact that, unlike Nu Mark's products, JUUL had demonstrated that it could convert adult smokers. F. 430, 623. In any event, as explained above, even if the evidence supported a finding that Altria's purported concern about youth usage was pretextual, such evidence would not constitute affirmative evidence of the alleged agreement and would not be sufficient circumstantial evidence to outweigh the evidence of Altria acting independently.

and would continue to incur losses. F 676. Furthermore, as summarized in section II.C.6.b. above, Altria believed that Nu Mark's remaining e-vapor products had little prospect of securing FDA approval, particularly since, in November 2018, new problems were emerging in connection with Altria's effort to address MarkTen's formaldehyde problem caused by dry puffing. F. 682-686.

To support its claim of pretext, Complaint Counsel points to the relative proximity in time between Nu Mark's shutdown and the closing of the Transaction. However, as stated previously in section II.D.2.b. above, whether Altria's decision to withdraw cig-a-likes from the market and close Nu Mark stemmed from a prior commitment to or demand by JLI, or from independent business reasons, is the operative question for a Section 1 claim. To the extent those independent business reasons included consideration of the likelihood of closing the contemplated transaction with JLI, the issue is more appropriately considered in connection with assessing potential anticompetitive effects of the Transaction. *Infra* section II.E.2.b. In addition, the evidence shows that Altria makes its annual budgeting determinations every December and that in December 2018, Altria realized that both of the "two pathways" Altria was pursuing to grow its e-vapor business – developing a leapfrog product through the Growth Teams or the potential investment in JLI – would require a substantial financial commitment. F 655. Altria decided to stop making the MarkTen cig-a-like products to save money in order to fund either the Growth Teams or, if Altria and JLI were able to finalize the terms, to fund Altria's investment in JLI. F. 654. In December of 2018, terms were still being negotiated between JLI and Altria and a deal was, at that time, uncertain. F. 931, 940-945. The fact that the discontinuations of the products "predate[d]" any certainty about getting the deal done with JLI undercuts Complaint Counsel's pretextual argument. *See In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 158 F. Supp. 3d 544, 568 (E.D. La. 2016).

In addition, the theory that Altria's reasons for discontinuing its products are pretext for an agreement with JLI is undercut by the fact that Altria did not withdraw all its e-vapor products at once. Instead, it made two separate decisions months apart in response to separate business exigencies: (1) the FDA's demand for "bold action" on youth usage rates in September 2018; and (2) the budgetary issues that the company was facing in December 2018. If JLI were in fact insisting that Altria completely exit the e-vapor category as a condition of the investment, it would not make sense for Altria to remove those products in stages. Moreover, when Altria shut down Nu Mark, this also resulted in the discontinuation of Verve, an oral nicotine product, which would not have been subject to the non-compete provision contemplated in the context of a transaction with JLI. F. 688. Like Altria's remaining cig-a-like products, "there was no sign [Verve] was ever going to be successful," and so Altria discontinued it as well. F. 689.

Finally, JLI was unaware of Altria's decision to withdraw Nu Mark's remaining cig-a-like products and did not register it as a notable event. F. 938. As characterized by JLI's Valani, Altria's decision was "irrelevant." F. 939. To JLI, the MarkTen cig-a-likes were not "a competitive entity in the market." F. 939. Neither Pritzker nor Valani could remember learning, prior to this litigation, that Altria had shut down Nu Mark and removed its remaining cig-a-like products in December 2018. F. 939. Such evidence is also inconsistent with an inference of a prior agreement.

In summary, the evidence regarding Altria's withdrawal of its cig-a-likes from the market and the closing of Nu Mark is at least as consistent with independent action as with an inference

of a conspiracy with JLI for Altria to take such action; and Complaint Counsel's argument that Altria's reasons were pretextual is unsupported and is rejected.

3. Conclusion

For all the foregoing reasons, and based on the totality of the evidence, extensively reviewed in the Facts and in this Analysis, the evidence fails to prove the alleged agreement between Altria and JLI for Altria to stop competing with its existing products.

Ordinarily, the analysis would next turn to the issue of whether the evidence proves that the written non-compete provision, the terms of which are contained in the Relationship Agreement portion of the Transaction Documents, is an unreasonable restraint of trade under Section 1. As noted in section II.B. above, the parties agree that the evaluation of the non-compete provision as an unreasonable restraint of trade under Section 1 is to be analyzed under the rule of reason. CCB at 58 n.17; RB at 88. The rule of reason in this context requires, at a minimum, a showing of anticompetitive effects. *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021) (stating that the "initial burden is on the FTC to show anticompetitive effects"). Similarly, the Section 7 claim requires proof that "the effect of [an] acquisition may be substantially to lessen competition . . . ." 15 U.S.C. § 18. Accordingly, since both the Section 1 claim and the Section 7 claim require an analysis of anticompetitive effects, in the interest of efficiency and avoiding undue repetition, the Analysis will turn to the Section 7 claim for an assessment of anticompetitive effects.

E. Count II – Unlawful Transaction

1. Applicable Legal Standards

Section 7 of the Clayton Act prohibits the acquisition of "the whole or any part of the stock or other share capital" where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 applies to partial acquisitions such as the instant case. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) ("[A]ny acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.").[26]

Under Section 7, "the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 274 (7th Cir. 1981). "Congress used the words '*may* be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C.

26 The allegation that an acquisition is a Section 5 violation, as well as a Section 7 violation, "does not require an independent analysis . . . . " Chicago Bridge, 2005 FTC LEXIS 215, at **8 n.23. Accord FTC v. PPG Indus., Inc., 798 F.2d 1500, 1501 n.2 (D.C. Cir. 1986) (stating that Section 5 of the FTC Act "may be assumed to be merely repetitive of [Section] 7 of the Clayton Act").

Cir. 2001) (*quoting Brown Shoe*, 370 U.S. at 323). "Thus, to establish a violation of Section 7, the FTC need not show that the challenged merger or acquisition *will* lessen competition, but only that the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *CCC Holdings*, 605 F. Supp. 2d at 35 (*quoting United States v. Marine Bancorp., Inc*., 418 U.S. 602, 623 n.22 (1974)).

Courts and the Commission have traditionally analyzed Section 7 claims under a burden shifting framework. *See, e.g., United States v. Anthem, Inc*., 855 F.3d 345, 349 (D.C. Cir. 2017); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *In re ProMedica Health Systems, Inc.*, 2012 WL 2450574, at *30 (F.T.C. June 25, 2012). Under this framework, the government can establish a presumption of liability by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in that market. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963); *Baker Hughes*, 908 F.2d at 982-83. The typical measure for determining market concentration is the Herfindahl-Hirschman Index (the "HHI"). *CCC Holdings*, 605 F. Supp. 2d at 37. The HHI calculates market power by summing the squares of the individual market shares of all the firms in the market. *Swedish Match*, 131 F. Supp. 2d at 166 n.11.

The government can bolster the presumption based on market structure with evidence showing that anticompetitive effects are likely. *Heinz*, 246 F.3d at 717. For example, the plaintiff may show that the merger would eliminate significant head-to-head competition, a particularly aggressive competitor in a highly concentrated market, or significant future competition. *See, e.g., Staples*, 970 F. Supp. at 1082-83 (crediting evidence in those categories).

Once the government establishes the prima facie case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the government's evidence as predictive of future anticompetitive effects. *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *accord Baker Hughes*, 908 F.2d at 982-983. "[E]vidence on a variety of factors can rebut a prima facie case," *Baker Hughes*, 908 F.2d at 984, including "ease of entry into the market, the trend of the market either toward or away from concentration," the "continuation of active price competition," or "unique economic circumstances that undermine the predictive value of the government's statistics." *Heinz*, 246 F.3d at 715 n.7 (internal quotation marks omitted). Rebuttal evidence may also include other factors relating to competition in the relevant market or the competitive or financial weakness of the acquired company. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 494-504 (1974); *Baker Hughes*, 908 F.2d at 985-86. Finally, if the respondent successfully rebuts the prima facie case, the burden of production shifts back to the government and merges with the ultimate burden of persuasion, which remains with the government at all times. *Chicago Bridge*, 534 F.3d at 423. Although the burden shifting analysis "conjures up images of a tennis match," *Univ. Health*, 938 F.2d at 1218-19 & n.25, in reality, the evidence is often considered all at once and the burdens are analyzed together. *Id.*; *see also, e.g., Chicago Bridge*, 534 F.3d at 424-25.

2. Reasonable Likelihood of Anticompetitive Effects

a. Market Shares and Concentration

As explained above in section II.B. above, the relevant market in this case is the sale in the United States of closed system e-cigarettes, which encompasses both cig-a-likes and pod-based products. The next step of the analysis is to "consider the likely effects of the proposed acquisition on competition within that market." *Swedish Match*, 131 F. Supp. 2d at 166. Under the applicable legal framework, sufficiently large HHI figures establish "a 'presumption' that the merger will substantially lessen competition."[27] *Heinz*, 246 F.3d at 715 (*citing Baker Hughes*, 908 F.2d at 982); *see also In re Polypore Int'l, Inc*., 2010 WL 9933413, at *22 (F.T.C. Dec. 13, 2010) (applying presumption of competitive harm in markets for various types of battery separators). This presumption of harm is, of course, rebuttable. *See Gen. Dynamics*, 415 U.S. at 497-98.

Complaint Counsel's economic expert witness, Dr. Rothman, measured concentration in the market for closed system e-cigarettes sold in the United States using the HHI as described in the Horizontal Merger Guidelines. F. 175; *Merger Guidelines* § 5.3. Dr. Rothman calculated pre-Transaction HHIs by using market shares derived from sales of units by Altria, JLI, ITG, JTI, NJOY, and Reynolds in the 12-month period beginning October 2017 and ending September 2018, which was before Altria removed any of its e-cigarette products from the market. F.176. As measured by this 12-month period, Dr. Rothman calculated that Altria had a 10.1 percent market share among closed system products. PX5000 (Rothman Expert Report ¶ 89, Tbl. 2).

Respondents first charge that Complaint Counsel must measure the market as it existed at the time of the Transaction in December 2018, when Altria had no e-vapor products on the market. Respondents next criticize Dr. Rothman for using a 12-month period from October 2017 to September 2018 because Altria's market share of e-cigarettes was falling during this period, as a function of the rise in popularity of pods.

The evidence demonstrates that during the 12-month period that Dr. Rothman used to measure pre-Transaction HHI, the total market share of e-cigarette cartridge sales volume for cig-a-likes declined rapidly, falling from having a majority (59 percent) in January 2018 to a minority (19 percent) shortly before Altria discontinued sales of MarkTen in December 2018. F. 178. The evidence further shows that during the 12-month period that Dr. Rothman used to measure pre-Transaction HHI, in comparing cig-a-likes versus pod-based device volume sales, the total market share of pod devices increased from 20 percent in October 2017 to over 50 percent by September 2018. F. 179. By September 2018, Altria's share of the closed system e-cigarettes market was 7.5%, as measured by sales of units. F. 180. During the 12 months leading up to December 2018,

27 The Merger Guidelines consider markets with an HHI above 2500 to be "highly concentrated," and state that "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." Merger Guidelines § 5.3; Heinz, 246 F.3d at 715.

by which time Altria had discontinued of its e-cigarette products, based on IRI projected data[28] for devices and cartridges, weekly sales of cig-a-likes were essentially flat, whereas weekly sales of pods grew by 619 percent. F. 966.

"The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, *annual data* are used . . . ." *Merger Guidelines* § 5.2 (emphasis added). In the particular circumstances of this case, where Altria stopped selling products in the relevant market prior to the Transaction, first in October 2018, with the withdrawal of Elite, and later in December 2018, with the withdrawal of cig-a-likes, Complaint Counsel's economic expert witness properly treated Altria as an existing competitor by analyzing the market that existed prior to October 2018. A similar approach was utilized in *United States v. Aetna Inc*., 240 F. Supp. 3d 1 (D.D.C. 2017), where the district court accepted the government's market concentration analysis to show that "the proposed merger leads to presumptively anticompetitive levels of market concentration in the three complaint counties in Florida [in 2018, 2019, and 2020]." *Aetna*, 240 F. Supp. 3d at 79, 90. In that case, the government's economic expert witness used "the most recent 2016 market-share data available," which came from the period before Aetna's decision to discontinue selling insurance plans in those counties, to calculate the HHI levels and the district judge cited those HHI numbers approvingly in the opinion. *Id.* Given the circumstances of this case, Dr. Rothman's reliance on market shares from the most recent 12-month period before Altria stopped selling products in the relevant market to calculate pre-Transaction market shares is appropriate and consistent with the Merger Guidelines.

However, "[m]arket shares may not fully reflect the competitive significance of firms in the market or the impact of a merger." *Merger Guidelines* § 5.3. They do not in this case. Because Altria's share in the market declined over the measured 12-month period, the pre-Transaction market share of 10.1 percent for Altria overstates Altria's competitive significance. *Merger Guidelines* § 5.2 ("[R]ecent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance."). Where the market share of a supplier is dropping for reasons that are likely to persist, like a declining product as opposed to a one-time disruption, the predictive value of the HHI is lessened. *See Brown Shoe*, 370 U.S. at 322 n.38 ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger."). Complaint Counsel's expert witness admits that the market shares of cig-a-likes and pod-based systems "reversed" between 2017 and 2019 and that Altria's market share was declining over the one-year period that he used to calculate market share. F. 182-183. Given the continually declining importance of cig-a-likes in the closed system e-cigarettes market (discussed in greater detail in section II.E.2.b.i. above), Altria's historical market share is

28 Information Resources, Inc. ("IRI") is a data compiler company that tracks retail sales of products, including e-vapor products and traditional cigarettes. F. 173. IRI projected data is an aggregated view of more than 80,000 sample stores out of a universe of more than 350,000 stores that sell tobacco products. F. 173.

a poor predictor of what its share would have been in a but-for world in which Altria continued to sell e-cigarette products.

The next step in Dr. Rothman's HHI analysis was to calculate post-Transaction HHIs, which he did by proportionally reallocating Altria's market share to the remaining competitors. PX5000 (Rothman Expert Report ¶¶ 88, 89, Tbl. 2). For example, if, pre-Transaction, Altria had a 10% market share, JLI had a 50% market share, and ITG had a 6% market share, Dr. Rothman assigned 50% of Altria's 10% market share to JLI and 6% of Altria's 10% market share to ITG. *See* PX5000 (Rothman Expert Report ¶¶ 88, 89, Tbl. 2). Using this methodology, Dr. Rothman calculated that the Transaction resulted in an HHI of 3,929 and an increase in HHI of 652 points. PX7048 (Rothman Trial Dep. at 27-28); PX5000 (Rothman Expert Report ¶ 89). Based on an evaluation of the criticisms of his approach, summarized below, Dr. Rothman's post-Transaction HHI calculations are not economically sound.

Respondents assert that Dr. Rothman made incorrect assumptions about where Altria's market share would go in Altria's absence and argue that most MarkTen cig-a-like customers diverted to other cig-a-like products, not to pod-based products like JUUL or Vuse Alto. Respondents' economic expert witness, Dr. Kevin Murphy, analyzed actual market data from sales of cartridge volume in units for all closed system e-cigarettes from August 2017 to August 2020 and found that Altria's market share was diverted to other cig-a-likes, *i.e.*, products other than JLI's JUUL product. F. 185. Dr. Murphy's analysis is well-founded and undermines the basis for Dr. Rothman's HHI calculations. Moreover, Dr. Rothman's incorrect assumption that JLI would capture half of Altria's diverted sales accounts for 94% of his calculated increase of 652 points in market concentration under the HHI presumption and thus vastly overstates the market concentration increase. F. 186.

Dr. Murphy measured market concentration using actual market data from sales of cartridge volume in units for all closed system e-cigarettes from October 2018 to September 2020. F. 187, 1041. Dr. Murphy's calculations show a decrease in market concentration for all closed system e-cigarette products by 471 points. F. 1041 (showing that HHI fell from 5,493 in October 2018 to 5,022 in September 2020). Dr. Rothman does not dispute that post-Transaction, "HHI levels are . . . lower than they were prior to December 2018." F. 188; *see also* F. 1040. Dr. Murphy's calculations, which are based on actual data showing what has happened post-Transaction, are more persuasive than Dr. Rothman's calculations and diminish the reliability of Dr. Rothman's projections.

"Market definition is a predictive tool that is not always the best vehicle to establish proof of competitive harm and can in some cases obscure rather than expose the competitive effects of a merger." *Polypore*, 2010 WL 9933413, at *9 (citing *In re Evanston Northwestern Healthcare Corp.*, 2007 WL 2286195, at *75 (F.T.C. Aug. 6, 2007)) ("The role of the market definition tool, however, is potentially much less important in merger cases in which the availability of natural experiments allows for direct observation of the effects of competition between the merging parties, as well as the absence of such competition."). *See also Chicago Bridge*, 534 F.3d at 433 (stating HHIs "should be viewed with caution and within the larger picture of long-term trends and market structure").

Given the defects in Dr. Rothman's HHI calculations summarized above, the evidence fails to prove that the Transaction would lead to undue concentration in the market. Therefore, Complaint Counsel is not entitled to a presumption that the Transaction will substantially lessen competition. *Baker Hughes*, 908 F.2d at 982. However, Complaint Counsel relies not just on a presumption based on market concentration, but also on evidence that Complaint Counsel asserts proves that the Transaction has harmed and will continue to harm competition in the U.S. market for the sale of closed system e-cigarettes. That evidence is reviewed next.

b. Competitive Harm

First, although Complaint Counsel is not entitled to a presumption of harm based on undue market concentration, Complaint Counsel offers direct evidence in an effort to demonstrate actual competitive harm caused by the Transaction, under Section 7 of the Clayton Act. Second, although Complaint Counsel did not prove the alleged unwritten agreement between Altria and JLI for Altria to stop competing with its existing products under Section 1, Complaint Counsel also challenges the written non-compete provision, contained in the Transaction Documents, as unlawful under Section 1 of the Sherman Antitrust Act.

Under Section 7, Complaint Counsel must show that there is a "'reasonable probability' of a substantial impairment of competition . . . ." *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979); *Univ. Health*, 938 F.2d at 1218. Under Section 1, Complaint Counsel must prove that "the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).[29] Because the claims require proof of anticompetitive effects or the reasonable likelihood of anticompetitive effects and the evidence overlaps, the evidence regarding anticompetitive effects for both the Section 1 claim and the Section 7 claim is considered together.

Complaint Counsel asserts that "but for" the Transaction, Altria's e-vapor products would still be on the market, and that the Transaction eliminated the then-existing competition between Altria and JLI. Complaint Counsel also asserts that the Transaction, in particular the non-compete provision in the Relationship Agreement, through which Altria agreed not to sell or develop new e-vapor products while it was providing services to JLI, harms competition by eliminating potential future competition between Atria and JLI.

Respondents assert that Complaint Counsel failed to prove that Altria would have kept its products on the market but for the Transaction. Respondents further assert that Altria would not have been a significant competitor with Nu Mark's existing products or with products Altria had not yet developed.[30]

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29 As noted earlier, the Complaint expressly alleges a Section 1 violation based upon a rule of reason analysis and Complaint Counsel confirms in its post-trial brief that it does not rely on a per se theory. Complaint ¶ 79; CCB at 58 n.17.

30 Respondents contend that Complaint Counsel's failure to prove the alleged agreement between JLI and Altria for Altria to stop selling its then-existing products necessarily precludes finding that the withdrawal from the market of Elite in October 2018 and/or the discontinuation of Nu Mark's remaining e-vapor products in December 2018 were

i. Elimination of Competition from Altria's Existing Products

(a) Withdrawal of Products from the Market

In September 2018, Altria decided to discontinue Elite, together with its other pod-based product and all non-traditional cig-a-like flavors. As detailed in the Facts, sections III. K.L., and summarized in section II.C. above, in addition to the regulatory pressure from the September 12, 2018 FDA Letter and the myriad of facts demonstrating barriers to successfully commercializing Elite, including lack of nicotine satisfaction and questionable likelihood of PMTA approval, the evidence shows that at the time Altria made the decision to withdraw these products from the market in September 2018, negotiations between Altria and JLI were at an impasse, for reasons unrelated to terms concerning Altria's then-existing products. JLI's Board had formally cut off continued negotiations and was actively considering an offer from a different potential investor. F. 858, 861. Indeed, Garnick, Altria's General Counsel and one of Altria's principal negotiators with respect to the Transaction (F. 704), believed Altria's pod and flavor products should be withdrawn from the market, as a "bold step" in response to the FDA, "regardless of" any potential deal with JLI. F. 630. Instead, Altria established the Growth Teams in preparation for developing a leapfrog pod-based product to replace Elite entirely. F. 600-602, 610, 632-633. According to Garnick, Altria would not have "pulled the trigger" on transitioning to Growth Teams "if [Altria] thought that the JUUL deal was going to go ahead." F. 610. In summary, the evidence fails to prove Complaint Counsel's contention that Elite would still be on the market, but for the Transaction with JLI.

However, even if the facts supported the inference that Elite would still be on the market, but for the Transaction, Altria was not a meaningful competitor with Elite and the evidence fails to prove that the withdrawal of Elite has substantially harmed or is reasonably likely to substantially harm competition, as explained below.

In early December 2018, Altria decided to discontinue its cig-a-like products and close down Nu Mark, only weeks before closing the Transaction. Whether Altria would have withdrawn its cig-a-likes from the market, but for the Transaction, is a closer question than with respect to the pod-based product, Elite. The evidence supports the conclusion that Altria decided to stop making the MarkTen cig-a-like products in order to save money to fund either the Growth Teams or, if Altria and JLI were able to finalize the terms of the Transaction, to fund Altria's investment in JLI. F. 654. As explained in section II.C.5.b. above, Nu Mark had lost money every year since at least 2015; Altria expected Nu Mark to continue to lose money and did not see a path toward profitability; and Altria was unsure if it could develop a dry puff prevention fix that they could

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"effects" of the Transaction, for purposes of assessing anticompetitive effects under the Section 7 claim. Respondents cite no authority supporting such a proposition. Moreover, logic does not support the proposition. Whether Altria's actions in withdrawing products from the market because of a prior agreement with or demand by JLI to do so is a distinct question from whether Altria's actions in that regard – even if undertaken independently – were undertaken because of the then-potential future investment in JLI. In any event, as shown below, the evidence fails to prove that Altria's removal of products from the market or discontinuation of Nu Mark has substantially harmed or is reasonably likely to substantially harm competition.

submit for a PMTA. F. 660-686; *see also* F. 401, 408-409. Moreover, as of mid-December 2018, there were a number of outstanding issues remaining to be finalized between Altria and JLI and Altria's Board was advised that "although progress has been made a potential deal with [JLI] is still highly uncertain and subject to many factors." F. 940-941. However, Altria's contention that the withdrawal of the MarkTen cig-a-likes was completely unrelated to the Transaction is unpersuasive. Altria contemplated that the savings from discontinuing cig-a-likes would be used either for the Growth Teams or, if JLI and Altria finalized terms for the contemplated transaction, to fund the JLI transaction. F. 654.

Ultimately, it need not be decided whether or not the facts support the inference that the MarkTen cig-a-like products would still be on the market, but for the Transaction, because the evidence fails to prove that the withdrawal of Mark Ten cig-a-likes from the market has substantially harmed or is reasonably likely to substantially harm competition, as explained below.[31]

(b) Harm to Competition from Removal of Products

Section 7 requires that Complaint Counsel show that the elimination of competition from Altria "create[s] an appreciable danger of [anticompetitive] consequences in the future." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J.). Section 7 "is concerned with whether an acquisition or merger *itself* may cause antitrust injury." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 511 (2d Cir. 2004) (emphasis in original). The analysis logically and "necessarily 'focus[es] on the future.'" *Aetna*, 240 F. Supp. 3d at 79 (quoting *Baker Hughes*, 908 F.2d at 991); *see also* Merger Guidelines § 1 ("[M]erger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds . . .").

The Supreme Court has also stressed that courts must judge "the probable anticompetitive effect of the merger" "functionally" and based on "a further examination of the particular market – its structure, history and probable future . . . ." *Gen. Dynamics*, 415 U.S. at 498 (quoting *Brown Shoe*, 370 U.S. at 321-22 & n.38). "Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *Gen. Dynamics*, 415 U.S. at 501.

The evidence in the instant case fails to prove that the elimination of competition from Altria creates an appreciable danger of anticompetitive consequences in the future because the evidence establishes that Altria was not a significant competitor at the time of the Transaction.

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31 As previously noted, "the Commission is 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., 361 U.S. at 193-94. Issues of fact or law that do not affect the result in a case are not fairly deemed "material," for purposes of Section 557(c)(3)(A) of the APA, 5 U.S.C. § 557(c)(3)(A), or Rule 3.51(c)(1) of the Commission's Rules of Practice, 16 C.F.R. § 3.51(c)(1), notwithstanding that there may be allegations or evidence presented on such issues. Rather, "a fact is only material if its resolution will affect the outcome" of the case. Lenning, 260 F.3d at 581 (summary judgment case). See also Timpa, 20 F.4th at 1028 (stating in a summary judgment case that "[a] fact is 'material' if it 'might affect the outcome of the suit under the governing law'") (quoting Anderson, 477 U.S. at 248).

Furthermore, evidence of Altria's past production does not give a proper picture of Altria's future ability to compete, as analyzed below.

The evidence proves that Altria was not a significant competitor while it was participating in the relevant closed system e-cigarette market. As found in F. 291-295, 524, 579, 699, 963-974, the closed system e-cigarette market was shifting significantly away from cig-a-likes to pods. For instance, IRI sales data shows that in early 2016, cig-a-likes represented more than 90 percent of total e-cigarette cartridge sales volume, but that by December 2018, cig-a-like cartridge sales volume had fallen to less than 19 percent. F. 963; *see also* F. 964. Considering that, in 2018, 90 percent of Altria's sales in the closed system e-cigarette market were cig-a-likes (F. 181, 974), this dramatic shift away from cig-a-likes casts serious doubt on Altria's future ability to compete.

The lack of competitive significance of cig-a-likes in the relevant market of closed system e-cigarettes is also demonstrated by the actions of other e-vapor manufacturers. PMI had commercialized MarkTen cig-a-likes in a test market outside the United States, but then discontinued sales based on low market share. F. 969. Similarly, NJOY has discontinued two of its cig-a-like products. F. 970. While NJOY continues to market a cig-a-like product called the Daily, the Daily's sales volume in 2021 was [redacted] of that of NJOY's Ace pod. F. 971. Reynolds also continues to market cig-a-like products (Vuse Ciro, Vuse Solo, and Vuse Vibe), but shipments for its Vuse Solo cig-a-like fell by almost [redacted] percent between 2018 and 2019, and then fell by an additional [redacted] percent from 2019 to 2020. F. 972. JLI's O'Hara confirmed the weak competitive position of the MarkTen cig-a-like at trial, explaining that Nu Mark's cig-a-like products "were not viable . . . . They didn't have nicotine salts, they didn't satisfy nicotine cravings, and they were cig-a-likes." F. 967; *see also* F. 968, 973 (Category Manager at Sheetz agreeing that the e-vapor category is "overwhelmingly pods").

In addition, as explained in sections II.C.1.b. and II.C.2. above, by the summer of 2018, Altria's leadership was aware that its cig-a-like products were not converting smokers, were not competitive with pod-based products, and were unlikely to obtain FDA approval. For instance, by the summer of 2018, Altria's scientists advised Altria leadership that "no one thinks we can get a PMTA on current Mark Ten product." F. 541; F. 423 (the MarkTen cig-a-like "fell short [of the PMTA standard] on risk reduction and conversion"). Thus, Altria was not well positioned to compete in the closed system e-cigarette market with its cig-a-likes.

With respect to Altria's pod-based products, Apex had minimal distribution and was removed a month after it was launched. F. 984 n.44. It had only been available for online purchase in ten states and only 460 Apex units were sold. F. 984 n.44. Thus, the impact of the withdrawal from the market of Apex to competition is extraordinarily insignificant. Elite never achieved more than a one percent market share of cartridge unit sales among closed systems on the market over the eight months that it had been on the market in 2018. F. 984. The notion that a product with a market share of less than one percent could be a significant competitive constraint is illogical. This is particularly so in this case where the consumer demand was shifting (and has continued to shift) to pods with nicotine salts, a product which Altria never had. *See* F. 1012-1018; F. 445. As explained in II.C.2. above, Altria realized Elite lacked the nicotine formulation needed to be competitive, was not demonstrating conversion potential, and was not likely to obtain FDA

approval. Thus, Altria was not well positioned to compete in the closed system e-cigarette market with its pod-based products.

(c) Price, Shelf Space or Innovation Competition

Complaint Counsel also asserts that the Transaction and the non-compete agreement harm competition by eliminating then current and future price, shelf space, and innovation competition from Altria in the U.S. closed system e-cigarette market. As discussed below, the evidence fails to prove Complaint Counsel's claims that the Transaction has substantially harmed or is reasonably likely to cause substantial harm to competition on prices, shelf space, or innovation.

Price

In support of its argument that Altria put pricing pressure on JLI, Complaint Counsel cites to an August 2018 slide deck prepared by ITG, evaluating *my*Blu competitors in retail, which states: "JUUL has responded [to MarkTen Elite] with a kit promotion on both their starter kit and battery." CCB at 60 (citing CCFF ¶ 1429). This uncorroborated hearsay statement of ITG's view of JLI's actions is entitled to little weight. Complaint Counsel also cites to one instance, in March 2018, when JLI launched a device promotion by dropping the JUUL starter kit price by $20. CCB at 61 (citing CCFF ¶ 1434). JLI's promotions were generally planned six months to a year in advance, meaning that a spring 2018 promotion would have been planned by the fall of 2017, long before Elite's launch in February 2018. F. 982. After the launch of Elite, JLI did not respond with new promotions, but ran its "standard" promotion. F. 983. Thus, Complaint Counsel's evidence on whether JLI adjusted its prices in response to competition from Elite is not persuasive. Moreover, Complaint Counsel's expert witness, Dr. Rothman, did not analyze whether JLI changed price in response to the introduction or the removal of Elite. F. 985.

There is also no probative evidence to show that JLI adjusted its prices in response to competition from Altria's cig-a-likes. Dr. Murphy's analysis comparing all cig-a-likes, Altria cig-a-likes, and non-Altria cig-a-likes, shows that as Altria's sales declined following the discontinuation of its cig-a-like products, sales of rival cig-a-like products increased by a nearly equal magnitude, demonstrating that sales of Altria's cig-a-likes diverted to other cig-a-likes, not to pod-based products, and that Altria's cig-a-likes did not constrain JLI's pricing. F. 975. As confirmed by Robbins, JLI's Chief Growth Officer, JLI did not ever change its pricing or promotions in response to the MarkTen cig-a-like products or in response to the withdrawal from the market of MarkTen cig-a-like products. F. 977-978. Furthermore, as discussed below, competition on prices increased post-Transaction. *See* section II.E.2.b.i.(d).

Shelf space

Complaint Counsel fails to persuasively explain how the elimination of shelf space competition from Altria harms competition. Prior to the Transaction, Altria, as the largest tobacco company in the United States, had access to the best shelf space in all the top retailers. F. 1030. After Altria's products were withdrawn from the market and Altria's shelf space lease to JLI was terminated pursuant to the January 28, 2020 Amended Services Agreement, there was increased

competition for shelf space for innovative tobacco products. F. 1032; *see also* F. 1033-1037. Dr. Murphy explained the reallocation of shelf space as follows:

> [O]ne of the things that happens when a firm leaves the market is resources are re-allocated to other uses and often re-allocated within the same marketplace. And the resource that was re-allocated in this case was the shelf space of retailers . . . . [I]f, when that product came off the shelf, other products went on the shelf, the person walking into the store doesn't have less choice. They might even have more choice than they had before. (Murphy Tr. 3130). [W]hen products leave, particularly unsuccessful products, they typically will be replaced. And in this case, it looks like they were. (Murphy Tr. 3134).

This reallocation of shelf space is discussed further below, as an element of increased output, post-Transaction, section II.E.2.b.i.(d).

Innovation

Complaint Counsel also argues that Altria was trying to come up with a product that could compete with JLI and that that competition stopped as a result of the Transaction. The evidence shows that after JLI's early success with a pod-based system, Altria sought to offer a competitive product and failed. There is ample evidence in the record demonstrating that Altria was not a competent innovator of e-vapor products, despite spending billions of dollars. *See, e.g.*, F. 44-54. Considering the FDA's regulatory regime, it was unlikely that Altria could innovate further to compete with JLI, as discussed in section II.E.2.b.ii. *infra*.

In support of its argument that Altria and JLI had been engaged in innovation competition prior to the Transaction, Complaint Counsel asserts that Altria and JLI "competed by offering different nicotine strengths in response to consumer preferences," noting that Robbins advised JLI's CEO at the time, Kevin Burns, that "[a]ll viable competitors . . . offer variable Nicotine Strengths . . . We should too." CCB at 62 (citing CCFF 1473, 1474). There is no evidence that Robbins was referring to Altria, whose e-vapor products JLI regarded as "terrible." F. 429, 939. Further, Robbins' reference to "all" viable competitors shows that differentiation on nicotine strength, even if considered an innovation, was widespread in the e-cigarette market and not a unique feature of any Nu Mark product. Complaint Counsel also asserts that "after Altria introduced a magnetic pod insertion in its MarkTen Elite, JLI explored magnetic pods for its next generation JUUL devices." CCB at 62 (citing CCFF 1477, 1481). However, any significance of this assertion is belied by the fact that Elite was not the only pod-based product with magnetic pod insertion, since Vuse Alto and NJOY Ace had the same feature. F. 988, 1000.

(d) Competition since the Transaction

To assess a merger's probable effect on competition, the court must undertake a "comprehensive inquiry" into the "future competitive conditions in a given market." *Baker Hughes*, 908 F.2d at 988. "[T]he essential question [in a Section 7 case is] whether the probability of such *future* impact [lessening of competition] exists at the time of trial." *Gen. Dynamics*, 415 U.S. at 505 (emphasis in original); *Lektro-Vend Corp.*, 660 F.2d at 276 ("[T]he probability of anticompetitive effects is judged at the time of trial."). Trial was conducted in June 2021. The

Transaction was announced in December 2018. Evidence as it existed at the time of trial necessarily includes post-Transaction evidence.

Absent circumstances suggesting that post-acquisition evidence is the product of a conscious "decision on the part of the merged companies to deliberately but temporarily refrain from anticompetitive actions," such evidence may properly be considered in determining whether the probable effect of a merger will be a substantial lessening of competition. *Gen. Dynamics*, 415 U.S. at 506 ("Such evidence went directly to the question of whether future lessening of competition was probable, and the District Court was fully justified in using it."); *compare Lektro-Vend Corp.*, 660 F.2d at 276 (holding that "post-acquisition evidence favorable to a defendant can be an important indicator of the probability of anticompetitive effects," particularly where such evidence "could not reflect deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity") *and United States v. Int'l Harvester Co.*, 564 F.2d 769, 780 (7th Cir. 1977) (holding that post-merger evidence that is "beyond the power of the parties to manipulate" may be properly considered) *with Chicago Bridge*, 534 F.3d at 435 (holding that post-acquisition evidence was not probative where acquiring company could have manipulated the evidence by temporarily allowing competitors to "win a few bids so as to bolster the market's appearance of competitiveness").

The post-Transaction evidence in the instant case, summarized below, shows increased competition driven by aggressive price activity and expansion by third parties, such as Reynolds and NJOY, who are beyond Respondents' control. There is no evidence to suggest that the competitive environment that has prevailed post-Transaction was subject to manipulation by Respondents.[32] *See In re AMR Corp.*, 625 B.R. 215, 250 (Bankr. S.D.N.Y. 2021) (holding that where "evidence . . . center[ed] on market trends involving third parties," there was "little basis, if any, to suggest that the evidence . . . [was] subject to . . . manipulation").

To be clear, "Section 7 does not require proof that a merger or other acquisition caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Hospital Corp.*, 807 F.2d at 1389 (citation omitted). Thus, Complaint Counsel is not required to prove that the Transaction resulted in higher prices. However, the evidence in this case demonstrates the contrary, that the prices of JUUL and other e-vapor products declined, output increased, and market concentration decreased post-Transaction.

Prices

In the second half of 2018, competitors commercialized product lines using products that had been introduced in limited quantities before the Deeming Rule went into effect in August

32 The aggressive price activity and expansion by NJOY and Reynolds are discussed below. NJOY's Andrew Farrell testified that NJOY's 99-cent promotion, which is ongoing and has disrupted the market, had nothing to do with these proceedings. F. 989. Reynolds' Wade Huckabee confirmed that neither JLI nor Altria "manipulated Reynolds into running [the] 99-cent promotion" that has catapulted Reynolds over JLI with respect to market share of devices. F. 1004.

2016. F. 986. The most significant entrants were two pod-based devices: Vuse Alto, launched by Reynolds in August 2018, and NJOY Ace, launched by NJOY by November 2018. F. 987, 999.[33] Unlike Altria's Elite, these pod-based devices used nicotine salts and therefore had the ability to provide the nicotine satisfaction that Elite could not. F. 986; *see also* F. 441, 444.

In 2019, NJOY and Reynolds began "aggressive discounting on devices" designed to "generate trial." F. 989, 1044. NJOY launched a 99-cent promotion beginning in 2019 on its pod-based device, and Reynolds soon followed, reducing the prices of its pod-based devices to 99 cents. F. 989, 1004. The aggressive discounting "cannibalized [JUUL's] growth, and threatened to take its established userbase." F. 995. At one large retail chain, NJOY Ace captured 66 percent of device market share, almost three-quarters of which came "at JUUL's expense." F. 990. By September of 2019, roughly one year after its launch, NJOY had captured nearly 23 percent of total volume share of devices sold in the e-cigarette market segment. F. 991. [redacted] F. 993-994.

Recognizing that a "quick, strong response to NJOY Ace 99¢ [promotion] was necessary to secure Alto's market potential," Reynolds also began rolling out a 99-cent promotion on its Alto device throughout August and September 2019. F. 1004. By December 2019, Reynolds had overtaken JLI as the leading seller of pod-based devices. F. 1008. In 2021, Reynolds was selling "more than twice the number of devices per week" as JLI. F. 1009. Like NJOY, Reynolds saw a similar increase in cartridge sales following its device promotion. F. 1010. Both Reynolds and NJOY, facing sustained price competition, have maintained their 99-cent promotions into 2021. F. 998, 1011.

PMI observed in August 2019, after NJOY "triggered [a] price war" in the e-vapor category, "JUUL's dollar share slipped for the first time." F. 1021. In August 2019, JLI had observed that the company was "facing an aggressive competitive threat for the first time." F. 997. As a JLI internal analysis explained, JUUL users do not perceive JUUL as offering "meaningful advantages to justify its cost," so "it is common and easy for users to try something else." F. 996. Recognizing that it was no longer "priced in line with consumer expectations of the category," and needing to mount a response to the first real "competitive threat" it had faced, JLI abandoned its standard promotions and decided to "close out 2019 with deeper discounts." F. 1019. JLI would later permanently lower the price of its device in response to the new competitive landscape. F. 1020.

Furthermore, the average price of a pod-based device fell from about $27 in September 2018 to around $8 in September 2020, representing a roughly 72 percent reduction in price. F. 1022; *see also* F. 1023. The average price of pod cartridges fell by over 15 percent during the same period. F. 1024. Lower prices are "often . . . the very essence of competition." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

33 Ace had been on the market under different ownership prior to August 2016. F 987. Reynolds acquired Vuse Alto after August 2016 and reintroduced the product in August 2018. F. 999.

Output

"Impacts on prices, market output and capacity are generally considered indicators of a merger's competitive impact, and showings of increased output have been found to overcome claims of anticompetitive effects in other antitrust contexts." *AMR Corp.*, 625 B.R. at 255 (*citing Am. Express*, 138 S. Ct. at 2288 (evaluating alleged violations under the Sherman Act). In this case, output has increased since the Transaction. By October 2019, one year after Altria discontinued Elite, sales of pod-based devices had increased by more than 20 percent. F. 1025. Over the same time period, sales of pod cartridges had likewise increased by more than 30 percent. F. 1025. At the time Altria withdrew its pod-based products from the market, Altria was selling only 100,000 Elite cartridges a week. F. 1027. Less than two years later, competitors' sales (excluding sales of JUUL) had increased by more than three million cartridges a week. F. 1027. As Dr. Murphy explained at trial, this reflects "actual market evidence that these other sellers were able to expand the sales of their products on the market dramatically, 31 times what would be required to offset the loss of Elite in this case." F. 1027.

Furthermore, after Altria's discontinuation of its MarkTen products, the average number of e-vapor products in the top 20 retailers increased from 3.0 to 3.8. F. 1028. As Dr. Murphy explained, "when a product leaves the market," other manufacturers have the "ability and incentive . . . to expand, to come in and fill the void," which "creates an opportunity for more attractive products" (Murphy Tr. 3140), and thus the increase in the number of average e-vapor products is evidence of a robust and healthy competitive process. While e-cigarette companies that do not sell conventional cigarettes have struggled to get shelf space for their e-cigarettes, with Altria out of the market, other companies have filled the shelves. *See* F. 1028, 1032-1037. In 2018, MarkTen was "often at the top of the shelves"; in 2019, Reynolds' Vuse "was often in the top half of the shelf." F. 1033. NJOY, too, was able to establish a presence in major convenience store chains in 2019. F. 1035. "Repositioning" of competitors can offset potential anticompetitive effects (Merger Guidelines § 6.1) and has done so here.

Market share and concentration

Less than a year after the introduction of NJOY's Ace, a pod-based product with nicotine salts, NJOY achieved a 30 percent share of device sales for a time, approximately the same share as JUUL. F. 1038. Reynolds' Vuse Alto surpassed both NJOY and JUUL, capturing about 60 percent of all pod-based device sales as of September 2020. F. 1038. JLI's share of device sales has correspondingly decreased from approximately 69 percent in October 2018 to approximately 30 percent in September 2020. F. 1038; *see also* F. 1039. In addition, JLI lost approximately 20 percent in cartridge unit market share from December 2018 to September 2020. F. 1040.

Importantly, market concentration has significantly *decreased* since the Transaction. Using actual market data from IRI Projected Data for cartridge volume by unit, Dr. Murphy calculated that the HHI for the relevant market in this case, all closed system e-cigarette products, decreased by nearly 500 points from October 2018 to September 2020. F. 1042. "Market concentration is often one useful indicator of likely competitive effects of a merger." Merger Guidelines § 5.3. *See Lektro-Vend*, 660 F.2d at 276-77 (post-acquisition evidence of "dramatically declin[ing]" market share was highly probative because it could not "arguably have been subject to the defendant's

deliberate manipulation, nor [was] it likely that the market was less competitive after the acquisition than it would have been otherwise").

(e) Conclusion

"'[A]ntitrust theory and speculation cannot trump facts, and even [preliminary injunction merger] cases must be resolved on the basis of the record evidence relating to the market and its probable future.'" *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 292 (D.D.C. 2020) (quoting *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116-17 (D.D.C. 2004)). The record evidence relating to prices, output, and market concentration shows that since the Transaction, the closed system e-cigarette market has become more competitive. For all the foregoing reasons, and based on the totality of the evidence, extensively reviewed in the Facts and in this Analysis, the evidence fails to prove that the Transaction has substantially harmed or is reasonably likely to substantially harm competition.

ii. Elimination of Future Competition

As summarized above, Altria ceased all e-cigarette product research and development and disbanded the Growth Teams upon closing the Transaction in order to raise money to fund Altria's investment in JLI. F. 696-698. Furthermore, under the non-compete provision in the Relationship Agreement portion of the Transaction Documents, Altria agreed "not to, directly or indirectly, . . . own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business" so long as it was providing services to JLI under the Services Agreement portion of the Transaction Documents. F. 951. The initial term of the non-compete provision was set at six years from closing, to run concurrently with the six-year period Altria agreed to provide services to JLI under the Services Agreement. F. 953.

Complaint Counsel argues that the Transaction – the non-compete provision, in particular – harmed future competition in the e-cigarette market by preventing future price, output, shelf space, and innovation competition with Altria. Complaint Counsel argues preliminarily that, for purposes of future effects analysis, Altria should be considered to have been an actual competitor in the e-cigarette market at the time of the Transaction, rather than an actual potential competitor. Complaint Counsel asserts that Altria had the incentives and resources to compete in the e-cigarette market; Altria was working on improved versions of Elite and its cig-a-like products; Altria was working to develop a leapfrog product through the Growth Teams; and Altria was collaborating with PMI under the Joint Research Development and Technology Sharing Agreement ("JRDTA") to improve and develop e-vapor products; and that all of the foregoing was foreclosed by the Transaction. Complaint Counsel further argues that the Transaction foreclosed the possibility of Altria collaborating with or acquiring smaller competitors. Complaint Counsel relies on substantially the same factual assertions to argue that the Transaction harmed future competition as Complaint Counsel uses to argue, alternatively, that Altria was an actual potential competitor. *See, e.g.*, CCB at 62-65, 80-82, 95-97. Respondents argue that the evidence fails to prove that Altria would have competed in e-vapor with a new or improved product in the near future, either through its own internal efforts or through collaboration or acquisition.

(a) Applicable Legal Principles

Regardless of whether Altria is considered an actual competitor or an actual potential competitor, proving a reasonable likelihood of substantial harm to future competition nonetheless requires proving that such competition, more likely than not, would have existed in the "near future." *See Aetna*, 240 F. Supp. 3d at 93 (treating Aetna as an actual competitor, despite earlier exit, and basing Section 7 liability on the likelihood that Aetna would bring new insurance products to market "in the near future"); *In re B.A.T. Industries, Ltd.*, 1984 WL 565384, at *7-9 (F.T.C. Dec. 17, 1984) (holding that, under the actual potential competition doctrine, the Commission must find, among other things, that the alleged actual potential competitor "would have entered the market independently, either de novo or by making a toehold acquisition," in "the near future"). Moreover, the likelihood of future price, output, shelf space, or innovation competition is logically inextricable from the question of whether Altria would have any competing products on the market in the near future.

The court in *B.A.T. Industries*, explained that "[e]stablishing liability through the actual potential competition doctrine requires establishing four separate facts." 1984 WL 565384, at *7. "First, the Commission must establish that the relevant product and geographic markets are concentrated." *Id.* "In addition to establishing that the target market is concentrated, the Commission must second establish that independent entry would result in a substantial likelihood of ultimately producing deconcentration of [the target] market or other significant procompetitive effects." *Id.* at *8. "Third, the [alleged actual potential entrant] must be one of only a few equally likely actual potential entrants, since eliminating one of many potential entrants could not be expected to eliminate substantial future competition." *Id.* "Fourth and finally, the Commission must establish that the [alleged actual potential entrant] would have entered the market independently, either de novo or by making a toehold acquisition," but for the challenged merger. *Id.* at *9. Establishing this last factor requires proof, not only that the alleged actual potential entrant possesses the "'capabilities, economic incentives, and interest,'" to feasibly enter the relevant market, but also that "entry would have occurred within the near future." *Id.* at *9. *See also Id.* n.31 (citing *Mercantile Texas Corp. v. Board of Governors of Fed. Res. Sys.*, 638 F.2d 1255, 1271-72 (5th Cir. 1981) (holding that independent entry should be expected within two or three years); *Republic of Texas Corp. v. Board of Governors of Fed. Res. Sys.*, 649 F.2d 1026, 1047 (5th Cir. 1981) (holding that the Board's finding of likely entry in the "reasonably foreseeable future" was insufficient and suggesting that a finding of entry within a specified "range of months or years" is necessary).

In *BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977), relied on by the Commission in *B.A.T. Industries*, the court held that the Commission's finding a "reasonable probability" that the alleged potential entrant would have "eventually entered" the relevant market was insufficient to sustain a Section 7 claim because such an "eventual entry" test was "wholly speculative" in nature. *Id.* at 29. "[S]uch uncabined speculation cannot be the basis of a finding that Section 7 has been violated." *Id.* The court in *BOC International* explained:

> [A]s the Court wrote in *Marine Bancorp.*, "[Section] 7 deals in 'probabilities,' not 'ephemeral possibilities.'" 418 U.S. at 622-23, quoting *Brown Shoe Co. v. United States*,

> *supra*, 370 U.S. at 323. Thus the FTC was correct in using a "reasonable probability" test here, but its accompanying reference to "eventual entry" makes the overall FTC test, we believe, one based largely on "ephemeral possibilities."

557 F.2d at 28-29. Instead, to sustain a claim based on potential future competition, the evidence must demonstrate a reasonable probability that the alleged entry will occur in the "near future . . . [s]ince 'remote possibilities are not sufficient to satisfy the test set forth in § 7[.]'" *Id* at 29. *See also Aetna,* 240 F. Supp. 3d at 93. The "near future" is required because the "degree of uncertainty" in any economic prediction as to future market conditions "becomes unacceptably high as it is projected further and further into the future." *Mercantile Texas Corp.*, 638 F.2d at 1271. "At some point in the future," market conditions, such as the degree of concentration in the market, "become[] so inherently unpredictable that the entire predictive enterprise should be abandoned . . . ." *Id.*

As set forth below, the evidence fails to prove a reasonable probability that Altria would have competed in the e-cigarette market in the near future. Even if the evidence established the first three of the four factors that must be demonstrated to establish liability – that the e-cigarette market is concentrated; that Altria's entry with a new product would make the market more competitive; and that Altria was one of only a few likely entrants – Complaint Counsel's argument still must fail because the evidence fails to prove the fourth factor – that Altria possesses the "capabilities, economic incentives, and interest," and that there is a reasonable probability that entry would occur in the near future, either through Altria's marketing a competing product independently or through collaboration or acquisition.[34] Accordingly, Complaint Counsel's claims as to harm to future competition are rejected. [35]

(b) Analysis

As noted above, apart from exceptions recognized under the Deeming Rule, no e-vapor product can be marketed without first obtaining approval from the FDA, through the PMTA process. F. 196-197, 200. Only the FDA can determine whether a product is "appropriate for the protection of the public health." F. 193, 216. The process is "very demanding" with "rigorous" standards, and the outcome "is uncertain." F. 220. "The presence of [a] regulatory scheme and

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34 The Commission in B.A.T. Industries, after evaluating federal appellate court precedents, held that "clear proof that independent entry would have occurred but for the merger or acquisition should be required to establish that a firm is an actual potential competitor" for purposes of Section 7 because a "reasonable probability" standard is "quite ambiguous. The difficulties that the courts have had in identifying the evidence that will show that independent entry is reasonably probable confirm the correctness of that view. For these reasons, we therefore adopt the 'clear proof' standard." B.A.T. Industries, 1984 WL 565384, at *10. The Commission, in In re McWane, Inc., 2014 WL 556261, at *32-35 (F.T.C. Jan. 30, 2014), applied a "reasonable probability" standard in determining whether an agreement foreclosed a potential competitor from entering in violation of Section 1. Under either standard, as explained infra, Complaint Counsel's proof fails to meet its burden.

35 Even if it assumed that the MarkTen cig-a-likes would still be on the market but for the Transaction, as explained above, cig-a-likes were a declining market at the time of the Transaction. The record presents no reasonable basis for concluding that the MarkTen cig-a-likes would have been a stronger competitive force in the near future, capable of affecting price, output, innovation, or shelf space competition in the e-vapor market.

need for approval" may "convert[] what might have been deemed antitrust injury in a free market into only a speculative exercise," especially where "[t]here are no facts . . . which even permit [a court] to speculate as to the likelihood of" regulatory approval. *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 267-68 (3d Cir. 1998). In the instant case, Complaint Counsel failed to proffer evidence or expert opinion as to the likelihood of FDA approval for any hypothetical future e-vapor product. Under these circumstances, to conclude that future products would likely obtain FDA approval and reach the market would require unacceptable and unfair speculation. In fact, Complaint Counsel acknowledges in its brief that "any predictions about which products will or will not receive PMTA approval [is] highly speculative." CCRB at 122 n.62.

Internal development

Even if it is assumed that Altria has the financial resources, economic incentive, and the interest to compete in the e-cigarette market, the evidence fails to prove that Altria had the capability to do so in the near future. In fact, Altria's capabilities to develop a competitive product to bring to market in the near future is questionable at best. In the past, Altria has not been successful in developing e-vapor products. F. 44-54. Altria found that development of electronic products, such as e-cigarettes, required "an entirely different construct" than what was required for conventional tobacco products. F. 50. Quigley assessed that Altria approached product development from the perspective of a cigarette company, while what was needed was to "think more like a technology company," and that Altria needed "different capabilities and different processes." F. 51, 556. Although Nu Mark had pursued at least a half dozen internal projects to develop e-vapor products, many of which were the subject of years of effort, Nu Mark never succeeded in developing from scratch its own e-vapor product. F. 52. Rather, every product that Nu Mark launched into the marketplace resulted from an external acquisition, licensing arrangement, or partnership with another e-vapor company. F. 54.

Moreover, the evidence fails to prove a reasonable probability that any hypothetical product developed by Altria would reach the e-cigarette market in the near future. With product development, the time-consuming PMTA preparation process, and the approval process, at least five years is required to bring a product to market and the process, even if successful, can take as long as ten years, with five to seven years being typical. F. 1049; *see also* III.H.4. Altria's Growth Teams, which were disbanded upon closing the Transaction, were charged with developing a new leapfrog e-vapor product without any product concept at the outset. F. 602, 639, 696. As Jupe, who was tasked with overseeing the Growth Teams, explained the process, the Growth Teams would first need to finish the product definition phase, and then proceed to the development phase, where the Growth Teams would engineer the product. F. 640. After that, they would go to the commercial phase, where they would write all the manufacturing specifications, after which they would "lock" the design. F. 640. This "product development cycle" would take two years, "if you're lucky." F. 640. After design lock, the Growth Teams would begin gathering scientific evidence, which would take approximately two years. F. 640. Then the product goes through FDA review, which could "easily" take 18 months. F. 640. By this timeline, Altria was at least five to six years away from having any potential product with which to compete in the e-cigarette market. F. 640.

Based on the foregoing, the evidence fails to prove that it is reasonably probable that Altria would have entered the e-cigarette market in the near future, but for the Transaction. The competitive conditions of a market five years in the future cannot reliably be predicted. *Mercantile Texas Corp.*, 638 F.2d at 1272. Moreover, in a heavily regulated industry, such as the e-vapor industry, "regulatory change can quickly alter the structure of the market." *Id.*

Collaboration with PMI

In addition, the evidence fails to prove a reasonable probability that Altria, through collaboration with PMI, would be bringing PMI's VEEV product to the e-vapor market in the near future but for the Transaction, as argued by Complaint Counsel. VEEV is a pod-based e-cigarette product sold by PMI outside the United States. F. 1050. PMI started selling VEEV in late 2020. F. 1051. VEEV uses PMI's proprietary technology, referred to as mesh technology,[36] which was also used in the Apex product, which was a failure in the market. F. 75, 984 n.44, 1053-1054. VEEV and Apex otherwise have a number of differences. F. 1054. Among other things, PMI improved VEEV's form compared to Apex. F. 1055. VEEV is smaller, fits the hand better, and has a more appealing shape than Apex. F. 1055; *see also* F. 616.

Complaint Counsel points to the JRDTA between Altria and PMI, [redacted] F. 889, 1056. Under the JRDTA, [redacted] F. 1056. At the time of Altria's investment in JLI in December 2018, VEEV was several years away from commercialization. F. 1059. Furthermore, the JRDTA did not include any terms as to distribution or details of how commercialization of VEEV would occur. F. 1057. [redacted] F. 1057. For Altria's sales of Apex, Altria signed a separate distribution agreement with PMI, [redacted] F. 1058. Moreover, neither PMI nor Altria can sell VEEV in the United States without first obtaining FDA approval through the PMTA process. *See* F. 196-197, 200. [redacted] F. 1060. King speculated that [redacted] F. 1061. Based on the foregoing, it would be pure conjecture to conclude that a collaboration between Altria and PMI would bring PMI's VEEV product to the e-vapor market within any reasonable future time period.

36 The name "Mesh" refers to the mesh heater that is "like a fine-wire screen, in effect, where you pass electricity through the screen, and that creates the aerosol." F. 1053.

Other potential collaborations or acquisitions

Complaint Counsel also argues that the Transaction prevented Altria from collaborating with or acquiring other e-vapor companies or products. Complaint Counsel points to evidence that in 2018, Altria identified some potential alternative product or company acquisitions, in the event an investment with JLI did not come to fruition, and discontinued some existing agreements. CCB at 65 (citing CCFF 1717-30). However, Complaint Counsel presented no other evidence or testimony about the probability of any such acquisitions, or demonstrate what, if any, effect on competition such collaborations or acquisitions was reasonably likely to have. To conclude that, but for the Transaction, it was reasonably probable such collaborations or acquisitions would have resulted in competitive entry in the future is "uncabined" speculation.

(c) Conclusion

In summary, Complaint Counsel's argument relies on evidence of Altria's efforts, progress, and plans toward developing new or improved products that could be submitted for PMTA approval, or potentially collaborating with or acquiring other e-vapor companies. As the court stated in *BOC International*, "it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record." *BOC Int'l*, 557 F.2d at 29. Complaint Counsel fails to aver or demonstrate a reasonable probability that Altria's efforts would result in Altria competing in the e-cigarette market in the near future, or even identify any reasonable range of time by which such alleged competitive entry was probable to occur. In essence, Complaint Counsel is arguing that due to Altria's resources as a large company, and economic incentives to participate in the e-cigarette market, Altria would have eventually had a product competing in that market. This is precisely the position rejected by the court in *BOC*, above.[37] Accordingly, it is rejected here as well.

3. Conclusion

Complaint Counsel has failed to meet its burden of proving that the Transaction is unlawful under Section 7. Accordingly, Count II of the Complaint must be dismissed.

37 To the extent that Complaint Counsel relies on the opinion of its expert witness, Dr. Rothman, to support its claim that the Transaction harms future competition, the opinion is entitled to no weight. Dr. Rothman, based on his review of certain documents, testimony and data, concluded that the Transaction harms future competition in e-cigarettes because, in his opinion, Altria had the incentives and ability to compete in the e-vapor market. PX7048 (Rothman Trial Dep. at 29-34); PX5000 (Rothman Expert Report ¶¶ 91-129, 131-33). As shown above, precedent is clear that demonstrating incentives and ability to compete, while necessary, is not sufficient to demonstrate a reasonable probability that, but for the challenged transaction, competition would have occurred within the near future. B.A.T. Industries, 1984 WL 565384, at *9.

F. Non-Compete Provision as Violation of Section 1

Complaint Counsel argues that, even if the evidence fails to prove the alleged unwritten agreement between Altria and JLI for Altria to remove its then-existing products from the market, the written non-compete provision, agreed to as part of the Transaction, "is an independent violation of Section 1 under the rule of reason" because of "Altria's status as a 'potential competitor.'" CCB at 68. Complaint Counsel asserts that the anticompetitive harms from the non-compete provision "substantially outweigh any benefits" and the provision is "more restrictive than necessary to achieve" any legitimate, competitive business interest. CCB at 70. Respondents contend that the evidence fails to prove any substantial anticompetitive effect in the relevant market arising from the non-compete provision, and therefore Complaint Counsel fails at "Step 1" of the rule of reason analysis. RB at 129. Respondents further argue that any anticompetitive effects are outweighed by procompetitive benefits from the non-compete provision, and that Complaint Counsel has failed to demonstrate a viable, less restrictive alternative to the non-compete provision. RB at 131-32.

Explaining the application of the rule of reason in a Section 1 case, the court in *Impax* stated:

> [The] rule-of-reason inquiry uses a burden-shifting framework. *See Ohio v. Am. Express*, 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678 (2018). The initial burden is on the FTC to show anticompetitive effects. *Id.* If the FTC succeeds in doing so, the burden shifts to Impax to demonstrate that the restraint produced procompetitive benefits. *Id.* If Impax successfully proves procompetitive benefits, then the FTC can demonstrate that any procompetitive effects could be achieved through less anticompetitive means. *Id.* Finally, if the FTC fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint. *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002). If the anticompetitive harms outweigh the procompetitive benefits, then the agreement is illegal. *Id.*

994 F.3d at 492.

Thus, the first question is whether Complaint Counsel has met its initial burden of demonstrating anticompetitive effects from the non-compete provision. As held in section II.E.b.ii.(c) above, the evidence fails to prove a reasonable probability that Altria would have competed in the e-vapor market in the near future, through Altria's marketing a competing product independently or through collaboration or acquisition. Complaint Counsel's claims as to harm to future competition arising from the Transaction have been rejected. Thus, Complaint Counsel has failed to meet its initial burden of proving that the non-compete provision violates Section 1 under the rule of reason. For this reason alone, the analysis should not proceed further. *E.g.*, *Am. Express*, 138 S. Ct. at 2283, 2290 (affirming entry of judgment in favor of defendants because "the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects."). *See also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991) (affirming entry of summary judgment and holding that

where plaintiff "failed to meet his initial burden of showing" the challenged agreement "substantially restrained competition in a relevant market," the claim "fails under a rule of reason analysis"). Since Complaint Counsel has failed to meet its initial burden, it is illogical and inappropriate to shift the burden to Respondents to nevertheless prove procompetitive benefits. Complaint Counsel has failed at the outset to sustain its claim that the non-compete provision is unlawful under the rule of reason, and no further analysis is necessary.

Because Complaint Counsel has failed to meet its burden of proof under Count I, both as to the alleged unwritten agreement not to compete with existing products and the written non-compete provision, Count I of the Complaint must be dismissed.

G. Conclusion

Having fully considered the applicable law, the arguments of the Parties, and the entire record in this case, and for all the foregoing reasons, the evidence fails to prove a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Having fully considered the applicable law, the arguments of the Parties, and the entire record in this case, and for all the foregoing reasons, the evidence fails to prove a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Therefore, the Complaint must be DISMISSED.[38]

III. FINDINGS OF FACT

A. Jurisdiction

1. Altria Group, Inc. ("Altria") is a for-profit corporation with its principal place of business at 6601 West Broad Street, Richmond, Virginia 23230. (JX0001 (Joint Stipulations of Law and Fact at 001 ¶ 2)).

2. JUUL Labs, Inc. ("JLI") is a for-profit corporation with its principal place of business at 1000 F Street NW, Washington, D.C., 20004. (JX0001 (Joint Stipulations of Law and Fact at 001 ¶ 6); PX0028 at 006 ¶ 18 (Answer of JLI)).

3. Altria and JLI engage in activities in or affecting commerce as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. (JX0001 (Joint Stipulations of Law and Fact at 001 ¶¶ 4, 7)).

38 Given the holdings above that the evidence fails to prove the violations alleged in this case, it is not necessary to address the affirmative defenses raised by Respondents in their Post-trial Brief (RB at 132-38), including that JLI, as a "seller" in the Transaction, cannot be held to have violated Section 7, which addresses acquirers, and that Respondents cannot be held liable in this proceeding because FTC proceedings and the structure of the decision makers are unconstitutional.

B. The Parties

1. Altria

4. Altria is a holding company incorporated in Virginia. It is the parent company of multiple tobacco companies, including Philip Morris USA Inc. ("PM USA"), which "is engaged in the manufacture and sale of cigarettes in the United States [of America ('United States' or 'U.S.')]." (JX0001 (Joint Stipulations of Law and Fact at 001 ¶ 3); PX9017 (Altria) at 004).

5. Altria's subsidiary PM USA is the largest United States cigarette company. (PX9017 (Altria's Form 10-K) at 005; PX8011 (Eldridge (ITG) Decl. at 006 ¶ 28)).

6. Altria wholly owns U.S. Smokeless Tobacco Company LLC ("USSTC"). USSTC is the leading producer and marketer of moist smokeless tobacco ("MST") products. The smokeless products segment of the MST market includes the premium brands, Copenhagen and Skoal, and value brands, Red Seal and Husky. (PX9017 (Altria) at 004, 005).

7. Altria's operating subsidiaries are primarily engaged in the manufacture and sale of tobacco products in the United States. (JX0001 (Joint Stipulations of Law and Fact at 001 ¶ 3)).

8. From 2012 to 2018, Altria had an active operating company called Nu Mark LLC ("Nu Mark"), which sold what Altria refers to as "innovative tobacco products," including electronic cigarettes ("e-cigarettes"), in the United States. (Murillo (Altria/JLI) Tr. 2898; PX9017 (Altria) at 004-05; Schwartz (Altria) Tr. 1850; Quigley (Altria) Tr. 1995).

9. Prior to December 2018, Altria participated in the e-vapor category of the tobacco market and developed and commercialized innovative tobacco products through its operating subsidiary Nu Mark. (PX9017 (Altria) at 005 (Altria FY2018 10-K)).

2. JLI

10. JLI manufactures and sells an e-cigarette, referred to as "JUUL" or "Juul", which heats a nicotine-based liquid into an aerosol to deliver nicotine to users. (PX2218 (JLI) at 003 (HSR Notification Form); PX9017 (Altria) at 004).

11. JUUL is a closed system pod-based product ("pod" or "pod product") that was first introduced in 2015. (PX0017 (Altria) at 003).

12. In 2018, JUUL was the best-selling e-cigarette in the United States. (Pritzker (JLI) Tr. 729; PX2098 (JLI) at 001, 014; PX9017 (Altria) at 058; *see also* Huckabee (Reynolds) Tr. 442-43; PX1316 (Altria) at 007; PX3228 (Reynolds) at 006; PX1115 (Altria) at 003).

C. The Transaction

13. On December 20, 2018, Altria and JLI entered into a transaction (the "Transaction"), whereby, among other things, Altria invested $12.8 billion dollars in JLI in exchange for a 35 percent economic interest in JLI. (RX1001 (Altria) at 001; PX9081 (Altria) at 001; *see also* PX2141 (JLI) (Purchase Agreement)). Pursuant to the Transaction, Altria obtained the right to appoint one-third of JLI's directors upon antitrust clearance of the Transaction. The Transaction also imposed some restrictions on JLI's sale rights, and imposed some restrictions preventing Altria from acquiring control of JLI. (RX1001 (Altria) at 001; PX2216 (JLI) at 004-05, 052; PX1276 (JLI) at 029-32, 041).

14. The Transaction included a number of related documents, including a "Purchase Agreement," a "Relationship Agreement," a "Services Agreement," and a "Voting Agreement." (PX2141 (JLI) (Purchase Agreement); PX1276 (JLI) (Relationship Agreement); PX1275 (JLI) (Services Agreement); PX2216 (JLI) (Voting Agreement) (collectively, "Transaction Documents")).

D. E-Cigarette Industry

1. Background

15. An e-cigarette is an electronic device that aerosolizes nicotine-containing liquid ("e-liquid"). (JX0001 (Joint Stipulations of Law and Fact at 002 ¶ 10)).

16. The terms "e-cigarettes" and "e-vapor" can be used interchangeably. (JX0001 (Joint Stipulations of Law and Fact at 002 ¶ 11); Farrell (NJOY) Tr. 207). E-cigarettes and e-vapor products can also be referred to as vapor products. (Farrell (NJOY) Tr. 207; (Huckabee (Reynolds) Tr. 384).

17. Electronic nicotine delivery systems is abbreviated as ("ENDS"). ENDS is a term the United States Food and Drug and Administration ("FDA") uses to refer to "all e-vapor products." (Willard (Altria) Tr. 1361; Murillo (Altria/JLI) Tr. 2908-09).

18. E-cigarettes generally work as follows: When a consumer puffs on the device to inhale, the air flow passes over a puff sensor, "which tells the sensor to communicate with the battery to release a charge. Upon releasing that charge, that charge goes through the coil, heats the coil, the coil is saturated in e-liquid, and it vaporizes, atomizes the e-liquid, and the adult consumer proceeds to inhale." (Schwartz (Altria) Tr. 1852-53).

2. Rise of E-Cigarettes

19. Following the introduction of e-vapor products in the United States in the late 2000s, "[t]he category grew rapidly starting in 2011 as more convenience stores and tobacco shops began carrying the products." (PX8003 (Wexler (Turning Point Brands) Decl. at 002 ¶ 6); Schwartz (Altria) Tr. 1859; PX2531 (JLI) at 034).

20. In 2013, large tobacco companies, such as R.J. Reynolds Tobacco Company ("Reynolds") and Altria, began acquiring and scaling up e-cigarette brands, fueling further growth. (PX2531 (JLI) at 013, 034; *see also* Jupe (Altria) Tr. 2226; PX7010 (Gifford (Altria) IHT at 145-46)).

21. Prior to 2017, demand for traditional cigarettes had decreased at a rate of around 2 to 4 percent annually. (PX5000 (Rothman Expert Report at 044 ¶ 94) (analyzing data from documents, including Altria Board of Directors presentation, May 2018, PX1229 (Altria) at 003 and 007); *see* Willard (Altria) Tr. 1324-25 (stating that Altria's top-selling combustible cigarette was declining in volume); PX7004 (Willard (Altria) IHT at 41-45) (estimating 3 to 4 percent annual decline in the volume of cigarette sales up until 2017 or 2018, and a 5.5 percent decline in the first nine months of 2019)).

22. In late 2017, the e-cigarette category of the tobacco market experienced rapid growth. (PX1316 (Altria) at 005 ("E-vapor category growth has accelerated"); PX1424 (Altria) at 003-06, 010-11; PX1229 (Altria) at 007).

23. In 2018, e-cigarette sales were "growing rapidly" while the decline in sales of traditional cigarettes was "noticeably increasing." (PX7023 (Fernandez (Altria) Dep. at 59-60); PX7021 (Pritzker (JLI) Dep. at 48-49)).

24. The rapid growth in e-cigarettes in 2017 and 2018 was driven almost entirely by JLI's e-cigarette product, JUUL. (Willard (Altria) Tr. 1106 ("[A]s a category, it was growing faster than you had anticipated, and specifically what was driving that was pod-based products."); Schwartz (Altria) Tr. 1866 ("The pod business was growing exponentially, driven by JUUL."); PX1424 (Altria) at 010-011; PX1041 (Altria) at 007; PX1229 (Altria) at 004-005, 007, 012; PX2168 (JLI) at 006; PX4029 (Altria) at 016; PX3228 (Reynolds) at 003, 006).

25. In 2018, JLI's share of the e-cigarette market grew and sales exceeded $1 billion. (PX2142 (JLI) at 006). JLI's JUUL, a pod-based product, was the best-selling e-cigarette in the United States. (Pritzker (JLI) Tr. 728-30).

26. As JLI's sales increased, traditional cigarette sales continued to decline. (Pritzker (JLI) Tr. 782-83; PX7021 (Pritzker (JLI) Dep. at 48-49) ("[T]he decline in cigarette revenues in the United States was increasing, noticeably increasing."); Willard (Altria) Tr. 1145-47; PX2098 (JLI) at 017; PX2168 (JLI) at 006; PX1229 (Altria) at 010). The rate of decline in traditional cigarette volumes increased to around 5 to 6 percent in 2019. (PX8011 (Eldridge (ITG) Decl. at 002 ¶ 7)).

27. Traditional tobacco companies invested heavily in e-cigarettes and other next-generation tobacco products as "the key driver of future growth." (PX1166 (Altria) at 006; *see also* PX1166 (Altria) at 009 ("Vapor will be the largest category and has considerable margin opportunity."); PX1172 (Altria) at 007 (Willard interview with the Wall Street Journal dated March 23, 2019)).

3. Types of E-Cigarettes

a. Closed System E-Cigarettes

28. There are two main types of e-cigarettes: closed system e-cigarettes and open-tank e-cigarettes. (*See* F. 29-43).

29. Closed system e-cigarettes, also called closed systems, are comprised of a battery and a container that comes prefilled with liquid that contains nicotine. (Farrell (NJOY) Tr. 207, 209-10; Schwartz (Altria) Tr. 1851-52).

30. Closed system e-cigarettes include cig-a-likes (F. 31-33) and pod-based products (F. 34-35). (Huckabee (Reynolds) Tr. 384-85; Crozier (Sheetz) Tr. 1492-93; Begley (Altria) Tr. 969; Farrell (NJOY) Tr. 206-07, 210-11).

i. Cig-a-likes

31. A cig-a-like is narrow and tubular in shape, "similar to a traditional cigarette." (Huckabee (Reynolds) Tr. 385; Farrell (NJOY) Tr. 210-11, 213-14 (a cig-a-like is "generally longer than it is wide, and reminds someone of a combustible cigarette"); Jupe (Altria) Tr. 2136 ("[Cig-a-likes are] supposed to emulate the look of the cigarette); Gifford (Altria) Tr. 2721-22; PX4029 (Altria) at 007).

32. Some cig-a-likes are disposable and "designed for one time use." (Farrell (NJOY) Tr. 212-14, 285, 290, 361; Crozier (Sheetz) Tr. 1491; PX9101 at 004; PX7026 (Gardner (Altria) Dep. at 48-49); PX7012 (Eldridge (ITG) Dep. at 49); PX7019 (Crozier (Sheetz) Dep. at 55-56)).

33. Some cig-a-likes have rechargeable batteries. These cig-a-likes are not considered disposable. (Farrell (NJOY) Tr. 212-15; PX9101 at 005; PX7026 (Gardner (Altria) Dep. at 48-49)).

ii. Pod-based Products

34. Pod products can vary in form. Some pod products are rectangular. Some pod products look like a USB flash drive or thumb drive. (O'Hara (JLI) Tr. 496; Begley (Altria) Tr. 1094-95; Farrell (NJOY) Tr. 210). Pod products are not tubular or similar in shape to a traditional cigarette. (Huckabee (Reynolds) Tr. 385; Farrell (NJOY) Tr. 210-11, 214).

35. Pod-based e-cigarettes are designed to be used with disposable pods or cartridges that come prefilled with liquid nicotine and attach to the device. (Crozier (Sheetz) Tr. 1487-89; King (PMI) Tr. 2346; Farrell (NJOY) Tr. 214-15; Gifford (Altria) Tr. 2721-22; PX7035 (Masoudi (JLI) Dep. at 107)).

b. Open System Devices

36. Open system devices "consist of a battery, [e-liquid] tank, [heating] coil, and atomizer." (PX8003 (Wexler (Turning Point Brands) Decl. at 002 ¶ 8); *see also* Farrell (NJOY) Tr. 207-09 (discussing components)).

37. Open system devices include "a reservoir that a user can refill with an e-liquid of their choosing." (PX9027 (FDA) at 009).

38. Open system devices have the largest batteries of the various e-vapor product types, allowing them to generate more power, which produces larger "plumes of vapor." (PX8003 (Wexler (Turning Point Brands) Decl. at 002 ¶ 8)).

39. Many open system devices allow users to adjust the energy from the device, and with it, the volume of the vapor plume. (PX7030 (Wexler (Turning Point Brands) Dep. at 33); PX7002 (Schwartz (Altria) IHT at 24-25)).

40. "As their industry name implies, open systems allow users to customize their experience by choosing variations of the liquid nicotine solutions for use in the tank. E-liquids typically consist of liquid nicotine, flavoring, and solvents. As a result, open system users can experiment with a wide variety of potential flavor combinations and nicotine strengths." (PX8003 (Wexler (Turning Point Brands) Decl. at 002 ¶ 9); *see also* Begley (Altria) Tr. 969-70 (explaining that open systems allow users to adjust the device settings and e-liquids)).

41. In addition, "users can customize the individual components of an open system, such as the battery, coil, and atomizer." (PX8003 (Wexler (Turning Point Brands) Decl. at 002 ¶ 9)). As a result, "there's almost infinite variety in open systems." (PX7030 (Wexler (Turning Point Brands) Dep. at 100); *see also* Farrell (NJOY) Tr. 208 (explaining that users can swap out the various parts)).

42. "Many open system users view customizing these products as a hobby." (PX8003 (Wexler (Turning Point Brands) Decl. at 002 ¶ 9); *see also* Huckabee (Reynolds) Tr. 387). That is because the products are more "complex" and generally require maintenance and cleaning. (Farrell (NJOY) Tr. 207-09).

43. Open system devices are typically sold in vape shops. (Huckabee (Reynolds) Tr. 386-87; Farrell (NJOY) Tr. 208; Begley (Altria) Tr. 972-73; Gifford (Altria) Tr. 2756; PX4029 (Altria) at 008; Gifford (Altria) Tr. 2741; Crozier (Sheetz) Tr. 1494-95).

E. Closed System E-Cigarette Industry Participants

1. Altria/Nu Mark

44. Altria established its Nu Mark operating company in 2012 with the goal of developing and marketing innovative tobacco products, including e-cigarette products, for adult tobacco consumers. (JX0001 (Joint Stipulations of Law and Fact at 002 ¶ 12)).

45. Nu Mark was the Altria operating company responsible for competing in the e-cigarette market in the United States. (Begley (Altria) Tr. 961-62; PX9017 (Altria) at 005 ("Nu Mark participated in the e-vapor category and developed and commercialized other innovative tobacco products.")).

46. Beginning in 2013, Nu Mark launched a series of internal development efforts, which were undertaken by scientists and engineers at Altria's Center for Research and Technology. (Willard (Altria) Tr. 1149, 1332-33; Jupe (Altria) Tr. 2211).

47. By 2015, Nu Mark had five projects underway to develop new e-vapor devices. Of those, two were designed to compete against cig-a-likes and two were closed system products designed to appeal to open-tank users. The remaining project was still evolving. (PX1135 (Altria) at 020, 046).

48. As early as 2016, Altria believed that e-cigarettes represented a "significant longer-term opportunity." (PX7022 (Begley (Altria) Dep. at 92-94); PX4040 (Altria) at 018 ("Nu Mark 2016-2018 Strategic Plan") ("E-Vapor Category Represents a Significant Longer-Term Opportunity"); PX7023 (Fernandez (Altria) Dep. at 181-82)).

49. Altria put substantial resources into Nu Mark and "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." (Willard (Altria) Tr. 1341).

50. Altria found that development for electronic products like e-cigarettes required "an entirely different construct" than what was required for conventional tobacco products such as cigarettes. (PX7024 (Crosthwaite (Altria/JLI) Dep. at 267-68)). It required "engineering skills, [and] software skills." (PX7006 (Crosthwaite (Altria/JLI) IHT at 106)). Altria found it was "much harder" to develop innovative electronic products "than it is to maintain and line extend products that are in the combustible cigarette business." (PX7031 (Willard (Altria) Dep. at 261-62)).

51. Brian Quigley, who was President and Chief Executive Officer ("CEO") of Nu Mark in 2018, believed that Altria and Nu Mark were not "structured appropriately" to develop innovative products, explaining that Altria always "approached product development like a cigarette company" and "needed to think more like a technology company and have different capabilities and different processes." (Quigley (Altria) Tr. 2024-25).

52. Although Nu Mark had pursued at least a half dozen internal projects to develop e-vapor products, many of which were the subject of "years" of effort, Nu Mark never succeeded in developing from scratch its own e-vapor product. (Murillo (Altria/JLI) Tr. 2940-41; *see also* PX7041 (Quigley (Altria) Dep. at 148-49); PX7018 (Schwartz (Altria) Dep. at 163-64)).

53. In addition to trying to develop an e-vapor product internally, Altria sought to acquire existing e-vapor products. (Willard (Altria) Tr. 1343-44).

54. Every product that Nu Mark launched into the marketplace was a result of an external acquisition, licensing arrangement, or partnership with another e-vapor company. (PX7018 (Schwartz (Altria) Dep. at 163-64); *see also* Garnick (Altria) Tr. 1742-43; PX7017 (Magness (Altria) Dep. at 287-88)).

55. Until October 25, 2018, Nu Mark sold MarkTen Elite pod-based products and Apex pod-based products. (PX9114 (Altria) at 002; PX4029 (Altria) at 021; PX0015 (Altria) at 007-09).

56. Until December 2018, Nu Mark sold MarkTen cig-a-likes and Green Smoke cig-a-likes. (PX9114 (Altria) at 002; PX4029 (Altria) at 021; PX0015 (Altria) at 007-09).

a. Cig-a-likes

i. MarkTen Brand

57. In 2013, Nu Mark introduced its first e-vapor product, a cig-a-like called MarkTen King Size. (JX0001 (Joint Stipulations of Law and Fact at 002 ¶ 13); PX7007 (Murillo (Altria/JLI) IHT at 126); Gifford (Altria) Tr. 2734). That product was acquired from a Chinese contract manufacturer named Kimree. (PX7018 (Schwartz (Altria) Dep. at 163-64)). The MarkTen King size came in two nicotine strengths: 1.5 percent nicotine and 2.5 percent nicotine. (RX0175 (Altria) at 003).

58. By mid-2015, Nu Mark found that neither the 1.5 percent nor the 2.5 percent nicotine products were "competitive . . . or satisfying enough to drive conversion from a traditional cigarette or most other e-vapor products." (RX0175 (Altria) at 003). Altria concluded that MarkTen King Size would not "drive conversion and sustainable volume[,] and risk[ed] damaging the credibility of the brand[.]" Altria abandoned the product in favor of MarkTen XL (*see* F. 61). (RX0175 (Altria) at 003; *see also* PX7002 (Schwartz (Altria) IHT at 81-82) (explaining that MarkTen King Size "proved to be less than successful")).

59. In April 2014, Nu Mark acquired the e-vapor business of an Israeli company named Green Smoke, Inc. (Willard (Altria) Tr. 1460; Schwartz (Altria) Tr. 1864).

60. Nu Mark incorporated Green Smoke's technology into a new iteration of the MarkTen brand, the "MarkTen XL," which also was a cig-a-like. (Willard (Altria) Tr. 1345; Gifford (Altria) Tr. 2734; *see also* PX7002 (Schwartz (Altria) IHT at 35) (explaining that MarkTen

XL "was a former Green Smoke product that [Altria] reskinned into a Mark Ten presentation"); RX0746 (Altria) at 028 ("Green Smoke product portfolio overlaps with MarkTen portfolio")).

61. MarkTen XL was a larger version of MarkTen. (PX7034 (Mountjoy (Altria) Dep. at 57)). MarkTen XL had several varieties, including MarkTen Bold. (PX7015 (Gogova (Altria) Dep. at 30)).

62. MarkTen Bold was a cig-a-like product that had higher levels of nicotine than MarkTen and included nicotine salts.[39] (Begley (Altria) Tr. 980-81; PX9047 (Altria) at 009).

63. Cig-a-likes sold under the MarkTen brand included MarkTen Bold, MarkTen XL, and MarkTen. (O'Hara (JLI) Tr. 506; PX9114 (Altria) at 009, 012).

ii. Green Smoke

64. After the launch of Mark Ten XL, Nu Mark kept the Green Smoke brand in the market. (PX4040 (Altria) at 038).

65. Altria sold the Green Smoke cig-a-like primarily through commercial transactions conducted electronically on the internet (e-commerce). (PX9080 (Altria) at 001; PX9114 (Altria) at 002).

b. Pod-based Products

i. Elite

66. In February 2018, Nu Mark launched MarkTen Elite, often referred to as Elite, a pod-based closed system e-cigarette. (Jupe (Altria) Tr. 2244-45; Schwartz (Altria) Tr. 1871; Willard (Altria) Tr. 1308, 1354; Begley (Altria) Tr. 984, 990, 1059).

67. Elite had been sold on the market by another company before the August 8, 2016 Deeming Rule (F. 195). (Begley (Altria) Tr. 984; Garnick (Altria) Tr. 1690).

68. Altria acquired the right to MarkTen Elite in late 2017 from a Chinese manufacturer, Smoore Shenzhen Technology ("Smoore"). (Begley (Altria) Tr. 984-85; Jupe (Altria) Tr. 2244-45; Schwartz (Altria) Tr. 1862-64; Murillo (Altria/JLI) Tr. 2941-42; PX2084 (JLI) at 020).

69. Nu Mark also entered into a partnership with a U.S. e-vapor company (Avail) that made e-liquids for Elite. (Begley (Altria) Tr. 984-85; PX9045 at 006).

39 Nicotine salts are discussed in section III.J.4. infra.

70. Nu Mark was interested in acquiring Elite because Nu Mark had started to see pod-based products gain popularity in the marketplace. (Begley (Altria) Tr. 985) ("We saw fairly rapid growth of the pod segment and we thought it was important to compete.").

71. Nu Mark "was hopeful" Elite would disrupt JUUL's growth when Altria launched Elite. (Begley (Altria) Tr. 990-91).

ii. Apex

72. Apex was a closed system pod-based product that was developed by Philip Morris International ("PMI").[40] (Willard (Altria) Tr. 1157-58, 1240; Schwartz (Altria) Tr. 1916; PX9114 (Altria) at 002). Apex was introduced in the United States prior to the 2016 Deeming Rule. (PX7020 (King (PMI) Dep. at 228)).

73. Altria had the rights to commercialize Apex in the United States pursuant to a joint research, development, and distribution agreement between Altria and PMI. (Begley (Altria) Tr. 983-84; Jupe (Altria) Tr. 2133; King (PMI) Tr. 2545).

74. Around August 2018, Altria was selling Apex through e-commerce. (Murillo (Altria/JLI) Tr. 3053; King (PMI) Tr. 2535; Begley (Altria) Tr. 984).

75. Apex was commercialized "in a very limited e-commerce distribution." (PX7017 Magness (Altria) Dep. at 288). It was only available for online purchase in ten states. (PX1072 (Altria) at 004).

2. JLI

76. What is now known as JLI was founded in 2007 by Adam Bowen and James Monsees, two former graduate students at Stanford University. JLI was originally incorporated as PLOOM, Inc. in 2007. It was later renamed Pax Labs, Inc. On June 30, 2017, Pax Labs renamed itself Juul Labs, Inc., and spun off certain assets and employees and other non-nicotine vaporizer products into a new company Pax Labs, Inc. (JX0001 (Joint Stipulations of Law and Fact at 002 ¶ 14)).

77. In 2015, JLI, then operating under the name Pax Labs, launched a product called JUUL. (JX0001 (Joint Stipulations of Law and Fact at 002 ¶ 15)).

78. In December 2017, sales of JUUL overtook the then category leader, Reynolds' Vuse. (Huckabee (Reynolds) Tr. 410).

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40 PMI is an international company that manufactures and sells various nicotine containing products, including cigarettes and heated tobacco products, as well as e-cigarettes. (King (PMI) Tr. 2337). In 2008, PMI split from its former parent, Altria, with PMI focusing on international markets and Altria focusing on the U.S. markets. (King (PMI) Tr. 2337).

79. In 2018, JLI was the best-selling e-cigarette in the United States and the "market leader." (Pritzker (JLI) Tr. 729 (discussing PX2022); PX2098 at 014 ("JUUL continues to lead the vapor category"); PX1115 (Altria) at 003 ("JUUL is the undisputed leader in the U.S. e-vapor market")).

3. Reynolds

80. Reynolds American, Inc. owns RJR Tobacco Company and RAI Innovations Company. RAI Innovations Company owns RJR Vapor Company. British American Tobacco owns Reynolds American, Inc. (Huckabee (Reynolds) Tr. 371-72; O'Hara (JLI) Tr. 501). This corporate group is referred to as "Reynolds." (Huckabee (Reynolds) Tr. 372).

81. Reynolds is the second-largest tobacco company in the United States after Altria. (Begley (Altria) Tr. 1120; Huckabee (Reynolds) Tr. 372).

82. Reynolds currently sells four e-cigarettes under the Vuse brand: Vuse Solo, Vuse Ciro, Vuse Vibe, and Vuse Alto. (Huckabee (Reynolds) Tr. 377). All of these products are closed system e-cigarettes. (Huckabee (Reynolds) Tr. 381-82).

83. Vuse Solo was launched in 2011 and was the first Vuse e-cigarette sold by Reynolds. Vuse Solo was developed by Reynolds. (Huckabee (Reynolds) Tr. 444-45).

84. Vuse Solo, Vuse Vibe, and Vuse Ciro are cig-a-likes. (O'Hara (JLI) Tr. 502; Huckabee (Reynolds) Tr. 378, 441).

85. Vuse was the leading e-cigarette brand in the United States from 2016 to 2017 until JUUL overtook Vuse in December 2017. (Huckabee (Reynolds) Tr. 409-10; PX1280 (Altria) at 009-10).

86. In August 2018, Reynolds launched Vuse Alto, a pod product. (Huckabee (Reynolds) Tr. 378-79, 395).

87. Vuse Alto is offered in three nicotine strengths: 1.8%, 2.4%, and 5%. Reynolds offers different nicotine strengths because different consumers prefer different nicotine strengths. (Huckabee (Reynolds) Tr. 395).

4. ITG

88. ITG Brands ("ITG") is the third-largest tobacco company in the United States. (PX8011 (Eldridge (ITG) Decl. at 001 ¶ 2); PX8010 (Folmar (ITG) Decl. at 001 ¶ 2)).

89. ITG is a subsidiary of British-based tobacco company Imperial Brands PLC. (PX8011 (Eldridge (ITG) Decl. at 001 ¶ 3); PX8010 (Folmar (ITG) Decl. at 001 ¶ 1)).

90. Fontem U.S. LLC ("Fontem US") is a subsidiary of Imperial Brands. (PX7012 (Eldridge (ITG) Dep. at 32-33); PX8011 (Eldridge (ITG) Decl. at 001 ¶ 4)). Fontem US is focused on next-generation nicotine products, and its primary product is the blu brand of e-

cigarettes. (PX3025 (ITG) at 004). ITG is the sales agent for Fontem US. (PX7012 (Eldridge (ITG) Dep. at 32-33)).

91. ITG sells e-cigarettes under the brand name blu. (PX8011 (Eldridge (ITG) Decl. at 004-05 ¶ 19); PX8010 (Folmar (ITG) Decl. at 001 ¶ 2)). Blu is a closed system product line. (Begley (Altria) Tr. 976).

92. ITG sells three types of closed system products: *my*blu pod device; the blu Plus+ cig-a-like; and the single-use blu Disposable, which is a cig-a-like. (PX7012 (Eldridge (ITG) Dep. at 49-50); PX8011 (Eldridge (ITG) Decl. at 004-05 ¶ 19); PX8010 (Folmar (ITG) Decl. at 001 ¶ 2)).

93. ITG introduced the *my*blu pod device in 2017. (PX8011 (Eldridge (ITG) Decl. at 004-05 ¶ 19)).

94. Imperial Brands acquired its blu e-cigarette brand in 2015. (PX8011 (Eldridge (ITG) Decl. at 001 ¶ 3)).

5. JTI

95. Japan Tobacco Inc. ("JTI") is a tobacco company that sells the Logic e-cigarette brand. (Begley (Altria) Tr. 977; Crozier (Sheetz) Tr. 1489; Farrell (NJOY) Tr. 272).

96. Logic is a line of closed system e-cigarettes. (Crozier (Sheetz) Tr. 1488-89; Begley (Altria) 977).

97. The Logic brand includes several products, including Logic Pro and Logic Power (Crozier (Sheetz) Tr. 1489; PX2597 (JLI) at 040). Logic also sells a pod-based product called Logic Compact. (PX2084 (Altria) at 020; O'Hara (JLI) Tr. 575-76).

98. Logic Compact is manufactured by Smoore. (PX2084 (Altria) at 020; O'Hara (JLI) Tr. 575-76).

6. NJOY

99. NJOY, LLC ("NJOY") is a privately held manufacturer of e-cigarettes. (Farrell (NJOY) Tr. 200).

100. NJOY is not affiliated with a traditional tobacco firm. (Farrell (NJOY) Tr. 326; O'Hara (JLI) Tr. 505).

101. NJOY currently sells a closed system pod product with a rechargeable battery called the NJOY Ace, and a closed system disposable cig-a-like called the NJOY Daily. (Farrell (NJOY) Tr. 206, 214; PX3216 (NJOY) at 003-04).

102. NJOY Ace was launched in October or November 2018. (Farrell (NJOY) Tr. 336).

103. In 2018, NJOY also sold three cig-a-likes: Loop, PFT, and King. (Farrell (NJOY) Tr. 206-07).

104. NJOY Ace is manufactured by Smoore. (O'Hara (JLI) Tr. 577; PX3195 (NJOY) at 10).

F. The Relevant Market

1. Relevant Product Market

105. The relevant product market in this case is the closed system e-cigarettes market that includes both cig-a-likes and pod-based products. (F. 106-170).

a. Distinction between Closed System and Open System Products

106. Closed system e-cigarettes or closed systems consist of a battery and a container that comes prefilled with liquid containing nicotine. The cartridges (also referred to as pods) are not meant to be refilled by users and the consumer cannot adjust the performance of a closed system device. Closed system e-cigarettes are sold primarily through conventional convenience stores, supermarkets, and other outlets where cigarettes are sold. (F. 107, 113-114, 122, 132).

107. Closed system e-cigarettes offer an "appealing" combination of factors to consumers in that it is a "convenient product that is also typically very discreet in nature, meaning its vapor cloud is relatively low[.]" (Huckabee (Reynolds) Tr. 385-86).

108. Open system devices consist of a battery, an e-liquid tank, a heating coil, and an atomizer. The devices may be refilled by users and users can adjust the energy from the device, the volume of the vapor plume, the flavor combinations and the nicotine strengths. Open system devices are typically sold in vape shops. (F. 36-43).

109. "MOC" stands for "multi-outlet convenience" and refers to the sales channel that includes "conventional convenience stores, supermarkets, and various other outlets where cigarettes are sold." (Begley (Altria) Tr. 1090).

110. Altria views closed system e-cigarettes as a distinct market from open system products, tracking its share in the MOC channel. (Begley (Altria) Tr. 973; *see, e.g.*, PX1280 (Altria) at 010 (Altria Board update); PX1087 (Altria) at 004 (MarkTen weekly share report); PX1703 (Altria) at 043-44 (Nu Mark business update); PX1284 (Altria) at 016).

111. JLI views closed system e-cigarettes as a distinct market from open system products. (PX2145 (JLI) at 023 (slide from draft credit investor presentation from November 2018, titled "U.S. competition overview" showing sales for Vuse, Juul, MarkTen XL Bold, Elite, Logic Power, Blu Plus, and *my*blu, which are all closed system e-cigarette products); PX2062 (JLI) at 007 (sales and marketing slide presentation tracking the performance of MarkTen, Vuse, Blu, Logic, and NJOY, all of which are closed system products)).

112. Reynolds, ITG, and NJOY, manufacturers of closed system e-cigarettes, view closed system e-cigarettes as a distinct market from open system products. (PX8008 (Huckabee (Reynolds) Decl. at 021 ¶ 41); PX7012 (Eldridge (ITG) Dep. at 170); Farrell (NJOY) Tr. 225).

b. Product Features, Consumers, and Vendors

113. Both cig-a-likes and pod-based products have pods or cartridges that are prefilled with nicotine liquids. The pods or cartridges are not meant to be refilled by users. (Huckabee (Reynolds) Tr. 384; Farrell (NJOY) Tr. 207, 210; King (PMI) Tr. 2341-42; PX7035 (Masoudi (JLI) Dep. at 107); PX7022 (Begley (Altria) Dep. at 74)). The user lacks the ability to adjust the performance of a closed system device. (Begley (Altria) Tr. 970; PX7022 (Begley (Altria) Dep. at 74-76); PX7002 (Schwartz (Altria) IHT at 28)).

114. Cig-a-likes and pod-based e-cigarettes can be sold as a kit including the battery and the prefilled pod or cartridge, or as separate components. (Farrell (NJOY) Tr. 214-15; PX7009 (Burns (JLI) IHT 022-23)).

115. Cig-a-likes and pod-based e-cigarettes may or may not contain nicotine salts. (O'Hara (JLI) Tr. 503-05; PX4015 (Altria) at 012; PX4115 (Altria) at 010; PX3005 (ITG) at 008, 022-23; PX7012 (Eldridge (ITG) Dep. at 168); PX1166 (Altria) at 021).

116. Cig-a-likes and pod-based e-cigarettes can have an array of different nicotine strengths. (Begley (Altria) Tr. 982 (discussing PX9000 (Altria) at 017); Huckabee (Reynolds) Tr. 395; Farrell (NJOY) Tr. 228-29, 341-42; Gardner (Altria) Tr. 2673-75; PX7025 (Burns (JLI) Dep. at 45-46); PX4115 (Altria) at 010; PX4014 (Altria) at 030).

117. Cig-a-likes and pod-based products can come in a variety of options in terms of flavors. (Huckabee (Reynolds) Tr. 441 (noting that Reynolds' pod-based e-cigarette (Vuse Alto) and cig-a-like products (Vuse Ciro, Solo, and Vibe) are each offered in various flavors); Farrell (NJOY) Tr. 342-43 (describing nicotine strength and flavor options for NJOY's cig-a-like product, the Daily)).

118. Generally, pod-based products are larger than cig-a-likes, (Willard (Altria) Tr. 1348), which means they can use larger batteries. (King (PMI) Tr. 2353-54 (explaining that the larger the device, the higher capacity of the battery)).

119. Battery power influences "the amount of vapor that is produced in a puff." (Farrell (NJOY) Tr. 292; *see also* Huckabee (Reynolds) Tr. 449-50).

120. Pods have "larger," "more effective batteries" compared to cig-a-likes, which makes them "more effective at taking the liquid and turning it into vapor . . . ." (PX7030 (Wexler (Turning Point Brands) Dep. at 42)).

121. The Vuse Vibe, a cig-a-like, "has the largest capacity cartridge and the longest-lasting battery of the VUSE product line." (PX8008 (Huckabee (Reynolds) Decl. at 007-09 ¶ 18(c)); Huckabee (Reynolds) Tr. 378).

122. Closed system products come in different shapes, referred to as "form factors." (Farrell (NJOY) Tr. 210-11).

123. A cig-a-like is "an e-vapor product that looks like a cigarette. It's white, it's cylindrical, and, frankly, it's more similar in size to a cigarette than these more recently introduced pod-based products." (Willard (Altria) Tr. 1352; Farrell (NJOY) Tr. 365 (Because "cigalikes as a whole . . . try to mimic the appearance and the shape and the feel of combustible cigarettes[,]" an "adult smoker that wants to try them as an alternative [will] see[] some similarities [with] what they were using previously.")).

124. Altria's MarkTen and MarkTen Bold, both cig-a-likes, had a narrow and tubular shape and looked similar to a cigarette. (Huckabee (Reynolds) Tr. 385; Farrell (NJOY) Tr. 210-211, 213-214; PX4029 (Altria) at 007; PX7026 (Gardner (Altria) Dep. at 48)).

125. Pod products are "not tubular or similar to a traditional cigarette." They are "larger" and "more rectangular in nature." (Huckabee (Reynolds) Tr. 385).

126. Altria's MarkTen Elite, a pod-based product, "was a sort of smashed diamond shape." (PX7026 (Gardner (Altria) Dep. at 210-11)).

127. The Juul devices are shaped like a USB flash drive or thumb drive. (Crozier (Sheetz) Tr. 1555-56; Farrell (NJOY) Tr. 210-11; Begley (Altria) Tr. 1094-95).

128. The difference in shape between cig-a-likes and pods "is far more than just an aesthetic issue." (Begley (Altria) Tr. 1079).

129. Cig-a-likes' resemblance to a traditional cigarette means that this form "carrie[s] some of the stigmas of smoking a cigarette[.]" (Begley (Altria) Tr. 1099-1100). Many "smokers who want[] to convert to non-combustible tobacco products d[o] not want to appear to be smoking a cigarette[.]" (PX7036 (Garnick (Altria) Dep. at 134-35)).

130. Cig-a-like consumers are "generally an older consumer who is not worried about the social friction of cigarettes, and so they want a product that looks and feels and performs similar to their cigarette product." (Myers (Altria) Tr. 3350; *see also* PX7000 (Garnick (Altria) IHT at 108) ("I think our traditional cig-a-like[s] were generally used more by the older cohorts, I'm not sure what the age group was, but the older cohorts than the pod products.")).

131. Pods are "used more by the younger adult cohorts." (PX7000 (Garnick (Altria) IHT at 108)). That demographic "wanted something that looked different" than a cigarette. (Myers (Altria) Tr. 3350; PX7030 (Wexler (Turning Point Brands) Dep. at 51) ("Pod systems

[users] are significantly younger in our particular database. They'd be – 30 and under somewhere is around the average.")).

132. Cig-a-like and pod-based products are sold primarily through the MOC channel. (Begley (Altria) Tr. 971-72 (acknowledging that the MOC channel is the major sales channel for the sale of closed system e-vapor products); Huckabee (Reynolds) Tr. 387 (testifying that Reynolds "sell[s] the vast majority of our closed-system products in traditional retail channels, convenience stores being the biggest percentage by far"); Farrell (NJOY) Tr. 220-21 ("NJOY has focused its attention on convenience and gas stores, so a convenience market."); PX8008 (Huckabee (Reynolds) Decl. at 006 ¶ 14); PX8004 (Farrell (NJOY) Decl. at 002 ¶ 11)).

133. Cig-a-likes and pod-based products "compete for . . . the same customers, adult smokers and adult vapers who frequent" convenience stores. (Farrell (NJOY) Tr. 291). Reynolds regards its "competitive set as all products that are sold and available in our channels. So products that compete for consumer purchase, very primarily in the convenience store channel, . . . these are almost without exception closed-system products . . . [including] [p]ods and cigalike products." (Huckabee (Reynolds) Tr. 388-89).

134. Nu Mark's 2018 three-year strategic plan included a plan for future merchandising shelf space showing both its pod-based Elite and its MarkTen cig-a-likes displayed on adjacent shelves. (PX4012 (Altria) at 40).

135. The majority of retailers who sell NJOY's e-cigarette products sell both NJOY's pod-based product, Ace, and its cig-a-like product, Daily. At a majority of those retailers, both products are displayed next to each other on shelves. (Farrell (NJOY) Tr. 257-58).

136. NJOY uses the same distributors for both its pod-based product Ace and its cig-a-like product Daily. (Farrell (NJOY) Tr. 257-58).

c. Market Participants' Views of Competition

i. JLI

137. JLI's pricing strategy in 2017 included comparing prices for its JUUL pod e-cigarette to a number of e-vapor products, including cig-a-like products MarkTen XL, Vuse Solo, and Blu Plus. (PX2579 (JLI) at 007) (listing specific products used for comparison); PX2333 (JLI) at 005-08 (summarizing Nielsen data and comparing JUUL to MarkTen, Vuse, Blu, and Logic across a range of metrics, including device pricing, device units, refill pricing, and refill dollars)).

138. In May 2017, JLI commissioned a pricing survey by a consulting firm, McKinsey & Company ("McKinsey"). The pricing survey noted that "[c]losed-system vaporizers, sometimes known as cigalikes and e-cigs . . . include disposable e-cigarettes or e-cigarettes that use replaceable cartridges or pods." (PX2579 (JLI) at 181). A McKinsey slide deck on pricing strategy prepared for JLI includes a slide comparing prices for a number of e-vapor

products, including JUUL's pod product and cig-a-like products MarkTen XL, Vuse Solo, and Blu Plus. (PX2579 (JLI) at 007).

139. JLI tracked starter kit unit shares over time for competitors, including Vuse and MarkTen. (PX2588 (JLI) at 003, 017) (September 2017 Board update containing a "Competitive Analysis" slide on brand marketing including Vuse, Blu, Logic, MarkTen, and IQOS).

140. JLI reported on market shares from October 2017 and January 2018, before MarkTen Elite and Vuse Alto were introduced, for MarkTen, Vuse, Blu, Logic, and Juul. (PX2488 (JLI) at 002; PX2487 (JLI) at 001; PX2483 (JLI) at 002).

141. JLI, in a business overview from December 2017, stated: "JUUL competes within an ecosystem with a range of vaporizer products," and identified its competitors as including Blu, MarkTen, and Vuse. (PX2597 (JLI) at 037, 039).

142. In numerous confidential information memoranda from 2018, JLI compared its Juul product with both MarkTen and Elite, as well as Vuse, Blu, Logic, and NJOY, in terms of nicotine satisfaction and user experience. (PX2590 (JLI) at 029; PX2158 (JLI) at 047; PX2531 (JLI) at 033).

143. JLI, in an April 2018 competitor benchmarking presentation, compared flavor and nicotine attributes of closed system products, including cig-a-like products such as MarkTen, Vuse Solo, and Blu Plus. (PX2344 (JLI) at 004, 007).

144. In a 2018 first quarter investor update, JLI compared JUUL's change in share at retail from April 2017 to April 2018, before Alto was introduced, to those of Vuse, Blu, MarkTen, and Logic. (PX2345 (JLI) at 004).

145. In a May 2018 JLI slide presentation titled "Flavor Competitive Landscape," JLI compared JUUL's flavor offerings to those of "top competitors," including both Elite and MarkTen, as well as cig-a-likes Vuse Solo, Vuse Ciro, and Blu Plus. (PX2090 (JLI) at 009).

146. JLI commissioned a McKinsey study in May 2018 that compared the price elasticity of JUUL's devices and consumables with the price elasticity of other closed system products, including the MarkTen cig-a-like. (PX2252 (JLI) at 012, 048-49).

147. JLI commissioned a McKinsey study in June 2018 that calculated detailed product-level price elasticities, comparing pricing for various closed system products, including JUUL, Blu, Vuse, and cig-a-like MarkTen XL. (PX2486 (JLI) at 013, 042-43).

148. In a JLI sales and marketing slide deck from November 2018, JLI compared market shares from October 2017 to November 2018 of Juul, Vuse, Blu, MarkTen, Logic, and NJOY, and included both Altria's Elite and cig-a-like products. (PX2062 (JLI) at 007; Robbins (JLI) Tr. 3245-46).

149. In an investor presentation from November 2018, JLI tracked "competitive [product] launches," including cig-a-like products MarkTen Bold, Vuse Ciro, and Blu Plus. (PX2532 (JLI) at 016; PX7042 (Danaher (JLI) Dep. at 42-43)).

150. In his competitive intelligence role at JLI, Joseph O'Hara tracked the MarkTen cig-a-like products, including MarkTen, MarkTen XL, and MarkTen Bold. (O'Hara (JLI) Tr. 506-07; PX7033 (O'Hara (JLI) Dep. at 13, 48-49)).

151. JLI did not "change its pricing" or "its promotions" of JUUL, a pod-based product, "as a result of cig-a-like competition." (Robbins (JLI) Tr. 3245; *see also* Robbins (JLI) Tr. 3248 (stating that JLI never made any pricing decisions as a result of MarkTen Bold)).

ii. Altria

152. Altria categorized e-vapor products, including both cig-a-likes and pod-based products, as reduced-risk products. (PX7041 (Quigley (Altria) Dep. at 127)).

153. Nu Mark viewed all vapor products in closed systems as competitors. (PX7014 (Baculis (Altria) Dep. at 75) ("[A]ll of the vapor products in closed systems sold in MOC were part of the competitive set for Nu Mark."); PX7026 (Gardner (Altria) Dep. at 65-66) ("Everyone that sold [an] e-vapor product was a competitor to Nu Mark.")).

154. The market share figures that Altria presented to its Board of Directors in February 2017, before MarkTen Elite or Vuse Alto were introduced on the market, included JUUL's pod-based products and Vuse and MarkTen cig-a-likes. (RX0746 (Altria) at 014).

155. In an August 2017 update to the Altria Board, Nu Mark's slide presentation included a slide showing MarkTen's weekly market share performance as compared to Vuse, Juul, Blu, and Logic. (PX4028 (Altria) at 011). These market share figures take into account both cig-a-like and pod products. (Begley (Altria) Tr. 976). The update also presents retail volume share by brand, including Vuse Vibe, Vuse Solo, MarkTen XL, MarkTen KS, NJOY, Blu, Vapin Plus, Logic, and Juul. (PX4028 (Altria) at 012).

156. Nu Mark's 2018 three-year strategic plan from February 2018, before Vuse Alto was introduced on the market, includes a slide showing 2017 market shares for Vuse, MarkTen, Juul, Logic, and Blu. (PX4012 (Altria) 012).

157. In a February 2018 draft of its 2018-2020 three-year strategic plan, Nu Mark compared the pricing for its Elite product against both pod-based products (JUUL) and cig-a-likes (Vuse Solo and MarkTen cig-a-like). (PX1298 (Altria) at 030).

158. In a Board presentation from April 2018, before Vuse Alto was introduced, Nu Mark presented a slide showing top e-vapor brands from 2017 by share position in the MOC channel, including Vuse, MarkTen, Juul, Logic, and Blu. (PX4029 (Altria) at 013).

iii. Other Market Participants

159. Reynolds considers the competitive set for its Vuse cig-a-like products as including both "[p]ods and cigalike products" primarily in the convenience store channel. (Huckabee (Reynolds) Tr. 388).

160. Reynolds considers its Vuse pod-based products as competing with "the other pod-based and cigalike products that are on the market . . . in those same channels." (Huckabee (Reynolds) Tr. 388-89).

161. In pricing its closed system vapor products, Reynolds "take[s] into account the pricing of competitor pod-based and cigalike products, as well as promotional effectiveness in the market." (Huckabee (Reynolds) Tr. 389).

162. Reynolds typically does not discount the prices for its cig-a-like products, Ciro, Solo, and Vibe. While prices for those products have been relatively stable for some time, Reynolds is active in the pricing management of its pod product, Alto. (Huckabee (Reynolds) Tr. 389).

163. [redacted] (Huckabee (Reynolds) Tr. 419, *in camera*).

164. NJOY views cig-a-likes as competing with pod products, in that they "compete for . . . the same customers, adult smokers and adult vapers who frequent the convenience channel. They also . . . compete for limited shelf space." (Farrell (NJOY) Tr. 290-91).

165. For ITG, the biggest factor in setting prices for its pod product and in deciding what promotions to run is the price of competing pod products. (PX8011 (Eldridge (ITG Brands) Decl. at 006 ¶ 29); PX7012 (Eldridge (ITG Brands) Dep. at 130) (ITG Brands "compare[s] pods to pods.")).

166. Turning Point Brands does not consider the price of cig-a-likes when setting the price of its pod-based products. (PX7030 (Wexler (Turning Point Brands) Dep. at 50-51)).

iv. The Food and Drug Administration

167. The FDA defines a closed e-cigarette as "an e-cigarette that includes an e-liquid reservoir that is not refillable, such as a disposable cigalike, or that uses e-liquid contained in replaceable cartridges or pods that are not intended to be refillable." (PX9027 (FDA) at 009).

168. The FDA's regulation of electronic nicotine delivery systems encompasses "all e-vapor products." (Willard (Altria) Tr. 1361; Murillo (Altria/JLI) Tr. 2908-09).

169. The FDA's flavor ban that went into effect in February 2020 applies to both pod-based products and rechargeable cig-a-likes equally. (Sheetz (Crozier) Tr. 1495-96; PX9016 at 001-02 (Jan. 2020 FDA news release)).

v. The Relationship Agreement

170. The Relationship Agreement that is part of the Transaction Documents defines the "e-Vapor business" to include both cig-a-like and pod products. (PX1276 (Altria/JLI) at 009 ("'e-Vapor Business' means business activities and operations relating to vapor-based electronic nicotine delivery systems (including vaporizers and e-cigarettes that create an aerosol, vapor or other gaseous form that the user inhales) other than Heat-not-Burn Nicotine Delivery Systems")).

2. Relevant Geographic Market

171. The relevant geographic market in this case is the United States. (JX0004 (Additional Joint Stipulations of Law and Fact at 001 ¶ 1)).

G. Market Share and Concentration

1. Pre-Transaction

172. Complaint Counsel's expert witness, Dr. Dov Rothman, calculated market shares based on unit sales of closed system consumables in pods, cartridges, and disposables. (PX7048 (Rothman Trial Dep. at 25)). Dr. Rothman used STARS data, which covers shipments from wholesalers to retailers, to calculate market shares. (PX7048 (Rothman Trial Dep. at 25); *see* PX5000 (Rothman Expert Report at 108 (Ex. 3a)). Dr. Rothman also used Nielsen Syndicated Major Market data to calculate market shares. (PX5000 (Rothman Expert Report at 109, Ex. 3b)).

173. Information Resources, Inc. ("IRI") is a data compiler company that tracks retail sales of products, including e-vapor products and traditional cigarettes. (Robbins (JLI) Tr. 3243-44; Begley (Altria) Tr. 1108; Gifford (Altria) Tr. 2732-33; PX7039 (Robbins (JLI) Dep. at 28-29)). Altria and JLI utilize IRI data to project their respective market shares in the United States. (Begley (Altria) Tr. 1108; Gifford (Altria) Tr. 2732-33; Robbins (JLI) Tr. 3243). IRI projected data is an aggregated view of more than 80,000 sample stores out of a universe of more than 350,000 stores that sell tobacco products. IRI projects total retail sales based on this representative sample of stores. (RX1217 (Murphy Expert Report at 008-09 ¶ 12 n.17)).

174. Respondents' expert witness, Dr. Kevin Murphy, calculated market shares based on IRI data provided to the FTC by Altria ("IRI Projected Data") for device unit sales and cartridge unit sales by volume. (RX1217 (Murphy Expert Report at 008-09 ¶ 12 n.17, 18)).

175. Dr. Rothman measured concentration in the market for closed system e-cigarettes sold in the United States using the Herfindahl-Hirschman Index ("HHI") as described in the

Horizontal Merger Guidelines. (PX7048 (Rothman Trial Dep. at 24-25); PX5000 (Rothman Expert Report at 042-43 ¶¶ 86-89); PX9098 (Horizontal Merger Guidelines) § 5.3 at 021-22).

176. To calculate the HHI and measure market concentration before the Transaction, Dr. Rothman used market shares based on units of closed system consumables, including cartridges, pods, and disposables sold by Altria, JLI, ITG, JTI, NJOY, and Reynolds in the 12-month period from October 2017 through September 2018, which was before Altria removed e-cigarette products from the market. (PX7048 (Rothman Trial Dep. at 24-26); PX5000 (Rothman Expert Report at 042 ¶ 87)).

177. Dr. Rothman calculated that Altria had a 10.1 percent market share among closed system products, as measured in the 12-month period from October 2017 to September 2018. (PX5000 (Rothman Expert Report at 043 ¶ 89, Tbl. 2)).

178. During the 12-month period that Dr. Rothman used to measure pre-Transaction HHI, the total market share of e-cigarette cartridge sales volume for cig-a-likes declined rapidly, falling from a majority (59 percent) in January 2018 to a minority (19 percent) shortly before Altria discontinued sales of MarkTen. (RX1217 (Murphy Expert Report at 062 ¶ 80)).

179. During the 12-month period that Dr. Rothman used to measure pre-Transaction HHI, in comparing cig-a-like versus pod-based device volume sales, the total market share of pod devices increased from 20 percent in October 2017 to over 50 percent by September 2018. (RX1217 (Murphy Expert Report at 028-29 ¶ 41, Fig. IV.2) (devices)).

180. By September 2018, Altria's share of the e-cigarette market was 7.5%, as measured by sales of units. (PX1127 (Altria) at 003).

181. In 2018, 90 percent of Altria's closed system cartridge unit sales were from its MarkTen cig-a-likes. (RX1217 (Murphy Expert Report at 008-09 ¶ 12) (citing IRI Projected Data); Murphy Tr. 3106-07; *see also* PX7048 (Rothman Trial Dep. at 174) (Elite never had more than one percent of the share of closed system market.)).

182. Dr. Rothman acknowledges that in November 2017, the monthly cartridge volume share for cig-a-likes was 80 percent and the monthly cartridge volume share for pod-based vaporizers was 20 percent and that "[t]wo years later, those ratios were reversed." (PX7046 (Rothman Dep. at 224)).

183. Dr. Rothman acknowledges that between 2017 and 2018, Altria's share of unit sales and revenue in the e-cigarette market went down from about 15 percent to about 8 percent. (PX7048 (Rothman Trial Dep. at 46)).

2. Post-Transaction

184. To calculate the HHI and measure market concentration after the Transaction, Dr. Rothman assumed Altria's share would be reallocated to the remaining competitors in proportion to the competitors' shares. (PX7048 (Rothman Trial Dep. at 26-27); PX5000 (Rothman Expert Report at 042 ¶ 88)). He then calculated the change in HHI as the difference between the HHI after the Transaction, as reallocated, and the HHI before the Transaction. (PX7048 (Rothman Trial Dep. at 27); PX5000 (Rothman Expert Report at 042 ¶ 88)).

185. Dr. Murphy's analysis of sales volumes from August 2017 to August 2020, comparing all cig-a-likes, Altria cig-a-likes (Mark Ten and Green Smoke cig-a-like products) and non-Altria cig-a-likes, shows that as Altria's sales declined following the discontinuation of its cig-a-like products, sales of rival cig-a-like products increased by a nearly equal magnitude, which shows that sales lost by Altria's cig-a-likes diverted to other cig-a-likes, not to pod-based products. (RX1217 (Murphy Expert Report at 068-69, 082, 083 ¶¶ 88, 113, 115, Fig. VI.3); Murphy Tr. 3118).

186. Dr. Rothman's assumption that Altria's share would be reallocated to the remaining competitors in proportion to the competitors' shares accounts for 94 percent of his calculated increase in market concentration. (RX1217 (Murphy Expert Report at 088-89 ¶ 125 & n.220)).

187. Dr. Murphy used IRI Projected Data for cartridge volume in units and calculated that the HHI for all closed system e-vapor products decreased by nearly 500 points from October 2018 to September 2020. (RX1217 (Murphy Expert Report at 051-52 ¶ 68)).

188. Dr. Rothman does not dispute that post-Transaction, "HHI levels are . . . lower than they were prior to December 2018." (PX7048 (Rothman Trial Dep. at 97)).

H. Regulation of E-Vapor Products by the FDA

1. Background

189. The FDA has the authority to regulate tobacco products pursuant to the Family Smoking Prevention and Tobacco Control Act (the "Tobacco Control Act"), passed in 2009, which amended the Food, Drug, and Cosmetic Act to bring tobacco products under the FDA's purview. (Pub. L. No. 111-31, 123 Stat. 1776 (2009); Murillo (Altria/JLI) Tr. 2901-02; PX8005 (Graham (NJOY) Decl. at 001-02 ¶ 7)).

190. Under the Tobacco Control Act, regulated tobacco products sold in the United States as of February 15, 2007, are "grandfathered products" and may be marketed without FDA premarket review. (Garnick (Altria) Tr. 1685-86, 1688; PX8009 (Garner (Reynolds) Decl. at 002 ¶ 7); *see also* 21 U.S.C. § 387j(a)).

191. "New tobacco products" – meaning those that were not marketed in the United States as of February 15, 2007, or any significant modification of a grandfathered product – are subject

to the Food, Drug, and Cosmetic Act's requirement of premarket review. (21 U.S.C. § 387j(a)(1); *see also* Garnick (Altria) Tr. 1685-86; PX8009 (Garner (Reynolds) Decl. at 002 ¶ 8)).

192. E-cigarettes were not included in the original list of tobacco products subject to FDA regulation under the Tobacco Control Act; however, Congress authorized the FDA to issue regulations deeming additional categories of tobacco products subject to the Tobacco Control Act. (21 U.S.C. § 387a(b); *see also* Murillo (Altria/JLI) Tr. 2903-05).

193. For products that were subject to the FDA's original regulatory authority and were introduced or modified after February 2007, there are three regulatory pathways for manufacturers to obtain marketing authorization, set forth below (21 U.S.C. § 387j(a)(2)):

(a) A manufacturer can file a substantial equivalence report for a new product that is "substantially equivalent" to a tobacco product that was marketed on the grandfather date or to a product that was previously found substantially equivalent. This requires showing that the product has the same characteristics – meaning the same materials, design, and other features – as the predicate product or that the different characteristics do not raise different questions of public health. (Garnick (Altria) Tr. 1685-86; PX8005 (Graham (NJOY) Decl. at 002 ¶ 11; PX8009 (Garner (Reynolds) Decl. at 002-03 ¶ 10)). That is the pathway used by most cigarettes and smokeless tobacco products. (Garnick (Altria) Tr. 1686).

(b) A manufacturer can file an exemption request if "the change to the tobacco product is minor and that change only involves a change to an additive in a tobacco product that can be sold under the [Food, Drug, and Cosmetic Act]." (PX8005 (Graham (NJOY) Decl. at 002 ¶ 12); *see also* PX8009 (Garner (Reynolds) Decl. at 002 ¶ 10)). Such exemptions are "rare." (PX8005 (Graham (NJOY) Decl. at 002 ¶ 12); *see also* Murillo (Altria/JLI) Tr. 2915-16 (describing this as a "small pathway")). Exemptions are generally only available to products that were on the market in 2007. (Murillo (Altria/JLI) Tr. 2915-16).

(c) If a product does not satisfy the requirements of the two other pathways, a manufacturer must file a premarket tobacco product application ("PMTA") under 21 U.S.C. § 387j, which requires showing that the new tobacco product would be "appropriate for the protection of the public health." (PX8005 (Graham (NJOY) Decl. at 002, 003 ¶¶ 10, 14); PX8009 (Garner (Reynolds) Decl. at 002-03 ¶ 10); Garnick (Altria) Tr. 1686). This involves a "rigorous analysis" and requires extensive scientific studies, ranging from toxicological assessments to clinical studies, which "take[] a lot of money and a lot of time." (Garnick (Altria) Tr. 1686).

2. The Deeming Rule

194. In April 2014, the FDA announced its intention to regulate e-cigarettes through rulemaking that would deem such products subject to its regulatory authority under the Tobacco Control Act. (79 Fed. Reg. 23,142, 23,143 (Apr. 25, 2014); Murillo (Altria/JLI) Tr. 2904).

195. In May 2016, following extensive public comments on the rulemaking referenced in F. 194, the FDA issued a final rule. (81 Fed. Reg. 28,974 (May 10, 2016); Murillo (Altria/JLI) Tr. 2904-05). That regulation, which has become known as the "Deeming Rule," declared all products (other than accessories) that met the Tobacco Control Act's definition of a "tobacco product" to be subject to the FDA's authority under the Act, effective August 8, 2016. (81 Fed. Reg. 28,974, 29,102; PX8005 (Graham (NJOY) Decl. at 002 ¶ 8, 003 ¶ 17); PX8009 (Garner (Reynolds) Decl. at 003-04 ¶¶ 13-14)). At present, essentially all tobacco products that can be regulated by the FDA are regulated, including e-cigarettes. (PX8005 (Graham (NJOY) Decl. at 002 ¶ 8); PX8009 (Garner (Reynolds) Decl. at 004 ¶ 15); Garnick (Altria) Tr. 1687-88).

196. As a result of the Deeming Rule, any deemed product that was not marketed legally as of February 15, 2007, is considered a "new tobacco product" subject to the requirement of FDA premarket review. This means that manufacturers of these products must secure authorization under one of the three regulatory pathways outlined above in F. 193. (PX8005 (Graham (NJOY) Decl. at 002 ¶ 9); PX8009 (Garner (Reynolds) Decl. at 004 ¶ 16); *see also* Garnick (Altria) Tr. 1685-86).

197. In practical effect, the Deeming Rule subjects all e-cigarette products to the third pathway described in F. 193 – the PMTA requirement. This is because "no [e-vapor] product has yet to be identified" as a product that had been marketed legally "as of February 15, 2007." (PX8009 (Garner (Reynolds) Decl. at 004-05 ¶ 18); Garnick (Altria) Tr. 1685-86). Thus, "[t]here are no clearly identified grandfathered vapor products that [can] serve as the predicate for a substantial equivalence application. Further, the FDA has stated that manufacturers of [e-vapor products] will face difficulty demonstrating a product is substantially equivalent to a combustible cigarette or smokeless tobacco product." (PX8005 (Graham (NJOY) Decl. at 002-03 ¶ 13)).

198. "To prevent [e-vapor] manufacturers from immediately having to remove all newly deemed products from the market upon the effective date of the . . . Deeming Rule," the FDA announced that it would delay enforcement of the Deeming Rule for several years for those products that were on the market as of August 8, 2016, to give manufacturers adequate time to prepare PMTAs. (81 Fed. Reg. at 28,978; PX8009 (Garner (Reynolds) Decl. at 005 ¶ 19)). In other words, the FDA established a grace period permitting then-existing e-cigarette products to "stay on the market, provided [the e-vapor manufacturers] filed a PMTA for [those] product[s] by a certain date." (Garnick (Altria) Tr. 1687).

199. The Deeming Rule has fundamentally changed the e-vapor industry (PX7018 (Schwartz (Altria) Dep. at 30-31)), including by imposing two important practical implications. First, all existing e-cigarette manufacturers must secure PMTA approval from the FDA in order to keep their product on the market. (Garnick (Altria) Tr. 1688-90; PX7009 (Burns (JLI) IHT at 74) ("Getting PMTA approval is critical to stay in the marketplace.")). Second, the Deeming Rule effectively "froze[]" e-cigarette product offerings as they existed on August 8, 2016. (Garnick (Altria) Tr. 1699; *see also* Jupe (Altria) Tr. 2218 (describing the market for e-vapor products as "locked down")). By limiting its exercise of enforcement discretion

to those e-vapor products that were on the market as of August 8, 2016, the FDA has "prevent[ed] new products from readily entering." (PX8005 (Graham (NJOY) Decl. at 003 ¶ 19)).

200. As a result of the Deeming Rule, while manufacturers could acquire (or sell) product lines that existed as of August 8, 2016, they could not introduce new products into the market without going through the PMTA process. (Garnick (Altria) Tr. 1690, 1699).

201. The FDA did not provide clear guidance under the Deeming Rule as to what changes a manufacturer could or could not make to a product without obtaining premarket authorization through the PMTA process, which created some uncertainty. (Garnick (Altria) Tr. 1691). The Deeming Rule includes in the definition of "new tobacco products," "any modification (including a change in design, any component, any part, or any constituent, . . . or in the content, delivery or form of nicotine, or any other additive or ingredient) of a tobacco product[.]" (21 U.S.C. § 387j(a)(1)(B)).

202. In January 2017, the FDA issued guidance for vape shops stating that "[m]odifying a product would generally result in a new tobacco product for which a vape shop is required to seek premarket authorization." (PX1593 (Altria) at 008). The guidance qualified that the FDA would not enforce this requirement for changes that were "consistent with the specifications provided by the original manufacturer," on the assumption that these modifications would not "alter the performance of the tobacco product as described or intended by the original manufacturer." (PX1593 (Altria) at 008).

203. In the absence of specific guidance from the FDA for e-vapor products, apart from those sold in vape shops, manufacturers, including Altria, attempted to apply vape shop guidance to cig-a-likes and pod-based products. (Garnick (Altria) Tr. 1691-93).

204. Altria interpreted the Deeming Rule to generally prohibit marketing e-vapor products having any significant modifications from the products that were on the market as of August 8, 2016, without first receiving regulatory approval through the PMTA process. (Garnick (Altria) Tr. 1691-92).

205. Altria believed that "if the modification changed the aerosol delivery, changed the composition or changed consumer exposure or usage behavior, it was a new product" within the meaning of the Deeming Rule. (PX7026 (Gardner (Altria) Dep. at 41-42); *see also* Murillo (Altria/JLI) Tr. 2927-28).

206. Altria believed that adding nicotine salts to a product would be a significant change that would "absolutely" require a PMTA. (Murillo (Altria/JLI) Tr. 2927-28, 3069).

207. Any new tobacco product that is required to have premarket authorization by the FDA and does not have such authorization is considered an adulterated product. (21 U.S.C. § 387b(6); *see also* PX8009 (Garner (Reynolds) Decl. at 003 ¶ 12)). Introducing adulterated products into the market is prohibited by statute and violations of this prohibition can result

in both civil and criminal penalties. (21 U.S.C. §§ 331, 333; *see also* PX8009 (Garner (Reynolds) Decl. at 003 ¶ 12)).

3. Recognition of Continuum of Risk

208. In July 2017, the FDA announced "a new comprehensive plan for tobacco and nicotine regulation that [would] serve as a multi-year roadmap to better protect kids and significantly reduce tobacco-related disease and death." This was a significant policy announcement. (PX9058 (FDA) at 001; *see also* Murillo (Altria/JLI) Tr. 2905-06).

209. The centerpiece of the FDA's new regulatory approach (F. 208), was a recognition that nicotine "is delivered through products that represent a continuum of risk and is most harmful when delivered through smoke particles in combustible cigarettes." (PX9058 (FDA) at 001; *see also* Garnick (Altria) Tr. 1694-97). Nicotine replacement therapy was on the other end of the risk continuum. (Murillo (Altria/JLI) Tr. 2905-06; Jupe (Altria) Tr. 2222-23).

210. The objective of the FDA's new regulatory approach (F. 208) was to "try to move people down th[e] continuum of risk," (Murillo (Altria/JLI) Tr. 2905-06) by helping smokers "migrate" from combustible products "to noncombustible tobacco products." (Garnick (Altria) Tr. 1694-95).

211. The FDA's new regulatory approach (F. 208) is known by the shorthand term "continuum of risk." (Murillo (Altria/JLI) Tr. 2905-06).

212. The idea behind the FDA's continuum of risk policy was to get smokers to migrate away from noncombustible tobacco products, if they cannot or will not quit smoking. Because this required a pool of products for smokers to migrate to, Altria was encouraged that the FDA would be supportive of noncombustible tobacco products, such as e-vapor products. (Murillo (Altria/JLI) Tr. 2905-06; Garnick (Altria) Tr. 1694-95).

213. On July 27, 2017, the FDA issued a statement indicating that it would tighten restrictions on cigarettes, while working to facilitate the success of innovative reduced-risk products, such as e-vapor, that could convert adult smokers away from combustible cigarettes and thereby promote overall public health. (PX9058 (FDA) at 001-02).

214. The July 27, 2017 FDA statement noted that policies to "help smokers quit cigarettes" must also "protect kids" and that the FDA would therefore be assessing those two goals together, including by seeking input on the role that flavors in e-cigarettes "play in attracting youth and may play in helping some smokers switch to potentially less harmful forms of nicotine delivery." (PX9058 (FDA) at 001-02).

4. Premarket Tobacco Product Applications

215. The PMTA process is an "expensive, time-consuming process." (Quigley (Altria) Tr. 2008-09; *see also* Farrell (NJOY) Tr. 358 (agreeing that PMTAs cost millions of dollars); Begley

(Altria) Tr. 1039, 1045 (explaining that PMTAs involve "lots of" "really long-term comprehensive, complicated studies"); Willard (Altria) Tr. 1382 ("[I]t was a very expensive process"); Garnick (Altria) Tr. 1699 (describing the PMTA process as "very expensive and time-consuming"); Schwartz (Altria) Tr. 1866 (stating that the PMTA process is "a very costly, protracted process"); Jupe (Altria) Tr. 2218 (explaining that the PMTA process is "not dissimilar to kind of the . . . process of getting a new [pharmaceutical] drug or a medical device on the market"); King (PMI) Tr. 2457 (describing IQOS PMTA as a "very heavy application"); PX8005 (Graham (NJOY) Decl. at 004 ¶ 20) ("A PMTA is a very substantial undertaking[.]")).

a. Standards for PMTA Approval

216. To obtain FDA authorization for an e-vapor product pursuant to a PMTA, a manufacturer must demonstrate that the product is "appropriate for the protection of the public health." (21 U.S.C. § 387j(c)(2)(A)).

217. For pharmaceuticals, the standard for approval is "safe and effective." Because "tobacco products are not inherently and cannot be safe and effective, . . . a different standard had to be devised." Congress adopted the standard of "appropriate for the protection of the public health." This "protection of the public health" standard is unique to tobacco products. (Murillo (Altria/JLI) Tr. 2919).

218. In determining whether a manufacturer has met the protection of public health standard, the Tobacco Control Act requires the FDA to weigh: (1) "the risks and benefits to the population as a whole, including users and nonusers of tobacco products"; (2) the "likelihood that existing users of tobacco products will stop using such products"; and (3) the "likelihood that those who do not use tobacco products will start using such products." (21 U.S.C. § 387g(a)(3)(B)(i); *see also* Murillo (Altria/JLI) Tr. 2919, 3032).

219. Under the PMTA framework, a manufacturer must demonstrate that the product (1) "reduce[s] the constituents of harm that smokers are taking in when they're smoking"; (2) "reduce[s] the risk" relative to other tobacco products; and (3) will actually "convert" smokers without having undue unintended effects on the non-tobacco-using population. (Murillo (Altria/JLI) Tr. 2917-20; *see also* PX9027 (FDA) at 026-27).

220. Industry participants understand that the standards for successfully obtaining a PMTA are "rigorous." (Garnick (Altria) Tr. 1685-86; *see also* PX8009 (Garner (Reynolds) Decl. at 011-12 ¶ 37)). "The FDA will grant a PMTA only if the manufacturer meets a very demanding standard." (PX8005 (Graham (NJOY) Decl. at 003 ¶ 14); *see also* PX7017 (Magness (Altria) Dep. at 89) (describing a PMTA as "a very high bar")). The "outcome" of the FDA approval process "is uncertain." (PX8005 (Graham (NJOY) Decl. at 004 ¶ 23)).

b. PMTA Requirements

221. The specific required elements of a PMTA, which are outlined in the Food, Drug, and Cosmetic Act, are "expansive." (PX8005 (Graham (NJOY) Decl. at 004 ¶ 21); *see also*

RX2019 (Altria) at 017 (summarizing application requirements); Murillo (Altria/JLI) Tr. 2915-21 (discussing application elements)).

222. The PMTA process requires a manufacturer to submit "full reports of all information," including that which is "known" or "should reasonably be known" to the applicant, "concerning investigations which have been made to show the health risks of such tobacco product and whether such tobacco product presents less risk than other tobacco products." (21 U.S.C. § 387j(b)(1)(A)).

223. The PMTA process requires manufacturers to produce, among other things, "a full statement of the components, ingredients, . . . and . . . principles of operation"; "a full description of the methods used in, and the facilities . . . used for, the manufacture" of the product; "samples of such tobacco product"; and "specimens of the labeling proposed to be used." (21 U.S.C. § 387j(b)(1)(B), (C), (E), (F)). There is also a catchall provision requiring manufacturers to produce "such other information relevant to the subject matter of the application as the [FDA] may require." (21 U.S.C. § 387j(b)(1)(G); *see also* PX8009 (Garner (Reynolds) Decl. at 009 ¶ 30)).

224. The FDA requires, as part of showing that an e-vapor product is appropriate for the protection of public health, that the manufacturer address in the PMTA the "relative health risks" compared to "other tobacco products on the market," including both cigarettes and "other [e-cigarettes]." (PX9027 (FDA) at 026-27; *see also* Garnick (Altria) Tr. 1603-05 (explaining that manufacturers must show that the product is less risky than cigarettes and address the risk relative to "other products of the same category")).

225. In June 2019, three years after the Deeming Rule was issued, the FDA released a final guidance document offering detailed instructions for e-cigarette PMTAs. (Murillo (Altria/JLI) Tr. 2908-09; *see also* PX9027 (FDA)). The guidance document instructs applicants to submit a wide variety of information ranging from scientific literature to non-clinical (not on human subjects) and clinical (on human subjects) studies. (PX9027 (FDA) at 026-27).

226. Among other things, the June 2019 guidance (F. 225) requires:

(a). "Stability information," including the "established shelf life of the product and changes in pH and constituents (including [harmful or potentially harmful constituents] and other toxic chemicals) over the lifespan of the product," and "how stability is affected by [different] storage conditions," (PX9027 (FDA) at 030; Murillo (Altria/JLI) Tr. 3071-72);

(b). A "complete list of uniquely identified constituents or chemicals . . . contained within the product or delivered by the product," including analysis of 33 constituents identified by the FDA, such as formaldehyde and nickel, (PX9027 (FDA) at 031-32);

(c). A "full assessment of the toxicological and pharmacological profile" of the product including "[t]oxicology data from the literature," "[a]nalysis of constituents . . . under both intense and non-intense use conditions," and "[c]omputational modeling of the toxicants," (PX9027 (FDA) at 037-38);

(d). A "literature review" of relevant published studies, including a summary describing each study's "design" and "statistical analysis," (PX9027 (FDA) at 035-36); and

(e). Evaluations of "how consumers perceive product harms" and the "topography of how individual users consume the product (*e.g.*, the number of puffs, puff duration, puff intensity, duration of use)." (PX9027 (FDA) at 041-42).

227. A final PMTA is "voluminous." (Garnick (Altria) Tr. 1607-08). For example, the PMTA for IQOS, a heat-not-burn device manufactured by Philip Morris International, was "close to 2 million pages." (PX7017 (Magness (Altria) Dep. at 87-88); *see also* Garnick (Altria) Tr. 1608).

c. Time Required for PMTA Preparation

228. The level of "product testing [required for a PMTA] takes a significant amount of time and is a process that cannot be sped-up." (PX8005 (Graham (NJOY) Decl. at 005 ¶ 28); *see also* Garnick (Altria) Tr. 1699 (describing the process as "expensive" and "time-consuming"); Quigley (Altria) Tr. 2009; Schwartz (Altria) Tr. 1866 (referring to the PMTA process as "costly" and "protracted"); Gardner (Altria) Tr. 2582-83 (describing multi-year process for obtaining FDA approval); Begley (Altria) Tr. 1039, 1045 (describing multiple scientific studies that must be completed for a PMTA)).

229. The studies required for a PMTA generally cannot begin until a manufacturer has reached "design lock," meaning that it has "achieved a design for the new product that [is] not going to change." (Murillo (Altria/JLI) Tr. 2923-24). Design changes can cause delay and require repeating previous studies. (Murillo (Altria/JLI) Tr. 2930; PX7000 (Garnick (Altria) IHT at 25-26) (explaining that before starting PMTA studies, "you need to really lock down the design of the product" and that "if you don't do that and you start engaging in studies and the designers change the product, you are going to have to do the studies all over again")).

230. In limited instances, a manufacturer that discovers design flaws during the testing for a PMTA may be able to save some time using a process known as "bridging," which means "building a bridge from the prior data to a new product." (Gardner (Altria) Tr. 2572; *see also* Murillo (Altria/JLI) Tr. 3004 ("[T]he concept of bridging is that you don't have to redo all of the work required for a PMTA for each change or each SKU [(stock keeping unit)], that you say, well, these things are sufficiently similar to each other, and here's how we prove that, and you should rely on this underlying test.")). A manufacturer may be able to use study results for research on an e-liquid with one nicotine concentration for an e-liquid with a different nicotine concentration. (PX8005 (Graham (NJOY) Decl. at 005-06 ¶ 32)).

231. Bridging prior data to a new product requires a substantial degree of similarity in the performance of the products, as well as the performance of "enforceability testing" to demonstrate that data associated with one product is applicable to another. (PX7027 (Murillo (Altria/JLI) Dep. at 74-75, 161-62); *see also* Gardner (Altria) Tr. 2572-73 (explaining that to get the benefit of bridging, the "two products [need to] behave[] the same in delivering an aerosol"); Murillo (Altria/JLI) Tr. 3003-04 (explaining that bridging requires "prov[ing]" that two products "are sufficiently similar to each other")).

232. After a manufacturer has reached design lock in the development process, it takes "approximately two years" of scientific research to prepare a PMTA. (Murillo (Altria/JLI) Tr. 2924-25; Gardner (Altria) Tr. 2582-83).

233. "Many studies [for a PMTA] can take 6-12 months or longer . . . ." (PX8005 (Graham (NJOY) Decl. at 005 ¶ 28); *see also* Garnick (Altria) Tr. 1661 (explaining that some of the studies can "take months and months"); Murillo (Altria/JLI) Tr. 2925 (explaining that testing whether a product is stable for 12 months takes 12 months)).

234. For Reynolds, "the planning, research and final application [for [redacted] PMTAs] took nearly [redacted] years to complete." (PX8009 (Garner (Reynolds) Decl. at 018 ¶ 57), *in camera*). Reynolds estimated that studies took "from one (1) year to three (3) years to complete, which includes planning, protocol development, securing a contract laboratory to perform work, sample generation, testing conducted by the laboratory, data evaluation, and generation of the final reports." (PX8009 (Garner (Reynolds) Decl. at 015 ¶ 45)).

d. PMTA Costs

235. Conducting years of scientific studies for a PMTA is a significant expense. (Farrell (NJOY) Tr. 358; Willard (Altria) Tr. 1382; Garnick (Altria) Tr. 1699; Schwartz (Altria) Tr. 1866; Quigley (Altria) Tr. 2009; PX7046 (Rothman Dep. at 204)).

236. Manufacturers must submit a PMTA for each product or stock keeping unit ("SKU"), and the application can cost approximately $5 to $8 million per SKU. Because product lines with different flavors and nicotine strengths can have ten or more SKUs, a PMTA for a single product line easily can cost up to $50 to $100 million. (Murillo (Altria/JLI) Tr. 2950-51).

237. For Reynolds, the total cost to submit PMTAs for its Vuse Solo products was approximately [redacted] million dollars. (PX8009 (Garner (Reynolds) Decl. at 018 ¶ 56), *in camera*; *see also* PX7037 (Huckabee (Reynolds) Dep. at 120), *in camera* (agreeing that Reynolds' PMTAs cost [redacted] millions of dollars")).

238. NJOY's "PMTA is . . . likely to cost at least tens of millions of dollars." (PX8005 (Graham (NJOY) Decl. at 004 ¶ 20); *see also* Farrell (NJOY) Tr. 358 (acknowledging that PMTAs cost millions of dollars)).

239. As of April 2020, ITG Brands' sister company, Fontem, had spent about [redacted] million preparing PMTA submissions for the companies' blu brand and estimated that, when the applications were complete, the total would be approximately [redacted] million. (PX8010 (Folmar (ITG) Decl. at 002 ¶ 7), *in camera*).

240. The PMTAs for JLI's JUUL products cost over $100 million. (Murillo (Altria/JLI) Tr. 3074; PX7009 (Burns (JLI) IHT at 71)).

241. According to Altria's cost estimates, PMTAs would cost $80 to $90 million for the MarkTen cig-a-like (PX1400 (Altria) at 010); $9 to $14 million for the MarkTen Bold cig-a-like (PX1400 (Altria) at 011), and $42 to $50 million combined for Elite and an improved Elite, referred to internally at Altria as Elite 2.0 (F. 386). (PX1400 (Altria) at 005, 007).

e. Expertise Required to Prepare PMTAs

242. "[V]ery specific expertise[]" is required to generate the underlying studies and to compile a PMTA. (Murillo (Altria/JLI) Tr. 2975).

243. The relevant tests for a PMTA "must be performed by accredited labs. These labs are limited in number and capacity." (PX8005 (Graham (NJOY) Decl. at 004 ¶ 26); *see also* Gardner (Altria) Tr. 2557; PX7027 (Murillo (Altria/JLI) Dep. at 80) ("[T]here's a very small number of laboratories that are capable of doing validated methods with respect to vapor products."). "[E]ven with . . . pre-existing relationships [with certain labs], NJOY has faced challenges finding available [p]roviders with the capacity to conduct timely research on its products." (PX8005 (Graham (NJOY) Decl. at 005 ¶ 27)).

244. "Studies such as in vitro toxicology studies are also extremely difficult to perform with few labs available to test [e-vapor] products." (PX8005 (Graham (NJOY) Decl. at 005 ¶ 29)).

245. Altria was able to locate only two external companies with the capability and capacity for e-vapor PMTA work. (PX7017 (Magness (Altria) Dep. at 80)). For some studies, such as gas chromatography/mass spectrometry fingerprinting of e-vapor aerosols, "[t]here were no contract labs available to do this work" in 2018. (Gardner (Altria) Tr. 2616).

246. The relevant components of the PMTA application require "[d]ozens and dozens of scientists at [every] stage[]," ranging from chemists and physicists to toxicologists and clinicians. (Murillo (Altria/JLI) Tr. 2918-19). Altria's core team for a given PMTA would have "25 [people], includ[ing] chemists, toxicologists, [a] battery engineer, [a] quality professional who could speak to the manufacturing system, . . . a clinical scientist or two, and then . . . some behavioral scientists." (PX7017 (Magness (Altria) Dep. at 57)).

247. Scientists working on a PMTA must possess specific expertise. (Murillo (Altria/JLI) Tr. 2975). "Conducting human subject studies . . . requires specialist expertise from Clinical Research Organizations . . . and organizations with relevant experience in behavioral research and surveys." (PX8005 (Graham (NJOY) Decl. at 004 ¶ 26)). In addition, to "project the impact of the product on the population, an [e-vapor] manufacturer needs to

develop or have access to a population model." (PX8005 (Graham (NJOY) Decl. at 005 ¶ 31)). "These tools are not publicly available" and they are "difficult to procure or develop." (PX8005 (Graham (NJOY) Decl. at 005 ¶ 31)).

248. Many manufacturers of e-vapor products lack "the regulatory experience to oversee the production of a PMTA that is ultimately likely to be favorably acted upon by FDA." (PX8005 (Graham (NJOY) Decl. at 004 ¶ 20)). Because the PMTA requirements are different from the premarket approval regime applicable to drugs and medical devices, "there are few individuals and counsel familiar with the PMTA process." (PX8005 (Graham (NJOY) Decl. at 004 ¶ 21)).

f. Evolution of PMTA Deadlines

249. The Deeming Rule originally required manufacturers to submit PMTAs for on-market e-vapor products by August 8, 2018, which was 24 months after the effective date of the Deeming Rule. (Murillo (Altria/JLI) Tr. 2943-44; PX8009 (Garner (Reynolds) Decl. at 005 ¶ 19)).

250. In May 2017, the FDA announced that it was extending the original PMTA deadline by three months, from August 2018 to November 2018. (PX8009 (Garner (Reynolds) Decl. at 005-06 ¶ 20)).

251. In July 2017, the FDA extended the PMTA deadline by nearly four years, from November 2018 to August 8, 2022. (PX8009 (Garner (Reynolds) Decl. at 006 ¶ 21)).

252. In March 2019, the FDA announced its intent to modify the PMTA deadline for certain flavored e-vapor products (all flavors other than tobacco, menthol, and mint) by moving it back one year, from August 8, 2022 to August 8, 2021. (RX2012 (FDA) at 003; Murillo (Altria/JLI) Tr. 2945; PX8005 (Graham (NJOY) Decl. at 003 ¶ 18)).

253. In March 2018, certain public health organizations filed a lawsuit challenging the FDA's extension of the PMTA deadline to August 2022. (Murillo (Altria/JLI) Tr. 2944). The challengers prevailed. In the summer of 2019, the United States District Court for the District of Maryland accelerated the deadline by two years, ordering the FDA to require all PMTAs for newly deemed products to be submitted by May 12, 2020. (Murillo (Altria/JLI) Tr. 2945; PX8009 (Garner (Reynolds) Decl. at 006-07 ¶ 23); *see also Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 498 (D. Md. 2019) (vacating 2017 Guidance); *Am. Acad. of Pediatrics v. FDA*, 399 F. Supp. 3d 479, 481 (D. Md. 2019) (imposing new deadline)).

254. In the spring of 2020, the PMTA deadline was extended once more when the disruption caused by COVID-19 forced manufacturers and the FDA to work remotely. The ultimate PMTA deadline for on-market e-vapor products was September 8, 2020. (Murillo (Altria/JLI) Tr. 2945; *Am. Acad. of Pediatrics v. FDA*, No. 18-cv-883, Dkt. No. 182 (D. Md. April 22, 2020) (Order)).

255. A manufacturer that has filed a PMTA for a product by the deadline can continue to market that product pending the FDA's review of its submission. (Murillo (Altria/JLI) Tr. 3028-29).

256. If a manufacturer did not submit a PMTA for an on-market product by the September 2020 deadline, the manufacturer was required to remove that product from the market. (Murillo (Altria/JLI) Tr. 2946).

g. Time for PMTA Review by the FDA

257. After a manufacturer submits a PMTA, it takes years for the FDA to review the application and determine whether to approve the product. (Jupe (Altria) Tr. 2301 (explaining that the FDA's review of PMTA applications takes "a long time," most likely at least 18 months to two years if not longer); Garnick (Altria) Tr. 1661 ("[I]t takes the FDA a long time to review a PMTA for an e-vapor product."); Gardner (Altria) Tr. 2582-83 (observing that a year for FDA review would be "optimistic[]")).

258. The FDA can require manufacturers to submit supplemental information for their PMTAs, which can add time to the review process. (Jupe (Altria) Tr. 2222; PX7027 (Murillo (Altria/JLI) Dep. at 39)).

259. Before the September 2020 deadline, the FDA received at least a half million PMTAs for e-vapor products. (Murillo (Altria/JLI) Tr. 2932). Some of these applications have been pending for over two years. (Jupe (Altria) Tr. 2301). As of the time of trial, no e-vapor product had been approved. (Jupe (Altria) Tr. 2301; Garnick (Altria) Tr. 1608).

260. For tobacco products in product categories other than e-vapor that have previously received PMTA approval, the FDA's review took two to four years. PMI submitted a PMTA for its IQOS heat-not-burn product in May 2017 and the FDA did not approve the product until April 2019. (Garnick (Altria) Tr. 1661; PX8009 (Garner (Reynolds) Decl. at 013-14 ¶ 41); *see also* Murillo (Altria/JLI) Tr. 2908; PX7017 (Magness (Altria) Dep. at 282)). The application for Swedish Match, an oral tobacco product, took over four years for the FDA to approve. (PX7017 (Magness (Altria) Dep. at 86, 282)).

261. On October 12, 2021, the FDA announced the first authorization of an e-cigarette product pursuant to a PMTA, which authorized Reynolds' Vuse Solo cig-a-like device and tobacco-flavored cartridges. The FDA also issued ten marketing denial orders for Vuse flavored cartridges. The FDA stated it was "still evaluating [Reynolds'] application for menthol-flavored products under the Vuse Solo brand." FDA News Release, "FDA Permits Marketing of E-Cigarette Products, Marking First Authorization of its Kind by the Agency," https://www.fda.gov/news-events/press-announcements/fda-permits-marketing-e-cigarette-products-marking-first-authorization-its-kind-agency.

5. Conversion Potential

262. Conversion rates are a measure of the rate at which consumers that use a product stop smoking. (Gardner (Altria) Tr. 2586).

263. The potential of an e-vapor product to convert adult smokers away from combustible cigarettes is one of the factors that the FDA assesses in the determining whether an e-vapor product meets the standard of "[a]ppropriate for the protection of public health." (PX4149 (Altria) at 029; *see also* Quigley (Altria) Tr. 1986 (explaining that in determining whether the e-vapor product is appropriate for the protection of public health, the FDA considers the "relative risk reduction")).

264. Demonstrating the conversion capability "is a critical part of the evidence [Altria] ha[s] to produce" to the FDA to win PMTA approval. (Jupe (Altria) Tr. 2220).

265. Proof of conversion potential is "necessary to demonstrate" that an e-vapor product meets the "appropriate for the protection of public health" standard for FDA approval. (Gardner (Altria) Tr. 2586).

266. "[I]f adult smokers don't convert to the product, you're not reducing harm to the population and to the adult smokers," and from a regulatory perspective, "the product had no reason for being in the market." (Gardner (Altria) Tr. 2586; *see also* PX7017 (Magness (Altria) Dep. at 279) ("If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")).

267. Conversion potential is related to nicotine satisfaction. Smokers who are looking to switch to an e-vapor product need the product to provide nicotine satisfaction. (Gardner (Altria) Tr. 3089-90).

268. Conversion rates generally cannot be measured premarket. Therefore, for PMTA purposes, the focus is on establishing the product's ability to convert, or conversion potential. (Gardner (Altria) Tr. 2644-45; PX4149 (Altria) at 029).

269. The FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of public health. (Gardner (Altria) Tr. 2640-41).

270. In order to demonstrate conversion potential, it is not sufficient to show that smokers are using both e-vapor and traditional cigarettes. (Murillo (Altria/JLI) Tr. 2906-07; PX7015 (Gogova (Altria) Dep. at 126-27); PX7023 (Fernandez (Altria) Dep. at 79-80, 83)). That is because, "unless consumers actually switch to the product, there is no reduction of risk." (PX7026 (Gardner (Altria) Dep. at 242)). "They're just maintaining their cigarette consumption but adding something to it[.]" (Murillo (Altria/JLI) Tr. 2906-07).

6. FDA Statements in April/May 2018

271. On April 23, 2018, the FDA issued a statement announcing a "large-scale undercover nationwide blitz to crack down on the sale of e-cigarettes" to minors, online and in brick and mortar stores. (RX0155 (FDA) at 001-02).

272. The FDA's April 23, 2018 statement acknowledged "the possibility for . . . products like e-cigarettes . . . to provide a potentially less harmful alternative for currently addicted individual adult smokers who still want to get access to satisfying levels of nicotine without many of the harmful effects that come with the combustion of tobacco[,]" but further acknowledged the need "to step in to protect our kids" from "getting hooked" on more "novel forms of nicotine-delivery" products. (RX0155 (FDA) at 004). The FDA warned manufacturers that it would be taking additional steps to hold manufacturers "accountable" to make sure e-cigarettes "aren't getting into kids' hands." (RX0155 (FDA) at 002-04).

273. In April and May 2018, the FDA sent letters to five e-vapor manufacturers of pod-based products, including JLI, requiring each company "to submit important documents to better understand the reportedly high rates of youth use" of their products. These letters targeted pod-based products containing nicotine salts. Elite did not contain nicotine salts (F. 445) and Altria did not receive one of these letters. (RX0155 (FDA) at 003; *see also* RX0156 (FDA) at 001; Willard (Altria) Tr. 1369).

274. On May 17, 2018, the FDA issued a press release regarding the letters referenced in F. 273, which emphasized that the "agency plan[ned] to explore additional restrictions on the sale and promotion" of e-vapor products, including "measures on flavors/designs that appeal to youth." (RX0156 (FDA) at 002).

7. FDA Statement and Letters in September 2018

275. The FDA issued a statement demanding e-vapor manufacturers take "bold action" to address the FDA's concerns related to youth e-cigarette use on September 11, 2018 (the "September 11 Statement") and sent a letter on September 12, 2018 to five major e-vapor manufacturers including JLI and Altria (the "September 12 Letter"). (RX1921 (FDA) at 005-07; RX1120 (FDA) (letter to Altria); PX9051 (FDA) (letter to JLI)).

276. In the September 11 Statement, FDA Commissioner Gottlieb reiterated "that tobacco products exist on a continuum of risk"; and "that there are opportunities to move adult smokers down that ladder of harm." (RX1921 (FDA) at 008).

277. The FDA's September 11 Statement included the following points:

- The FDA would not "tolerate a whole generation of young people becoming addicted to nicotine as a tradeoff for enabling adults to have unfettered access to these same products." (RX1921 (FDA) at 003).

- The FDA was considering whether to "curtail the marketing and selling of flavored products." (RX1921 (FDA) at 004).

- The FDA was "re-examining the enforcement discretion we currently exercise for other e-cig[arette] products currently on the market without authorization." (RX1921 (FDA) at 006).

- The FDA was "especially focused on the flavored e-cigarettes" and was "seriously considering a policy change that would lead to the immediate removal of these flavored products from the market." (RX1921 (FDA) at 006).

278. The FDA's September 11 Statement concluded: "Let me be clear: Everything is on the table. This includes the resources of our civil and criminal enforcement tools." (RX1921 (FDA) at 007).

279. In the September 11 Statement, Commissioner Gottlieb explained that the FDA issued five letters to e-vapor manufacturers to put them "on notice." (RX1921 (FDA) at 006-07). Gottlieb called for manufacturers "to respond with forceful plans . . . or face regulatory consequences" and to take "bold action to reform their . . . practices." He reiterated the FDA's expectation that these manufacturers would bring those "robust plans" to the FDA in 60 days. (RX1921 (FDA) at 006-008).

280. In its September 12 Letter to Altria, the FDA noted that its spring "blitz" of retailers had uncovered "the illegal sale of MarkTen products to minors" and demanded that Altria take "prompt action[.]" (RX1120 (FDA) at 002-03).

281. The FDA's September 12 Letter advised Altria that the FDA was "reconsidering" its policy of limiting the exercise of enforcement discretion with respect to e-vapor products allowed under the Deeming Rule – *i.e.*, the FDA was raising the possibility that all e-vapor products, including those on the market before August 8, 2016, would need to be removed unless and until they received PMTA authorization. (RX1120 (FDA) at 002; *see also* Murillo (Altria/JLI) Tr. 2963 (recalling FDA's letter "made clear" that the options on the table included "accelerating the deadlines or taking products off the markets pending an application or approval")).

282. The FDA asked Altria to both meet with the FDA and respond in writing within 60 days with "a detailed plan . . . to address and mitigate widespread use by minors." The FDA listed "[r]emoving flavored products from the market until those products can be reviewed" by the FDA as part of the PMTA process as an example of what Altria could include as part of its plan. (RX1120 (FDA) at 003). Altria understood this comment to "strongly suggest[]" that it should remove flavored products from the market pending FDA review. (Willard (Altria) Tr. 1441).

283. The FDA's September 12 Letter, coming "from [Altria's] most important regulator[,]" was something that Altria took "very seriously." (Willard (Altria) Tr. 1322, 1437; PX7027 (Murillo (Altria/JLI) Dep. at 202) (Altria took the letter "extremely seriously.")).

284. Willard perceived the FDA Commissioner's letter as "pretty threatening," as the Commissioner was "essentially . . . saying, you're part of the problem, and I expect you to contribute to fixing it. I expect you to do it quickly and completely." (Willard (Altria) Tr. 1437, 1439).

285. Murillo could not "overstate the significance" of the FDA's statement that it was reevaluating its compliance policy regarding closed system products. (Murillo (Altria/JLI) Tr. 2962). In his view, the FDA's letter "cast a pall over the vapor category[.]" (Murillo (Altria/JLI) Tr. 2961).

286. For Altria, the relationship with its regulator, the FDA, is critical to its business. (Begley (Altria) Tr. 1046-47) ("[Nu Mark] thought it was important to engage on various regulatory issues, legislative issues, and certainly on underage e-vapor use, and . . . just think as a responsible leader in the tobacco space . . . because society can revoke your license to operate at any point in time."); PX7031 (Willard (Altria) Dep. at 270-71) (explaining that "[t]here were few things [Altria] took more seriously than" comments and guidance from the FDA because the "FDA had regulatory authority over the US tobacco business, and they ultimately decided which products could stay on the market, [and] which products had to be removed from the market").

287. Altria believes that if the FDA demands "bold action" in response to youth vaping, as it did in the September 12 Letter (RX1921 (FDA) at 007), that is a request that Altria must take seriously and act upon. (Willard (Altria) Tr. 1437; PX7027 (Murillo (Altria/JLI) Dep. at 202)).

288. The FDA's September announcement and letter had a "profound impact" on Altria. As Garnick explained: "[F]or a number of years [Altria] had devoted a good deal of resources, time, and attention at reducing youth usage numbers for cigarettes, and we got them so that they were at an all-time low. Then for this issue to come up with respect to e-vapor products was something . . . we really wanted . . . to address." (Garnick (Altria) Tr. 1757-58).

8. FDA Flavor Ban in January 2020

289. In January 2020, the FDA announced a new enforcement policy that required all non-tobacco, non-menthol flavored cartridge-based e-cigarettes (such as fruit and mint-flavored pods and cig-a-likes) to be removed from the market until they receive PMTA approval. (PX9016 (FDA) at 001) ("Flavor Ban"). The Flavor Ban took effect in February 2020. (PX9016 (FDA) at 002).

290. Pursuant to the FDA's Flavor Ban, no e-vapor manufacturer is permitted to sell pod-based products or cig-a-likes in flavors other than tobacco or menthol without premarket authorization. (PX9016 (FDA); Crozier (Sheetz) Tr. 1495-96).

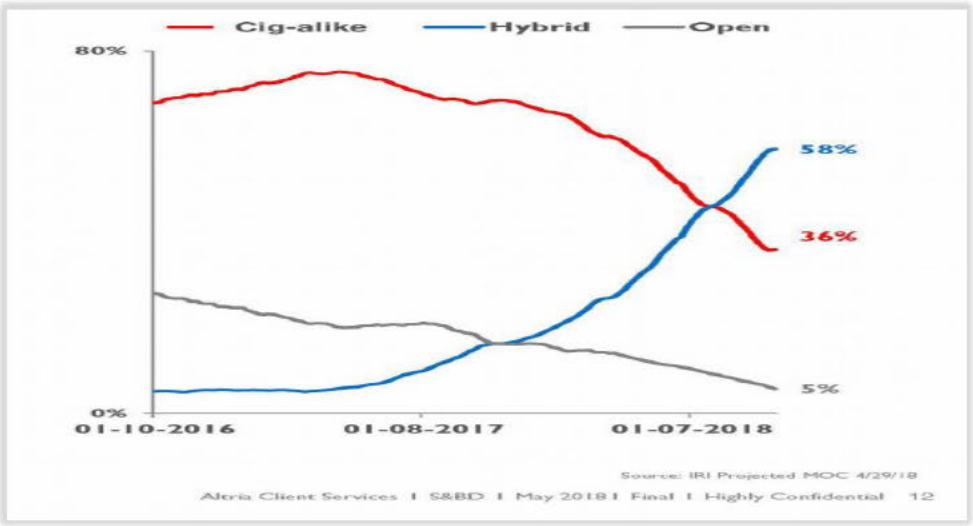
I. Background on Elite

1. Assessment of Cig-a-likes versus Pods

292. By early 2015, it was clear to Nu Mark leadership, including Joe Murillo, then President and General Manager of Nu Mark, that "cig-a-like products were not going to be of sufficiently deep and broad appeal . . . to convert large numbers of [smokers.]" (PX7007 (Murillo (Altria/JLI) IHT at 117)).

293. "[F]or many smokers and vapers, [cig-a-likes] were underpowered and did not provide enough satisfaction." (RX1990 (JLI) at 003; *see also* PX7030 (Wexler (Turning Point Brands) Dep. at 35-36) (explaining that cig-a-likes are ineffective at "deliver[ing] the nicotine to the consumer"); *see also* Begley (Altria) Tr. 1030-31 (explaining that consumers did not find early e-vapor products satisfying)).

294. Gifford and Begley presented to the Board, in May 2018, a slide based on IRI projected sales data showing "the cigalike share of total e-vapor [was] plummeting" compared to pods, called "hybrids" in the below chart. The share of cig-a-likes started at in excess of 70 percent share in January 2016 and dropped to 36 percent in January 2018, while the share of pods grew to 58 percent in that same time period. (Willard (Altria) Tr. 1365-67; RX0272 (Altria) at 013) (excerpted).



295. Between 2016 and the end of 2017, sales of pods increased by over 600 percent, driven largely by JUUL. At the same time, the cig-a-like segment, in which Nu Mark was selling its only e-vapor product at the time, was contracting, with volume dropping by 5,800,000 units in 2017 compared to the prior year. (PX4012; RX0746 (Altria) at 038; *see also* Gifford (Altria) Tr. 2721-22 (describing how Altria called pod-based products "hybrid in the beginning")).

296. As of 2017, Nu Mark's product line consisted solely of cig-a-likes. (PX7014 (Baculis (Altria) Dep. at 144-45)).

297. The lack of a pod product was a significant gap in Nu Mark's portfolio. (PX7014 (Baculis (Altria) Dep. at 144-45); Schwartz (Altria) Tr. 1866 ("Cigalike was declining very quickly. The pod business was growing exponentially, driven by JUUL. And . . . [Altria was] getting [its] butt[] kicked week in and week out."); *see also* PX7018 (Schwartz (Altria) Dep. at 152-53) (characterizing Nu Mark as "far behind" its competition)).

2. Acquisition of Elite

298. Given the August 8, 2016 deadline imposed under the Deeming Rule, Altria could not in 2017 develop and bring to market a pod-based product of its own. In order to sell a pod product to compete with JUUL, Altria would have to acquire a pod product that had been on the market prior to August 8, 2016. (Begley (Altria) Tr. 1044).

299. In the spring of 2017, Altria launched what it called "Project Mule" – a project for pursuing "potential acquisitions of pod-based products." (Begley (Altria) Tr. 1069; *see also* RX1103 (Altria) at 006 ("Adding a closed-tank product to Nu Mark's portfolio is a priority[.]")).

300. In late May 2017, Altria's strategy & business development ("S&BD") group identified six potential pod products and associated companies that were considered for potential acquisition: the k-stick, by Kangertech; Bo, by J Well; Cync, by Vape Forward, NEX Elite, by Smoore; My, by Von Erl; and Juul, by Pax Labs (which later became JLI). Based on "conversations with a number of different companies" and consumer research, S&BD concluded that only two of the six companies presented attractive options for acquisition, Pax Labs and Von Erl, with Pax Labs being the number one choice, followed by Von Erl. (Begley (Altria) Tr. 1073; RX1103 (Altria) at 007, 023).

301. In May 2017, as part of an update on Project Mule, S&BD recommended "accelerated evaluation" of the [Juul] opportunity, though a transaction could be expensive and complex." (RX1103 (Altria) at 009).

302. In April 2017, Altria had an initial discussion with JLI about a possible acquisition. The parties did not progress past the exploratory phase. (Begley (Altria) Tr. 1008, 1074).

303. In the spring of 2017, S&BD submitted an investment proposal to Von Erl. (RX1103 (Altria) at 023). In July 2017, Von Erl made a distribution deal with Imperial (the corporate owner of ITG). (RX0865 (Altria) at 012; *see also* Begley (Altria) Tr. 1074). Imperial subsequently announced that it was acquiring Von Erl and would relaunch Von Erl's products under a new brand name, *m*yblu. (RX1912 at 001-02).

304. In late June 2017, the e-vapor product team at Nu Mark began to explore a possible investment in NEX Elite, a product developed and manufactured by a Chinese company called Smoore. (PX4126 (Altria) at 001). NEX Elite was a product that S&BD had

previously considered as part of its original Project Mule assessment but had not included as a potentially attractive option. (RX1103 (Altria) at 007; RX0865 (Altria) at 012).

305. Nu Mark licensed the exclusive right to commercialize NEX Elite from Smoore in late October 2017, for a sum of $500,000. (Schwartz (Altria) Tr. 1862-63, 1868-69; PX7018 (Schwartz (Altria) Dep. at 86); PX0032 (Altria) at 017-18).

306. Altria acquired rights to NEX Elite and to Cync believing it would be helpful to have more than one pod-based product to market. (Begley (Altria) Tr. 1074-75).

307. Altria's Cync acquisition was a "strategic hedge." (RX0865 (Altria) at 023).

308. Cync's market launch would eventually be put "on [h]old" indefinitely in light of an "[a]cute battery hazard" issue, "[a]cute toxicological risk due to nickel components," and "[f]ailed child resistance testing," among other problems. (PX4149 (Altria) at 093).

309. Altria never commercialized Cync. (Schwartz (Altria) Tr. 1914).

310. After Altria acquired rights to NEX Elite (F. 304), Nu Mark worked to launch Elite as quickly as possible. (Begley (Altria) Tr. 990; PX7014 Baculis (Altria) Dep. at 133-34).

311. Based on marketplace and consumer dynamics, Altria concluded there was an "urgent need to compete beyond the cig-a-like category." (RX1292 (Altria) at 055; Schwartz (Altria) Tr. 1871 ("There was a lot of urgency for [Altria] to be able to play in that [pod-based] space.").

312. Normally, commercializing a product can take a year or more. (Schwartz (Altria) Tr. 1870).

313. Nu Mark originally targeted a May/June 2018 launch for Elite. Altria's management asked the Nu Mark team if it could "do better." The operations team developed plans to accelerate the launch from May to February 2018. (PX1647 (Altria) at 004-005; Schwartz (Altria) Tr. 1870-71).

314. Altria brought Elite to market with "[e]xceptional speed[,]" with only a four-month period between obtaining the exclusive rights to Elite and its retail launch. (PX1113 (Altria) at 027).

315. Based on the assumptions in Nu Mark's 2017 three-year strategic plan, prepared in February 2017, Nu Mark had predicted that it would likely lose $33 million in 2018 and then break even in 2019. (RX0746 (Altria) at 007; Gifford (Altria) Tr. 2728).

316. Nu Mark's 2018 three-year strategic plan, presented to Altria's Board of Directors in February 2018 ("Nu Mark's 2018 three-year strategic plan"), depended heavily on Nu Mark's having successful pod-based products. Nu Mark hoped to sell 11 million units of pod products in 2018 and, anticipated that by 2019, pod products would account for the majority of its volume, while cig-a-like volume rapidly declined. The plan further assumed

that, with strong pod sales, Nu Mark's overall sales volume would grow by between 20 to 30 percent year over year. (PX4012 (Altria) at 009-10; Begley (Altria) Tr. 1085-88; *see also* Gifford (Altria) Tr. 2739 (The 2018 projections included Nu Mark's hopes that the launch of Elite would bolster the company's financial viability.)).

317. Based on the assumptions in Nu Mark's 2018 three-year strategic plan, Nu Mark projected it would lose $70 million in 2018, followed by a $24 million loss in 2019, before hopefully turning a profit in 2020. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2736-37).

318. Nu Mark's 2018 three-year strategic plan explained to Altria's Board of Directors that "Elite's primary benefit [was a] feeling of vapor fullness on the inhale/exhale combined with good tasting flavors" and the "[p]rimary drawbacks for some include lack of nicotine satisfaction[.]" (PX4012 (Altria) at 023; *see also* PX1260 (Altria) at 001 ("Fundamentally, Juul appeals to those seeking a cigarette experience, whereas MarkTen Elite provides a full inhalation, vaping experience" and consumers appeared to be favoring the experience offered by JUUL)).

3. Prelaunch Home Use Tests

319. While Nu Mark's operations team was scaling up manufacturing and preparing its distribution network to receive Elite, Nu Mark's consumer research team undertook to learn more about the pod-based products Altria had just bought (Cync and Elite). (PX4075 (Altria) at 001; RX2015 (Altria) at 001).

320. Nu Mark's general practice for many of its new products was to conduct an extended home use test ("HUT"), in which participants are paid to take the product home, use it for several weeks, and provide feedback. (Begley (Altria) Tr. 1097-98; Jupe, Tr. 2247). Nu Mark viewed the results of a home use test as an indication of whether a product might be successful in the marketplace. (Begley (Altria) Tr. 1098; *see also* PX7014 (Baculis (Altria) Dep. at 300-01)).

321. Home use tests are not necessarily predictive of market success. "[T]he test at the end of the day is what people are buying at retail." (Jupe (Altria) Tr. 2247-48; *see also* Begley (Altria) Tr. 1098 (Retail sales is where to "get the best learnings in terms of how appealing [a] product [is] to consumers[.]"); PX7023 (Fernandez (Altria) Dep. at 155-56) (While the results of home use tests are "indicators," manufacturers "get the real answer in the marketplace[.]"); PX7014 (Baculis (Altria) Dep. at 300-01) ("A home use test could give you an indication that a product might be successful in the market, but it is not really very predictive.")).

322. Beginning in late 2017, Nu Mark ran HUTs on three different products: Elite, Cync, and JUUL. (RX2015 (Altria) at 004). The preliminary results showed that, over a three-week period, the purchase intent for Elite remained steady, at 43 percent, and was higher than that of JUUL. (PX4075 (Altria) at 001). Nu Mark viewed this result as an encouraging initial sign. (Begley (Altria) Tr. 986-89; PX4075 (Altria) at 001).

323. For those home use test participants who had not used a vapor product within the last seven days, meaning those who were "predominantly cigarette smokers," the purchase intent for Elite was lower than that for JUUL. (RX2015 (Altria) at 010; Jupe (Altria) Tr. 2250-51).

324. For those home use test participants who had not used a vapor product in the last seven days, meaning those who were "predominantly cigarette smokers," the data showed that users began replacing cigarette smoking sessions with JUUL immediately, in numbers that were statistically significant. The data did not show users replacing smoking sessions with Elite until five or six days into the study and the numbers were not statistically significant. (RX0496 (Altria) at 019; Jupe (Altria) Tr. 2250-53).

325. The fact that cigarette smokers in Altria's home use tests did not replace smoking sessions with Elite until five or six days into the study time means that a pack-a-day smoker "would have to buy 35 pods and continue using them for five weeks" before they might determine that they can change from cigarettes to e-vapor, which is unlikely. (Jupe (Altria) Tr. 2253 (Consumers "don't go and buy 35 new products. The first [purchase] is going to tell you what you are going to need to know[.]")).

326. The other pod-based product in Nu Mark's portfolio, Cync, showed the lowest propensity to replace cigarettes in Altria's home use tests, with cigarette usage occasions remaining relatively constant throughout the study. (RX0496 (Altria) at 019).

327. Although Nu Mark ran the Elite home use test for six weeks, it ran the JUUL home use test for just three weeks because Nu Mark could not find enough JUUL product on the market to continue the test. The products were "sold out." (Jupe (Altria) Tr. 2248-49; *see also* Begley (Altria) Tr. 1098-99).

328. A January 2018 report regarding Altria's home use testing of Elite, Cync, and JUUL, prepared by Altria's Consumer & Marketplace Insights team summarized, "Cync & Elite provide different product experiences than that provided by JUUL[], and therefore the products show strong performance among different [adult smoker and vaper] audiences. JUUL provides a more 'familiar cigarette-like experience' and demonstrates immediacy in replacing cigarette usage occasions among . . . those who are still predominantly smoking cigarettes[]. Cync & Elite provide more 'non-traditional vaping experiences' and demonstrate higher usage among . . . those who are more familiar with e-vapor product usage." (RX2015 (Altria) at 007).

329. The results of Altria's home use testing indicated to the head of Altria's consumer research division, Pascal Fernandez, that Elite "didn't perform as well towards th[o]se consumers who were looking for [the] smoking sensation"; and that Elite was "not converting" those consumers. (PX7023 (Fernandez (Altria) Dep. at 25-26, 153-55)).

4. Elite Launch and Promotions

330. On February 26, 2018, Altria launched MarkTen Elite, Nu Mark's first pod-based product. (O'Hara (JLI) Tr. 631-32 (discussing PX2086 (JLI) at 001); Willard (Altria) Tr. 1356-57).

"The Elite product was on the market under a different name and sold prior to [the Deeming Rule date of] August 8, 2016 . . . ." (PX0015 (Altria) at 008).

331. Altria's launch of Elite was well-funded because the company wanted to get Elite out on the market as quickly and effectively as possible. (Willard (Altria) Tr. 1356-57).

332. The efforts of the sales force responsible for selling Elite to expand distribution resulted in Elite's placement in "tens of thousands of stores." (Willard (Altria) Tr. 1296-97). The sales force was able to get Elite into over 90 percent of the stores that it targeted. (Myers (Altria) Tr. 3323).

333. Nu Mark expanded distribution of Elite from over 6,000 stores in the first quarter of 2018 to more than 23,000 stores by the end of the second quarter. (PX9047 (Altria) at 003). By the fourth quarter of 2018, Elite had reached 25,000 stores. (PX7004 (Willard (Altria) IHT at 204)).

334. Shortly after Elite's launch in February 2018, Altria also launched its Innovative Tobacco Products ("ITP") program, which consolidated e-vapor products in a designated location at retail stores and provided Altria with shelf space at the top of retail fixtures. (Begley (Altria) Tr. 1005-07; RX1240 (Altria) at 001; *see also* Farrell (NJOY) Tr. 331; Crozier (Sheetz) Tr. 1522-24).

335. Over the course of 2018, Altria spent over $100 million on the Nu Mark ITP program. (Quigley (Altria) Tr. 1982; PX7003 (Quigley (Altria) IHT at 47-49)). This was a significant investment in Nu Mark. (Quigley (Altria) Tr. 1951).

336. Altria invested in significant promotions to sell Elite. (PX7023 (Fernandez (Altria) Dep. at 78-79) ("[Altria had] very attractive promotional offers to give really good value . . . – low price to the consumer."); Myers (Altria) Tr. 3336-37 (describing various discounts and other promotions for Elite); Crozier (Sheetz) Tr. 1512 ("Altria basically had Elite on promotion the entire time it was in Sheetz stores."); Myers (Altria) Tr. 3316 (testifying that Altria's sales force "put[] any resource [it] could" into the rollout of Elite).

337. The goal of the promotions was to incentivize a "trial" – to get consumers to try the device in the hope that they would return for cartridges (pods), akin to the razor/razor blade model. (Crozier (Sheetz) Tr. 1510; *see also* Myers (Altria) Tr. 3331).

338. Among the promotions that Nu Mark ran for Elite was a "Buy a Device, Get a Pod for Free" promotion. Because the Manufacturer Suggested Retail Price ("MSRP") for the Elite devices was $19.99 and the MSRP for the Elite pod packs was $8.99, the consumer got roughly $30 of value for just $19.99. This was considered "a pretty aggressive offer – to get the initial trial for the product." (Myers (Altria) Tr. 3319-20; RX2052 (Altria) at 003); Myers (Altria) Tr. 3319-20).

339. The $19.99 promotion referred to in F. 337 "wasn't seeming to get people to purchase." Nu Mark decided to expand the promotion in June 2018, but reduced the bundle price to

$8.99. (Myers (Altria) Tr. 3323-24, 3331; PX1229 (Altria) at 021; *see also* Gifford (Altria) Tr. 2753-56 (describing promotions, including $8.99 trial offer, clerk incentive program, signage, direct mailings, retail intercepts, and events in Las Vegas, Nevada)).

340. The $8.99 bundle promotion (F. 338), because it included the battery device plus any pod pack, was in essence giving the battery device away "for free." (Begley (Altria) Tr. 1115; *see also* Myers (Altria) Tr. 3333 ("[W]e were basically giving the device away for free . . . .").

341. The $8.99 bundle promotion (F. 338) was "an aggressive offer." (Quigley (Altria) Tr. 2055; *see also* Crozier (Sheetz) Tr. 1512 (agreeing the $8.99 promotion was "pretty rich"); Myers (Altria) Tr. 3332 (characterizing the $8.99 offer as "even more aggressive" than the $19.99 promotion)).

342. Nu Mark offered coupons for $10-off Elite and instituted a store intercept program where Altria employees physically went to stores and handed out coupons to consumers. Because the coupons could be used together with the device bundle promotion, a consumer using both could get both the pod and the battery device for free. (Myers (Altria) Tr. 3333-36; PX1229 (Altria) at 021).

343. Nu Mark instituted a clerk incentive program. If a clerk at a store sold 25 devices, they could get $500 for the employees at the store, which was "a big deal." Nu Mark did not pay out the incentive very often. (Myers (Altria) Tr. 3335-36; PX1229 (Altria) at 021).

344. The promotions referenced in F. 337-342 were fully funded by Nu Mark, not the retailer. Nu Mark would pay the retailer the difference between the list and promotional price either "after the promotion or monthly." (Crozier (Sheetz) Tr. 1505-06, 1513; *see also* Myers (Altria) Tr. 3335 (confirming the operating company bears the cost of the promotions)).

345. In addition to the $100 million that Altria spent on the ITP program (F. 334), Nu Mark spent $76 million in marketing and sales expenditures in 2018. (PX1072 (Altria) at 010; Quigley (Altria) Tr. 1982).

346. Where promotions worked to incentivize some sales, ending the promotion tended to substantially decrease sales. (Crozier (Sheetz) Tr. 1539-40 (confirming that, in his experience, after a device promotion ended, there was a significant drop off in sales); PX7038 (Myers (Altria) Dep. at 183-84) (Altria found that as soon as a promotion was "turned . . . off, the sales dropped and [Nu Mark was] quickly scrambling to try to get it turned back on.")).

347. Altria promotions worked to incentivize some consumers to try Elite; however, those consumers did not return to purchase additional pods to use with the device. For example, the $8.99 bundle promotion for a device and any pod (F. 338) ran at retailer Sheetz from May 20, 2018 until September 30, 2018, which lead to a spike in device sales at Sheetz. However, there was no corresponding rise in sales of pods. (Crozier (Sheetz) Tr. 1513-15; RX1135; RX1136).

348. Pod sales are an important indicator of future product success because they show that the consumer is continuing to use the product. (Crozier (Sheetz) Tr. 1515; *see also* PX7019 (Crozier (Sheetz) Dep. at 58) ("Cartridge sales are important because it shows there's through-put with the consumer. So they buy the device and then keep coming back to, you know, buy the pods together with the device, as opposed to just buying the device once and whether it came with pods or not, the [purchases of] pods show that the person is still using the device.")).

5. Sales Performance of Elite

349. Elite's promotions did not result in the increase in subsequent pod sales that Altria hoped to see. (Myers (Altria) Tr. 3384-85 (discussing pod sales at 7-Eleven); Crozier (Sheetz) Tr. 1514-15; PX7019 (Crozier (Sheetz) Dep. at 77-78) (discussing the "pretty big drop-off" in sales when an Elite promotion was stopped); *see also* PX7038 Myers (Altria) Dep. at 176 ("[W]e see it getting some initial trial, but we're not seeing it convert into pod sales. Maybe pods grew a pod a week or something like that, but that is not where they would set the bar at for a successful new product launch. They were looking for a really strong growth line on the pod side of it.")).

350. Altria found that due to its promotions and distribution pushes, Elite was generating some trial by consumers, but buying a two-pack of pods on a trial offer does not generate "very much volume." Altria was "hoping [consumers would] try [Elite] and [would] say this is great, and [then] go out and buy a pack a couple of times a week. That drives volume. [But Altria] never convinced the consumer, after their initial trial, to become a repeat purchaser." (Willard (Altria) Tr. 1367-68; PX9047 (Altria) at 003, 009).

351. "To be successful in the e-vapor marketplace, it's not enough just to have the resources of a large tobacco company, you also have to have a product that's attractive to consumers and that can clear the regulatory hurdles." (PX7012 (Eldridge (ITG Brands) Dep. at 161); *see also* Huckabee (Reynolds) Tr. 429 (agreeing that price promotions will not help if consumers do not like a product); PX7030 (Wexler (Turning Point Brands) Dep. at 105) ("If people don't like the product, they're not going to buy the product," no matter what you do.); PX7037 (Huckabee (Reynolds) Dep. at 82) (agreeing that if a product is "suboptimal" that will "impact the repurchase of the product for consumers")).

352. To Altria, Elite's performance was "nothing compared to what you would expect when you're trying to disrupt the consumer and trying to get a consolidated group of consumers to engage with the brand . . . ." (Gifford (Altria) Tr. 2755).

353. After its first eight weeks, Elite was selling 7.2 pods per week per Sheetz store; with two pods to a pack, that translates to "roughly a pack sold every other day." (Begley (Altria) Tr. 1112-13 (discussing PX1229 (Altria) at 019)). In May 2018, Nu Mark was selling just one Elite pack every other day in Sheetz. (PX1229 (Altria) at 019; *see also* Begley (Altria) Tr. 1113; PX7022 (Begley (Altria) Dep. at 248-49)).

354. 7-Eleven is Altria's largest retailer, "both from a business contribution and from a total retail store standpoint on the convenience [store] side." (Myers (Altria) Tr. 3307).

355. By June 2018, more than half of 7-Eleven stores carrying Elite "had yet to sell a single pod." (PX7044 (Stout (7-Eleven) Dep. at 137)).

356. By the week of July 16, 2018, following the $8.99 bundle promotion offering a free battery device (F. 338), 8,109 battery units were sold across the roughly 8,000 7-Eleven stores then selling the product, an average of just one device per store per week, which Scott Myers, then Vice President of Altria's western region, where 7-Eleven is headquartered (Myers (Altria) Tr. 3307) and presently the President and CEO of Altria Group Distribution Company ("AGDC"), termed "poor performance." (Myers (Altria) Tr. 3352-55 (discussing RX2051)).

357. As of the first week of August 2018, Elite was being sold in 7,971 7-Eleven stores. Of those stores, 4,800 sold a battery device. Myers, the head of AGDC, explained this was "really bad. . . . [A] chain their size with the visibility and awareness, it just shows that consumers aren't interested in buying this product." (Myers (Altria) Tr. 3357-58).

358. At 7-Eleven, if sales of Elite products failed to reach their preset selling threshold within four to six weeks, the chain's inventory management system automatically would put the product into "uncarried" status and stop reordering Elite. A product losing "carried" status is "a really early indicator that . . . it's not selling." (Myers (Altria) Tr. 3321-22; *see also* 3336, 3345-46 (testifying that losing carried status is "a very bad sign")).

359. In June and July 2018, Elite fell out of "carried" status at "[a] lot" of 7-Eleven stores because of insufficient sales. (Myers (Altria) Tr. 3336, *see also* 3345-46 (testifying as to a "summer battle" of trying to "get [Elite] back into carried status")).

360. Only about 20 percent of 7-Eleven stores were reordering Elite after the first four to six weeks after its launch. (PX7038 (Myers (Altria) Dep. at 206-07)).

361. As of August 17, 2018, Altria had "55 weeks of inventory" in Elite, which is "over a year of inventory" in warehouses. That represents money "being tied up in something that's not moving, much like for [Altria's] retail customers when [product is] just sitting on a shelf." This was a "bad sign." (Myers (Altria) Tr. 3363-65; PX4239 (Altria) at 004).

362. By the summer of 2018, Altria was undertaking efforts for Elite that it had not had to undertake for prior new product launches. It had to "guarantee the product so that if it went out of date or [stores] didn't sell it," Altria "would take it back." It "had to cover things like restocking fees [for] their wholesaler if they did have to sell it back or return it back." It had to have salespeople "stand in a store and intercept consumers to show [its] commitment to try to gain trial." It had to keep promotions running to demonstrate to retailers that Altria "would at least get them trials so they didn't have any real risk around the inventory investment they were going to make to carry [the] product." (PX7038 (Myers (Altria) Dep. at 130-31); *see also* Myers (Altria) Tr. 3316, 3330-31).

363. Elite was the "worst" performing product rollout that Myers worked on in his 24 years of experience with Altria. (Myers (Altria) Tr. 3366; PX7038 (Myers (Altria) Dep. at 12)).

364. Myers explained that there are two "moments of truth" for consumers – when they see the product in the store and decide whether to make a purchase, and then "when they take it out of the package and use the product." (Myers (Altria) Tr. 3329). Altria's sales force could "roll it out and get it everywhere in position," *i.e.*, "create good conditions for the first moment," but Elite was not winning the second part, after the consumer took it home and used the product. (Myers (Altria) Tr. 3329-30, 3366-67).

365. Based on Dr. Murphy's analysis of projected IRI data (F. 173), Elite's share of all closed system cartridge unit sales never exceeded 1%. (RX1217 (Murphy Expert Report at 008-09 ¶ 12)).

366. On July 26, 2018, Willard notified investors on an earnings call that Nu Mark's sales volume had grown by approximately 16% in the second quarter of 2018 and 23% for the first half. Willard stated that the growth was "primarily driven by expanded distribution[,]" explaining that "[m]ost recently, Nu Mark expanded MarkTen Elite from over 6,000 stores in the first quarter to more than 23,000 stores by the end of the second quarter." Willard further explained that Elite and MarkTen Bold were "[t]he drivers of the growth in second quarter and first half" and were "getting traction with consumers, albeit in the shadow of a product that's growing much more quickly." (Willard (Altria) Tr. 1167-68 (discussing PX9047 (Altria) at 003, 009-10 (Altria's Q2 2018 Earnings Call)).

367. From May 2018 to late July 2018, Elite's average sales per week per store in Walgreens had increased from 0.2 units to 0.5 units, which is a total of two units per month. In 7-Eleven, they increased from 1.7 units per week to 4.4 units per week, which is less than one sale per day. In Wawa, they increased from 2.4 units to 6.4 units, which is less than one sale per day. (PX1013 (Altria) at 007).

368. Over the six-week period from May 20, 2018 to June 24, 2018, sales of Elite grew week over week by 1.4 percent, 16.5 percent, 25 percent, 77.9 percent, 17.7 percent, and 8.2 percent, respectively. (PX2616 (JLI) at 009). This indicated that "growth was inconsistent and decelerating, especially towards the end, and overall sales were quite low." (O'Hara (JLI) Tr. 560).

369. "Marginal contribution" is the price less the variable cost to get to margin. It is a measure that excludes fixed costs and overhead, such as "fixed-manufacturing expense, marketing, sales, and any allocated costs that are used to support the business." (Gifford (Altria) Tr. 2724; PX7040 (Gifford (Altria) Dep. at 98)).

370. As of July 2018, Elite had a 38 percent year-to-date positive marginal contribution, excluding distribution costs, such as the ITP promotional program. As of September 2018, when distribution costs were included, Nu Mark's total marginal contribution was $3 million below target and $15 million less than the previous year. (PX1056 (Altria) at 008 (Nu Mark Brand Update, Aug. 2018); PX1127 at 003).

371. Elite's same-store sales slowed in the third quarter of 2018. While same-store sales had increased by 56 percent from May to July 2018, from July through September 2018, growth increased by 38 percent. (PX1056 (Altria) at 033; PX1072 (Altria) at 004).

372. Over the 21-week period after Elite's launch, from March 11, 2018 through July 29, 2018, Elite's average weekly sales volume increased steadily, with a sharper increase after the introduction of the Elite $8.99 promotion in June 2018 (F. 338). Distribution of Elite similarly expanded during this time period to a total of 24,000 stores. As of July 29, 2018, 90,645 units had been sold, or less than four units per store per week. (PX1056 (Altria) at 012, 015 (Nu Mark Brand Update, Aug. 2018)).

373. Elite grew in sales volume after its launch as distribution expanded and price discounting encouraged people to try it. (Quigley (Altria) Tr. 1945). Nu Mark's promotions were expensive and not financially sustainable. (PX7013 (Brace (Altria) Dep. at 83-84)).

374. Though Elite was able to "get[] initial traction with consumers[,] largely because of expanded distribution and promotional offers[,]" this "limited success . . . was substantially less than [JUUL,] the leading product in the marketplace." (Willard (Altria) Tr. 1386-87; *see also* PX9047 (Altria) at 009-10 (July 26, 2018 Altria Q2 2018 Earnings Call)).

375. The success of a promotion can be determined within a few weeks, and for Elite, it appeared that the $8.99 promotion was not generating sufficient trials or repeat purchases. (Myers (Altria) Tr. 3345; *see also* Myers (Altria) Tr. 3313-14 (explaining that the retailers quickly know how a product is performing based on "the data they're seeing" and "what they're hearing from their store managers")).

376. As of October 15, 2018, Altria had sold 4.9 million units of pod products. (PX1127 (Altria) at 004).

J. Problems with Nu Mark's Products

1. Design Issues with Elite

377. The term Elite 1.0 refers to the version of Elite that had been on the market prior to

August 8, 2016, and which was acquired and commercially sold by Altria beginning in February 2018. (Jupe (Altria) Tr. 2134).

378. Nu Mark decided to pursue a PMTA for Elite 1.0 on March 15, 2018. (PX4318 (Altria) at 007; Quigley (Altria) Tr. 1977).

379. Altria believed that the PMTA for the in-market Elite product faced "[i]ncreased application risk" and an "[u]ncertain authorization outcome." (RX0496 (Altria) at 011; Murillo (Altria/JLI) Tr. 2942 ("[F]rom the first day [Altria] got [Elite], [it] knew that there were a number of changes that were likely going to be necessary ultimately for both consumer and regulatory purposes . . . .")).

380. Altria pursued a PMTA for the in-market Elite while it worked on redesigning the product to have the "must have" features that Altria believed were necessary for PMTA approval. (RX0496 (Altria) at 010-015, 017; *see also* PX7017 (Magness (Altria) Dep. at 101-03)).

381. Elite lacked dry puff prevention technology. (F. 411).

382. Elite contained nickel wire, which was "very concerning" and something about which Altria "needed long-term studies to definitively understand whether it was a risk or not." (Gardner (Altria) Tr. 2663-64).

383. Elite's "black parts" were "made out of ABS plastic." (PX7026 (Gardner (Altria) Dep. at 89-90)). "The A, the B and the S all represent [harmful or potentially harmful constituents] that are toxic, and if there's any impurities in the manufacturing process, they could be released into the liquid and aerosol and expose the smokers." (PX7026 (Gardner (Altria) Dep. at 90); Gardner (Altria) Tr. 2614).

384. Elite's pod "was made of polycarbonate," which has "some toxicity in fish studies, not in humans[,]" but nonetheless, "has a lot of science stigma around it." (PX7026 (Gardner (Altria) Dep. at 90)).

385. Elite's e-liquid formulations were not developed by Altria and thus "were not developed to use [Altria's] toolbox of ingredients for e-vapor formulations," meaning that they were not made with ingredients for which Altria "had sufficient data that [it] felt was necessary for a PMTA." (PX7026 (Gardner (Altria) Dep. at 90-91)). For the non-toolbox ingredients, Altria "would have to do significant study, years of studies to demonstrate they're appropriate for the protection of public health." (PX7026 (Gardner (Altria) Dep. at 91)).

386. Altria determined in early 2018 that a half-dozen components of Elite would need to be replaced, which led Altria to "conceptualize[]" a redesigned version of the product. (PX4025 (Altria) at 001; Murillo (Altria/JLI) Tr. 2942).

387. Elite 2.0 refers to a version of Elite that was to incorporate certain fixes to the version of Elite that had been on the market in 2018. (Jupe (Altria) Tr. 2134-35).

388. Altria never finalized the design of Elite 2.0 and it was never sold in the market. (Garnick (Altria) Tr. 1614).

389. The changes that were being contemplated for Elite 2.0 would require a PMTA, so the modified product could not be introduced on the market in advance of FDA approval. (Garnick (Altria) Tr. 1699-1700; *see also* Jupe (Altria) Tr. 2256-58 ("It first had to be obviously developed and designed and tested, the science approved by the FDA, get an authorization from the FDA, and then commercialize it, and . . . our best guess at that point was five to six years."); PX7014 (Baculis (Altria) Dep. at 150-52); PX7017 (Magness (Altria) Dep. at 108-12); PX1673 (Altria) at 013)).

390. In March 2018, Altria knew that "Elite, both the current version and the future version, need to be modified and redesigned, resulting in a delay in PMTA work and filing." (RX0270 (Altria) at 001).

391. To maximize the time for the FDA to review the Elite 2.0 PMTA, Altria's plan was to use the on-market Elite (Elite 1.0) as a placeholder filing: To "get the 1.0 [PMTA] in at the very last moment knowing that it was going to be an insufficient application and really just allow for that review time on the preferred version of the 2.0." (PX7017 (Magness (Altria) Dep. at 102-03)).

392. Nu Mark evaluated whether it could rely on some bridging (*see* F. 230) of Elite 1.0 to Elite 2.0 in any PMTA. Altria's plan for bridging from Elite 1.0 to Elite 2.0 was "conceptual" because the base scientific data was not done, as Elite 2.0 was not yet even designed. (PX7027 (Murillo (Altria/JLI) Dep. at 161-62)).

393. Nu Mark would not know whether the bridging plan for Elite 2.0 would work "until [it] did years' worth of work." (PX7041 (Quigley (Altria) Dep. at 152)).

394. As of June 2018, Nu Mark estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (RX0450 (Altria) at 069).

2. Dry Puffing

395. Dry puffing is a phenomenon that occurs when a closed system's cartridge begins to run out of e-liquid at the end of its life. The remaining e-liquid overheats, which results in the generation of aldehydes, particularly formaldehyde. (Jupe (Altria) Tr. 2237, 2303-04; PX7015 (Gogova (Altria) Dep. at 90-91); PX4149 (Altria) at 033; King (PMI) Tr. 2351-52).

396. Aldehydes are a class of compounds, with formaldehyde being the most common and the simplest. Formaldehyde is the particular compound "most likely to increase with thermal decomposition." Altria sometimes used the terms "aldehyde" and "formaldehyde" interchangeably. (Gardner (Altria) Tr. 2574-76).

397. Formaldehyde is a carcinogen. (Gardner (Altria) Tr. 2562; Willard (Altria) Tr. 1423).

398. Although the FDA has not specified a numerical level for formaldehyde that is acceptable for e-vapor products, there must be a showing of reduced risk compared to conventional cigarettes, and it would be difficult to demonstrate risk reduction if the levels of formaldehyde in the e-vapor product were similar to cigarettes. (Gardner (Altria) Tr. 2666-67).

a. Cig-a-likes and Dry Puffing

399. Prior to October 2017, Altria tested its MarkTen cig-a-like (which contains a battery known as BVR 2.3) (PX1011 (Altria) at 020; Gardner (Altria) Tr. 2572) for formaldehyde

exposure using an "intense" puffing regime, which it believed to be the "conservative" testing approach. Under "intense" puffing conditions, the MarkTen cig-a-like generated "very low formaldehyde levels." (PX7000 (Garnick (Altria) Dep. at 122-23); Gardner (Altria) Tr. 2673 (noting "intense" puffing regime involves 140 puffs); *see also* RX0817 (Altria) at 010-11).

400. Sometime after the testing referenced in F. 398, in late 2017, Altria conducted additional testing of its MarkTen cig-a-likes in connection with research being done for the PMTA for the MarkTen cig-a-likes. In testing for formaldehyde exposure, this research used a non-intense, or moderate, puffing regime, which Altria found to be more consistent with how the product was actually being used in the market. Under these testing conditions, with the exception of one flavored variety, MarkTen cig-a-like's formaldehyde yields through the life of the cartridge "were higher than expected and higher than other products in the market," and "were similar to a cigarette." (PX7000 (Garnick (Altria) Dep. at 122-23); Gardner (Altria) Tr. 2569-70; RX0817 (Altria) at 012-13; *see also* PX1247 (Altria) at 009 (chart showing MarkTen cig-a-likes' formaldehyde levels exceeding Vuse e-vapor products, Blu, and Juul)).

401. Dry puffing does not present an acute health risk. However, the discovery of dry puffing with the MarkTen cig-a-like did create a regulatory concern within Altria as to whether the dry puffing issue would hinder Altria's ability to obtain FDA approval for the MarkTen cig-a-like. (Jupe (Altria) Tr. 2237-38; *see also* PX7027 (Murillo (Altria/JLI) Dep. at 115) (testifying that dry puffing represented a "tremendous risk" for the MarkTen cig-a-like PMTA)).

402. By March 2018, Altria determined that fixing the MarkTen cig-a-like's dry puff issue would require "fairly significant . . . changes" to be made to the product, and that Altria would therefore have to delay its planned PMTA filing pending these changes. As of March 2018, Altria's regulatory group described the status as "delayed – date TBD." (Murillo (Altria/JLI) Tr. 2937-38; RX0630 (Altria) at 019).

403. In June 2018, Altria developed an electronic component for dry puff prevention that shut off the battery once it reached a certain temperature, to avoid overheating. This also meant the device would shut off and "stop working during that puff." (Garnick (Altria) Tr. 1601-02, 1635; Gardner (Altria) Tr. 2576-77).

404. The revised MarkTen battery containing dry puff prevention technology referenced in F. 402 was known as BVR 2.8. (Garnick (Altria) Tr. 1601-02, 1635; Gardner (Altria) Tr. 2570-71, 2576-77; PX7000 (Garnick (Altria) IHT at 122-23)).

405. JLI's method for dry puff prevention was temperature control, *i.e.*, to control the power to the heater to maintain a certain temperature throughout the puff. Gardner, Altria's Senior Principal Scientist, analogized Altria's approach to an older computer's heat regulation system – when the computer processor overheated, it would simply turn off; while JUUL's "closed-loop temperature control," which will still generate aerosol, but with reduced

power delivery, was more like a modern computer – when the processor gets too hot, it slows down but continues to work. (Gardner (Altria) Tr. 2576-77).

406. Altria's early studies of the BVR 2.8 battery showed that it successfully reduced formaldehyde levels. (Gardner (Altria) Tr. 2571-72).

407. Early in the process of developing the BVR 2.8 battery, Altria's scientists discovered that "[w]ith the dry puff prevention electronics, . . . the cartridges needed to be heat-treated" – a process called "annealing" – "in order for the dry puff prevention technology to work appropriately." (Gardner (Altria) Tr. 2573-74).

408. There was full agreement within Altria that Nu Mark would need to go through the PMTA process before it could sell MarkTen cig-a-likes with the BVR 2.8 battery. (Garnick (Altria) Tr. 1726 ("There was no doubt that that would require preapproval by the FDA.")). "Changing the electronics would be a product change, [which] required premarket approval from the agency." (Gardner (Altria) Tr. 2570).

409. As of June 18, 2018, none of Altria's scientists thought Altria could get a PMTA on the MarkTen cig-a-like product that was then on the market because it did not have dry-puff prevention. (Garnick (Altria) Tr. 1726-27; *see also* Gardner (Altria) Tr. 2593-95; Jupe (Altria) Tr. 2236-38 (listing dry puffing among the "problems with [the cig-a-like] that compromised [Altria's] ability to get it through" the FDA's PMTA process); PX1890 (Altria) at 001-02; PX1028 (Altria) at 005-06).

410. The technical problems contributed to delays in 2018 in the timeline for PMTA submission for the MarkTen cig-a-like then on the market (the "BVR 2.3 Version"). (Gardner (Altria) Tr. 2577; Jupe (Altria) Tr. 2321; *see also* Gardner (Altria) Tr. 2584-85 (explaining that design issues required the company to restart the stability studies required for the PMTA)).

411. To save time on completing a PMTA for the MarkTen cig-a-like with the BVR 2.8 battery (the "BVR 2.8 Version"), Altria wanted to use the PMTA research already done on the BVR 2.3 Version by bridging – "building a bridge from the prior data to a new product." (Gardner (Altria) Tr. 2572; *see also* F. 230). If Altria could demonstrate that the BVR 2.3 Version and the BVR 2.8 Version "behaved the same in delivering an aerosol," then Altria could use the toxicology, clinical, and behavior studies already completed for the PMTA for the BVR 2.3 Version for the PMTA for the BVR 2.8 Version. (Gardner (Altria) Tr. 2572-73). The bridging plan would add 12 to 18 months to the PMTA timeline. (Gardner (Altria) Tr. 2570).

b. Elite and Dry Puffing

412. When Altria acquired rights to commercialize Elite in the fall of 2017, Elite "didn't have dry puff [prevention]." Therefore, Elite had the potential for formaldehyde generation, as did other e-vapor products without the prevention technology. (Jupe (Altria) Tr. 2305-06; *see also* PX7017 (Magness (Altria) Dep. at 104) ("Elite . . . was missing the temperature control feature that [Altria] had come to deeply appreciate was critical to reducing

formation of certain constituents that are of concern, including formaldehyde[.]"); Gardner (Altria) Tr. 2562-63).

413. Initial scientific testing of Elite's formulations conducted in December 2017 indicated that some "devices delivered low aerosol mass and high formaldehyde results." (RX0825 (Altria) at 001).

3. Conversion Potential

414. Conversion potential is the potential of an e-vapor product to convert adult smokers away from combustible cigarettes and is one factor that the FDA has indicated it will consider in connection with PMTA approval of e-vapor products. (Gardner (Altria) Tr. 2586-87, 2640; Willard (Altria) Tr. 1421-22).

415. Market share is a measure of sales percentage relative to competitors. "[M]arket share tells you . . . what the adult smokers are actually doing in the market with their money." "[T]hat piece of data, combined with other information, is used to assess the conversion potential of the product." (Gardner (Altria) Tr. 2644-45).

416. "[A] low sales rate or sales volume" is an indication that the product does not have the potential to convert smokers. "If consumers don't like [a product], they're not going to convert." (Gardner (Altria) Tr. 2648).

417. PMI interpreted the low market shares held by Altria as an indication that Altria's e-vapor products were not successful in converting smokers. (PX7020 (King (PMI) Dep. at 246-47)).

418. Altria's consumer research cast doubt on the conversion potential of Nu Mark's products. (Jupe (Altria) Tr. 2234, 2251-53; F. 418-420).

419. Home use test (HUT) results from January 2018 (F. 321) indicated that Elite and Cync did not offer the necessary nicotine satisfaction for cigarette users, with Cync demonstrating no meaningful impact at all on the number of occasions of cigarette use ("cigarette occasions") and Elite showing negligible effect until over a month into the study, long after the average consumer would have rejected the product. (Jupe (Altria) Tr. 2251-53; RX0496 (Altria) at 019).

420. In the spring of 2018, Nu Mark re-analyzed the HUT data from January 2018. Instead of analyzing participants based on whether they had used an e-vapor product within the last week, Altria's consumer research team analyzed the results based on whether the participants had indicated they were seeking a cigarette experience or a vaping experience. Analyzed in this way, neither Cync nor Elite had any meaningful impact on cigarette occasions. JUUL was the only product among the three that was "taking cigarette occasions from those who [were] seeking a cigarette experience." (PX1225 (Altria) at 001, 037).

421. Jennifer Schmidt, the market researcher responsible for analyzing the HUT data for Altria explained, "Elite [and] Cync . . . are more for those seeking the vaping experience than the smoking experience. JUUL tends to have the most behavioral impact among those seeking the smoking experience[.]" (PX1225 (Altria) at 001).

422. Apex had no nicotine salts (*see* F. 431-433), and low nicotine concentration, making it "hard to see" how it would be "effective at conversion." (Murillo (Altria/JLI) Tr. 2960; Begley (Altria) Tr. 1082-83; *see also* PX7023 (Fernandez (Altria) Dep. at 197) (explaining that Apex did not "satisf[y] versus the smokers' requirements"); RX0532 (Altria) at 011 ("[l]ow" conversion potential due to "minimal nicotine satisfaction")).

423. In July 2018, Paige Magness, then Managing Director of Regulatory Affairs for Altria and responsible for PMTA submissions, wrote that the regulatory "team need[ed] to recommend which projects should move forward and which should not, based on conversion potential and satisfaction." (RX0788 (Altria) at 002). Magness concluded that "none of [Altria's] products [were] anywhere near ready (still concepts, formulations not decided, no data to know if we can make a successful PMTA)." (RX0788 (Altria) at 001; *see also* PX1028 (Altria) at 006-07 (comparing MarkTen products with those of competing brands and demonstrating that MarkTen and Elite both had a lower nicotine content and higher pH than both JUUL and Reynolds' Vuse cig-a-like product)).

424. MarkTen cig-a-like "fell short [of the PMTA standard] on risk reduction and conversion. . . . With regard to adult smoker conversion, this [was] a product with a relatively low nicotine concentration and [it] did not have the presence of acids that would have improved the level of satisfaction." (PX7017 (Magness (Altria) Dep. at 290-91)).

425. Many "smokers who want[] to convert to non-combustible tobacco products d[o] not want to appear to be smoking a cigarette," which makes the form of a cig-a-like "just wrong for conversion." (PX7036 (Garnick (Altria) Dep. at 134-35); *see also* O'Hara (JLI) Tr. 624-25 (explaining that a cigarette shape "isn't ideal for people that are trying to switch from cigarettes"); PX7033 (O'Hara (JLI) Dep. at 191-92) ("[Cig-a-likes] generally were not . . . a strong form factor for converting smokers.")).

426. The "[c]onversion potential [of MarkTen cig-a-like] was weak." (Jupe (Altria) Tr. 2304-05; PX7024 (Crosthwaite (Altria/JLI) Dep. at 213-14) (Cig-a-likes have not "demonstrated [conversion] potential.")). *See also* Willard (Altria) Tr. 1421-22 (MarkTen cig-a-like "wasn't having any success in the marketplace in converting adult cigarette smokers.").

427. "MarkTen Elite did not have high conversion potential. It had insufficient nicotine satisfaction due to the absence of nicotine – due to the absence of nicotine salts." (Gardner (Altria) Tr. 2594-95). "MarkTen Elite didn't have the nicotine experience necessary to satisfy consumers coming in from the cigarette category[.]" (Gifford (Altria) Tr. 2779). Elite "didn't deliver the nicotine satisfaction that adult smokers were looking for to lead to conversion." (Begley (Altria) Tr. 1096-97).

428. "The problem we were having is the consumer[s] who intended to buy [Elite] were more likely to be dual users and were not converting, or there was very little evidence of conversion and the product really sticking." (PX7023 (Fernandez (Altria) Dep. at 78-79)). Elite just "didn't satisfy to the extent it needed to satisfy" to convert smokers. (PX7023 (Fernandez (Altria) Dep. at 152)).

429. PMI, which was watching the U.S. e-vapor industry evolve from abroad and had launched some of Altria's products in international markets, concluded that none of Nu Mark's products were successful at converting smokers. (King (PMI) Tr. 2431-32, 2502). Martin King, then CEO of PMI Americas, testified that this conclusion was based on "the actual results in the marketplace and the fact that [Altria] never achieved very . . . significant market shares." (King (PMI) Tr. 2503).

430. JLI believed that Nu Mark's products were not successful at converting smokers. (*See, e.g.*, RX1420 (JLI), PX2269 (JLI)). JLI's cofounder, Adam Bowen, observed that Elite "do[es]n't provide cig-like nicotine satisfaction" and believed MarkTen "Bold is a terrible product – they didn't get it right." (RX1420 (JLI) at 001; PX2269 (JLI) at 001). Bob Robbins, JLI's Chief Growth Officer, testified that cig-a-likes did not "deliver[] the nicotine satisfaction that a smoker would want to convert[.]" (Robbins (JLI) Tr. 3244). Elite "didn't seem to be effective at converting cigarette smokers[.]" (Robbins (JLI) Tr. 3251).

431. Altria saw in the data from scientists and analyst reports "that JUUL was effective at converting smokers" and Altria viewed JUUL as "the most . . . effective, noncombustible product on the market to convert smokers[.]" (Garnick (Altria) Tr. 1771; Gifford (Altria) Tr. 2828 ("[T]he outside world was clearly seeing – and this was an independent survey done by [market analysts] – that JUUL was very successful in converting adult smokers, [and was] impacting brands across the cigarette space.")).

4. Nicotine Salts

a. Function of Nicotine Salts

432. The addition of organic acids to a nicotine solution produces "nicotine salts." (Jupe (Altria) Tr. 2229; PX4504 (Altria) at 009, 024).

433. The addition of nicotine salts brings down the pH (a measure of acidity) of the nicotine in the e-liquid. (Gardner (Altria) Tr. 2600-01). The pH measure serves as a proxy for how nicotine is delivered to the lungs because "the more acid you added, the lower the pH of the liquid, and . . . the more nicotine salt would be created." (Quigley (Altria) Tr. 2006; *see also* Jupe (Altria) Tr. 2269 ("The salts influence the pH. The right level of salts take the pH down . . . .")). By introducing an acid to nicotine to make nicotine salts, the pH level starts to approach the level of a combustible cigarette. (Jupe (Altria) Tr. 2138-39).

434. Nicotine salts are intended to mimic the nicotine that comes from heating and burning leaf tobacco. (O'Hara (JLI) Tr. 547). Nicotine salts deliver nicotine "deeper into the lungs,"

(Gardner (Altria) Tr. 3086-87), and offer a "smoking experience very similar to conventional cigarettes." (PX7015 (Gogova (Altria) Dep. at 120); *see also* PX2158 (JLI) at 036 (explaining that nicotine salts "allow[] for a nicotine absorption rate that closely matches that of a comparative traditional cigarette"); PX2168 (JLI) at 011).

435. By the summer of 2018, Altria's scientists believed that nicotine salts were necessary for nicotine satisfaction, and that nicotine salts could mimic the cigarette experience only if they were used in the correct ratio. (Jupe (Altria) Tr. 2142, 2229; PX4504 (Altria) at 009, 024).

436. Altria's understanding of nicotine salts evolved gradually over time. (F. 436-444).

437. Altria's scientists understood that nicotine salts were important for "abating some of the irritation in the throat" caused by nicotine. (Jupe (Altria) Tr. 2139, 2229-30; *see also* PX4504 (Altria) at 009 (explaining that salts "[m]odulat[e] . . . harshness")).

438. Altria's scientists had hypothesized that nicotine salts were important to nicotine satisfaction, but "didn't have the data" to support that hypothesis. (PX7015 (Gogova (Altria) Dep. at 310-12)). Until 2018, because of safety and other concerns, Altria's scientists were not permitted to run consumer tests with nicotine salts in sufficient concentrations, which limited their ability to develop effective nicotine salt formulations. (PX7034 (Mountjoy (Altria) Dep. at 64-66); PX7015 (Gogova (Altria) Dep. at 133-37, 310-13)).

439. When Altria's scientists were able to conduct testing of nicotine salts in sufficient concentrations, the results led in the summer of 2018 to what Altria's scientists termed a "eureka moment." (Jupe (Altria) Tr. 2142).

440. Altria's scientists discovered in June 2018 that, in addition to mitigating the harshness of nicotine in the throat, nicotine salts created nicotine absorption most similar to how the nicotine in a cigarette is absorbed. (Jupe (Altria) Tr. 2137-39; PX4504 (Altria) at 009; RX0526 (Altria) at 006).

441. By June 2018, Altria's scientists discovered that without nicotine salts, the nicotine in aerosolized e-vapor is largely in the gas phase, and such nicotine escapes into the mouth and throat before it can be absorbed in the lungs. (Jupe (Altria) Tr. 2270-71; RX0796 (Altria) at 039; PX7015 (Gogova (Altria) Dep. at 40-42)). The addition of nicotine salts serves to keep more of the nicotine in the particulate phase and thus enables it to reach the lungs. (Jupe (Altria) Tr. 2138, 2270-71; Quigley (Altria) Tr. 2005-06; RX0796 (Altria) at 039; PX7015 (Gogova (Altria) Dep. at 40-42)). *See also* PX7015 (Gogova (Altria) Dep. at 42) ("[I]f you are really looking for immediate nicotine satisfaction and replacement of conventional cigarettes, the easiest way would be [to] provide the adult smokers with similar nicotine release profile as a conventional cigarette, and this cannot be achieved truly without the acids to create nicotine salts technology.").

442. In the summer of 2018, Altria's scientists reached a consensus that the "[u]se of nicotine salts or addition of acids to achieve a certain pH is required for a satisfying and relaxing E-vapor experience." (Jupe (Altria) Tr. 2275; RX0796 (Altria) at 053; PX4504 (Altria) at 024; *see also* Gardner (Altria) Tr. 2585-86 ("The consensus was that nicotine salts would be required for adult smoker conversion to e-vapor products."); RX0419 (Altria) at 001-02; RX0526 (Altria) at 006).

443. Altria's goal was to add enough acid to "adjust the pH of an aerosol from an e-vapor product" so that it would match as closely as possible the pH of a cigarette and "replicate the nicotine satisfaction experience [of smoking] . . . in an e-cigarette." (Quigley (Altria) Tr. 2005-06; *see also* Jupe (Altria) Tr. 2270; Murillo (Altria/JLI) Tr. 3051-52).

444. Altria's scientists determined that a 4:3 ratio of nicotine to organic acids was the "most appropriate ratio." (Jupe (Altria) Tr. 2136-37).

445. These realizations led Altria's scientists to take the position that "[a]ll newly developed e-vapor products, regardless of nicotine content, should utilize nicotine salt technology." (Jupe (Altria) Tr. 2275; RX0796 (Altria) at 053).

b. Elite Did Not Have Nicotine Salts

446. Elite did not contain nicotine salts and had a low nicotine content. (Willard (Altria) Tr. 1357).

447. When Joseph O'Hara, JLI's Director of Regulatory Strategy, realized that Elite did not have nicotine salts, he "did not expect that [Elite] would be a particularly strong competitor," especially because it had "low nicotine content" and "no salts." (O'Hara (JLI) Tr. 631-32) discussing PX2086 (JLI) at 001 (February 26, 2018 email providing "summary of our views on the launch of MarkTen Elite this morning. Net takeaway is that we believe the MarkTen Elite is a meaningful positive for us relative to expectations based on (1) low nicotine content pods, (2) no salts, and (3) lack of marketing roll-out."). (PX2086 (JLI) at 001).

448. When Bowen, one of JLI's cofounders, realized Elite was not using salts, he concluded that Elite could not "provide cig-like nicotine satisfaction" and thus was "not a threat." (RX1420 (JLI) at 001; *see also* RX1421 (JLI) at 001). This defect made Elite "an absolute nonstarter" in his view. (PX2269 (JLI) at 001).

449. Because Elite lacked nicotine salts, its e-liquid pH was too high to mimic that of a cigarette and caused a "significant amount of nicotine loss." (RX0419 (Altria) at 001).

450. The level of pH is measured on a logarithmic scale. "[A] one-unit difference in pH – for example, from 7 to 8 – is a tenfold difference in the acidity level or the acid level." (Gardner (Altria) Tr. 2600-01).

451. The pH of Elite was approximately 9. (RX2036 (Altria) at 005; *see also* PX1028 (Altria) at 006). The pH of a Marlboro cigarette is around 5.8. (RX2036 (Altria) at 005; RX0796 (Altria) at 037; RX0429 (Altria) at 004).

452. Altria's scientists believed that Elite's high pH was "not ideal for conversion" of adult cigarette smokers to e-vapor. (PX1028 (Altria) at 001).

453. Elite's lack of nicotine salts meant that virtually none of the nicotine in the vapor was being delivered to the lung in the way it would be delivered in a cigarette. (Jupe (Altria) Tr. 2272-75; RX0796 (Altria) at 050; *see also* Schwartz (Altria) Tr. 1920-21 ("[Elite's] vapor delivery system was inefficient in the sense that that vapor stream in the absence of salts was not getting to the lower lung and up into the bloodstream . . . .")).

454. In the spring of 2018, Altria scientists ran a denuder tube study to test the role of nicotine salts. A "denuder tube" was "a very long tube" into which a "cigarette was puffed." (Jupe (Altria) Tr. 2272). E-vapor products were then puffed into the same tube, and the goal was to get the aerosol to "come out of the tube just like the cigarette [smoke] does." (Jupe (Altria) Tr. 2272-73). This was "a good proximate of how the lung is receiving nicotine." (Jupe (Altria) Tr. 2273).

455. Altria's scientists presented the results of the denuder tube study to Altria's consumer research team in May 2018. (RX0796 (Altria) at 001; Jupe (Altria) Tr. 2145-46). A tested product with 4.5 percent nicotine by weight and no acid was "pretty close to where Elite was" and the study showed that it was delivering almost no nicotine to the lung. (RX0796 (Altria) at 050; Jupe (Altria) Tr. 2272-75).

456. As Jupe testified, Elite "was not a product that we found to be satisfying, and in our opinion – my opinion, especially – we didn't think this was going to be a product that was going to convert or switch smokers, because it lacked that nicotine satisfaction that really you can only ascertain through the introduction of salts." (Jupe (Altria) Tr. 2153-54).

457. Nu Mark's "best guess" for how long it would take to create the right nicotine salts formula, submit a PMTA on that formula, and receive FDA approval to commercialize the new product "was five to six years." (Jupe (Altria) Tr. 2256).

458. As a result of Elite's lack of salts, Jupe came to believe by the summer of 2018 that "Elite, as it was, was not the product [Altria] needed in [its] portfolio." (Jupe (Altria) Tr. 2155-56).

c. MarkTen Bold with Nicotine Salts

459. Unlike the other MarkTen cig-a-likes, MarkTen Bold had nicotine salts. In February 2018, while addressing investors, Willard stated, "MarkTen Bold, which is currently in about 25,000 retail stores, uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes." (PX2176 (JLI) at 110).

460. By the summer of 2018, Altria believed that MarkTen Bold did not have the correct nicotine salts formula. (Quigley (Altria) Tr. 2037-38; Jupe (Altria) Tr. 2230-33; PX7016 (Jupe (Altria) Dep. at 107-08)).

461. As Jupe explained, the "addition of nicotine salts" was just "part of" what was required for nicotine satisfaction. (Jupe (Altria) Tr. 2136-37). "The second part of it is having the right level of nicotine salts to the right level of nicotine." (Jupe (Altria) Tr. 2137).

462. MarkTen Bold had 4 percent nicotine by weight and 1 percent acid. (Jupe (Altria) Tr. 2228-29; PX7015 (Gogova (Altria) Dep. at 137-38); RX2036 (Altria) at 005). JUUL came in a 5 percent nicotine by weight and 4 percent acid (leading to the creation of nicotine salts). (RX0796 (Altria) at 050; *see also* Jupe (Altria) Tr. 2273-74).

463. MarkTen Bold had a pH of 8, while the pH of a Marlboro cigarette is around 5.8. (RX2036 (Altria) at 005; RX0796 (Altria) at 037; RX0429 (Altria) at 004).

464. MarkTen Bold's high pH meant that it was losing approximately half of its nicotine into the mouth and throat region. (Jupe (Altria) Tr. 2274 (discussing RX0796 (Altria) at 50); *see also* RX0526 (Altria) at 016; Jupe (Altria) Tr. 2274 (explaining that a product "pretty close" to MarkTen Bold's nicotine by weight, with the same amount of acid, was "losing 60 percent of its nicotine into the mouth and throat region, not getting to the lung")).

465. The salts ratio in MarkTen Bold was "the best [Altria] knew" in 2016 when the formulation was created, "but it wasn't enough salt. It just was not satisfying." (Jupe (Altria) Tr. 2228-29).

466. Pharmacokinetic (PK) models, referred to as "PK curves," are used to measure how nicotine is delivered to the body. (Jupe (Altria) Tr. 2231-33, 2270).

467. To generate a PK curve, blood is drawn from a test subject, and nicotine levels are measured in the blood over time. The curve generated from the results of this testing depicts the way that nicotine is delivered to and maintained in the bloodstream. (Jupe (Altria) Tr. 2231-33).

468. A comparison of a cigarette's PK curve to that of an e-vapor product "is a surrogate . . . for cigarette satisfaction or nicotine satisfaction." (Jupe (Altria) Tr. 2231-32).

469. A smoker trying MarkTen Bold would have to take anywhere from "25 to 30 puffs to really get closer" to the nicotine satisfaction of a "conventional cigarette." That is "too much additional work for adult smokers to do" to "get closer to where they wanted to be" with MarkTen Bold. (PX7015 (Gogova (Altria) Dep. at 144-46)). In that situation, the smoker would just start "looking for potentially other alternatives" that do not require working as hard or using the product as much. (PX7015 (Gogova (Altria) Dep. at 144-46)).

d. Assessment of Need for Nicotine Salts

470. In June 2018, Quigley revised Nu Mark's vision and mission statements to focus on "switching" smokers. (Quigley (Altria) Tr. 2013-14; RX0371 (Altria) at 018). Quigley believed that if Nu Mark was going to succeed, it had to find a way to "ensure that the nicotine experience [was] going to be what it need[ed] to be to get a smoker to put down a pack of cigarettes and move to an e-cigarette product." (Quigley (Altria) Tr. 2014).

471. Quigley began meeting with Altria's scientists, including Dr. Gerd Kobal, to familiarize himself with what the scientists had learned about nicotine salts and to discuss the path forward. (Jupe (Altria) Tr. 2265-67).

472. Dr. Kobal was an Altria scientist who ran the company's "sensomics department," which studied "the senses and interaction with [Altria's] products" and worked on product development within Altria's Regulatory Sciences division. (Quigley (Altria) Tr. 2005; Jupe (Altria) Tr. 2217).

473. Dr. Kobal's work involved extensive research on nicotine salts. The research showed that "the products that were in the [Nu Mark] portfolio, the products that were being worked on, [and] the products that were on the shelf were inadequate to achieve this goal of converting smokers." (Jupe (Altria) Tr. 2279).

474. Dr. Kobal's analysis of nicotine salts in JUUL showed that JUUL possessed an optimal formulation of nicotine salts, allowing it to mimic the nicotine delivery of a cigarette. (Jupe (Altria) Tr. 2265-68, 2271-74; Gardner (Altria) Tr. 3086-87).

475. Dr. Kobal and other Altria scientists informed Quigley in June 2018 of their view on the necessity of nicotine salts. (Quigley (Altria) Tr. 2005-08; RX0419 (Altria) at 002; *see also* PX4504 (Altria) at 024).

476. When Quigley learned of this view, he had what he called an "aha" moment. (Quigley (Altria) Tr. 2076; *see also* Quigley (Altria) Tr. 2029 (agreeing that discovery of the necessity of nicotine salts was the "eureka" moment he and Dr. Kobal had in early June)). Dr. Kobal showed Quigley the market comparison of the pH of all e-vapor products, which illustrated that none of Nu Mark's products "had enough acid to have the pH to be similar to a cigarette." (Quigley (Altria) Tr. 2007).

477. Quigley learned from Kobal and Jupe that there were other features desired in an e-vapor product, but "at the end of the day, if you didn't have the immediate nicotine satisfaction, you would not be successful." (Quigley (Altria) Tr. 2012-13; *see also* PX4504 (Altria) at 024; RX0419 (Altria) at 002). As Quigley explained at the Level Setting Meeting (F. 548), drawing on his experience "work[ing] in the diaper business," he came to understand that an e-vapor product that does not deliver nicotine satisfaction is like a diaper that leaks – it does not do its job. (Quigley (Altria) Tr. 2015-16 ("[Y]ou could add velcro tabs and you can make them pull up and make them more comfortable, but if your diaper is leaking, no one is going to come back and buy your diaper.")).

478. After meetings with Dr. Kobal (F. 470-476), Quigley "felt like [he] had learned something that was . . . the most foundational thing about [Nu Mark]," and it gave him "the foundation to know . . . the problem with all of [Nu Mark's] products," and "what [Nu Mark] had to do to build a plan." (Quigley (Altria) Tr. 2008).

479. Once Altria realized the importance of nicotine salts, Altria had to determine what type of acid (acetic, lactic, or benzoic) to use and the optimal ratio of those acids in combination with the right ratio of nicotine. (Jupe (Altria) Tr. 2139-40).

480. To improve its nicotine salt formulations, Altria would also have to test the "flavor system interacting with the acids, interacting with the nicotine." (Jupe (Altria) Tr. 2147). "There's a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids." (PX7016 (Jupe (Altria) Dep. at 332-33)).

481. To improve its nicotine salt formulations, Altria would have to determine that the salts formula used would not "degrade" the components in the product. "[The] flavor system has to survive within the pod, within a packed-down environment for at least six months to a year, such that it doesn't interact with the metals. Amino acids, obviously interact with metals. They interact with plastics." (PX7016 (Jupe (Altria) Dep. at 332-34)).

482. To improve its nicotine salt formulations, Altria would also need to put the salts formula in a format that could be delivered by aerosol. (PX7016 (Jupe (Altria) Dep. at 334)).

483. Altria believed that if nicotine salts were added to its e-vapor formula, it would be considered a new product for purposes of the Deeming Rule, which, in order to be sold on the market, would first require authorization from the FDA through a PMTA. (Jupe (Altria) Tr. 2230, 2256; Murillo (JLI/Altria) Tr. 2927-28, 3069; Begley (Altria) Tr. 1081; PX7026 (Gardner (Altria) Dep. at 41-42).

5. Leaking Issues with Elite

484. Altria was aware before launching Elite that there was a problem with the pods leaking. Some within Altria deemed the leaking to be at a manageable level, although those in Nu Mark's operations division felt the level was unacceptable. There was "a lot of tension in terms of wanting to get the product out." While Elite had "issues," it was the only pod-based product Altria had that could be put into the market consistent with the Deeming Rule. (Schwartz (Altria) Tr. 1881-83; PX4129).

485. Although leaking was common to many pod-based e-cigarettes, leaking issues "were certainly worse with some [products] than others." (PX7033 (O'Hara (JLI) Dep. at 90-91)).

486. Altria had not expected to have a leaking problem with Elite that was as significant as it was. (Begley (Altria) Tr. 1126; PX7022 (Begley (Altria) Dep. at 231)).

487. One study referenced in an April 2018 internal Nu Mark e-vapor update showed that at times, over 40 percent of Elite's pods leaked. (RX0547 (Altria) at 007). Elite's level of leaking at launch was "unacceptably high." (Willard (Altria) Tr. 1298; *see also* Willard (Altria) Tr. 1295; Schwartz (Altria) Tr. 1880-81 (discussing PX4129 (Altria) and describing Elite's level of leaking as "unacceptable").

488. JLI's Joseph O'Hara, Director of Regulatory Strategy, recalled that, the day Elite launched, he ordered "a large number of samples" "and when those samples arrived to [him], every single one of those samples was leaking in the packaging, as well as whenever [he] tried to use them, they would then leak . . . in [his] mouth." (PX7033 (O'Hara (JLI) Dep. at 192). *See also id* at 78 ("The overall product quality was also very poor. There was a lot of leaking of the pods in the packaging, in the device, out of the pods while you were consuming it."); O'Hara (JLI) Tr. 548 (In O'Hara's experience, Elite "pods were uniquely leaky, unlike just about any other product" he had ever seen")).

489. A consumer opening an Elite package "would see literally fluid inside the pod in the package . . . . And in some cases, the leaking was so bad" it could be seen "on the outside of the carton" that had been used to ship the products to the retail store. (Myers (Altria) Tr. 3324).

490. In March 2018, an Altria document reported that two employees and two other individuals purchased eleven packs of Elite products and that of those packs, seven had at least one pod that leaked, and leaked more than a couple of drops. The document reported that three of the four people that purchased the Elite "also reported liquid dripping into their mouths when using the product." (PX4083 (Altria) at 003).

491. In comparison with other pod products, Elite's leaking was "much more pervasive." (Myers (Altria) Tr. 3324-25).

492. In JLI's consumer studies, leaking was "a top feature of MarkTen Elite." (O'Hara (JLI) Tr. 639).

493. Altria received complaints from consumers and retailers regarding Elite's leaking pods. (Willard (Altria) Tr. 1309; PX7014 (Baculis (Altria) Dep. at 179-80); *see also* PX4129 (Altria) (March 22, 2018 email from Craig Schwartz assuring sales representative that there was a "concerted effort afoot to address" the leaking issue and asking that he "continue to share any and all MarkTen Elite product quality feedback . . .); Schwartz (Altria) Tr. 1880-81 (discussing PX4129 (Altria)).

494. Retailers of Elite notified Altria of complaints from customers about leaking, and retailers' frustration with customers "taking their frustration out on them when [the leaking] was really [Nu Mark's] problem." (Begley (Altria) Tr. 1103-04; *see also* Myers (Altria) Tr. 3324-25 (explaining that Elite's retailers notified Altria of consumers upset by leaking issues and complaining to clerks, and inquired what Altria was going to do to rectify the issue).

495. Wholesalers and retailers such as McLane Services (Altria's largest wholesale distributor) and 7-Eleven (the largest retail convenience store in the United States) had "gone to great lengths operationally" to get Elite into stores "and to have it be defective out the gate, they were pretty upset." (Myers (Altria) Tr. 3324-25, 3327; Begley (Altria) Tr. 1101; *see also* PX4083 (Altria) at 001 (Myers promising to "keep McLane and 7-Eleven calm" regarding the leaking)).

496. First impressions of a product are important and Elite's leaking was unhelpful in trying to get Elite "off the ground." (PX7022 (Begley (Altria) Dep. at 232) ("[Y]ou don't get many bites at the apple. And so to have [leaking] as a prevalent issue in the marketplace is terribly unhelpful as you're trying to get a new brand off the ground."); PX7012 (Eldridge (ITG Brands) Dep. at 147)).

497. "[I]t's hard to undo [consumers'] first perception of the brand." (Begley (Altria) Tr. 1104; *see also* Myers (Altria) Tr. 3328-29 ("[T]o launch a new product and then . . . the consumer uses the product for the first time and find it had leakage in it, you know, [retailers] were really concerned that we were – you know, big misstep here."); PX7037 Huckabee (Reynolds) Dep. at 81 ("[P]od leakage [is] a very primary constraint. If the pods aren't themselves functioning properly, you won't have promotional effectiveness[.]")).

498. If a consumer purchases a product that "leaks heavily . . . they aren't likely to repurchase that product." (PX7037 (Huckabee (Reynolds) Dep. at 82-83)).

499. Consumers were "turned off by the fact" that Elite pods were leaking. (Willard (Altria) Tr. 1297).

500. Elite's leaking issue "impacted [Altria's] expansion plans for MarkTen Elite[;] as long as [Elite's] pods were leaking, it was hard [for Altria] to expand the product." (Schwartz (Altria) Tr. 1905-06).

501. JUUL was the market leader and Elite needed to be "that much better than the competition to dislodge [consumers] from their choice" of product. (PX7018 (Schwartz (Altria) Dep. at 152-53); Schwartz (Altria) Tr. 1889-90 ("It's very hard to dislodge a consumer who's very content with JUUL if I give them a product that's leaking.")).

502. By July 12, 2018, JLI concluded that Elite's "[e]xcessive leakage ha[d] significantly (perhaps irreparably) damaged the brand[.]" (RX1165 (JLI) at 004; *see also* Myers (Altria) Tr. 3328-29 (agreeing he "certainly felt [the leaking] had" damaged the brand)).

503. Altria determined that in large part, the leaking problem with Elite was due to "a leaking gasket. When pressures changed, whether that was in shipping or in the distribution system, it would cause the liquid to come out of the pod." (Begley (Altria) Tr. 1102-03).

504. Over time, Altria came up with multiple ways to address the problem of leaking pods. (Willard (Altria) Tr. 1294-96).

505. Some of the earliest fixes were manufacturing changes. (Willard (Altria) Tr. 1294-95). As Willard explained at trial, Elite was manufactured by hand in China, and it took time for newly hired employees to learn how to assemble the device properly. (Willard (Altria) Tr. 1294-95; *see also* RX0547 (Altria) at 006)). "[W]hen they learned how to do it well, the leaking went down dramatically." (Willard (Altria) Tr. 1295).

506. Nu Mark also experimented with "chang[ing] the shipping from China so that pods were shipped in a different position," (Willard (Altria) Tr. 1309), as well as shipping the pods in blister packs and without caps over the cartridge. (RX0547 (Altria) at 007).

507. By March 2018, a series of quick fixes, such as those in F. 504-505, had reduced Elite's leaking. (PX4129 (Altria) (showing improvement in leaking)).

508. By June 8, 2018, Nu Mark developed a new gasket that it believed would fix the leaking associated with Elite and began planning for "production [of] MarkTen Elite with the New Gasket[.]" (Schwartz (Altria) Tr. 1895-96 (discussing PX1579 (Altria)).

509. Nu Mark believed that a replacement gasket would take the leaking "from mostly fixed to even more fixed, and the Nu Mark team proposed that as a solution at the time." (Willard (Altria) Tr. 1295-96; *see also* Willard (Altria) Tr. 1303 ("I was told by the Nu Mark team that they had made substantial progress with a focus on improving their manufacturing process, but they felt that they could make further progress by making this gasket fix.")).

510. The replacement gasket was called the c1A gasket. (Garnick (Altria) Tr. 1622; Schwartz (Altria) Tr. 1898; Gardner (Altria) Tr. 2664).

511. Testing on the c1A gasket demonstrated that it further improved, but did not entirely resolve, Elite's leaking. (PX1556 (Altria) at 002; PX1560 (Altria) at 002; Schwartz (Altria) Tr. 1901-02; 1908-10; Gardner (Altria) Tr. 2664; PX7016 (Jupe (Altria) Dep. at 121-22); PX7026 (Gardner (Altria) Dep. at 187-88)).

512. Altria maintained a "Change Management Team" or "CMT" to review proposed e-cigarette product changes and determine whether the changes compromised the status of the product under the FDA's Deeming Rules. (Schwartz (Altria) Tr. 1891-93). After the proposed change goes through this committee, "if it's a risky issue, if it requires upper management, it then goes to the leadership team and goes to Howard [Willard, Altria's CEO]." (Garnick (Altria) Tr. 1801-02).

513. The MarkTen Elite gasket change was submitted to Altria's Change Management Team. (PX7003 (Quigley (Altria) IHT at 77)).

514. On August 10, 2018, Willard approved the production of Elite with the c1A gasket. (Schwartz (Altria) Tr. 1904 (discussing PX1582 (Altria) at 002); PX7027 (Murillo (Altria/JLI) Dep. at 165-66); PX7036 (Garnick (Altria) Dep. at 142-43)).

515. After approving the production of Elite with the new gasket, and after further discussions, Willard reversed his approval, and decided that the new gasket should not be implemented due to the regulatory risk it might create. (Willard (Altria) Tr. 1309-11, 1313-14, 1317-19; *see also* Garnick (Altria) Tr. 1636).

516. Willard's reversal as to implementation of the gasket change notwithstanding, the gasket change was implemented. (Schwartz (Altria) Tr. 1904-05). Units of Elite with the c1A gasket were introduced to the U.S. market, "[f]irst through e-commerce . . . probably late August/early September [2018, and then in retail] probably . . . mid-September, late September [2018]." (Schwartz (Altria) Tr. 1910-11).

517. As of October 22, 2018, Altria had converted its MarkTen Elite inventory network to the c1A gasket. (PX1567 (Altria) at 001).

518. The c1A gasket reduced, but did not eliminate, leaking in MarkTen Elite. (Gardner (Altria) Tr. 2664).

519. The c1A gasket was successful in reducing minimal and excessive leakage rates in Elite. (Schwartz (Altria) Tr. 1907-10 (discussing PX1560 (Altria) at 001-02)). In an email dated October 22, 2018, and titled "MarkTen Elite Complaint Summary (October 2018)," Charles Epps, a quality technician who worked within the quality team at Nu Mark, reported that MarkTen Elite pods produced in production weeks 22 through 31, which were made without the new gasket, had "~35% Minimal Leakage Rate" and "~6% Excessive Leakage Rate," while MarkTen Elite pods produced in production weeks 34 and 35, which was after the c1A gasket change, had "0.6% Minimal Leakage Rate" and "0.2% Excessive Leakage Rate." (PX1560 (Altria) at 001-02).

520. Willard explained that Elite's issue with leaking "was not a primary factor in [Altria's] deciding to discontinue the product. I think by the time we got to the end of the summer [of 2018], the leaking problem, while still higher than we would like, had been dramatically reduced . . . ." (Willard (Altria) Tr. 1299).

521. The gasket change did not remedy Elite's lack of nicotine satisfaction. (Quigley (Altria) Tr. 1947-48, 2057-59; *see also* PX7041 (Quigley (Altria) Dep. at 153); PX7003 (Quigley (Altria) IHT at 118-19). By the summer and fall of 2018, retailers were less concerned about Elite's leaking and "more concerned about . . . the fact that it wasn't moving very quickly, and because it didn't have, in their mind, the right level of nicotine and nicotine salts." (PX7038 (Myers (Altria) Dep. at 86-87)).

K. Altria's Internal Assessments of Nu Mark and its Products

1. Internal Assessment of Nu Mark, Spring 2018

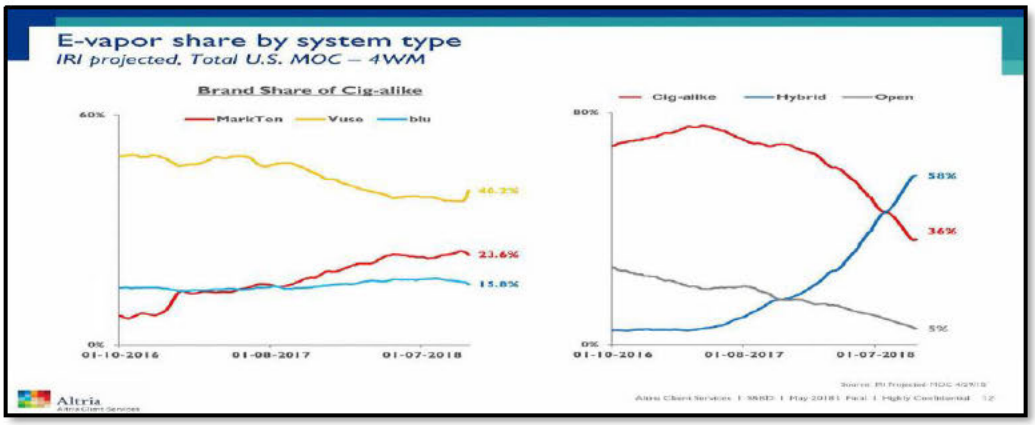
a. May 2018 Presentation to Altria's Board of Directors

522. In May 2018, Altria's management gave presentations to the Board of Directors on the state of the e-vapor category and Nu Mark's ability to compete in that market. (*See, e.g.*, PX1229 (Altria) at 001-02, 004-06, 011-24).

523. By May 2018, the e-vapor category was "growing faster than . . . anticipated" and "specifically what was driving that was pod-based products." (Begley (Altria) Tr. 1106; PX1229 (Altria) at 005). This growth was "the kind of growth [Altria] really hadn't seen from really any other reduced-risk product before," and "was almost completely driven by JUUL's growth." (Willard (Altria) Tr. 1363-64; *see also* Gifford (Altria) Tr. 2743-44; RX0272 (Altria) at 005).

524. The unprecedented rapid growth of pod-based products in general and JUUL in particular confirmed for Altria that its cig-a-like portfolio was not going to provide a path to leadership in the e-vapor category. (Begley (Altria) Tr. 1108 ("[W]e didn't know how the [e-vapor] category was going to shape up and where consumer preferences were going to land, so we thought placing multiple bets was appropriate. It turns out that the bet you really needed to make was a satisfying product that didn't look like a cigarette."); *see also* Willard (Altria) Tr. 1366 (In May 2018, "market share is in a free-fall for the category as a whole. So being the best cigalike when the category is in free-fall is not an opportunity for future profit.").

525. In May 2018, a presentation to the Board by Gifford and Begley included a slide that showed that from January 2016 to January 2018, the cig-a-like share in the e-vapor market was "plummeting," starting with a share of in excess of 70 percent, and ending with a share of 36 percent. (Willard (Altria) Tr. 1365-66; RX0272 (Altria) at 013):



(RX0272 (Altria) at 013).

526. In his May 2018 presentation to the Board, Begley expressed concern about the competitiveness of Nu Mark's pod-based product, Elite. As Begley informed the Board, Altria had realized by this point that "JUUL and MarkTen Elite appeal[ed] to different [adult tobacco consumer] audiences." (PX1229 (Altria) at 017). "JUUL appeals to [those] that are seeking a familiar cigarette-like experience while Elite appeals to [those] that are seeking a vaping experience." (PX1229 (Altria) at 017).

b. Corporate Restructuring in May 2018

527. In May 2018, Howard Willard became Altria's CEO. (PX9045 (Altria) at 001; Begley (Altria) Tr. 962).

528. Willard wanted Altria "to change [its] approach on innovation to have a better chance to fulfill [its] aspiration of being the U.S. . . . leader in noncombustible reduced-risk products." (Willard (Altria) Tr. 1372-73) (discussing RX0836 (Altria)).

529. In May 2018, Willard restructured Altria into "two divisions – core tobacco and innovative products." (RX0836 (Altria) at 001; *see also* Quigley (Altria) Tr. 1999-2000).

530. The goals of the restructuring of Altria in May 2018 were to "align" Altria's business units to the regulatory approach the FDA recently had announced, namely the continuum of risk between "combustible and noncombustible products"; "to rapidly transform [Altria's] product development capability"; "to turn around [its] e-vapor business"; (PX7003 Quigley (Altria) IHT at 25-26); and to overcome "the siloed nature of the way Altria did work[.]" (PX7034 (Mountjoy (Altria) Dep. at 93)).

531. As part of the May 2018 restructuring of Altria, to head the division focusing on innovative products, Willard appointed Brian Quigley, who previously had run U.S. Smokeless Tobacco Company, a subsidiary of Altria, to become the CEO of Nu Mark in May 2018. (RX0836 (Altria) at 002; *see also* Gifford (Altria) Tr. 2758-59; PX7031 (Willard (Altria) Dep. at 247-48)).

532. After appointing Quigley in May 2018 to lead the innovative products division, Willard asked Quigley to "go in and assess the strengths and, frankly, the weaknesses of the Nu Mark business and to make an assessment in his judgment on whether or not there were opportunities to make adjustments that would deliver greater success in the short run, and if success in the short run was a challenge, to identify what needed to happen over the longer term in order to have Nu Mark have more success." (Willard (Altria) Tr. 1373-74).

533. Willard believed that "[i]f there were opportunities to turn that business around, [Quigley] would likely be well positioned to identify them and, frankly, also if the business was as challenged as it seemed, . . . if he drew that conclusion, [then] that would be important feedback." (PX7031 (Willard (Altria) Dep. at 252)).

534. As part of Altria's annual planning process that typically would span the summer months (100 days) and culminate with a "game plan" to present at the Board meeting at the Ranch

in the fall (F. 613), Quigley's role as the new head of Nu Mark was to assess the situation, envision a plan to fix the situation, and map out the work that needed to either be funded or decisions that needed to be made to activate that plan. (Quigley, Tr. 2018-19).

535. Quigley understood that he was taking over a business that was "struggling and underperforming," and that his "directive was to figure out what was wrong and to fix the business." (Quigley (Altria) Tr. 1941; *see also* Quigley (Altria) Tr. 2086 (agreeing that Willard had "charge[d] [him] with coming up with the best plan [he] could to turn around [Nu Mark]")).

536. Quigley met with his immediate team in his first week and concluded that they "did not yet fully understand what was wrong with the business." (Quigley (Altria) Tr. 2003-04, 2010-11; *see also* Quigley (Altria) Tr. 2003 (describing meeting with Nu Mark's leadership team as the "very first thing" he did)).

537. As part of Altria's corporate restructuring in May 2018, Willard appointed K.C. Crosthwaite as Chief Growth Officer and tasked him with "building and acquiring the competencies, technologies and talent [Altria would] need to achieve [its] innovative products aspiration." (RX0836 (Altria) at 002).

538. Because commercializing new products was contingent on FDA approval, in May 2018, Willard moved the Regulatory Sciences division to be under the supervision of Murray Garnick, Altria's General Counsel and head of Regulatory Affairs, in order to better align regulatory strategy with the scientific agenda. (RX0836 (Altria) at 003).

539. In connection with supervising Altria's Regulatory Sciences division, in May 2018, Garnick was tasked with learning "the belief . . . of the scientific experts about the potential for Nu Mark's products to ultimately get approved by the FDA." (Willard (Altria) Tr. 1374-75).

2. Internal Assessment of Nu Mark, Summer 2018

a. Garnick's Meetings with Scientists

540. Starting in June 2018, in his new role as head of Regulatory Sciences at Altria, Garnick began having "a series of meetings with the scientists" on a weekly basis to understand "what the problems were" with Nu Mark's e-vapor products. (Garnick (Altria) Tr. 1712; Jupe (Altria) Tr. 2265; *see also* Gardner (Altria) Tr. 2578-79, 2581; PX7036 (Garnick (Altria) Dep. at 69)).

541. Altria's scientists conveyed to Garnick the problems with the chemistry of Altria's e-vapor products, including the formaldehyde issue (F. 394-396, 398-399, 411-412). (Garnick (Altria) Tr. 1713, 2581).

542. In their meetings with Garnick, Gardner and the other Altria scientists advised Garnick that the consensus among the scientists was that the FDA would not approve any PMTA for

Altria's products that were then on the market: "I was told that [Altria's] e-vapor products that were on the market would not get a PMTA. I was told that by [Altria's] scientists and I believed them. . . . In fact, I didn't think there was anyone on the science team who thought that they could get PMTAs." (PX7036 (Garnick (Altria) Dep. at 15)). A June 18, 2018 email from an Altria scientist to Garnick specifically advised that "no one thinks we can get a PMTA on current Mark Ten product[.]" (PX1890 (Altria) at 001; Garnick (Altria) Tr. 1725-27).

543. As a result of his meetings with the scientists in the summer of 2018, Garnick "developed a view that Altria should pull its e-vapor products from the market," although this view was "not shared by others at the time." (Garnick (Altria) Tr. 1583; *see also* PX7000 (Garnick (Altria) IHT at 101-02)). As Garnick explained, "it would cost a lot of money to create a new version [of each product] that would get a PMTA. And for every product, then, we would have to file two PMTAs, one to keep the current product on the market and one to introduce a new product." (PX7036 Garnick (Altria) Dep. at 101-02)). In addition, "none of the products on the market were effective in converting smokers[.]" (PX7000 (Garnick (Altria) IHT at 101-02)).

b. June 18, 2018 Strategy Session

544. On June 18, 2018, Quigley held a daylong strategy session with his team at the innovative products division ("June 18 Strategy Session"). (RX1282 (Altria) at 001; RX0371 (Altria)).

545. The attendees at the June 18 Strategy Session included senior people from "every function that touched [Nu Mark's] business," such as marketing and manufacturing. (Quigley (Altria) Tr. 2009-11).

546. At the June 18 Strategy Session, Quigley wanted to "start to share with [the attendees] what [he] was learning and . . . how [he] was starting to think about the future and what we wanted to accomplish with [the Nu Mark] business[.]" (Quigley (Altria) Tr. 2011).

547. Quigley's presentation at the June 18 Strategy Session was "informed" by what he "had learned with Gerd [Kobal] and Richard [Jupe]," which was that Nu Mark "had to acknowledge, with the goal of getting smokers to switch," that "the most important thing that products had to deliver to them was an immediate nicotine experience." (Quigley (Altria) Tr. 2012-13; RX0371 (Altria) at 010). Quigley "wanted to make . . . clear to everybody" that "at the end of the day, if you didn't have the immediate nicotine satisfaction, you would not be successful." (Quigley (Altria) Tr. 2012-13).

548. Quigley felt that Nu Mark had not been "clearly articulating what was the goal with our business," and that it was "critically important that we had to agree . . . that our vapor business' job was to switch smokers[.]" (Quigley (Altria) Tr. 2014). "[W]hen you use the word 'switch,' what we are saying is, we have to ensure that the nicotine experience is going to be what it needs to be to get a smoker to put down a pack of cigarettes and move to an e-cigarette product." (Quigley (Altria) Tr. 2014).

c. Level Setting Meeting

549. On June 21 and 22, 2018, Altria's senior leadership convened for a broader organizational meeting referred to within Altria as a level setting meeting ("Level Setting Meeting"). (RX0221 (Altria) at 003, *see also* at 007 (listing attendees)).

550. Willard set up the Level Setting Meeting because he was new to the CEO role, and he wanted "to understand all of [Altria's] products, understand where [the company was] with them, so he could assess . . . and [the leadership] could all assess" where the company stood. (Quigley (Altria) Tr. 2019-20; *see also* Willard (Altria) Tr. 1375-76).

551. The Level Setting Meeting included the operating company presidents, numerous senior vice presidents and senior leaders, including vice presidents for product innovation and regulatory affairs. Overall, there were "maybe 40 people in the room." (Quigley (Altria) Tr. 2021).

552. In his opening remarks at the Level Setting Meeting, Willard asked the group to "speak truthfully about the hard things" with regard to "the current situation," particularly Altria's "fundamental product and strategy gaps." (PX4205 (Altria) at 017). As Willard explained: "[W]e were really trying to understand what there was to be learned that could help us be more successful in the future." (Willard (Altria) Tr. 1376).

553. At the Level Setting Meeting, several presentations addressed the weakness of both Altria's innovative process and e-vapor product pipeline. Quigley began with a presentation highlighting the "[o]verarching [g]aps" in Nu Mark's existing e-vapor products. "Overarching gaps" identified in Nu Mark's product portfolio included a lack of "[c]lear understanding of how best to deliver nicotine satisfaction," a lack of "[c]lear understanding of how products map to" consumer desires, and the need for "[a]dditional foundational science . . . to ground product design." (RX0450 (Altria) at 024). As Willard explained, "gaps" is "a polite way of saying a weakness." (Willard (Altria) Tr. 1377-82).

554. At the Level Setting Meeting, Quigley explained to senior leadership the scientists' determination that nicotine salts are "required . . . to provide nicotine satisfaction to adult tobacco consumers." (Quigley (Altria) Tr. 2022-23, 2028-29; *see also* Jupe (Altria) Tr. 2287-88; RX0450 (Altria) at 024). Nu Mark needed to "[g]round all efforts in nicotine satisfaction first." (Quigley (Altria) Tr. 2022; *see also* RX0450 (Altria) at 021).

555. Quigley believed that it was "important [to] right size expectations for the current products," (RX0419 (Altria) at 002), given that "a consumer will not repurchase" a product that does not offer "immediate nicotine satisfaction." (PX7041 (Quigley (Altria) Dep. at 147)).

556. The takeaway from the Level Setting Meeting was that the leadership had "limited realistic confidence with [Nu Mark's] current portfolio." (Quigley (Altria) Tr. 2024 (discussing PX4205 (Altria) at 005)).

557. At the Level Setting Meeting, Quigley conveyed his belief that Altria and Nu Mark were not "structured appropriately" to develop innovative products. (Quigley (Altria) Tr. 2024-25). Quigley believed that the companies always "approached product development like a cigarette company" and "needed to think more like a technology company and have different capabilities and different processes[.]" (Quigley (Altria) Tr. 2025).

558. In Quigley's view, Altria had not been successful at innovating in the e-vapor space. Quigley did not think Altria was well-positioned to do so going forward. (Quigley (Altria) Tr. 2043).

559. In his presentation at the Level Setting Meeting, Jupe, Vice President of Product Development for Altria, highlighted a number of challenges facing Nu Mark's existing products (RX0450 (Altria) at 053):

- The pod product, Elite, would not be able to "compete successfully without higher level nicotine offerings" (RX0450 (Altria) at 068);

- MarkTen Bold needed a reformulated e-liquid capable of delivering nicotine satisfaction (RX0450 (Altria) at 065 (highlighting the need for "higher [nicotine by weight]" and "higher acids")); and

- The MarkTen cig-a-like's PMTA was contingent on a new battery to prevent dry puffing. (RX0450 (Altria) at 062-63).

560. The presentation from the regulation team at the Level Setting Meeting included as an option: "[c]ompletely re-set [Nu Mark's] product and filing plans." (RX0671 (Altria) at 004; *see also* RX0450 (Altria) at 051). Murillo, then Senior Vice President of Regulatory Affairs of Altria, "had no confidence in the current set of products and their [PMTA] filing plans, and it was a source of frustration, and [his presentation] was a somewhat perhaps unsuccessfully diplomatic way to convey to [his] colleagues that [the company] had to go back to the drawing board." (Murillo (Altria/JLI) Tr. 2949-50).

561. At the Level Setting Meeting, Murillo also urged the leadership to "[e]mbrace what it means to be regulated and be realistic about the FDA's approach." (RX0450 (Altria) at 051; *see also* Murillo (Altria/JLI) Tr. 2949-50 (discussing slide)). Murillo wanted to convey to his "colleagues on the executive team that we needed to go back to first principles, that we're a regulated company, and we can't just run around and throw products against the wall and see which ones stick and fix them later and all that stuff. We have to be realistic about the expectations that the FDA is setting forth with respect to these products." (Murillo (Altria/JLI) Tr. 2949; *see also* Murillo (Altria/JLI) Tr. 2948-49 (characterizing the enterprise as "running around like chickens with our heads cut off trying to find products in the vapor space that could be successful" and noting that "it wasn't going so well"); PX7015 (Gogova (Altria) Dep. at 102-03) (noting that the Nu Mark "business model [of] having as many products in the marketplace as possible" was not, from the scientists' perspective, "the right model to work under within the regulatory environment")).

562. Much of what was presented at the Level Setting Meeting was "new news" to Willard and the other executives in attendance. (Quigley (Altria) Tr. 2023; *see also* Garnick (Altria) Tr. 1727-28 (noting that before June 2018, Altria's leaders had not realized "that [Altria's] scientists believed that the MarkTen [cig-a-like] product would not get a PMTA" and "that in order to correct the problem" with the MarkTen cig-a-like, Altria "would need to get a PMTA first for the new product")).

563. Quigley recalled that at the end of the Level Setting Meeting, Willard "stood up and just said, this is a lot of information to process." (Quigley (Altria) Tr. 2023). Willard stated that the information provided "represented a fairly dire view of the likelihood of many of [Altria's] products getting FDA approval." (Willard (Altria) Tr. 1382-83; *see also* Murillo (Altria/JLI) Tr. 2952 (describing discussion as "sobering" and recalling "some people were dismayed")).

564. Willard did not believe that the PMTA risks communicated to him by his team at the Level Setting Meeting were manufactured or exaggerated. (Willard (Altria) Tr. 1382).

d. Nu Mark Portfolio Assessment

565. During his presentation at the June 21, 2018 Level Setting Meeting, Quigley announced the creation of a cross-functional team to be led by Nu Mark's Strategic Product Innovation ("SPI") group and to include representatives from Consumer Insights, Product Development, Regulatory, Operations, Sensomics & Flavor Development, and Strategy & Business Development. This team would undertake an assessment of the Nu Mark product portfolio ("Portfolio Assessment Team"). (RX0450 (Altria) at 026).

566. For each product reviewed, the Portfolio Assessment Team collected a range of different data points, including consumer research, whether the product contains salts, market trends, and how nicotine is delivered to the body. The team organized these data points into "Strengths," "Opportunities," and "Red Flags" for each product. (RX0532 (Altria) at 005-13).

567. The Portfolio Assessment Team found that one of the strengths of MarkTen Bold was that its pH testing results showed levels that were "as close as [Altria had] to a cigarette," but also stated that MarkTen Bold did "not have [the] optimal ratio of nicotine and salts." (RX0532 (Altria) at 006). For the MarkTen cig-a-like, the team's slide presentation highlighted both that the product had shown some conversion potential in an adult user study and that its "[n]icotine delivery may be less satisfying than other devices." (RX0532 (Altria) at 005). The Portfolio Assessment Team also found that, as to Elite, the home usage test showed an impact on cigarette usage "by week 4-5" but also that Elite did "not appeal to those seeking immediate nicotine satisfaction." (RX0532 (Altria) at 008).

568. The Portfolio Assessment Team rated each of Nu Mark's cig-a-like and pod-based products – including MarkTen cig-a-like, MarkTen Bold, Elite, Cync, and Apex – as having limited conversion potential. MarkTen cig-a-like, Elite, Cync, and Apex – which all lacked salts – were each rated as having "low" conversion potential. (RX0532 (Altria) at 005, 008, 010,

011; *see also* Gardner (Altria) Tr. 3092-94 (discussing slides for MarkTen and Elite)). MarkTen Bold, Nu Mark's only product with salts, was deemed to have "Low-Med" conversion potential, with the caveat that it was in a declining product format and did not have the "optimal ratio of nicotine and salts" to "provide expected nicotine satisfaction." (RX0532 (Altria) at 006).

e. July 15, 2018 Draft Presentation

569. On July 12, 2018, Garnick began working with his regulatory team to put together a presentation for an upcoming August 2018 Board meeting. Garnick asked the Regulatory Affairs team "to start putting together a board presentation so [the leadership] could discuss the issues as [it] saw them with the board." (Garnick (Altria) Tr. 1732; *see also* RX0914 (Altria); PX1786 (Altria); RX0642 (Altria); RX0689 (Altria)).

570. Magness, who was responsible for Altria's PMTA submissions in the summer of 2018, understood that Garnick, for the upcoming August 2018 Board meeting, "was interested in walking the board through each of the products in the e-vapor portfolio and helping them understand the regulatory questions and risks that [the regulatory team] had identified." (PX7017 (Magness (Altria) Dep. at 27, 176)). Garnick expressed to Magness that he wanted to share that product-specific information because he "was concerned with some of the product risks as [the regulatory team] had been updating him and wanted to make sure the board was clear about the regulatory risks [the team] had advised the business on." (PX7017 (Magness (Altria) Dep. at 179)).

571. The Regulatory Affairs team, including Magness, completed a first draft of a presentation for the Board on July 15, 2018. (RX0689 (Altria) at 001) ("July 15 Draft Board Presentation"). The substantive information in the draft "[came] from the scientists . . . and other technical experts in regulatory sciences." (Garnick (Altria) Tr. 1732).

572. Magness had no involvement with or knowledge of any negotiations with JLI while she was in Regulatory Affairs. (PX7017 (Magness (Altria) Dep. at 166-70, 284-85)). Greg Wilson and Joe Murillo, other members of the Regulatory Affairs team who also worked on the first draft of the Board presentation, were not involved in the JLI negotiations. (Garnick (Altria) Tr. 1706, 1761).

573. As to the MarkTen cig-a-likes, the July 15 Draft Board Presentation conveyed key concerns that the product could not satisfy two of the four criteria necessary to obtain PMTA approval: risk reduction and adult smoker conversion. (RX0689 (Altria) at 008; *see* Murillo (Altria/JLI) Tr. 2955-58; Garnick (Altria) Tr. 1735-36).

574. As to MarkTen Elite, the July 15 Draft Board Presentation conveyed key concerns that the product could not satisfy three of the four criteria necessary to obtain PMTA approval: manufacturing, risk reduction, and adult smoker conversion. (RX0689 (Altria) at 011; Murillo (Altria/JLI) Tr. 2956-58; Garnick (Altria) Tr. 1738-39). Elite's prospects as to the fourth criterion, no unintended consequences, were identified as uncertain because of the FDA's concerns regarding underage use of pod devices. (RX0689 (Altria) at 011; Murillo

(Altria/JLI) Tr. 2957). Elite overall had "three strikes and a question mark," which reflected Murillo's view that Elite "had very, very low prospects of success for a PMTA as it stood." (Murillo (Altria/JLI) Tr. 2958; *see also* Murillo (Altria/JLI) Tr. 2954-55 ("[I]f a product is, like, super good at risk reduction and could be controlled in the manufacturing sense and so forth, but doesn't convert smokers, then it's a failure . . . .")).

575. As to Apex, the July 15 Draft Board Presentation conveyed key concerns that it was uncertain whether the product could satisfy three of the four criteria necessary to obtain PMTA approval: risk reduction, adult smoker conversion, and no unintended consequences. (RX0689 (Altria) at 017; *see also* PX4149 (Altria) at 040 (final August 2018 Board presentation)).

f. August 3, 2018 Meeting

576. Quigley convened a meeting with Altria's senior management for August 2, 2018, which was held on August 3, 2018 ("August 3 Meeting"), in order to update them on Nu Mark's current year performance. (Quigley (Altria) Tr. 2029; PX7003 (Quigley (Altria) IHT at 123; PX1644 (Altria)). Quigley was not involved in the JLI negotiations. (Willard (Altria) Tr. 1390-91).

577. At the August 3 Meeting, Quigley advised senior management that Nu Mark "[l]ack[ed] quality pod products" and that Nu Mark's "Portfolio Gaps" included the lack of "[p]roducts that provide immediate nicotine satisfaction." (PX1644 (Altria) at 006, 018; Willard (Altria) Tr. 1395 (discussing PX1644 at 018 and explaining that "Portfolio Gaps" were "things [Nu Mark's] portfolio d[id]n't have that you would like to have")).

578. At the August 3 Meeting, Quigley highlighted that Elite was "Flavor Forward" because he believed that he "needed to start distinguishing with management that the products [Nu Mark] had [at the time] were flavor forward products but not necessarily the ones that had the nicotine satisfaction." (Quigley (Altria) Tr. 2037 (discussing PX1644 (Altria) at 018)).

579. In his presentation at the August 3, 2018 Meeting, Quigley concluded that "Nu Mark is limited to competing today in the cig-a-like segment." (PX1644 (Altria) at 006). Quigley viewed this as problematic, because by this point the cig-a-like segment was "very small and getting smaller relative to the growth in pods. So it was . . . not meaningful in terms of what was driving change in the tobacco landscape." (Quigley (Altria) Tr. 2032).

580. Willard recalled that at the August 3, 2018 Meeting, Quigley had explained, "at [that] point . . . the only products [Nu Mark] had that were at all competitive within a segment was the MarkTen cigalike, and while that might seem like a bright spot, [Altria] saw that the cigalike category was plummeting in share, and so if that was a bright spot, it was a very dim bright spot." (Willard (Altria) Tr. 1393).

581. In his presentation at the August 3, 2018 Meeting, Quigley concluded that Elite was not "proven to deliver broadly against [adult tobacco consumer] desires for a satisfying, enjoyable nicotine experience." (PX1644 (Altria) at 006). Quigley informed senior

management that Elite did not have nicotine salts and "did not have the nicotine relationship and levels of nicotine that adult smokers would be looking for" and had "design flaws." (Quigley (Altria) Tr. 2031-33). Quigley conveyed that nicotine satisfaction "was the most important thing [Nu Mark] needed in [its] products and [Nu Mark] didn't have it." (Quigley (Altria) Tr. 1959, 2031-32).

582. Willard recalled that at the August 3 Meeting, Quigley "concluded that [Nu Mark's] attempt at making MarkTen Elite into a quality and successful pod product had failed or was on its way to failure." (Willard (Altria) Tr. 1393-94). Willard understood Quigley to have been "suggesting that . . . we needed to go back and redouble our efforts to come up with a product that might be more competitive." (Willard (Altria) Tr. 1393-94).

583. Quigley's presentation at the August 3 Meeting highlighted the talent gaps at Nu Mark, particularly the need to bring in "external talent that had more experience innovating and that had experience with electronic products[.]" (Willard (Altria) Tr. 1396; *see also* PX1644 (Altria) at 022 ("Need proven capabilities to develop & launch[] innovative products outside a cigarette model[.]"); PX7041 Quigley (Altria) Dep. at 148-49 ("[Altria] had a long history of failure trying to do anything other than what [it] had proven to do successfully for decades," using a "cigarette model[.]")).

584. In advance of the August 3 Meeting, Elizabeth Mountjoy, then-Vice President of Corporate Strategy, circulated her "preliminary evaluation" of "the viability of Altria's current vapor products," which was "that Nu Mark does not have any products that merit a full-blown PMTA." (RX0199 (Altria) at 001; *see also* PX7034 (Mountjoy (Altria) Dep. at 145-48)). Mountjoy advised that "[t]he current portfolio should continue to be in market but with limited resources and applications. There needs to be (i) rapid advancement of our innovation system to develop a robust pipeline and (ii) an intense scrutiny of the people and roles supporting these efforts." (RX0199 (Altria) at 001).

585. To redirect Nu Mark going forward, at the August 3 Meeting, Quigley proposed a "bridge plan," to take Nu Mark from its then present situation, where there were gaps across Nu Mark's entire portfolio that needed to change, to a position that would allow Nu Mark to achieve leadership with FDA-approved products by 2025. The time period between 2018 and 2025 would be the bridge. (Quigley (Altria) Tr. 1956, 2040-41; PX1644 (Altria) at 004).

586. Quigley's bridge plan (F. 584) was "a very long plan" that required "five to seven years' worth of work[.]" (Quigley (Altria) Tr. 2032-33). "[I]t was going to be a long plan and an expensive plan, and there was a lot of risk on the science. We had learned, even when we thought we had a formula, we would be doing tox testing and it would fail. So it was . . . understood that this was going to be a long endeavor." (Quigley (Altria) Tr. 2042). Quigley acknowledged that even this plan was a "long shot," (PX7003 (Quigley (Altria) IHT at 118-19), and a "risky approach[.]" (Quigley (Altria) Tr. 2066).

587. Quigley believed that if Nu Mark was to achieve leadership, it "needed to have new products that [Nu Mark] did not have authorized to sell in the market, because [the existing

products] didn't have the nicotine salt." (Quigley (Altria) Tr. 2040-41; *see also* Willard (Altria) Tr. 1392-93 (Willard recalled Quigley conveying, "in the short run, I can't do much better than we're doing today, but if you need us to be doing something in the here and now in the market, that's kind of the best I can do. And then he was saying, but I am willing to sign up to build a better capability going forward, but it's going to take a while.")).

588. Based on Quigley's presentation at the August 3 Meeting about the gaps in Nu Mark's portfolio and the path to future profitability getting pushed out, Gifford believed Altria "really needed to assess whether [it] needed to free up those people and financial resources and invest them elsewhere." (Gifford (Altria) Tr. 2781-82). Responding to the presentation, Gifford asked whether Altria should consider pulling Elite from the market. Quigley recalled that Gifford observed at the time that Altria was "losing money" and did not "have the nicotine we need," and Gifford questioned "why are we continuing to lose money on this piece of shit business." (PX7041 Quigley (Altria) Dep. at 33-34).

589. Gifford's questions at the August 3 Meeting made sense to Quigley in light of "the[] fundamental business gaps" that Quigley had highlighted at that meeting. (Quigley (Altria) Tr. 1958-59). Quigley agreed that it made sense for Gifford to raise the idea of potentially pulling distribution of Elite. (Quigley (Altria) Tr. 2047-49).

590. As of the August 3 Meeting, Quigley had a directive from Willard, who was responsible for such decisions, to continue to "go forward with the Elite business." (Quigley (Altria) Tr. 2049-50; PX1174 (Altria) at 001).

g. August 23, 2018 Board Meeting

591. On August 23, 2018, General Counsel Murray Garnick presented to Altria's Board ("August 23 Board Meeting") the assessment of Nu Mark's regulatory prospects that the Regulatory Affairs team had begun preparing in early July ("August 23 Board Presentation"). (Willard (Altria) Tr. 1417; RX0689 (Altria) at 001).

592. The purpose of the presentation at the August 23 Board Meeting was to give the Board of Directors "a full and complete briefing on the regulatory issues the company was facing with [its] e-vapor products." (Garnick (Altria) Tr. 1743).

593. Some of the slides from the August 23 Board Presentation were revised since the initial draft, the July 15 Draft Board Presentation. However, "the significant, substantive information" conveyed about "MarkTen Key Concerns" and "MarkTen Elite Key Concerns" from the July 15 Draft Board Presentation remained the same in the final presentation given to the Board on August 23, as did the assessments of the products' ability to meet PMTA approval criteria, referenced in F. 572 and 573. (Garnick (Altria) Tr. 1734-35; *compare* RX0689 (Altria) at 008, 011 *with* PX4149 (Altria) at 033, 036 *see also* Willard (Altria) Tr. 1420-26 (discussing product performance on four criteria needed to obtain PMTA approval); Jupe (Altria) Tr. 2303-07; Gardner (Altria) Tr. 2603-07).

594. As to the MarkTen cig-a-like, the August 23 Board Presentation conveyed that the product could not satisfy two of the four criteria necessary to obtain PMTA approval: meaningful risk reduction and adult smoker conversion. (PX4149 (Altria) at 033).

595. As to MarkTen Elite, the August 23 Board Presentation conveyed that the product could not satisfy three of the four criteria necessary to obtain PMTA approval: manufacturing, risk reduction, and adult smoker conversion. Elite's prospects as to the fourth criterion, no unintended consequences, were identified as uncertain. (PX4149 (Altria) at 036).

596. In advance of the August 23 Board Meeting, Garnick and Willard discussed "that some of the board [might] be unhappy that [Nu Mark] hadn't had a better outcome," but they believed "that the board needed to know the facts about what [Garnick] had found in his regulatory review." (Willard (Altria) Tr. 1422; *see also* Gifford (Altria) Tr. 2787-88 (explaining that Altria's leadership informed the Board about the products' regulatory issues "[b]ecause we really needed to, one, be honest with the board, but two, you had to level-set about – we had to change directions in where we were headed, that what we were doing was not working, and even if it were working, there were significant regulatory hurdles to get through")).

597. At the August 23 Board Meeting, Garnick explained to the Board the FDA's expectations for reduced-risk products, the "[o]nerous and costly PMTA requirements," and that each of Nu Mark's products had significant regulatory red flags that likely would prevent FDA authorization. (PX4149 (Altria) at 027-041). Garnick conveyed that the primary problem, shared by all of Nu Mark's products, was lack of smoker conversion. (PX4149 (Altria) at 030, 033, 036; *see also* Willard (Altria) Tr. 1420-26; Jupe (Altria) Tr. 2303-07; Gardner (Altria) Tr. 2603-07).

598. Every Altria employee who was asked about the August 23 Board Presentation at trial or in a deposition affirmed that it was accurate. (Willard (Altria) Tr. 1427; Garnick (Altria) Tr. 1743; Jupe (Altria) Tr. 2305-07; Gardner (Altria) Tr. 2604-07; Murillo (Altria/JLI) Tr. 2961; PX7017 (Magness (Altria) Dep. at 285-86, 290-94); PX7041 (Quigley (Altria) Dep. at 155-56) ("the facts in the deck were accurate")).

3. Internal Assessment of Nu Mark, Fall 2018

a. September 2018 Assessment

599. Each September, Altria customarily begins putting together its plans for the upcoming year, and did so in September 2018. (Willard (Altria) Tr. 1433).

600. By September 2018, Altria "had concluded that many of the existing Nu Mark products – actually, all of the existing Nu Mark products – had failed to be successful in the marketplace," and that a "different approach" was needed. (Willard (Altria) Tr. 1434; *see also* Quigley (Altria) Tr. 2070-71 (agreeing Altria had "very little confidence" to "no confidence" in Nu Mark's current portfolio and its existing business approach to innovative products); PX7036 (Garnick (Altria) Dep. at 173-74) ("As it became clear to the company

that our products were not converting smokers and were not going to get a PMTA and were not profitable, we clearly needed to think about the future and what we would be doing in the future in the e-vaping market.")).

601. In September 2018, Altria decided "to put in place growth teams," which were officially announced on October 5, 2018 ("Growth Teams"). (Gifford (Altria) Tr. 2799; RX1149 (Altria) at 001) (September 5, 2018 email exchange between Crosthwaite and Garnick indicating Altria's need to "course correct" all of Nu Mark's activity, including by restructuring Nu Mark to be moved under the Chief Growth Officer); RX0842 (Altria) at 001-02)). *See also* Willard (Altria) Tr. 1380-81, 1433-34 (discussing PX1182 (Altria) at 001); PX7031 (Willard (Altria) Dep. at 266-69) ("[U]ltimately, we decided that, really, none of the MarkTen products had a reasonable likelihood of future success as measured by adult smoker conversion or profitability or, frankly, even being able to stay on the market, and we decided to take a different approach, which was . . . take everything we had learned, start over again with what we called growth teams, and acknowledge that it was probably going to be, I don't know, five or six years before the products that were designed by those teams . . . could go on the market . . . . And so we decided that the growth teams [were] a long shot, it was going to be slow, but that was the best path forward.").

602. The Growth Teams were designed to be "small teams" of individuals that would be "empowered . . . to move quickly" in pursuit of developing new "satisfying, innovative products." (RX0842 (Altria) at 002; *see also* Quigley (Altria) Tr. 2070 (recalling that the Growth Teams "would be empowered to make all the decisions going forward about what work continued and what work [Altria] needed to go do")).

603. The goal of the Growth Teams was to develop new products that "had the potential to leapfrog the JUUL product, which was at the time the superior product in the marketplace." (Willard (Altria) Tr. 1275). "[L]eapfrog products are traditionally viewed as products that are not a little bit better than the products that are out in the marketplace but that are so much better that they become a break-through leader when they're put in the market." (Willard (Altria) Tr. 1378).

604. Altria believed that any new product that the Growth Teams might come up with would be many years away: "[Altria] would be out on the market, call it, . . . five to seven years to get through the FDA process." (Gifford (Altria) Tr. 2799; Garnick (Altria) Tr. 1661-62 (explaining it "would have taken five to ten years" before any product developed by the Growth Teams could have received FDA approval and been placed on the market); Willard (Altria) Tr. 1436 ("It [would] . . . likely . . . take a number of years before their product could be introduced into the marketplace to compete . . . .").

605. Altria's transition to Growth Teams was "a big undertaking" that required Altria to "identify the best talent to go on the teams" and replace those people in their prior roles, as well as design the teams. (Gifford (Altria) Tr. 2799-2800).

606. Altria had difficulty recruiting outside talent with experience in innovation, electronics, and product chemistry. (Willard (Altria) Tr. 1396-97; *see also* Quigley (Altria) Tr. 2294-

96; Jupe (Altria) Tr. 2316-19; PX7024 (Crosthwaite (Altria/JLI) Dep. at 268-70, 279); PX7031 (Willard (Altria) Dep. at 261-64); PX7000 (Garnick (Altria) IHT at 86-87); PX7016 (Jupe (Altria) Dep. at 182-83); PX7017 (Magness (Altria) Dep. at 201-02)).

607. In order to fund and focus on the Growth Teams, Altria "would have to stop a lot of work, and that's what [it was] planning to do." (Jupe (Altria) Tr. 2311; Quigley (Altria) Tr. 2069-71, 2078 (explaining that as a result of the Growth Teams, Altria was going to "downsize the Nu Mark business"); RX1292 (Altria) at 055 ("Resources are constrained, spread across all Nu Mark initiatives and impacted by other operating companies[.]")).

608. On September 10, 2018, Altria's regulatory team took an inventory of ongoing projects for the purpose of transitioning to Growth Teams. (Jupe (Altria) Tr. 2310; *see also* RX0828 (Altria)). Quigley undertook a similar effort, to determine what Nu Mark work needed to continue and what work would stop for the Growth Teams "to then pick up going forward on vapor product development." (PX7003 (Quigley (Altria) IHT at 168-69)).

609. In a September 14, 2018 email, Garnick asked Quigley whether Altria should stop work on the PMTA for Elite: "My inclination is to stop work, because I have no reason to believe that Elite will be [the] device for the Juul fighter[.] I would have them shut down work in such a way to minimize the disruption if we have to start it back up again." (RX0319 (Altria) at 001).

610. In response to Garnick's email (F. 608), Quigley advised Garnick that "[w]e should stop ALL work around the [Elite] pmta." (RX0319 (Altria) at 001; *see also* Quigley (Altria) Tr. 2070-71 (agreeing that all work for the Elite PMTA should stop)).

611. On September 17, 2018, Willard approved a plan to establish the Growth Teams and discontinue all work on Elite. (PX1182 (Altria) at 001). Garnick explained that Altria would not have "pulled the trigger," on transitioning to Growth Teams "if [Altria] thought that the JUUL deal was going to go ahead." (PX7036 (Garnick (Altria) Dep. at 244-45)).

612. Within hours of receiving the FDA's September 12 Letter (F. 275, 280-282), Altria's leadership began to discuss the possibility of pulling MarkTen Elite from the market. In a September 12, 2018 email relating to Altria's planned response to the FDA, Garnick asked, "[s]hould we stop selling mark ten elite as part of our plan?" (PX1554 (Altria) at 001). As Garnick explained, Elite and the non-traditional flavored MarkTen cig-a-like products already were not "converting smokers, they were losing money, and they wouldn't get a PMTA[.]" The FDA's September 12 Letter provided Altria with another reason to discontinue these products. (Garnick (Altria) Tr. 1756-58).

613. By the time Altria received the September 12 Letter from the FDA, Elite had been on the market for "enough time [for Altria] to evaluate" it. (Willard (Altria) Tr. 1442-43; PX7003 (Quigley (Altria) IHT at 56) (explaining you need "26 weeks plus" (*i.e.*, 6 months) with a new brand to "really understand what you have")).

b. September 2018 Ranch Meeting

614. From September 25 to 27, 2018, Altria's leadership team gathered for an annual planning meeting at Altria's off-site facility in Montana, known as the Ranch. ("September Ranch Meeting"). (Willard (Altria) Tr. 1443-44; *see also* PX7031 (Willard (Altria) Dep. at 268)).

615. By the time of the September Ranch Meeting, there was agreement among Altria's and Nu Mark's leaders that pulling pod products and non-traditional flavors from the market were two ways that the company should and would respond to the FDA's concerns. (Murillo (Altria/JLI) Tr. 2965-66; Quigley (Altria) Tr. 1993, 2079; PX7000 (Garnick (Altria) IHT at 102-03); PX7031 (Willard (Altria) Dep. at 268) ("[T]he management team went off together . . . as part of our normal process, and we said, all right, given everything we've learned about the MarkTen product portfolio, what do we think we should do. And, ultimately, we decided to significantly scale back the MarkTen product portfolio.").

616. During the September Ranch Meeting, Altria concluded that Apex, another pod product, was even less promising than Elite, and evaluated removing Apex from the market. (Willard (Altria) Tr. 1445; RX1176 (Altria) at 024).

617. Apex's "large," "baton" like shape was seen as too "[c]lunky." (King (PMI) Tr. 2535; RX0532 (Altria) at 011; *see also* PX7023 (Fernandez (Altria) Dep. at 197) (describing Apex as "too big, bulky")). Consumers did "not like the fatter cigar-like shape" or its "[b]ulky feel in the hand." (RX1290 (Altria) at 032).

618. PMI had marketed Apex in the United Kingdom as a test of mesh technology utilized in Apex and made Apex available to Altria to do a similar test run in the United States. PMI knew that it would have to make improvements in the form and other aspects of the product before there could be any wide scale commercialization. With information learned from the test run, PMI would seek to create an improved, next generation product. (King (PMI) Tr. 2534-35, 2545-47).

619. Nu Mark "never really built out a [PMTA] plan for Apex." (PX7017 (Magness (Altria) Dep. at 114)). As Paige Magness, who was responsible for e-vapor PMTAs at the time, explained, "Nu Mark deprioritized [Apex] because it was having trouble acquiring the devices for [Regulatory Affairs] to be able to get the answers [it] needed." (PX7017 (Magness (Altria) Dep. at 62-63); *see also* PX7017 (Magness (Altria) Dep. at 288-89); PX4149 (Altria) at 043 (final August 2018 Board presentation) (stating "No current plan to file PMTA")).

620. At the September Ranch Meeting, in discussing what Altria's response to the FDA's September 12 Letter should be, Altria had pretty much decided to pull Elite, and made the decision that day to talk to the Board about pulling Elite. (Garnick (Altria) Tr. 1808).

621. As summarized in a slide presented by Quigley on September 26, 2018 at the September Ranch Meeting, Altria's leadership decided "in response to [the] FDA," that Altria would "[r]emove Elite & Apex from the Marketplace[.]" (RX1176 (Altria) at 024; *see also*

Quigley (Altria) Tr. 2078; Garnick (Altria) Tr. 1759; PX7036 (Garnick (Altria) Dep. at 241-43)).

622. As summarized in a slide presented by Quigley on September 26, 2018 at the September Ranch Meeting, the leadership also decided "in response to [the] FDA," that Altria would remove non-traditional flavored cig-a-like products (defined as all flavors other than tobacco, menthol, or mint) from retail. (RX1176 (Altria) at 024 ("Focus Retail on Brown and Green Cig-a-like Products"; and "Maintain Cig-a-like non tobacco and menthol flavors in E-Commerce"); Murillo (Altria/JLI) Tr. 2965-67 (explaining that Altria decided to pull its flavors to address the youth issue, with the exception of tobacco (shorthand "brown") and menthol/mint (shorthand "green")); Willard (Altria) Tr. 1444-45; Garnick (Altria) Tr. 1759; RX1176 (Altria) at 024; PX7000 (Garnick (Altria) IHT at 102, 105-06)).

623. Murillo thought that removing pods and non-traditional flavors was the right decision and made this recommendation at the September Ranch Meeting. (Murillo (Altria/JLI) Tr. 2967). He explained that he "thought it was really important to take Dr. Gottlieb's concern very, very seriously, and . . . that it was extremely appropriate to demonstrate to the FDA that the bigger principle of harm reduction was more important than sales . . . and that we could always come back with a PMTA in the future." (Murillo (Altria/JLI) Tr. 2967).

624. Willard agreed with the decision at the September Ranch Meeting to pull Altria's pod products because the products lacked the conversion capabilities necessary to justify keeping them on the market. (PX7031 Willard (Altria) Dep. at 266-70). As he explained, "if you can't convince" consumers to set down their other tobacco product "and start using yours, then there's no reason to keep the product on the market, particularly when it was a product that, in the case of MarkTen Elite, had some real challenges with regard to the manufacturing design that [Altria was] worried about getting approval from the FDA." (Willard (Altria) Tr. 1299-1300; *see also* PX7004 (Willard (Altria) IHT at 211-13) (distinguishing the two "very different product[s]" and explaining that, unlike JUUL, which was "probably the most successful product at converting adult cigarette smokers" and had "created a very significant positive public health benefit," Elite "was not actually very good at converting adult cigarette smokers," and "had a number of technical issues," so "when it was identified as a product of concern to the FDA, we thought that that was one more reason to withdraw that product from the marketplace")).

625. At the September Ranch Meeting, leadership continued to talk about how to move forward with the Growth Teams. Quigley explained that Nu Mark lacked the "internal development capabilities and processes required to lead in innovative products," including the "nicotine science and insights . . . to develop a product that [could] win and effectively switch smokers." (RX1176 (Altria) at 012). Quigley explained that the company needed to "[i]mplement a different structure and operating model," *i.e.*, the Growth Teams. (RX1176 (Altria) at 017).

626. At the September Ranch Meeting, Quigley proposed downsizing Nu Mark. (RX1176 (Altria) at 021-22). As Gifford explained, "if [Altria was] going to keep investing," it needed to figure out "how to shrink [costs] to reduce some of the overhead drag on [its] e-

vapor or Nu Mark business." (Gifford (Altria) Tr. 2806-07). Because the options for shrinking overhead were "either grow volume or reduce expenses," the conversation among leadership shifted to, "if [Altria is] going to think about growth teams and that being an additional investment, how can [it] start right-sizing this organization to free up some financial resources and people resources." (Gifford (Altria) Tr. 2806-07).

c. October 1, 2018 Communications Plan

627. After the September Ranch Meeting concluded, Altria began preparing for its meeting with the FDA, which was scheduled to take place on October 18, 2018 ("October 18, 2018 FDA Meeting"). (RX0314 (Altria) at 002).

628. As part of the preparation for the October 18, 2018 meeting with the FDA, Willard received an outline on October 1, 2018 detailing in part what he might say to the FDA, including with regard to decisions to withdraw pod-based products and limit cig-a-like flavors to tobacco, menthol, and mint ("October 1, 2018 Outline"). (Willard (Altria) Tr. 1446-49 (discussing RX0314 (Altria))).

629. The October 1, 2018 Outline was extensive (Willard (Altria) Tr. 1447) and was consistent with the September Ranch Meeting decisions to discontinue Elite and non-traditional flavored cig-a-likes. (Garnick (Altria) Tr. 1762; *see also* RX0314 (Altria) at 003-04).

630. The October 1, 2018 Outline indicated Altria's intent to recommend to the FDA that it "exercise its discretionary enforcement power to remove all pod-based products from the market until the manufacturer receives a market order." (RX0314 (Altria) at 003).

d. October 5, 2018 Board Call and Announcement of Growth Teams

631. In preparation for an October 5, 2018 call with the Board, in which Altria leadership advised the Board of the decisions made at the September Ranch Meeting (F. 620-621), on October 4, 2018, Garnick prepared notes with "some thoughts" for Willard to consider before presenting to the Board. (PX7036 (Garnick (Altria) Dep. at 242-43); PX1010 (Altria) at 001). Garnick's notes included:

- "At the last board meeting, we had a frank discussion about our product performance in the e-vapor space. We discussed that we currently do not have an evapor product that was a Juul fighter or free of regulatory problems." (PX1010 (Altria) at 002).

- "We are going to recommend that FDA require all pod products be taken off the market until PMTA's are obtained. We are going to say that we are seriously considering unliterally [sic] taking off Mark Ten Elite from the market." PX1010 (Altria) at 003).

- "Reason for unilateral action – (1) Gives us good cover and story for taking Mark Ten Elite off market now, (2) Not a JUUL fighter and not worth PMTA so we will have to take it off the market eventually; this is better context, (3) we have regulatory risk given design changes had to be made that are in grey zone, but defensible . . . (PX1010 (Altria) at 003).

- "We are going to recommend that FDA require all flavor e-vapor products be taken off the market until PMTAs are obtained . . . . We are going to say that we are unilaterally removing from the market all flavor e-vapor products other than tobacco, menthol, and mint." (PX1010 (Altria) at 003).

- "Regardless of Tree [the possible transaction with JLI], we believe we should take bold step[s]." (PX1010 (Altria) at 003).

632. Garnick explained that the phrase in his October 5, 2018 notes, "[g]ives us good cover and story for taking MarkTen Elite off market now," meant "what [he] said in the next sentence, that it was not a JUUL fighter and not worth the PMTA. So we will have to take it off the market eventually, and that this is a better context." (PX7036 (Garnick (Altria) Dep. at 176-77)). Garnick also explained, "I would also note that this also says 'regardless of Tree.' We believe that we should do this regardless of whether there was a Tree deal or not. And, at this time, it didn't look like there would be." (PX7036 (Garnick (Altria) Dep. at 177)).

633. On October 5, 2018, Altria officially announced the launch of the Growth Teams. (RX0842 (Altria) at 001-02).

634. On October 5, 2018, Willard circulated a company-wide memo announcing the formation of the Growth Teams, explaining that Altria had "spent the past 100 days doing a deep situation analysis" and determined that a "change in direction [was] necessary[.]" The company had decided that Growth Teams were the best way to continue the transformation that Altria had begun in May 2018 when it "create[ed] the Chief Growth Officer and restructur[ed] parts of the organization to accelerate [Altria's] innovation pipeline." (RX0842 (Altria) at 001; *see also* Willard (Altria) Tr. 1434-35; Gifford (Altria) Tr. 2812-13).

635. The Growth Teams would be the culmination of the 100-day review that had started in May 2018 and led primarily by Quigley. (Quigley (Altria) Tr. 2079-80; *see also* PX7003 (Quigley (Altria) IHT at 89-90)). Originally, Quigley proposed that Nu Mark run the Growth Teams, but Altria decided instead to staff the teams with "different people who [had] a fresh perspective." (Quigley (Altria) Tr. 2068-69). "[T]he idea [was] to start from scratch and build the expertise." (PX7000 (Garnick (Altria) IHT at 86-87)).

636. After the October 5, 2018 announcement of the Growth Teams, Nu Mark's "focus" would be "narrow[ed] . . . to the current products in the marketplace." The Growth Teams – which were to be housed outside Nu Mark – would take over innovative product development work. (RX0842 (Altria) at 003).

637. Roughly 60 Nu Mark employees would be terminated or transferred as part of the Growth Teams strategy. (RX0842 (Altria) at 003).

638. After the October 5, 2018 announcement of the Growth Teams, the Growth Teams began to work and had "free rein" to determine the direction of e-vapor product development. (Garnick (Altria) Tr. 1657; *see also* Jupe (Altria) Tr. 2309 (noting that Growth Teams had the ability to set their own direction, choose what to work on, and were not constrained "by how [Altria] ran things in the past and hierarchical decision-making")).

639. The Growth Teams were unconstrained by budget. Then-CFO William ("Billy") Gifford "met with each of the growth teams and told them do not let the budget be a constraint on [their] efforts," "giving them the freedom to start with the consumer and build from that point forward." (PX7010 (Gifford (Altria) IHT at 192-93); *see also* PX7016 (Jupe (Altria) Dep. at 216-17) (noting that in the course of Altria's normal budgeting process, the Growth Teams were in the process of "defining . . . their budget")).

640. At the time of the announcement of the Growth Teams in October 2018, Altria "didn't even have a product concept in mind, let alone a leapfrog concept . . . . The idea was to bring some of our best scientists together . . . and come up with a product concept." That product would then require a PMTA before it could be sold. (Garnick (Altria) Tr. 1661-62; *see also* Jupe (Altria) Tr. 2309, 2313 (noting that autonomy was intended to facilitate product development by 2023, which was an "aggressive" schedule); PX7000 (Garnick (Altria) IHT at 132) ("There was no concept of a product they were working on. It was a bunch of people in a room saying, okay, think of something."); PX7036 (Garnick (Altria) Dep. at 245-46)).

641. Jupe, who was tasked with overseeing the Growth Teams, explained that the Growth Teams would first need to finish the product definition phase, and then proceed to the development phase, where the Growth Teams would engineer the product. After that, they would go to the commercial phase, where they would write all the manufacturing specifications, after which they would "lock" the design. This "product development cycle" would take two years, "if you're lucky." After design lock, the Growth Teams would begin gathering scientific evidence, which would take approximately two years. Then the product goes through FDA review, which could easily take 18 months. "So [Altria was] five to six years away from a potential product." (PX7016 (Jupe (Altria) Dep. at 340-41)).

642. To help lead the Growth Teams, in October 2018, Altria hired Bassiouni Khalid as Senior Vice President of Innovative Product Development. (Jupe (Altria) Tr. 2317; RX0842 (Altria) at 002) (internal announcement describing Khalid as an "innovation leader with a proven track record," and a successful Amazon executive who had "led platform development for [Amazon] Alexa[.]").

643. Altria had been trying to hire someone with innovation experience "for a number of years," and in 2018, then-Chief Growth Officer Crosthwaite led a "very active effort . . . to hire somebody with that skill set at a relatively senior level[.]" (PX7031 (Willard (Altria) Dep. at 264); *see also* PX7024 (Crosthwaite (Altria/JLI) Dep. at 269) (describing the search for

talent as "very, very challenging"); PX7015 (Gogova (Altria) Dep. at 317-19) (noting Altria was in need of a leader who "could help [the Growth Teams] and teach [them] to change the culture and mindset" of the team members, as well as leverage an "external network with other innovators, potentially manufacturing facilities [and] academia")).

644. Within days of Khalid joining Altria in October 2018, the company realized that Khalid had plagiarized his resume, invented references, and entirely fabricated his claimed employment history. (Jupe (Altria) Tr. 2319-20; RX0248 (Altria) at 002-03).

645. Based on the events described in F. 643, Altria terminated Khalid's employment and placed Jupe in charge of the Growth Teams. (Jupe (Altria) Tr. 2320). Jupe's background is not in developing innovative products or electronic-based products; he is a physicist whose primary experience is in the design and manufacturing of conventional cigarettes. (Jupe (Altria) Tr. 2198-2202).

646. Altria began again to look for external talent to replace Khalid, but "there was no other candidate . . . that came as close to being hired[.]" Altria "found it difficult to find someone who had the expertise that [it was] looking for who was willing to move to Richmond." (PX7000 (Garnick (Altria) IHT at 82); *see also* PX7024 (Crosthwaite (Altria/JLI) Dep. at 269)).

4. October 25, 2018 Withdrawal of Products

647. On October 18, 2018, Altria met with Commissioner Gottlieb to discuss the FDA's September 12 Letter and Altria's planned response. (Willard (Altria) Tr. 1288, 1446). At the meeting, Altria informed the FDA of its intention to withdraw its pod-based products and its non-traditional cig-a-like flavors from the market. (Willard (Altria) Tr. 1448).

648. Altria's management "didn't think it would be appropriate to announce [Altria's decision to withdraw pod-based products and flavored cig-a-likes] before telling the FDA" at the October 18 Meeting. (Quigley (Altria) Tr. 2081-82).

649. On October 25, 2018, Altria sent its formal response to the FDA's September 12 Letter, in a letter that the company made public that same day ("October 25 Letter to the FDA"). (Willard (Altria) Tr. 1450-51; PX1071 (Altria)).

650. In its October 25 Letter to the FDA, Altria announced that it would withdraw its pod products from the market. (PX1071 (Altria) at 002). Altria stated that although it did not believe it had a "current issue with youth access to or use of [its] pod-based products," it did "not want to risk contributing to the issue" with a product that was not converting adult smokers. (PX1071 (Altria) at 003).

651. In its October 25 Letter to the FDA, Altria also announced that it would discontinue all non-traditional cig-a-like flavors. (PX1071 (Altria) at 003).

652. After sending it to the FDA, Altria publicly released the October 25 Letter to the FDA "as part of a collection of information related to [its third quarter] earnings call." (Willard (Altria) Tr. 1237-39, 1452-53; RX2028 (Altria) at 001).

653. Altria timed the release of the October 25 Letter to the FDA to coincide with its regularly scheduled earnings call because "there was material information in [the October 25 Letter to the FDA] related to some of the actions [it was] suggesting to the FDA," which Altria "thought the investment community was entitled to learn about[.]" (Willard (Altria) Tr. 1238-39).

654. In the third quarter earnings call on the morning of October 25, 2018, Altria explained that although Elite and non-traditional flavored cig-a-likes were being withdrawn from the market, 80 percent of Nu Mark's e-vapor volume from the third quarter would remain on the market. (PX9082 (Altria) at 003). That was "essentially because, while [Nu Mark] had a number of flavored products and [it] had certainly some volume in the pod-based products, most of [its] volume was tobacco flavored or a menthol or mint, and so while this was an impact to [its] business, there was still a number of products that represented a lot of volume that would remain on the market." (Willard (Altria) Tr. 1455-56; *see also* Gifford (Altria) Tr. 2809).

5. December 2018 Withdrawal of Cig-a-likes and Closing of Nu Mark

655. Altria decided to stop making the MarkTen cig-a-like products to save money in order to fund either the Growth Teams or, if Altria and JLI were able to finalize the terms of the Transaction, to fund Altria's investment in JLI. (F. 655-681).

a. Budgeting Review

656. In the course of its annual budget process in the fall of 2018, Altria realized that both of the "two pathways" Altria was pursuing to grow its e-vapor business – developing a leapfrog product through the Growth Teams or the potential investment in JLI – would require a substantial financial commitment. (Gifford (Altria) Tr. 2841-42; *see also* PX7010 Gifford (Altria) IHT at 18, 198, 203-04 (noting annual budget is prepared in December)).

657. If Altria "could . . . ever be successful with JLI, . . . [it] would have to finance [the investment], and any money [it] saved would help with the interest cost. Or if [Altria] were unsuccessful with JLI, [that money would] fund the growth teams, and those investments would have to step up through time as they made progress . . . ." (Gifford (Altria) Tr. 2842).

658. Altria anticipated that each Growth Team would cost approximately $30 million per year, and was prepared to allocate more money if necessary. (RX0570 (Altria) at 012, 024; PX7010 Gifford (Altria) IHT at 192-93 (explaining Altria would have given the Growth Teams $100 million per year if that's what they needed – "budget [would not] be a constraint" on the Growth Teams' efforts)).

659. If Altria completed an investment deal with JLI, Altria "needed to find about $500 million in cost savings [per year] to pay for it." (PX7036 Garnick (Altria) Dep. at 214).

660. "[A]s the financial person," Gifford believed that Altria "needed to . . . free up the resources to fund the growth teams, or make the decision to fund . . . [the] interest related to an investment [in JLI]." (PX7010 (Gifford (Altria) IHT at 188-89)).

b. Nu Mark Profitability

661. Nu Mark lost money every year during Begley's tenure as President and General Manager at Nu Mark from July of 2015 to May 31, 2018. (Begley (Altria) Tr. 1087-88).

662. From 2014 to 2017, Nu Mark lost $600 million. (PX4029 (Altria) at 010).

663. In 2015, Nu Mark lost $182 million. (PX4040 (Altria) at 012; Begley (Altria) Tr. 1061; Gifford (Altria) Tr. 2724-25).

664. In 2016, Nu Mark lost $118 million. (Gifford (Altria) Tr. 2726; RX0746 (Altria) at 007). In February 2015, Altria had projected that Nu Mark would lose $72 million in 2016. (RX1733 (Altria) at 092).

665. In 2017, Nu Mark lost $71 million. (Gifford (Altria) Tr. 2736-37; PX4012 (Altria) at 010).

666. In 2017, Nu Mark expanded distribution for MarkTen cig-a-likes by approximately 14,000 stores, from 51,000 stores in late 2017 (PX4073 (Altria) at 002), to 65,000 stores by the early 2018. (PX9045 (Altria) at 006). During this period, Nu Mark also expanded distribution for MarkTen Bold, which grew from 5,000 retail stores in late 2016 (RX0746 (Altria) at 018), to 25,000 stores by early 2018. (PX9045 (Altria) at 006).

667. There are various costs associated with expanding distribution into new locations, and greater volume is necessary to cover the fixed cost to drive profitability. (PX7040 (Gifford (Altria) Dep. at 74-75); Gifford (Altria) Tr. 2727).

668. Cost-cutting was an important driver of any reductions in Nu Mark's losses during 2016 and 2017. Cutting costs and thereby potentially increasing marginal contribution, while helpful, does not necessarily assure a path to long-term profitability. (Begley (Altria) Tr. 1040-41, 1046).

669. From 2014 to 2017, Nu Mark reduced its variable production costs for MarkTen cig-a-like products from $1.17 to $0.70 for cartridges and from $5.02 to $2.95 for devices. (PX7002 (Schwartz (Altria) IHT at 078-79) (discussing PX1093 (Altria) at 008 (Nu Mark Operations Financial Results for September 2018 vs 2018 Operating Budget))).

670. Every year that Begley was the CEO of Nu Mark, the point in the future at which Nu Mark hoped that it would break even or make a profit was pushed out further. (Begley (Altria) Tr. 1088; F. 670-672, 674).

671. In 2015, Nu Mark predicted that it would become profitable in 2017. (Gifford (Altria) Tr. 2719-21; RX1733 (Altria) at 092).

672. In 2016, Altria "pushed" its profitability projection for Nu Mark "out a year to 2018." (Gifford (Altria) Tr. 2725-26; PX4040 (Altria) at 012).

673. In its 2017 three-year strategic plan, Nu Mark had predicted that it would likely lose $33 million in 2018. Nu Mark's 2017 plan "pushed out another year" the estimated break-even point to 2019. (Gifford (Altria) Tr. 2726; RX0746 (Altria) at 007).

674. The fact that projections for when Nu Mark would break even and turn a profit were repeatedly pushed out in time, was "troubl[ing]" to Gifford, as the CFO. (Gifford (Altria) Tr. 2738).

675. By February of 2018, Nu Mark was estimating that it would lose $70 million in 2018, followed by a $24 million loss in 2019, before potentially turning a profit in 2020. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2737). Without "substantial volume growth" in the cig-a-like form, Begley explained, Altria was "going to continue to lose $70 million a year on the cigalike platform." (PX7022 (Begley (Altria) Dep. at 225)).

676. In the first nine months of 2018, Nu Mark lost $101 million. (Gifford (Altria) Tr. 2817-19; Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003). In that same time period, Nu Mark's share of the total dollars spent in the e-vapor market decreased from approximately 15 percent to 4.7 percent. (RX1447 (JLI) at 009).

677. Nu Mark's annual three-year plan, presented in February 2018, predicted that cig-a-like volumes would decline and pod volumes would grow substantially. (PX4012 (Altria) at 009). With only cig-a-like products and without a successful pod-based product, Nu Mark "had no chance of achieving [its financial projections]" and would continue to incur losses. (Begley (Altria) Tr. 1087-88).

678. Altria's November 2018 year-to-date financial results showed that Nu Mark's sales volume from January to November 2018 improved by 20.7% as compared to the same period in 2017. (PX7040 (Gifford (Altria) Dep. at 59-62) (discussing PX4231 (Altria) at 003 (Altria Group, Inc. Operating Companies 2018 November YTD Financial Results))). However, unit sales were 3.8 million units below the projected sales set in Altria's budget. (PX4231 (Altria) at 003).

679. In 2018, Nu Mark's objective was to "attain a #1 or #2 position" in multi-outlet and convenience stores. Although MarkTen sales volume grew by 21 percent versus the prior year, MarkTen achieved the "#3 position with MarkTen retail share of 6.8 [percent]," which was "down (5.8 [percentage points]) vs. [the prior year] due to significant growth of competitive products driving 73% growth in the category." (PX4366 (Altria) at 055).

680. Altria was willing to accept losses to make a long-term investment in e-vapor, but, as Begley explained, "there had to be a reasonable path to profitability at some point in the

future, and in 2016, [Altria] thought [it] had that path to profitability. It didn't turn out to be that way, . . . so certainly short-term investment is worth it as long as there's a reasonable path to long-term profitability." (Begley (Altria) Tr. 1019-20).

681. As of December 3, 2018, Nu Mark expected to lose $235 million over the next three years. (PX4232 (Altria) at 001, 013; *see also* RX0973 (Altria) at 014 (noting that the "[c]urrent 3YP [3 year plan] forecasts aggregate losses of over $200 million").

682. Altria spent at least $50 million per year for support services and overhead for Nu Mark. (PX4232 (Altria) at 013; *see also* PX7010 (Gifford (Altria) IHT at 202-03) (explaining this figure was likely "understated" due to Altria's accounting process for expenses allocated across operating companies)).

c. Additional Issues with Cig-a-likes

683. In late November 2018, Altria learned that the BVR 2.8 battery that Altria was developing for use in its cig-a-likes (F. 403) was "generating a relatively significant percentage less aerosol. So there was mass degradation[.]" (Murillo (Altria/JLI) Tr. 3070-71). After changes in the manufacturing supply, Altria found "the product was no longer performing the way" Altria thought. (PX7026 (Gardner (Altria) Dep. at 258-59) ("The aerosol delivery was different from what it was in 2016.")).

684. Late in the process of development of the BVR 2.8 battery, Altria's scientists discovered that there were problems with the cig-a-like's wicking rate,[41] which had decreased with the BVR 2.8 battery and with the cartridge, which needed to be heat treated (known as "annealing") for the dry puff prevention technology to work properly. (Gardner (Altria) Tr. 2571-74); RX0552 (Altria) at 006, 007 (noting unresolved investigation into problems with the cartridge and battery quality).

685. Altria scientists worked to resolve the changed aerosol mass problem referenced in F. 682 but were unable to do so. (PX7016 (Jupe (Altria) Dep. at 82-83) ("[W]e never figured out how to get a consistent aerosol at the end of the day."); PX7017 (Magness (Altria) Dep. at 155-56) (explaining consideration of an annealing process that may have had to be added to address the aerosol mass change); PX1407 (Altria) at 014; RX0552 (Altria) at 006, 007 (noting unresolved investigation into problems with the cartridge and battery quality)).

686. Altria's scientists were unsure that they had a dry puff prevention fix that they could submit for a PMTA for the cig-a-like with the BVR 2.8 battery. (Gardner (Altria) Tr. 2573-74; *see also* PX7015 (Gogova (Altria) Dep. at 244-46) ("[The scientists] knew what to anticipate and what to look for, but [they] had no way to know exactly what are the consequences [of the battery change].")).

41 Wicking rate is the "rate at which the liquid reache[s] the heater" which then results in the aerosol mass. (Gardner (Altria) Tr. 2573-74).

687. Murillo was "concerned" that the aerosol mass issue referenced in F. 682 "could not be resolved favorably in time to do all the work required for an application, including stability [studies (F. 226)]." As an example, for stability studies, in order to show "12 months stability, you need 12 months." (PX7027 (Murillo (Altria/JLI) Dep. at 131-32); *see also* Murillo (Altria/JLI) Tr. 2937-38).

d. December 7, 2018 Product Withdrawal and Closing of Nu Mark

688. On December 7, 2018, Willard sent an internal email to Altria employees announcing that the company would be discontinuing "production and distribution of all MarkTen and Green Smoke e-vapor products" and the company issued a public press release stating the same. (Willard (Altria) Tr. 1459-60; RX1000 (Altria) at 004 (email); PX9080 (Altria) at 001 (Altria press release) ("December 7 Announcement")).

689. The December 7 Announcement conveyed that, in addition to MarkTen and Green Smoke products, Verve products would also be discontinued. Verve was not an e-vapor product. Verve was an oral product which was essentially a chewable rubber disk that released flavor and nicotine. (Willard (Altria) Tr. 1459; Garnick (Altria) Tr. 1777-78).

690. Altria was losing money on Verve and "there was no sign it was ever going to be successful." (Willard (Altria) Tr. 1459-60; PX9080 (Altria) at 001; Garnick (Altria) Tr. 1777-78).

691. The December 7 Announcement quoted Willard stating: "We [Altria] remain committed to being the leader in providing adult smokers innovative alternative products that reduce risk, including e-vapor," adding, "We do not see a path to leadership with these particular products and believe that now is the time to refocus our resources." (PX9080 at 001 (Altria press release)).

692. Altria's internal and public announcements regarding the withdrawal of e-vapor products from the market in December 2018 conveyed that the decision to withdraw the cig-a-like products was made based on "current and expected financial performance, coupled with regulatory restrictions that burden our ability to quickly improve these products." (Willard (Altria) Tr. 1459-61; RX1000 (Altria) at 004; PX9080 (Altria) at 001).

693. As Gardner explained regarding the withdrawal of e-vapor products from the market in December 2018, "Without a pathway to profitability, [Altria] had already funded the growth teams," and [Altria] decided, "let's shut it down, let's not lose additional money, and let's look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space." (Gifford (Altria) Tr. 2841; *see also* Willard (Altria) Tr. 1460 ("[Altria] was making hard decisions to cut costs on products that hadn't worked out, and so [it] ultimately decided to eliminate these e-vapor products."); PX7024 (Crosthwaite (Altria/JLI) Dep. at 283) (recalling Altria decided it "would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform"); PX7031 (Willard (Altria) Dep. at 280-81); PX1182 (Altria); RX0878 (Altria)).

694. Regarding the decision to withdraw the e-vapor products from the market announced in December 2018, Altria employees not involved with the JLI negotiations agreed that the products should come off the market. Quigley thought it was a reasonable business decision to discontinue Nu Mark's business because "it was still losing money." (Quigley (Altria) Tr. 1993; *see also* PX7041 (Quigley (Altria) Dep. at 131) ("Ultimately, . . . [Nu Mark] didn't have the products, it was losing money and, . . . ultimately, I think it was the right business decision.")). Jupe "was very pleased by the decision in that we were refocusing our resources [and] thinking forward[.]" (Jupe (Altria) Tr. 2322-23). Schwartz explained, "[c]onsumers had moved away from cigalike. If the idea was to convert smokers, which was our mission, right, and to achieve leadership in the e-vapor space, we were not going to accomplish that with what was left of the portfolio." (PX7018 (Schwartz (Altria) Dep. at 162); *see also* PX7002 (Schwartz (Altria) IHT at 160) (agreeing with the decision because Nu Mark "only had a cig-a-like franchise" left)). Michael Brace, who at the time was the General Manager of Nu Mark, "underst[ood] the decision to discontinue Nu Mark and agree[d] with it." (PX7013 (Brace (Altria) Dep. at 11, 172)).

695. In a December 10, 2018 email, Altria's Garnick requested preparation of a draft "restructuring plan" to help the finance department identify potential budget cuts in the area of regulation, if the transaction with JLI occurred. Garnick noted that, assuming Altria completed a transaction with JLI, there would be no costs related to e-vapor research, product integrity work, or competitive analysis relating to e-cigarettes. (PX1265 (Altria) at 001). As Garnick explained, money in the budget would be used to fund the Growth Teams or "to pay the interest on the loan to pay for the JUUL transaction." (PX7000 (Garnick (Altria) IHT at 148)).

> [U]pper management did not want to announce . . . , if the transaction happened, without at the same time announcing productivity cuts to pay for the interest for JUUL in order to reassure investors that we had a way to pay for the interest for JUUL, which means that before JUUL was completed, we had to be prepared for, generally speaking, what productivity cuts we were prepared to make in case the transaction with JUUL closed[.]

(PX7000 (Garnick (Altria) IHT at 148)).

696. In a December 20, 2018 email, Altria's Jupe wrote that "[s]ubsequent to today's announcement [of the JLI transaction], it is important to convene a communications approach for internal and external recipients to ensure a rapid and comprehensive closure to product development work associated with e-vapor." (PX1022 (Altria)). "Internal" recipients referred to Altria team members, and "external" recipients referred to third-party partners. (PX7016 (Jupe (Altria) Dep. at 283-84)).

697. Altria disbanded its e-cigarette Growth Teams upon closing the JLI Transaction. The Growth Teams were disbanded because Altria ceased development work on e-cigarettes due to the JLI Transaction. (Garnick (Altria) Tr. 1660; PX7026 (Gardner (Altria) Dep. at 176)). If the JLI Transaction had not occurred, Altria would have continued to fund the Growth Teams. (Garnick (Altria) Tr. 1660). Gifford recalled that Altria disbanded the

Growth Teams "as [Altria] moved into December" 2018, although he was unable to recall the exact date. (Gifford (Altria) Tr. 2877).

698. Nu Mark as a business was shut down toward the end of 2018. Nu Mark as an entity no longer exists. (Begley (Altria) Tr. 1050).

699. Altria's Garnick confirmed in a January 2, 2019 email that, going forward, Altria had no role in e-cigarettes and that Altria R&D would not relate to e-cigarettes. (PX4531 (Altria) at 002).

L. Transaction Negotiations

1. Background

700. By mid-November 2017, Altria's budget projections for 2018 predicted that the pod/hybrid market segment would grow by 55 million units sold in the multi-outlet convenience channel, compared to the latest estimate for 2017, and that sales of cig-a-like products and open system products would collectively decline by 25 million units "due to Hybrid growth[.]" (RX0188 (Altria) at 001, 026).

701. Around November 2017, "JUUL . . . was growing quite rapidly in both volume and market share" and "was the fastest growing product in the e-vapor category." (Willard (Altria) Tr. 1341-42; *see also* Crozier (Sheetz) Tr. 1487 (explaining that JUUL "really took off" in the fall of 2017); Begley (Altria) Tr. 1055 ("[T]here appeared to be one format that was winning in the marketplace, which was a pod-based product with nicotine salts, which primarily was JUUL.")).

702. MarkTen was "the #2 brand" in e-vapor during 2017; however, JUUL "displaced MarkTen's position" in the fourth quarter of 2017. Nu Mark's section of the annual incentive compensation memo for Altria's Board of Directors predicted that "based on current momentum" JUUL was "likely to outpace Vuse's #1 position by the end of [first quarter] 2018." (PX4042 (Altria) at 006; Begley (Altria) Tr. 1021-22). At this time, Reynolds' Vuse brand consisted only of cig-a-likes. (F. 82, 84).

703. In November 2017, Altria told its investors that "innovation can be achieved in multiple ways – through organic product development" and "through strategic partnerships and acquisitions . . . ." (RX0176 (Altria) at 156 (Investor day presentation)).

704. In 2017, Altria viewed JLI as the most promising acquisition in the burgeoning market for pod-based devices. (RX0865 (Altria) at 013).

2. Negotiators

a. Altria

705. The primary negotiators for Altria for the Transaction were senior executives Howard Willard, Billy Gifford, Murray Garnick, and K.C. Crosthwaite. (Willard (Altria) Tr. 1169-70; PX7031 (Willard (Altria) Dep. at 123-24)).

706. Howard Willard was Chairman and Chief Executive Officer ("CEO") of Altria from approximately May 2018 until April 2020. (JX0001 (Joint Stipulations of Law and Fact at 003 ¶ 25)). Prior to becoming CEO in May 2018, Willard was Altria's Chief Operating Officer ("COO"). (PX7004 (Willard (Altria) IHT at 14-15)).

707. Billy Gifford is Altria's current CEO. He became CEO of Altria in April 2020. Prior to becoming CEO in April 2020, Gifford was Altria's Chief Financial Officer ("CFO") starting in March 2015, and its Vice Chairman starting in May 2018. (JX0001 (Joint Stipulations of Law and Fact at 003 ¶ 26)).

708. Murray Garnick is Executive Vice President and General Counsel of Altria, a position he has held since July 2017. Garnick also leads Altria's Regulatory Affairs (since July 2017) and Regulatory Sciences (since June 2018). (JX0001 (Joint Stipulations of Law and Fact at 003 ¶ 27)).

709. K.C. Crosthwaite was Chief Growth Officer at Altria from June 2018 until September of 2019. Prior to becoming Chief Growth Officer, Crosthwaite was President and CEO of Altria subsidiary Philip Morris USA. Crosthwaite is currently CEO of JLI. He became CEO of JLI in September 2019. (PX7024 (Crosthwaite (JLI/Altria) Dep. at 14-15); PX7006 (Crosthwaite (JLI/Altria) IHT at 8)).

710. JLI's lead negotiators (F. 715) most frequently interacted with Willard, Gifford, and Garnick, with Willard and Gifford being the primary points of contact. (Pritzker (JLI) Tr. 662-63; Gifford (Altria) Tr. 2761; PX7011 (Valani (JLI) IHT at 31)).

711. Altria Board member Dinyar Devitre was a trusted acquaintance of Riaz Valani, one of JLI's Board members and lead deal negotiators. (PX7004 (Willard (Altria) IHT at 191)). As a friend of Valani's, Devitre acted as a facilitator for negotiations. (PX7001 (Devitre (Altria) IHT at 13, 66-67) (explaining that he "was always very careful never to make an offer or to negotiate. . . . [W]hen it came to anything to do with a deal . . . it would be purely facilitation and nothing else."); PX7001 (Devitre (Altria) IHT at 80).

712. Devitre was significantly less involved in JLI negotiations than the other Altria negotiators; however, he was kept generally informed of the status of negotiations because Valani would sometimes contact Devitre to discuss JLI's thoughts on the deal or to express concerns about what Altria was proposing. Devitre kept the Altria negotiators informed regarding what he was told by Valani. (PX7031 (Willard (Altria) Dep. at 134, 143-44)).

713. When JLI would send a term sheet for the proposed Transaction to Willard, it was the normal practice for Willard to share the term sheet with Gifford, Garnick, and Crosthwaite. (PX7031 (Willard (Altria) Dep. at 176-77)).

714. Willard, Garnick, Gifford, and Crosthwaite would provide verbal comments and feedback on term sheets, and Altria's lawyers would consolidate those comments into marked-up term sheets. The lawyers would then circulate the mark-ups to make sure that they captured the feedback provided. (Willard (Altria) Tr. 1195-96).

715. Representatives of Perella Weinberg Partners ("PWP"), the investment bank that advised Altria with respect to the Transaction, participated in negotiations and sometimes communicated directly with JLI representatives. James Wappler, a partner at PWP, led the PWP team advising Altria. (Willard (Altria) Tr. 1181-82; PX7028 (Wappler (PWP) Dep. at 12, 15-16)).

b. JLI

716. The primary deal negotiators for JLI with respect to the Transaction were Nicholas Pritzker, Riaz Valani, and Kevin Burns. (Pritzker (JLI) Tr. 661-62, 676, 758-59; Willard (Altria) Tr. 1171; PX7031 (Willard (Altria) Dep. at 124-25)).

717. Pritzker is an investor in JLI through his family investment entities. (Pritzker (JLI) Tr. 660). Pritzker is also a member of JLI's Board of Directors. He has been on the Board of JLI (and its predecessors) since approximately 2013. (JX0001 (Joint Stipulations of Law and Fact at 004 ¶ 34); Pritzker (JLI) Tr. 764-65).

718. Valani was one of the initial investors in the company that is now JLI, through Valani's venture capital business, Global Asset Capital. Valani is also a member of JLI's Board of Directors. He has been on the Board of JLI (and its predecessors) since approximately 2007. (JX0001 (Joint Stipulations of Law and Fact at 004 ¶ 35); Valani (JLI) Tr. 899-900).

719. Kevin Burns was the CEO of JLI from approximately December 2017 to September 2019. (JX0001 (Joint Stipulations of Law and Fact at 004 ¶ 32)).

720. Investment banking firm Goldman Sachs advised JLI on the transaction. Peter Gross, the Vice Chairman of Investment Banking at Goldman Sachs, worked on the Altria transaction on behalf of JLI. (Pritzker (JLI) Tr. 678; PX7043 (Gross (Goldman Sachs) Dep. at 14, 16)).

3. Initial Exploratory Discussions (2017-April 2018)

721. In negotiations, the names "Tree" or "Project Tree" referred to the potential Altria/JLI transaction, or to JLI itself. (Pritzker (JLI) Tr. 725; Willard (Altria) Tr. 1183). The name "Richard" was used to refer to Altria. (Pritzker (JLI) Tr. 688-89; Willard (Altria) Tr. 1210; Garnick (Altria) Tr. 1586). The name "Jack" was used to refer JLI. (Pritzker (JLI) Tr. 688; Garnick (Altria) Tr. 1586).

722. In April 2017, at Altria's request, the first exploratory conversation took place at JLI's headquarters in San Francisco, California. The attendees at that meeting included Altria's Jody Begley (then-President of Nu Mark) and Crosthwaite and JLI's cofounder James Monsees and then-CEO Tyler Goldman. (PX7022 (Begley (Altria) Dep. at 152-53)). Subsequently, Altria senior management wanted to meet with JLI. (PX7001 (Devitre (Altria) IHT at 49)).

723. Senior leaders from both Altria and JLI met in late July 2017. The meeting was attended by Riaz Valani and Zach Frankel, both members of JLI's Board, and Isaac Pritzker, the son and business partner of JLI Board member and investor Nicholas Pritzker. Howard Willard, then COO, and Billy Gifford, then CFO, attended on behalf of Altria. (Valani (JLI) Tr. 902; RX1459 (JLI) at 001-02; *see also* PX1284 (Altria) at 018).

724. According to notes of the meeting referenced in F. 722, Altria suggested that "there may be an opportunity where the two [companies] working together is highly complementary[.]" Specifically, Altria could help with distribution, brand development, and "FDA + regulatory engagement [and] gov't affairs org[.]" (RX1459 (JLI) at 003).

725. In August 2017, Altria leadership informed Altria's Board of Directors that the company was pursuing an investment in JLI, stating that senior leaders had met with "key . . . investors" in JLI (then called Pax) and that JLI likely "favor[ed] a minority investment." (PX1284 (Altria) at 018, 020).

726. Altria and JLI leadership met in December 2017 at Altria's offices in Richmond, Virginia. Nicholas Pritzker joined Valani on behalf of JLI. Willard and Gifford represented Altria. (Pritzker (JLI) Tr. 772; PX1250 (Altria) (Project Tree Investor Presentation)).

727. During the December 2017 meeting between Altria and JLI, Altria highlighted Altria's "Regulatory Capabilities," noting the "complexity" of a PMTA, what Altria viewed to be the necessary PMTA components and studies, and Altria's experience with product submissions and interacting with the FDA. (PX1250 (Altria) at 005, 026-27). Pritzker found Altria's indication that it could be helpful with regulatory matters such as PMTAs an "intriguing idea." (Pritzker (JLI) Tr. 775-76).

728. As of the December 2017 meeting between Altria and JLI, Altria was proposing to buy 100 percent of the domestic side of JLI for between $4 and $5 billion. (Pritzker (JLI) Tr. 772-75).

729. For JLI, Altria's valuation of JLI's domestic business to be between $4 and $5 billion was a "non-starter" because JLI was "growing very quickly, and cigarette volumes were declining." (Pritzker (JLI) Tr. 781-82).

730. Prior to April 2018, discussions between JLI and Altria were "general" and "unstructured," with a focus on Altria's learning more about JLI's business and understanding how a deal might be structured to work together. (PX7031 (Willard (Altria) Dep. at 138-39); *see also* Pritzker (JLI) Tr. 775-76).

4. April/May 2018 Discussions

731. In spring 2018, Altria and JLI began to discuss potential structures for a deal. (PX2026 (JLI) at 001-04; Pritzker (JLI) Tr. 777).

732. Altria "typically like[s] control of the company," and negotiations in April and May 2018 were focused on whether Altria would acquire a majority of JLI's domestic business. (Gifford (Altria) Tr. 2762-63).

733. By April 2018, Altria had dropped its proposal to obtain 100 percent of JLI's domestic business. (Pritzker (JLI) Tr. 779-80).

734. On April 5, 2018, Pritzker, Valani, and Burns traveled to Richmond, Virginia and met with Willard and Gifford at Altria headquarters. (Pritzker (JLI) Tr. 777; PX2297 (JLI) at 001; PX2298 (JLI) at 001).

735. At the April 5, 2018 meeting between Altria and JLI, Altria outlined a concept in which it would buy 40 percent of JLI's U.S. business initially and then, following FTC approval, purchase an additional 10.1 percent, for a total of 50.1 percent ownership. (Pritzker (JLI) Tr. 780-81; *see also* PX2026 (JLI) at 002-03).

736. Altria and JLI negotiators did not have any discussions about what Altria would do with its existing e-cigarette products until after Altria moved away from seeking to purchase 100% of JLI and toward a partial acquisition. (PX7021 (Pritzker (JLI) Dep. at 64-65)).

737. On April 20, 2018, JLI sent Altria a letter proposing general terms for a potential transaction structure that was discussed at the April 5, 2018 meeting. The letter was prepared by JLI's legal counsel and sent by Burns. (PX2026 (JLI); Pritzker (JLI) Tr. 777-79, *see also* Tr. 789 ("[L]awyers drafted all the letters and term sheets.")).

738. As summarized in the April 20, 2018 letter, Altria would acquire 50.1 percent of JLI's U.S. business in two steps. Altria initially would purchase a 40 percent non-voting ownership stake for $6.4 billion, with an expectation that no filing would be required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). "Promptly following [Altria's] initial $6.4 billion investment, Altria would seek regulatory approval to obtain a 50.1% . . . ownership interest in [JLI] via an additional $1.6 billion capital investment (for a total of $8.0 billion)." (PX2026 (JLI) at 003; Pritzker (JLI) Tr. 778-81). Following "regulatory approvals," the previously acquired non-voting equity would convert to voting equity. (PX2026 (JLI) at 002; *see also* Pritzker (JLI) Tr. 780-81).

739. Under the structure summarized in JLI's April 20, 2018 letter, in addition to the $8 billion payment for equity in JLI, JLI would receive $1 billion from Altria upon receipt of regulatory approval of its PMTA for JUUL, for a total investment by Altria of up to $9 billion for 50.1 percent of JLI's domestic company. (PX2026 (JLI) at 003 & n.1; Pritzker (JLI) Tr. 781).

740. For governance provisions, JLI proposed in its April 20, 2018 letter that JLI would continue operating "on a stand-alone basis," including "equal board representation," and "management selection by non-Altria directors," among other rights. (PX2026 (JLI) at 004). In addition, JLI wanted to remain "free to complete an IPO or otherwise raise equity" without any input or consent by Altria, notwithstanding Altria's majority stake. (PX2026 (JLI) at 004).

741. The April 20, 2018 letter proposed that JLI's and Altria's respective antitrust counsel "would discuss and develop a plan with respect to seeking and obtaining regulatory approval for the majority investment, including the treatment of any competitive products owned by Altria." (PX2026 (JLI) at 003).

742. JLI understood from the outset of discussions with Altria that a transaction such as that being contemplated by JLI and Altria "would be closely scrutinized by regulatory agencies, and that antitrust counsel would have to be brought in . . . to optimize the chance" for regulatory approval. (Pritzker (JLI) Tr. 783-84).

743. Pritzker's "assumption [was that] the FTC would most likely require divestiture" of any competitive products of Altria's. (Pritzker (JLI) Tr. 785-86).

744. In the weeks following JLI's April 20, 2018 letter to Altria, Altria and JLI had "several conversations" and Altria sent JLI two letters. As Pritzker described it, there was "back-and-forth, [but] it was not really leading anywhere." (Pritzker (JLI) Tr. 792-93; *see also* Gifford (Altria) Tr. 2761 (Talks would heat up, the parties would "find that there were material differences," and talks would "cool off.").

745. Altria responded to JLI's April 20, 2018 proposal letter on May 3, 2018. (PX2184 (JLI)).

746. Consistent with JLI's April 2018 letter, Altria's May 3, 2018 response proposed a 50.1 percent acquisition of the U.S. business made in two phases, along with an additional payment contingent upon receipt of PMTA approval, for a total of up to $9 billion. (PX2184 (JLI) at 002-03).

747. In response to JLI's proposal for $6.4 billion up front, Altria proposed in its May 3, 2018 letter to pay JLI $500 million upfront, in exchange for approximately a three percent ownership interest. Altria proposed that, following antitrust approval, Altria would pay an additional $5 billion and increase its share to 50.1 percent. Altria was willing to offer "up to" an additional $3.5 billion upon JLI's receipt of PMTA approval, subject to further discussion as to "exact terms for such payment." (PX2184 (JLI) at 002-03).

748. With respect to governance provisions, in its May 3, 2018 letter, Altria rejected the possibility of having its 50.1 percent interest included in any future IPO and also insisted on being able to appoint a majority of JLI's Board of Directors. (PX2184 (JLI) at 003-04).

749. After a conversation between Altria and JLI negotiators on May 23, 2018, Altria sent a letter to JLI on May 30, 2018. (RX1402 (JLI)).

750. In Altria's May 30, 2018 letter, Altria offered JLI a $6.4 billion upfront payment, as requested by JLI in its April 20, 2018 proposal, in exchange for an initial 40 percent interest in JLI's U.S. business, followed by an additional $1.6 billion in exchange for increasing Altria's share to 50.1 percent voting equity, after clearance of the deal by antitrust regulators. Altria further proposed an additional payment to JLI of between $1 to $3 billion upon receipt of PMTA approval of JUUL, depending on JLI's earning performance at that time. This approach offered the potential for JLI receiving a total of up to $11 billion for 50.1 percent of the company. (RX1402 (JLI) at 002-03).

751. During the April and May 2018 time period, JLI and Altria were "not very close" on their views of JLI's valuation. Around the April 2018 time period, JLI's revenue was growing by approximately 30 percent per month. (Pritzker (JLI) Tr. 782-83). JLI believed that Altria's valuations of JLI "always seemed to be a little bit behind the curve." By the time Altria would propose a number, "the value of JUUL had jumped ahead of that" number. (Pritzker (JLI) Tr. 783).

752. On the issue of corporate control, in the weeks after JLI's April 20, 2018 letter, JLI had decided that it was "going to be unable or unwilling to do a transaction where Altria either had control or had a path to control of JLI." (Pritzker (JLI) Tr. 792-93).

753. In the spring of 2018, there were "heavy conversations going back and forth" between the companies regarding how JLI could spin off its international business so that Altria could invest in only JLI's U.S. business. (Gifford (Altria) Tr. 2762-63). JLI had "an increasing concern" as to "how cumbersome it would be to try to actually divide" JLI into domestic and international companies and whether "the value of the international company [would] be diminished in a transaction where the two were split." (Pritzker (JLI) Tr. 783).

5. July and August 2018 Negotiations

a. Background

754. On July 18, 2018, JLI's Goldman Sachs adviser Peter Gross called Altria CEO Willard and indicated that a major company was "willing to buy a minority stake" in JLI "at a $25 [billion] valuation." (PX3183 (Altria) at 001).

755. As of mid-July 2018, JLI was in negotiations with British American Tobacco, Reynolds' parent company, about a possible investment. (PX7035 (Masoudi (JLI) Dep. at 27); *see also* PX8008 (Huckabee (Reynolds) Decl. at 002 ¶ 5)).

756. On or around July 23, 2018, Altria was prepared to accept a minority investment in JLI and was contemplating a $13 billion investment for a 49.9 percent stake in JLI's U.S. business. (PX3169 (PWP) at 001).

757. Altria decided to accept a minority investment in JLI for three reasons: (1) due to JLI's "stellar performance in the marketplace," JLI investors were "unwilling to transact at valuation levels" Altria was proposing"; (2) there was "credible" interest from "a

competing bidder that is open to a minority stake"; and (3) "the market is squarely convinced that every company competing in U.S. combustibles has a JUUL problem." (PX4347 (Altria) at 002 (Draft notes for a July 31, 2018 Altria Board of Directors call)).

758. On July 24, 2018, Altria's PWP adviser, Wappler, emailed Willard and said he received the update that Willard was planning to speak to JLI adviser Gross regarding JLI's valuation. Wappler's email included some valuation-related discussion topics for Willard to consider covering with Gross. (PX3170 (PWP) at 001).

759. Prior to July 27, 2018, JLI and Altria discussed the treatment of Nu Mark's existing e-vapor products if Altria made a partial investment in JLI, "in the context of understanding that [such an investment] would require regulatory oversight[.]" (Pritzker (JLI) Tr. 683).

760. On July 27, 2018, in an email to Pritzker regarding potential terms to offer Altria, JLI's Goldman Sachs adviser Peter Gross wrote: "One additional note – I was under the impression that [Altria] would just shut down Mark 10. We don't want them thinking that they will receive any consideration for co[n]tributing it" to JLI. Pritzker responded, "I think they may need to sell it." (PX2330 (JLI) at 001).

761. By July 2018, Altria realized that JLI was unlikely to agree to "a deal that include[d] a pathway to control" for Altria. (PX4347 (Altria) at 002).

b. July 30, 2018 Term Sheet

i. Overview

762. On July 30, 2018, JLI sent a term sheet to Altria summarizing terms for a potential transaction ("July 30 Term Sheet"). In the email attaching the term sheet, JLI's Pritzker confirmed plans for Pritzker, Valani, Burns, Willard, and Gifford to meet at the Park Hyatt Hotel in Washington, D.C. on August 1, 2018. (PX1300 (Altria) at 001; Pritzker (JLI) Tr. 704).

763. The July 30 Term Sheet was the first term sheet exchanged between JLI and Altria. (Pritzker (JLI) Tr. 804).

764. The July 30 Term Sheet contemplated that Altria would purchase 45 percent of JLI's U.S. business in exchange for five percent of the voting power. Altria would obtain voting power via converting its initial non-voting stock, "upon receipt of Antitrust Clearance." (PX1300 (Altria) at 002-03).

765. Gifford found the ownership and control terms in JLI's July 30 Term Sheet "appalling," explaining that "you give all of this money to get an economic interest and you really only have 5 percent of the say." (Gifford (Altria) Tr. 2764-65).

ii. Antitrust Clearance Matters

766. The July 30 Term Sheet included two provisions that addressed the contemplated investment's implications for Altria's e-vapor product portfolio after the transaction took place. (PX1300 (Altria) at 004-06). The first of these provisions proposed steps for obtaining HSR clearance (or "antitrust clearance") for the transaction from the FTC. (PX1300 (Altria) at 004-05). The second of these provisions proposed a non-compete provision regarding Altria's e-vapor assets, with a carve-out for Altria's MarkTen and Elite products until antitrust clearance was achieved. (PX1300 (Altria) at 005-06).

767. The July 30 Term Sheet addressed the treatment of Altria's e-vapor products in connection with regulatory approval for the contemplated transaction as part of a section directed at "Antitrust Clearance Matters," stating:

> Promptly and in no event later than nine months following the Purchase, subject to the license [granted to JLI for Altria's non-trademark intellectual property in e-vapor], Richard [Altria] will divest (or if divestiture is not reasonably practicable, contribute at no cost to Jack [JLI] and if such a contribution is not reasonably practicable, then cease to operate), all Richard [Altria] assets relating to the Field[42] in the U.S., including all electronic nicotine delivery systems and products it acquired, developed, or has under development.

(PX1300 (Altria) at 005).

768. Under the "contribute" proposal in the July 30 Term Sheet, Altria would "sell or grant to JLI" its e-vapor products, and "JLI would operate them or do something with them," if required by the FTC. (Pritzker (JLI) Tr. 690).

769. "[T]he notional concept of 'cease to operate' [in the July 30 Term Sheet] was meant to be a sort of fail-safe if the other options had been exhausted." "[T]his was all in the context of it being done under the sanction of the regulator, was the intent." (Valani (JLI) Tr. 917-19).

770. Regarding the divest/contribute/"cease to operate" provision in the Antitrust Clearance Matters section of the July 30 Term Sheet, Valani explained that "it was important to JLI that if . . . [Altria] were to be a material equity holder" in JLI, that Altria not also sell products of its own to compete with JLI because, if the transaction went forward, Altria "would be privy to a lot of detailed commercial product and technology information that, you know, could prejudice JLI." The language was "driven by legal counsel's views on the different ways in which that could be achieved, subject, of course, to the sanction of the regulator." (PX7032 (Valani (JLI) Dep. at 49)).

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42 For purposes of the parties' negotiations, the "Field" was defined as "vapor-based electronic nicotine delivery systems." (PX1300 (Altria) at 004).

771. Pritzker's view was that, "[in] a kind of transaction where Altria would have access to data or proprietary information of JLI, it would be unacceptable for Altria to be in a position to use that information to compete against JLI, but that the process would be overseen by the FTC, and that I expected the FTC would likely require a divestiture of existing products." (Pritzker (JLI) Tr. 673-74). "[I]f [Altria] would be on [JLI's] board, they would have access to information. If they were to be providing services to the company, they would be in a position to know – have inside information. That was my concern." (Pritzker (JLI) Tr. 674-75).

772. The Antitrust Clearance Matters section of the July 30 Term Sheet required that both parties would use "reasonable best efforts to seek Antitrust Clearance for a period of at least nine months after the Purchase." It further provided that during the antitrust clearance process, both parties would "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." (PX1300 (Altria) at 005).

773. It was important for JLI to obtain assurances from Altria that "at the end of the FTC process, if the FTC required anything of Altria, even something that was concessionary in nature, like a potential divesting of products, that [Altria] would agree to those things" and that Altria would not be able to "walk away from the deal because of concessionary requirements." (Pritzker (JLI) Tr. 817-18). JLI "needed to make sure that Altria would, in fact, be willing to sell those products in the marketplace for whatever they could get for those products at the requirement of the FTC or anything else the FTC would require, for that matter." (Pritzker (JLI) Tr. 811).

774. The divestiture/contribution/"cease to operate" provision in the Antitrust Clearance Matters section of the July 30 Term Sheet was "[n]ot at all" intended to describe an obligation, or something Altria would do before Altria had a transaction with JLI. (Pritzker (JLI) Tr. 815; PX1300 (Altria) at 004-05).

iii. Richard Support Obligations/Non-compete

775. The July 30 Term Sheet contained a proposed non-compete provision in a section titled "Richard Support Obligations." This section detailed various support services that JLI proposed Altria would provide to JLI, such as regulatory assistance with JLI's PMTA applications. (PX1300 (Altria) at 005-06).

776. The non-compete provision proposed in the July 30 Term Sheet stated:

> Richard agrees, for so long as it owns at least 5% of Jack's outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture or contribution as described above).

(PX1300 (Altria) at 006).

777. JLI proposed the non-compete provision in the July 30 Term Sheet because, in providing the services contemplated by the Richard Support Obligations section of the July 30 Term Sheet, Altria "would be privy to [JLI's] technology, trade secrets, data," and other business information that would "work to the detriment of JUUL" if Altria were to "apply that information to [Altria's] own product portfolio." (Pritzker (JLI) Tr. 821).

778. The "goal" of the carve-out from the non-compete provision for MarkTen and MarkTen Elite prior to their divestiture or contribution "was for those [products] to stay in the marketplace until the FTC ruled on what would happen to them." (Pritzker (JLI) Tr. 692).

779. JLI believed that how the contemplated transaction handled Altria's existing products "would be scrutinized by the FTC, [and] that [they] would want to make a decision as to what would happen to them." JLI intended for the carve-out from the non-compete provision for MarkTen and MarkTen Elite prior to their divestiture or contribution to "allow Altria to keep those products on the market" until the FTC made its decision. (Pritzker (JLI) Tr. 822; Pritzker (JLI) Tr. 895-96 (Pritzker "knew that anything dealing with existing products was going to be subject to FTC review.")).

780. Altria believed that a transaction with JLI would require HSR review and that the FTC would determine how Altria's products would ultimately be handled. (Willard (Altria) Tr. 1400-01).

781. JLI was not concerned about competition from Altria's then-existing products, but feared that Altria would "use information [it was] getting from [JLI] to be able to enhance [its] product or develop new products that would be injurious to [JLI's] business." (PX7021 Pritzker (JLI) Dep. at 82-83; Pritzker (JLI) Tr. 895).

782. JLI's concern was "how Altria might use information that it would obtain from JUUL after the transaction in order to use JUUL's data and trade secrets against JUUL." JLI "would not have been worried about competition from MarkTen or MarkTen Elite as they were at that time but would have been concerned about changes that might be made to those products" using JLI's information. (Pritzker (JLI) Tr. 895).

c. August 1, 2018 Meeting

783. On August 1, 2018, Willard and Gifford from Altria met with Pritzker, Valani, and Burns from JLI at the Park Hyatt Hotel in Washington, D.C. ("August 1 Meeting"). (Willard (Altria) Tr. 1173-74).

784. The August 1 Meeting was not designed to go through the July 30 Term Sheet in detail, but to discuss "some of the most important terms between the two sides, . . . to assess whether or not there was enough common ground to proceed[.]" (PX7031 (Willard (Altria) Dep. at 177-78)).

785. The discussion at the August 1 Meeting was "[t]ense" and focused on issues of control and voting power. (RX1774 (PWP) at 001; PX7011 (Valani (JLI) IHT at 85-87)).

786. The proposal in the July 30 Term Sheet to provide five percent voting power for a 45 percent economic interest was "a huge sticking point." (PX7040 (Gifford (Altria) Dep. at 142-43)). "[I]t basically became a stand-still. [JLI] didn't give, and [Altria] didn't give." (Gifford (Altria) Tr. 2770).

787. At the August 1 Meeting, Pritzker perceived Altria to be "most unhappy" about "[t]he notion of buying 45 percent of the company and getting 5 percent of the vote[.]" (Pritzker (JLI) Tr. 825). Altria also was "not happy about no control." "[T]heir goal was to acquire the company completely at some point, and [JLI was then] making it clear that that was not going to be possible." (Pritzker (JLI) Tr. 826; PX7021 (Pritzker (JLI) Dep. at 107-08)).

788. An email summary of Altria's comments from the August 1 Meeting prepared by Valani does not show any comments regarding the July 30 Term Sheet's proposed non-compete or antitrust clearance provisions relating to disposition of Altria's existing products. (PX2331 (JLI)).

789. Minutes from an August 3, 2018 JLI Board of Directors meeting, at which Pritzker discussed the August 1 Meeting with Altria, make no reference to any discussion of the proposed non-compete or the antitrust clearance provisions. (PX2117 (JLI) at 025-26).

d. August 4, 2018 Term Sheet

790. On August 4, 2018, Pritzker sent Willard a revised proposed term sheet ("August 4 Term Sheet"). (PX2570 (JLI) at 001).

791. Prior to sending the August 4 Term Sheet, Pritzker had a short call with Willard regarding the term sheet. Pritzker suggested in the call that JLI "had taken [its] best shot at responding to [Altria's] concerns[.]" (PX2387 (JLI) at 001).

792. The August 4 Term Sheet included increased voting power for Altria (from five percent to 15 percent, plus a proportion of Altria's additional shares), the addition of an Altria-appointed non-voting observer of JLI's Board prior to receiving HSR clearance, and other terms related to control. (PX2570 (JLI) at 002-03 (voting power), 007 (observer)).

793. The divest/contribute/"cease to operate" provision in the Antitrust Clearance Matters section of the August 4 Term Sheet was unchanged from the July 30 Term Sheet. (PX2570 (JLI) at 005-06).

794. JLI's August 4 Term Sheet inserted the word "shutdown" to the non-compete provision in the July 30 Term Sheet. While the non-compete provision in the July 30 Term Sheet carved out "MarkTen and MarkTen Elite prior to their divestiture or contribution as described above," the non-compete provision in the August 4 Term Sheet carved out "MarkTen and MarkTen Elite prior to their divestiture, shutdown or contribution as described above." (PX2570 (JLI) at 007).

795. Pritzker did not remember why the "shutdown" term was added to the August 4 Term Sheet and denied it had been a subject of his discussions with Altria. Pritzker "believe[d] the lawyer that drafted [the August 4 Term Sheet] wanted to make this draft compatible" with the divest/contribute/"cease to operate" language in the Antitrust Clearance Matters section. (Pritzker (JLI) Tr. 829-30).

796. The August 4 Term Sheet was the last proposed term sheet to make any reference to "cease to operate" or "shutdown" and those terms did not appear in any subsequent draft term sheet, draft deal document, or in the final agreement. (*See* PX1432 (Altria) at 021-22, 024 (Aug. 19 term sheet); PX1269 (Altria) at 006-07, 008-09 (Oct. 15 term sheet); PX2503 (JLI) at 026-28, 030 (Oct. 28 term sheet); RX0285 (Altria) at 021-22, 024 (Oct. 30 term sheet); RX0838 (Altria) at 327-28, 373 (Nov. 15 draft purchase agreement); PX2141 (JLI) at 036-37 (Dec. 20 final purchase agreement)).

797. Kevin Burns, one of JLI's principal negotiators, did not recall JLI and Altria ever discussing "ceasing to operate" after the "cease to operate" language was removed after the August 4 Term Sheet. (PX7025 (Burns (JLI) Dep. at 207-08)).

e. Draft Talking Points for JLI/Altria Telephone Call

798. On August 5, 2018, Altria in-house attorney Carmine Reale sent Willard, Garnick, Gifford, and Crosthwaite a set of draft talking points for a planned call between Altria and JLI. ("August 5 Draft Talking Points"). The draft talking points were prepared by Altria's adviser PWP, and incorporated edits suggested by Reale. (PX1390 (Altria)).

799. It was not unusual for talking points to be prepared for Willard in advance of meetings, including some meetings with JLI, by members of Altria's team who wanted to "provide their perspective on what they would say if they were in the meeting." Willard would "incorporate anything [he] thought was helpful and obviously leave out anything that [he] didn't think was appropriate." (Willard (Altria) Tr. 1179-80). Such notes or draft scripts were "rarely what [Willard] actually said at the meetings." (Willard (Altria) Tr. 1405).

800. The focus of the planned call between Altria and JLI was to address what the August 5 Draft Talking Points referred to as a "foundational issue." The draft talking points stated:

> [T]here is one point that I wanted to discuss today because we consider it foundational. . . and it probably doesn't make sense to negotiate the other terms unless we agree on this particular item. The current term sheet assumes that the non-Altria shareholders can sell [JLI] without Altria's approval. If a 3rd party bidder approaches, the current draft assumes we would have the right to make an offer to acquire Jack, but would have no other protections beyond that. That's highly problematic for us." (PX1390 (Altria) at 003) (ellipsis in original).

(PX1390 (Altria) at 003).

801. The August 5 Draft Talking Points explained Altria's position on the foundational issue described in F. 799 as follows:

> If we establish this partnership, then we expect that Altria will: accelerate Jack's growth, contribute meaningful synergies, potentially exit our own vapor business, and cannibalize our own combustible business - and then could potentially be forced to sell our stake in Jack to a 3rd party, at a valuation to a large degree the result of our various contributions to Jack.

(PX1390 (Altria) at 003).

802. The August 5 Draft Talking Points stated that Altria needed to approve any sale of JLI's post-investment share of the business "to a strategic competitor. Likewise, we need to have Altria approve any sale of 100% of [JLI] to any 3rd party buyer (strategic or otherwise)." (PX1390 (Altria) at 003).

803. The August 5 Draft Talking Points defended Altria's proposal described in F. 801, noting that the proposal would not affect JLI's ability to pursue an IPO and "would also enable [JLI] to pursue any/all strategic alternatives related to the international business . . . ." (PX1390 (Altria) at 003).

804. The August 5 Draft Talking Points stated:

> I think you'll agree that Altria has come a long way to accommodate you in this process, including:
>
> - Meeting your requested valuation of $28 billion ($12.6 billion for 45%, US only, with Altria's operational support commencing immediately upon closing)
> - Agreeing to a minority stake instead of a controlling position
> - [Demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership]

(PX1390 (Altria) at 003-04) (brackets in original).

805. On August 6, 2018, Garnick circulated his comments on the August 5 Draft Talking Points. Garnick's version omitted the bracketed bullet point language set forth in F. 803. Garnick also changed the description of JLI's proposal to allow non-Altria shareholders to sell JLI without Altria's approval from "highly problematic" to "unacceptable" and a "deal breaker." (PX1304 (Altria) at 003; *compare* PX1390 (Altria) at 003).

806. Garnick's August 6, 2018 revised draft talking points added language at the conclusion of the document, stating:

> [W]e hope that you will carefully consider this request. If you're able to accommodate us, then we stand ready to meet with you immediately and work night and day to hammer out a deal, if that is what it takes. However, if you're unable to meet our ask on this point, then it[']s time to break off these discussions, shake hands, and agree to be competitors.

(PX1304 at 003; *compare* PX1390 (Altria) at 003). Garnick explained that "once there was HSR approval, we [Altria and JLI] would not have been competitors. So we were talking about a partnership that, with HSR approval, would have changed our status as competitors" and that the language "agree to be competitors" was shorthand for "continue being competitors." (PX7036 (Garnick (Altria) Dep. at 57-58)).

807. Garnick's August 6 revisions to the August 5 Draft Talking Points did not change the language referenced in F. 800 ("If we establish this partnership, then we expect that Altria will: . . . potentially exit our own vapor business . . . "). (PX1304 (Altria) at 003; *compare* PX1390 (Altria) at 003).

808. On August 6, 2018, Willard and Gifford called Pritzker and Valani. Willard "indicated that [Altria] need[ed] to approve any potential sale of Tree in the future (*i.e.*, not a [right of first refusal] – [Willard] indicated that [Altria] need[ed] to approve any sale transaction). Pritzker said he understood [Willard's] concern and would get back to [Altria] tomorrow." Pritzker "also indicated that, assuming [the parties] could agree on a path forward," JLI wanted to meet "asap and negotiate the rest of the term sheet." (PX2312 (JLI); PX3202 (PWP) at 001).

f. August 9, 2018 Term Sheet

809. On August 9, 2018, Altria sent JLI its first proposed term sheet ("August 9 Term Sheet"), which was a mark-up of the August 4 Term Sheet. (PX2313 (JLI) at 001).

810. Altria proposed in the August 9 Term Sheet that Altria would purchase a 45 percent stake in JLI's U.S. business and receive 35 percent of the voting power. (PX2313 (JLI) at 012-13).

811. Altria's August 9 Term Sheet retained JLI's language that both parties would use "reasonable best efforts to seek Antitrust Clearance," with Altria adding that the "details related to such efforts" were "to be discussed by the parties." The term sheet also retained JLI's language requiring Altria to "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC" in connection with changes in Altria's e-vapor business. However, Altria struck the entire divestiture/contribution/"cease to operate" provision, and in its place proposed that Altria would exclusively license its e-vapor assets to JLI upon HSR approval. (PX2313 (JLI) at 014-15; Pritzker (JLI) Tr. 840-42).

813. Altria's August 9 Term Sheet revised the non-compete provision to state as follows:

> Richard agrees to refrain from competing anywhere in the U.S. in the e-vapor business (other than with respect to existing and under development products prior to the non-trademark [intellectual property ("IP")] license as described above). The non-compete will terminate upon the earliest of (i) failure to receive Antitrust Clearance, (ii) the expiration of the Services Term and (iii) if Richard ceases to own at least 20% of Jack's outstanding shares[.]

(PX1303 (Altria) at 017).

814. Altria's August 9 revision to the non-compete provision (F. 811) retained the exception carved out for MarkTen and MarkTen Elite with the language about "existing" products and expanded it to include "under development" products. (Pritzker (JLI) Tr. 844).

g. August 15, 2018 JLI Issues List

815. On August 14, 2018, Pritzker wrote to Willard and Gifford:

> Howard/Billy: let's tentatively schedule a meeting in SF [San Francisco] Saturday [August 18, 2018] . . . . Tomorrow night or Thursday morning we will be sending you our position on a number of specific points to make sure you . . . understand where we will need to draw the line before finalizing a commitment to meeting. . .

(PX2025 (JLI) at 001).

816. On August 15, 2018, Devitre, who had been meeting with Valani, transmitted to Willard and Gifford a two-page bulleted list of JLI's issues to be discussed at the planned meeting in San Francisco, California on August 18. (PX1012 (Altria) at 001) (the "August 15 Issues List"); PX7001 (Devitre (Altria) IHT at 93-95); Valani (JLI) Tr. 928-32 (discussing PX4171 (JLI) at 001)).

817. The August 15 Issues List was an effort to clarify JLI's position and to communicate clearly that these were foundational concepts on which JLI was looking for alignment with Altria. (Valani (JLI) Tr. 929-32; *see also* (Pritzker (JLI) Tr. 711) (acknowledging that he wanted to send JLI's position on certain points so Altria would know some basic conditions that JLI had for a potential transaction).

818. The August 15 Issues List contained eight substantive bullet points, most of which related to control and governance. The first bullet stated: "We understood that you could accept not having a path to control except through a confidential offer which would be subject to approval by the non-Richard directors and stockholders. The following are inconsistent with that and are not acceptable to us" – and proceeded to list, among other issues, Altria's proposed right of first refusal on additional stock issuances, its proposal for 45 percent voting power with at least 35 percent discretionary voting rights, and its proposed composition of seats on JLI's Board of Directors. (PX1012 (Altria) at 002) (stating, among

other issues, that Altria's proposed valuation calculation was "not acceptable to [JLI]"; proposed indemnity provision was "not a topic for discussion"; and Altria must agree to restrictions on its ability to transfer shares: "We need you to commit to stay in the stock as a partner for the long term[,] [which] is inconsistent with the lack of meaningful transfer restrictions in your draft.")).

819. The second bullet point on the August 15 Issues List stated:

> We understood that you (and your successors and current and future affiliates) would not compete against us in vapor in the US and that JUUL would be the vehicle for all vapor assets. You have retained the right under certain circumstances to compete not only with existing Mark Ten products, but also with products under development and future products. The commitment to divest Mark Ten has been stricken. This is not acceptable to us.

(PX4171 (Altria) at 002).

820. The August 15 Issues List made no mention of Altria's having stricken in its August 9 Term Sheet the "cease to operate" language that had been included in the August 4 Term Sheet. (PX1012 (Altria)).

821. Valani explained the second bullet point in the August 15 Issues List: "[W]e did not feel like it was appropriate, natural, normal under any circumstances for a party that had access to all of our proprietary information to be – to be competing in markets, particularly in situations where they could use our own information for their own benefit." (Valani (JLI) Tr. 933-34).

h. August 18, 2018 Meeting

822. Altria and JLI, together with their respective outside counsel, met on August 18, 2018, at the offices of Pillsbury Winthrop Shaw Pittman ("Pillsbury") in San Francisco, California ("August 18 Meeting"). (Willard (Altria) Tr. 1403-04; PX1333 (Altria) at 001; PX2400 (Altria) at 001). Pillsbury was outside counsel for JLI. (Garnick (Altria) Tr. 1744; Willard (Altria) Tr. 1403; *see also* PX7040 (Gifford (Altria) Dep. at 152) ("All of the meetings in San Francisco were at the Pillsbury offices.")).

823. On August 17, 2018, Altria's outside counsel prepared and sent to Willard a "Notes/Outline" document for the August 18 Meeting. The four-page bulleted list addressed a variety of topics relating to JLI's August 15 Issues List. A bullet point under an "opening remarks" section stated:

- Some of the points you flagged in the document sent Wednesday also seem to boil down to miscommunication rather than substantive disagreement
  - For example, our approach on MarkTen was driven by antitrust and for the protection of both companies. Upon receiving antitrust approval, we would

> contribute MarkTen to Jack and become subject to a robust non-compete that makes Jack our exclusive e-vapor play. We can't agree to these terms under antitrust laws prior to receiving HSR approval, which was driving our clarifications in the term sheet[.]

(PX1493 (Altria) at 002).

824. Willard believes it would be "incorrect" to suggest that the August 17 "notes/outline" document prepared for Willard constituted a record of what was said at the August 18 Meeting. (Willard (Altria) Tr. 1405-07).

825. At the August 18 Meeting, "progress was starting to be made." However, Altria and JLI "were very significantly apart" on JLI's valuation. (Pritzker (JLI) Tr. 845-46).

826. At the August 18 Meeting, Altria and JLI discussed voting power and whether the potential investment would be in JLI's domestic business only or also include the international business. (Gifford (Altria) Tr. 2772). Pritzker remained concerned that splitting JLI for purposes of the transaction would "create a mountain of problems for the company in the future." (Pritzker (Altria) Tr. 845-46).

827. Willard did not recall the treatment of Altria's e-vapor products being a topic of the discussions between the senior group of negotiators at the August 18 Meeting. (Willard (Altria) Tr. 1218-19).

i. August 19, 2018 Term Sheet

828. By mid-August 2018, Altria and JLI arrived at an understanding with regard to the antitrust clearance and non-compete issues for the potential transaction. As Garnick, Altria's counsel, explained: "[T]here was a recognition that after HSR approval, [Altria] would be on [JLI's] board and . . . they didn't want us also to be competitors." By mid-August, there was a "resolution that [Altria] would remain in the market with our e-vapor products until we obtained HSR approval . . . and then when we obtained HSR approval, [Altria] would contribute our e-vapor products to" JLI. (PX7036 (Garnick (Altria) Dep. at 53)).

829. Garnick, Altria's counsel, explained: "[O]nce [Altria] fully understood what [JLI's] position was and the reason for it, we could understand it and we had some agreement, some sympathy for it, and that's why we thought we could live with a carve-out provision [from the non-compete] that allowed us to stay in the market until we got HSR approval and, at that point, we would get board seats, we would have more operational involvement into [JLI], and that would be an appropriate time for us to contribute our e-vapor products to [JLI]." (PX7036 (Garnick (Altria) Dep. at 54)).

830. On August 19, 2018, JLI sent proposed revisions to Altria's August 9 Term Sheet ("August 19 Term Sheet"). (PX1432 (Altria) at 001).[43]

831. JLI proposed in the August 19 Term Sheet that Altria would purchase a 45 percent stake in JLI's U.S. business and receive 20 percent of the voting power – a decrease from the 35 percent Altria proposed in the August 9 Term Sheet. (PX1432 (Altria) at 017-18).

832. With respect to Antitrust Clearance Matters, the August 19 Term Sheet maintained the requirements from prior term sheets that the parties "cooperate with the FTC" and "use reasonable best efforts to seek Antitrust Clearance," and that Altria "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX1432 (Altria) at 022).

833. With respect to treatment of Altria's existing e-vapor business in the August 19 Term Sheet, JLI revised the Antitrust Clearance Matters section to propose that Altria would contribute those assets to JLI upon receiving regulatory approval of the transaction, and if such approval was not received, Altria would divest the assets. The term sheet stated:

> [Altria] will contribute, upon receipt of Antitrust Clearance and at no cost to [JLI], all [Altria] assets relating to the Field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed or has under development (in each case to the extent it has the legal right to make such contribution). In the event Antitrust Clearance for the foregoing contribution is not obtained within nine months after the Purchase, then subject to the [IP license granted to JLI concurrent with Altria's purchase] referenced above, [Altria] will divest all such [Altria] assets relating to the Field in the U.S. within six months thereafter.

(PX1432 (Altria) at 021-22).

834. The August 19 Term Sheet did not state or contemplate that Altria would cease to operate its existing e-vapor business, either before or after HSR clearance. (PX1432 (Altria) at 021-22).

835. Nothing in the August 19 Term Sheet suggested that Altria would, or was expected to, take any action with regard to its e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

836. With respect to the services JLI wanted Altria to provide as part of the contemplated transaction ("Richard Support Obligations"), in the August 19 Term Sheet, JLI distinguished between services Altria "could provide to JLI" immediately upon closing – "while still being a competitor" – and enhanced services that Altria could provide only after HSR clearance. (Garnick (Altria) Tr. 1748; PX1432 (Altria) at 022-23).

43At trial, the August 19 Term Sheet was occasionally referred to as the "August 18 Term Sheet" (reflecting the draft stamp on the document). (Pritzker (JLI) Tr. 847).

837. JLI's proposed non-compete provision in the August 19 Term Sheet stated that Altria would "refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above)." This revision by JLI rejected Altria's effort in the August 9 Term Sheet to expand the carve-out to include "under development products." (PX1432 (Altria) at 024).

838. In the August 19 Term Sheet, JLI revised the non-compete provision to apply to Altria's "current and future affiliates." (PX1432 (Altria) at 024). This issue – whether a company that acquired Altria in the future would be bound by the non-compete – became known as the "upstream affiliates" issue. (Willard (Altria) Tr. 1431-32).

839. Based on JLI's August 19 Term Sheet, Altria concluded that JLI "had no problem with [Altria's] continuing to compete against them with the products we currently had on the market. What they wanted, though, is for that to stop once we got HSR approval and . . . participated on their board." (Garnick (Altria) Tr. 1750).

j. August 22, 2018 Joint Issues List

840. On August 22, 2018, counsel for Altria and JLI circulated a joint issues list, with each party identifying its positions as compared to the terms of the previous term sheet circulated on August 19, 2018 (identified in the document as the August 18 Term Sheet) ("August 22 Joint Issues List"). (RX1783 (PWP) at 001; RX1784 (PWP) at 001).

841. Regarding the Antitrust Clearance Matters section of the August 19 Term Sheet, the August 22 Joint Issues List showed consensus on the procedure to be followed: "Upon receipt of antitrust clearance, [Altria] to contribute to [JLI] all [Altria] e-vapor assets at no cost to [JLI]"; and "[i]f antitrust clearance for contribution is not received within nine months, [Altria] to divest e-vapor assets within six months."). Altria wrote, "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002-03).

842. The August 22 Joint Issues List reflected the parties' mutual understanding that MarkTen cig-a-likes and MarkTen Elite were exempted from any non-compete provision, prior to HSR approval, as provided under the August 19 Term Sheet. The sole reference in the August 22 Joint Issues List to MarkTen and MarkTen Elite is JLI's request that Altria "confirm that except as to MarkTen and MarkTen Elite, non-compete commences on signing." (RX1784 (PWP) at 004).

843. The August 22 Joint Issues List does not reflect any dispute as to JLI's having limited the non-compete carve-out to MarkTen and MarkTen Elite, rather than allowing a carve-out for future product development. Altria accepted JLI's position on the scope of the non-compete in this regard, having determined that JLI's concern that Altria could use inside information to compete against JUUL in the future was not unreasonable. (RX1784 (PWP) at 003-004; PX7031 (Willard (Altria) Dep. at 229-30)).

k. August 27, 2018 Meeting

844. During the August 23 Board meeting, Willard reported that Altria was still in discussions with JLI, and the Board asked that he keep working on the deal. (Willard (Altria) Tr. 1417-18; *see also* PX1344 (Altria) at 003-04). The Board told Altria's leadership to "really look at what were all of the options available to [Altria] to improve how [it was] competing in the e-vapor space," and it said to continue negotiations with JLI to try to make an investment. (Gifford (Altria) Tr. 2797-98).

845. On August 25, 2018, Altria Board member Thomas Farrell called Willard and confirmed that Altria's Board was supportive of moving forward with JLI with one key adjustment to the terms. The Board did not want Altria to sign and close the deal simultaneously, but instead wanted to wait for antitrust approval before transferring payment to JLI. (PX3177 (PWP)).

846. Under a sign-and-close deal structure, Altria would purchase non-voting shares of JLI that would convert to voting shares upon HSR clearance, as opposed to providing a smaller upfront investment pending antitrust review or purchasing voting shares outright following HSR clearance. (Pritzker (JLI) Tr. 859-61).

847. As James Wappler, a partner at Perella Weinberg Partners and Altria's financial advisor, explained sign-and-close transactions: "Oftentimes, in M&A transactions, you sign an agreement [with] an investor to acquire another company. You await antitrust approval and then you close and wire the funds at the time of close." By contrast, in a simultaneous sign-and-close deal, "you sign, simultaneously close and transfer the money and then seek antitrust approval." (PX7028 (Wappler (PWP) Dep. at 75-76)).

848. On or around August 27, 2018, JLI's Pritzker, Valani, Burns, and JLI's outside counsel met with Altria's Willard, Gifford, and Altria's outside counsel at the offices of Altria's outside counsel, Wachtell, Lipton, Rosen & Katz in New York, New York to try to resolve outstanding issues ("August 27 Meeting"). (PX7032 (Valani (JLI) Dep. at 87-88); PX7036 (Garnick (Altria) Dep. at 47); Willard (Altria) Tr. 1402-03, 1418).

849. The August 27 Meeting "didn't go well" and was "fairly quickly . . . dissolved." (Willard (Altria) Tr. 1418).

850. The August 27 Meeting ended with an impasse. Altria indicated it would not agree to a sign-and-close structure, but instead wanted to pay JLI after HSR approval. JLI indicated this was unacceptable. (PX7036 (Garnick (Altria) Dep. at 48); PX7032 (Valani (JLI) Dep. at 87-89)). JLI did not want to "bear the risk, and that was that." (PX7032 (Valani (JLI) Dep. at 90)).

851. JLI insisted on the sign-and-close structure because it would be "really difficult" for JLI "to enter into a transaction and then wait nine months or more" to find out if it would receive the full investment. As Valani explained, "the company was going to raise capital from somewhere, and if it wasn't Altria, it would have been financial investors. . . . [I]f

[JLI] decided on this route, [(the Altria investment)] it almost . . . foreclosed any other options. And so, to foreclose all those other options and to be left in limbo with a lot of explaining to do, in terms of how this is all supposed to work, felt like a very tenuous position for the company to be [in]." (PX7032 (Valani (JLI) Dep. at 88-89)).

l. Impasse

852. On August 28, 2018, the JLI Board concluded that, "in light of the wholly unsatisfactory nature of recent discussions with [Altria]" the negotiations were "highly unlikely to result in an investment by, or strategic relationship with, [Altria]." (PX2117 (JLI) at 031-32). The companies "still were very far apart on what a reasonable price would be," in part because Altria wanted to exclude the international company from the transaction. JLI was also concerned that a 45 percent interest was "too close to 51 percent," as Altria might "somehow figure out how to get a controlling position." (PX7021 (Pritzker (JLI) Dep. at 123-24)).

853. On August 29, 2018, Willard sent a note to Altria's Board stating: "We are still in discussions on the Tree [JLI] Opportunity. We have hit some setbacks and given the unavailability of one [of] the investors for two weeks we will likely have a break in the negotiations. If we have material developments, we will send a note or have a call." (PX4461 (Altria) at 002; PX4462 (Altria)).

854. In late August 2018, the parties "had reached an impasse" in the negotiations, (Garnick (Altria) Tr. 1753), and negotiations "broke down[.]" (Willard (Altria) Tr. 1419).

855. When the negotiations broke off in late August 2018, the upstream affiliates issue (F. 836) had not yet been resolved. (Willard (Altria) Tr. 1432).

856. In September 2018, Altria had internal discussions "from time to time" about the possibility of restarting negotiations with JLI. There were no substantive negotiations between Altria and JLI during this period. (Garnick (Altria) Tr. 1753, 1823).

857. There were no term sheets exchanged and Altria had "no meetings with JLI people" in September 2018. (Garnick (Altria) Tr. 1754-55).

858. At the end of August and into September 2018, Gifford, Altria's then Vice Chairman, believed that a potential deal with JLI "was off." (Gifford (Altria) Tr. 2798).

859. On September 8, 2018, JLI's Strategic Committee, composed of Pritzker and Valani, informed the JLI Board that "[the Committee] was frustrated with the progress that was being made with Altria and recommend[ed] that conversations cease for reasons that are listed" in the Board's meeting minutes. (Pritzker (JLI) Tr. 855-56 (discussing PX2117 (JLI) at 041)). The Committee was concerned about the gap in valuation, the distraction to the company, and the risk that the fact of negotiations would leak and "be reputationally harmful to the company[.]" (Pritzker (JLI) Tr. 856).

860. On September 8, 2018, JLI's Board of Directors heard an update on "certain legal discussions between counsel to the parties." The Board concluded that, "[i]n light of the (i) lack of progress in the negotiations, (ii) the number of remaining, significant, unresolved outstanding issues between the parties, (iii) the ongoing distraction and burden on the Company's management of further negotiations with Richard at a time when the Company was experiencing extraordinary growth, and (iv) the increase in valuation of the Company during the course of its discussions with Richard and its prospects for future growth and further increases in valuation (independent of any transaction with Richard), which were not adequately reflected in the Richard investment offer, . . . the Company should cease discussions of an investment or strategic relationship with Richard." (PX2117 (JLI) at 041; *see also* PX7021 (Pritzker (JLI) Dep. at 130-31) ("[W]e were no longer talking to Altria about the deal . . . [and] we determined at the board [meeting] that this was just not going to happen.")).

861. On September 11, 2018, Devitre and Valani spoke by phone. (PX4374 (Altria) at 006 (Devitre phone records)).

862. In a September 13, 2018 email, Wappler reported that Devitre had spoken with Valani two days earlier to explain that Altria had "a solution to the simultaneous sign/close issue, and [is] prepared to send a revised term sheet," and that Valani indicated that JLI was focused on a tender offer and not interested in additional discussions. (PX3154 (PWP) at 001).

863. By September 11, 2018, JLI had decided to pursue different financing than the Altria investment, and Pritzker "wanted to just get that done and move on." (PX7021 (Pritzker (JLI) Dep. at 132); *see also* PX3154 (PWP) at 001). "[Valani] had communicated to [Devitre, an Altria Board member] that [JLI was] planning on pursuing a different path." (PX7028 (Wappler (PWP) Dep. at 124-25)).

864. On or around September 21, 2018, Altria employees, including Crosthwaite, and Altria's advisers at PWP, had discussions and prepared a presentation regarding the potential implications of the FDA's September 12 Letter (F. 275) for JLI and for elements of the parties' negotiations ("September 21, 2018 Presentation"). (PX4273 (Altria)).

865. A slide from Altria's September 21, 2018 Presentation, setting forth the "[t]op non-value terms for renegotiation," lists "Board Seats," "Voting Stake," and "Exit Terms[.]" Another term mentioned for potential renegotiation, under a catch-all category of "Other" was "Non-compete limited to current and future subsidiaries" – the upstream affiliates issue (*see* F. 836). (PX4273 (Altria) at 013).

866. A slide from Altria's September 21, 2018 Presentation titled "Illustrative pathways" describes various scenarios and potential outcomes, if Altria were to "call Tree" or otherwise attempt to reengage with JLI. (PX4273 (Altria) at 014).

867. Due to the impasse, negotiations remained stagnant through September and into October of 2018, (PX7031 (Willard (Altria) Dep. at 178-79)), and there were no further substantive

negotiations after the August 27 Meeting until Willard sent a letter to JLI on October 5, 2018. (Willard (Altria) Tr. 1418-19).

6. October 2018 Negotiations

868. Beginning in October 2018, Altria's strategy for its post-Elite e-vapor business consisted of two simultaneous paths: internal growth teams to try to develop a "leapfrog" product and growth by acquisition of an interest in JLI. (F. 602, 632, 868-947).

869. The likelihood of completing a good acquisition is often uncertain and therefore Altria believed it was necessary to also have an internal strategy. (Willard (Altria) Tr. 1391 ("[T]he thing about acquisitions is, sometimes you find a good one and sometimes you can come to terms, but oftentimes, you can't come to terms, and so you better have an internal strategy.")) Its internal strategy shifted towards Growth Teams. (*See* F. 599-610, 632-644).

a. October 5, 2018 Letter from Altria to JLI

870. On October 5, 2018, Willard sent a letter to JLI, which Altria saw as "one last effort" to re-engage JLI, based on a different deal structure, to "see whether some of these different terms [would be] of any interest to them." ("October 5 Letter"). (PX7031 (Willard (Altria) Dep. at 225-26); *see* PX2152 (JLI)).

871. According to October 4, 2018 notes for a planned call with Altria's Board of Directors, prepared by Garnick, Altria leadership was "[n]ot terribly optimistic" about reaching out to JLI, "but [thought it was] worth a final try." Garnick stated his belief that "[m]ost likely, [JLI] will not make that commitment to engage. We are fully prepared for that." (PX1010 (Altria) at 004).

872. Under the deal structure Altria offered in the October 5 Letter, Altria would acquire a 35% economic and voting interest in the entirety of JLI. Previously, Altria had proposed acquiring a 45% interest of only JLI's U.S. business. The October 5 Letter also proposed that Altria would make the full investment at closing, at which time Altria would receive non-voting shares, with the parties cooperating to seek regulatory approval to convert those shares into voting shares. In addition, Altria would agree to a standstill to prevent it from acquiring additional shares or control of JLI following the investment. (PX2152 (JLI) at 002-003; Pritzker (JLI) Tr. 825-26).

873. JLI viewed the October 5 Letter as a "turning point" because it "solved" several of the items that in earlier negotiations had been matters of dispute between JLI and Altria. Altria's proposals in the October 5 Letter that Altria acquire a 35% interest (instead of 45%), invest in the entire JLI (not just the U.S. business), and agree to pay the full amount at closing, addressed JLI's concerns. (PX7021 (Pritzker (JLI) Dep. at 137-38); *see* Pritzker (JLI) Tr. 857-58; *see also* PX7021 (Pritzker (JLI) Dep. at 118-19) (discussing points that had been "critical" to JLI during the August 2018 time period).

874. By offering "a proposal that would encompass the entire company, [the October 5 Letter] gave the promise that actually [Altria and JLI] could get to an agreement on value." (Pritzker (JLI) Tr. 836).

875. The October 5 Letter proposed terms related to deal structure and control, which were "particularly important to JLI" and which were "different, significantly different than the last deal [Altria and JLI] were discussing." (PX7031 (Willard (Altria) Dep. at 225-26); PX7025 (Burns (JLI) Dep. at 211-12) (explaining that some of the "major points that were changed relative to previous discussions" related to control and "support [of JLI's] mission" through provision of support services).

876. Altria's new proposal contained in the October 5 Letter to acquire 35 percent ownership of JLI "divid[ed] what [Altria] would have preferred and what [JLI] would have preferred, which was less than that." (Pritzker (JLI) Tr. 807; *see also* PX7021 (Pritzker (JLI) Dep. at 138) ("I thought 35 percent was a good faith attempt to reach a number that might be acceptable to both parties . . . .")). JLI "did not want to give up control" but it also wanted the investment to "be meaningful on [Altria's] part," so 35 percent was "the right zip code or area in terms of size." (PX7025 (Burns (JLI) Dep. at 211-12)). By proposing a 35 percent interest, the October 5 Letter "made the likelihood of Altria's getting to a control position less likely" and made the "cash outlay" more feasible for Altria. (Pritzker (JLI) Tr. 836-37).

877. Altria's proposal in the October 5 Letter that Altria would agree to a standstill that would prevent it from acquiring additional shares or engaging in a business combination with JLI was important to JLI because it did not want to "give [Altria] a path to control unless it was [JLI's] desire to give them a path to control," and a standstill meant that Altria "could not edge their way into control by purchasing other shares above the 35 percent level." With the standstill provision, JLI "absolutely knew this was a non-control transaction." (PX7025 (Burns (JLI) Dep. at 212); PX2152 (JLI) at 003).

878. The October 5 Letter proposed that Altria would "provide support services in the U.S. along the lines previously discussed for a term of six years from closing, which would be renewable for successive three-year terms if mutually agreed. If at the end of any term, we did not mutually agree to extend the support services, Altria would nonetheless provide transition services for a reasonable period." (PX2152 (JLI) at 002-03).

879. Term number 6 of the October 5 Letter stated:

> Altria would agree that it and its current and future subsidiaries will not compete, in a manner consistent with our previous discussions, in the U.S. e-vapor market for any period, exclusive of the aforementioned transition period, during which it provides support services.

(PX2152 (JLI) at 003).

880. JLI understood Willard's reference to "our previous discussions" in term number 6 of the October 5 Letter to mean "consistent with [the] prior draft of the term sheets," the most recent of which was the August 19 Term Sheet sent by JLI. (Pritzker (JLI) Tr. 715; *see also* Pritzker (JLI) Tr. 863 (noting that "looking at the last term sheet would be instructive" on the meaning of "our previous discussions" in the October 5 Letter); PX7011 (Valani (JLI) IHT at 118)).

881. After receiving the October 5 Letter, "for the first time in the entire time that [JLI and Altria] been talking," Pritzker believed that the parties "had the outline of a transaction that might be possible." (PX7021 (Pritzker (JLI) Dep. at 137)).

882. On October 10, 2018, the JLI Board, citing the "recent letter received from [Altria] proposing to re-engage in discussions regarding a potential investment and strategic relationship on certain specified terms," authorized Pritzker, Valani, and Burns to "re-engage with [Altria] and to obtain further clarification of its proposal." (PX2117 (JLI) at 052 (JLI Board minutes)).

b. October 15, 2018 Term Sheet

883. On October 12, 2018, Pritzker informed Willard that JLI was amenable to the terms set forth in the October 5 Letter. (RX1265 (Altria) at 007).

884. On October 12, 2018, Willard provided the Altria Board with "an update on [Altria's] ongoing negotiation[s]." He wrote that Altria had "insisted upon a 35% stake in the entire company, both U.S. and international" and that Altria had emphasized to JLI that Altria was "not willing to negotiate" on those matters. Willard told the Board that Altria and JLI "agreed that it made sense for [Altria] to send [JLI] a revised draft term sheet" and that Altria would send JLI the revised term sheet "next week." (PX1350 (Altria) at 001).

885. On October 15, 2018, Altria sent JLI a revised version of the August 19 Term Sheet, reflecting the terms Altria proposed in the October 5 Letter. ("October 15 Term Sheet"). (PX1269 (Altria).

886. Regarding "Antitrust Clearance Matters," the October 15 Term Sheet continued to propose, as did prior term sheets exchanged between Altria and JLI, that both Altria and JLI would "cooperate with the FTC"; "use reasonable best efforts to seek Antitrust Clearance"; and "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX1269 (JLI) at 006-07).

887. Regarding treatment of Altria's existing products, the Antitrust Clearance Matters section of the October 15 Term Sheet proposed: "[I]f necessary to obtain Antitrust Clearance," Altria would offer to divest its e-vapor assets, and if those assets were not otherwise transferred to a third party, Altria would contribute such assets to JLI, upon receipt of antitrust clearance, for a price in the millions to be determined. (PX1269 (JLI) at 006; *see also* Pritzker (JLI) Tr. 868).

888. The October 15 Term Sheet provided that Altria would "elect the time (not to exceed two years from closing of the Purchase) when the parties initiate the HSR clearance process." (PX2147 (JLI) at 023). Altria added this term to make sure that it could divest or contribute its e-vapor portfolio, if requested by the FTC to obtain antitrust clearance, without potentially impacting a preexisting agreement with PMI. (*See* F. 887-890).

889. During the course of the negotiations, Altria became concerned that an existing agreement Altria had with PMI might complicate Altria's potential investment in JLI. Specifically, the issue was whether Altria's agreement with PMI – the E-Vapor Joint Research, Development and Technology Sharing Agreement ("JRDTA") – restricted Altria's ability to divest or contribute its e-vapor products to a third party during the term of the agreement. (Garnick (Altria) Tr. 1587-88; PX7036 (Garnick (Altria) Dep. at 156-57); *see* RX0873 (Altria) at 001).

890. Under the JRDTA, Altria had granted PMI a series of licenses to Altria's e-vapor products. (RX0873 (Altria) at 018-19). Altria was concerned that the JRDTA potentially constrained its ability to transfer ownership of those products during the term of the JRDTA. (PX7036 (Garnick (Altria) Dep. at 156-57)).

891. The JRDTA was set to expire on July 15, 2020, unless the parties negotiated an extension. (RX0873 (Altria) at 001 (establishing Effective Date of July 15, 2015), 027 (indicating that the R&D agreement would continue until the fifth anniversary of the Effective Date, unless extended)).

892. By providing in the October 15 Term Sheet that Altria could elect the time to initiate the HSR clearance process, not to exceed two years, Altria could delay the HSR filing date until after the July 15, 2020 date on which the JRDTA was set to expire. (Garnick (Altria) Tr. 1591-92; PX7036 (Garnick (Altria) Dep. at 156-57) (explaining that the two-year HSR filing deadline "was to give [Altria] some room to file HSR so that when we did it, and we got HSR approval, we could go ahead and contribute our product or divest it, if necessary, if possible, to a third party")).

893. The October 15 Term Sheet included a non-compete provision, which, consistent with the August 19 Term Sheet, contained a carve-out exempting "MarkTen and MarkTen Elite prior to their contribution or divestiture as described above" in the term sheet. (PX1269 (Altria) at 008).

894. In the October 15 Term Sheet, Altria revised the non-compete provision from the Support Obligations section of the August 19 Term Sheet by removing JLI's proposals that the non-compete apply "anywhere in the world" or to "current and future affiliates" (rather than to subsidiaries). (PX1269 (Altria) at 008; PX1432 (Altria) at 024). Altria also revised the non-compete to propose that it "terminate upon the termination of the" time period in which Altria is providing support services to JLI. (PX1269 (Altria) at 008-09).

895. With respect to the time for commencement of support services to be provided by Altria to JLI, the Support Obligations section of the October 15 Term Sheet added the language underlined below:

> • Services provided upon earlier of (i) contribution described above or (ii) Richard otherwise exiting the marketing and sale of products in the Field ("Contribution Date"). Richard agrees, effective from the Contribution Date and thereafter during the Services Term to provide the following services in the U.S. (the "Contribution Date Services," and together with the Purchase Date Services, the "Services"):
>
> • assist with direct marketing programs, including inserts and/or onserts;
>
> • fully support Jack's efforts to gain distribution, display and in-store support for Jack's products, including support point of sale prominence for Jack's products alongside Richard's; and
>
> • grant Jack access to Richard's best in class infrastructure (including distribution) to maximize the growth of Jack.

(PX2147 (JIL) at 024). Regarding the underlined language above, Altria's in-house counsel Garnick explained, it was Altria's understanding that there were certain services that Altria could not, in compliance with antitrust law, provide to JLI if Altria was a competitor of JLI's and that outside counsel added the underlined language "to ensure that [Altria was] protected and in compliance with the antitrust laws before . . . [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor]." (PX7036 (Garnick (Altria) Dep. at 193-94)).

896. On Saturday October 20, 2018, JLI's Valani and Altria Board member Devitre had a meeting in New York, and Valani indicated that JLI was "ready to do a deal." (PX1313 (Altria) (email from Willard to Crosthwaite, Gifford, and Garnick). As Valani explained:

> [M]y recollection is that he gave me the impression that [JLI was] 90 percent there to do a deal. There were still outstanding matters. And we had experience that the [JLI] people could change their mind at any time . . . . That's the impression I got, that this time he was quite serious about moving ahead with the deal, but I still felt that we hadn't agreed on all terms.

(PX7001 (Devitre (Altria) IHT at 127-28)).

c. JLI's Response to Altria's October 25, 2018 Letter to the FDA

897. On the morning of October 25, 2018, Altria sent the FDA a letter responding to the FDA's September 12 Letter (F. 275), which Altria made public the same day ("October 25 Letter to the FDA"). Altria's letter announced that it would withdraw its pod products from the market and discontinue all non-traditional flavored cig-a-likes. (PX1071 (Altria) at 002-003; Willard (Altria) Tr. 1238, 1451-53)).

898. After Altria's October 25 Letter to the FDA was released publicly, Willard forwarded the letter to JLI's Pritzker, Valani, and Burns. (PX2022 (JLI) at 001; Willard (Altria) Tr. 1237-39; Pritzker (JLI) Tr. 872-73; *see also* RX0216 (Altria)).

899. Altria had not discussed with JLI its decision to withdraw pod products and non-traditional flavored cig-a-like products before sending its October 25 Letter to the FDA. (Garnick (Altria) Tr. 1763-64).

900. JLI first learned about Altria's October 25 Letter to the FDA after the letter became public. (Valani (JLI) Tr. 954).

901. JLI had no advance notice of Altria's response to the September 12 FDA Letter, or that Altria was going to discontinue products as announced in its October 25 Letter to the FDA. (Pritzker (JLI) Tr. 873-74; Valani (JLI) Tr. 956; *see also* PX7021 (Pritzker (JLI) Dep. at 216-17); PX7032 (Valani (JLI) Dep. at 149-50); PX7025 (Burns (JLI) Dep. at 215-16); PX7035 (Masoudi (JLI) Dep. at 126-27)).

902. Altria anticipated that JLI would be unhappy with Altria's October 25 Letter to the FDA, particularly because the letter said that Altria "believed that pod products substantially contributed to the youth epidemic." (Garnick (Altria) Tr. 1765; *see also* Gifford (Altria) Tr. 2830 (confirming his belief that Altria's discontinuing Elite and flavored cig-a-like products would not increase chances of completing a deal with JLI)).

903. A retailer sent an email to JLI on October 25, 2018 relating to Altria's announcement of the withdrawal of Elite: "This just pisses me off. Continuously fail to compete in the category, so wa[ve] the white flag and try to bring others down with you." (PX2473 (JLI) at 001). Robbins, Chief Sales Officer for JLI, forwarded the retailer email internally, stating: "This seems to be the universal feeling out there. The Altria letter is a thinly veiled attempt to get rid of competition that threatens their cig franchise. Glad the retailers see it for what it is." (PX2473 (JLI) at 001).

904. JLI was surprised to learn of Altria's decision stated in its October 25 Letter to the FDA and viewed the letter as a "hostile action towards JUUL." (PX7011 Valani (JLI) IHT at 125; *see also* PX7011 (Valani (JLI) IHT at 124) (Valani was "shocked"); Valani (JLI) Tr. 944-45 (characterizing Altria's letter to FDA as "surprising"); PX7021 (Pritzker (JLI) Dep. at 150) (Pritzker "was amazed")).

905. Altria's decision to withdraw its pod products was not expected or welcomed by JLI. As Pritzker explained:

> I was and JUUL was perfectly happy to have those products stay on the market until an FTC decision. We were expecting it. We thought it was appropriate for the FTC to – to determine what should become of them and expected that it would be divestiture. We thought it was an FTC matter and not something for – for a premature action. So it was not welcomed. I thought it would complicate things.

(Pritzker (JLI) Tr. 874-75).

906. JLI was "surprised that [Altria] had taken the[] [products] off unilaterally." As Prtizker explained:

> [Altria] never seemed to mind divesting those products as part of – of what I thought to be agreed-upon strategy in which they would stay on the market, there would be a regulatory process, and I ultimately expected that [Altria] would not take them off the market. They'd be expected to divest them so that they remained in the market.·

(PX7021 (Pritzker (JLI) Dep. at 150)).

907. On October 25, 2018, after JLI had received Altria's October 25 Letter to the FDA, Altria's Willard and Gifford spoke to JLI's Pritzker, Valani, and Burns by telephone. During that telephone call, Willard said Altria was still interested in making a deal with JLI. (Pritzker (JLI) Tr. 728-30; Valani (JLI) Tr. 945).

908. Pritzker was "very skeptical," after Altria's October 25 Letter to the FDA, that a deal with Altria would be completed. One reason cited by Pritzker was Altria's "unilaterally taking products off the market," which Pritzker though was "complicating." Pritzker thought that Altria's action in that regard "seemed inconsistent with our conversations that [Altria] would continue to operate those [assets] until they sold them or were required to sell them, and I never wanted a unilateral withdrawal of the products." In addition, based on Altria's comments in the October 25 Letter regarding the negative impact on youth [of the] use of e-cigarettes, Pritzker was skeptical that Altria was "sincere in wanting to invest in" JLI. (PX7021 (Pritzker (JLI) Dep. at 154-55)).

d. October 28 and 30, 2018 Term Sheets

909. Garnick summarized in an email sent after JLI learned of the October 25 Letter to the FDA, "[t]he Tree folks are still talking to us even in light of the announcement we made today." (PX4350 (Altria) at 001). Altria was unsure that JLI would be willing to continue negotiating with Altria after the October 25 Letter. (Garnick (Altria) Tr. 1766-77 ("I was not sure that we would still be talking by the end of the day because of our letter and our announcement that we were removing pods. We thought that the folks at JLI might be upset by some of the statements we made in the letter and it might have ended the deal.")).

910. After Altria's October 25 Letter to the FDA, JLI was willing to continue negotiating with Altria. On October 28, 2018, Altria attorneys met with JLI attorneys. JLI's outside counsel circulated a revised term sheet ("October 28 Term Sheet"). (PX4350 (Altria); Pritzker (JLI) Tr. 875-77; PX4264 (Altria); PX2503 (JLI) at 001).

911. The Antitrust Clearance Matters section of the October 28 Term Sheet continued the proposal from prior term sheets that the parties "would be required to use reasonable best efforts to seek Antitrust Clearance" and to "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2503 (JLI) at 007-008). It also maintained the proposal that Altria offer to divest its e-vapor assets "if necessary to obtain Antitrust Clearance," and if those assets were not otherwise transferred to a third party, to contribute such assets to JLI upon receipt of antitrust clearance. (PX2503 (JLI) at 007). The October 28 Term Sheet added that such contribution would be "at [JLI's] election," but otherwise this provision was not materially revised from the most recent October 15 Term Sheet. (PX2503 (JLI) at 007).

912. In the October 28 Term Sheet, JLI largely accepted Altria's proposal to delay filing for HSR, as provided in the October 15 Term Sheet, but changed the filing deadline to be a date certain of July 15, 2020, rather than an undefined date within two years of closing (*see* F. 886). JLI's revision stated that "[Altria] shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process." (PX2503 (JLI) at 007).

913. The non-compete provision in the Support Obligations section of the October 28 Term Sheet maintained from prior term sheets the explicit carve-out for "MarkTen and MarkTen Elite prior to their contribution or divestiture as described above." (PX2503 (JLI) at 010).

914. JLI added the following underlined text to the non-compete provision in the Support Obligations section of the October 28 Term Sheet: "[Altria] agrees to refrain, and to cause its current and future subsidiaries and controlled affiliates to refrain, from competing (or preparing to compete, including through research and development activities) in the e-vapor business, other than (i) with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above and (ii) basic research not directed toward the e-vapor business and not undertaken with the intent (primarily or in part) of developing or commercializing technology or products in the e-vapor business. . . . Consequences of competition by an upstream [Altria] affiliate dealt with in "Richard Exit Right" below." How the non-compete provision would apply to certain research and development activities and whether it would bind Altria's controlled or upstream affiliates remained to be negotiated. (PX2503 (JLI) at 010).

915. On October 29, 2018, JLI and Altria negotiators met in New York, New York, for a previously scheduled meeting. (Pritzker (JLI) Tr. 875; PX2322 (JLI) at 001). The negotiators met at the office of Altria's outside legal counsel. The attendees included Willard, Gifford, Garnick, and Crosthwaite from Altria, and Pritzker, Burns, and Valani from JLI. (Valani (JLI) Tr. 945-46).

916. The October 29, 2018 meeting in New York among Altria and JLI negotiators "was a long meeting" and "covered a lot of points." Pritzker was "surprise[d]" that the meeting "ended with [him] feeling that actually there was a road to actually getting something done." The discussions were "sufficiently promising" that Altria and JLI decided to "allow attorneys to start putting together the full documentation and [to] negotiate the remaining open issues and the fine details of the agreement." (Pritzker (JLI) Tr. 876-77).

917. The evening of October 29, 2018 was the first time in negotiations between JLI and Altria that "there was alignment" on the terms of a term sheet. (Valani (JLI) Tr. 948-49; *see also* PX4167 (Altria) at 008 (Willard texting Devitre, "We have reached agreement on terms.")).

918. On October 30, 2018, JLI's outside legal counsel sent Altria what the transmittal email referred to as the "final term sheet" ("October 30 Final Term Sheet"). (PX1271 (Altria) at 001). The October 30 Final Term Sheet was expressly non-binding. (RX0285 (Altria) at 004 n.1 ("This term sheet is not binding on any party.")).

919. The October 30 Final Term Sheet maintained the same structure for treatment of Altria's existing e-vapor products as the October 28 Term Sheet, which was that Altria would either contribute or divest its existing products as part of the HSR clearance process. The non-compete provision remained unchanged from the October 28 Term Sheet, including its exemption for "MarkTen and MarkTen Elite prior to their contribution or divestiture . . . ." (RX0285 (Altria) at 021-22, 024).

920. The October 30 Final Term Sheet left unchanged JLI's proposal that Altria could delay HSR filing until July 2020. (RX0285 (Altria) at 022 ("[Altria] shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process.")). This proposal was acceptable to both Altria and JLI. (Garnick (Altria) Tr. 1671, 1677-78).

921. Allowing Altria to delay HSR filing until July 2020 "avoid[ed]" any potential issue with the PMI agreement and allowed Altria to divest or contribute its existing products. (Garnick (Altria) Tr. 1671). Such delay in seeking antitrust clearance also "push[ed] back the date when [Altria] would be on [JLI's] board," which, in Garnick's view, "was fine with JLI . . . ." (Garnick (Altria) Tr. 1678).

922. The October 28 Term Sheet and the October 30 Final Term Sheet, as did the October 15 Term Sheet, in the Altria Support Obligations section, distinguished between two types of services that Altria could provide to JLI after the closing of the transaction. (F. 921-922; PX1269 (JLI) at 007-09 (October15, 2018 Term Sheet); PX2503 (JLI) at 008-10 (October 28, 2018 term sheet); RX0285 (Altria) at 022-24 (October 30, 2018 Final Term Sheet)).

923. Some services that were anticipated to be provided by Altria to JLI could be provided immediately upon closing the transaction, including Altria's supporting, consulting, and assisting JLI in obtaining PMTA approval for JLI's products. (PX1269 (Altria) at 007); *see also* PX2503 (JLI) at 008-09; RX0285 (Altria) at 022-23).

924. Other services anticipated to be provided after closing the transaction – referred to as enhanced services ("Enhanced Services") – could not be provided so long as Altria and JLI remained competitors in the e-vapor category because of antitrust considerations. (PX7036 (Garnick (Altria) Dep. at 193-94); PX1269 (Altria) at 008). Enhanced services included assisting with JLI's marketing; assisting with JLI's "efforts to gain distribution, display and in-store support"; and providing JLI with access to Altria's "best in class infrastructure (including distribution)." (PX1269 (Altria) at 008; *see also* PX2503 (JLI) at 009; RX0285 (Altria) at 023).

925. The October 15 Term Sheet had proposed that Altria would not provide Enhanced Services until the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." (PX1269 (Altria) at 008). The October 28 and October 30 Term Sheets contained similar language but replaced "contribution" with "Antitrust Clearance." (PX2503 (JLI) at 009; RX0285 (Altria) at 023).

926. JLI did not see a delay in JLI's receiving Enhanced Services as a problem. While these services were valuable to JLI, they were "not the critical service[s]" to be provided by Altria. As Pritzker explained, it was "important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer" the Enhanced Services, "but when they started would not have been consequential to [him]." (Pritzker (JLI) Tr. 871-72).

927. For JLI, Altria's provision of regulatory support services to JLI, including assistance with PMTA approval, which is "existential" for JLI, was "invaluable." (Pritzker (JLI) Tr. 820; *see also* PX7025 (Burns (JLI) Dep. at 212) (explaining that support services were "incredibly important," to JLI, "especially things like support around PMTA submission and FDA support")).

928. Regarding the issue of provision of services to JLI, Willard's recollection was that JLI wanted Altria's services, but both sides understood that "there were certain reasons why they could be provided at various times, and . . . both sides were fairly flexible on that." Willard did not "recall that the timing of those services was an important part of what [JLI was] expecting." (Willard (Altria) Tr. 1212-13).

7. November 2018 until Execution of Final Documents

929. On November 13, 2018, JLI announced that it would discontinue sales of all non-traditional flavors at retail stores, leaving those flavors to be sold only online, and that JLI would be implementing additional age-verification measures. (RX1926 (JLI) at 001-03). The announcement indicates that JLI's decision was a response to the FDA, stating that JLI and the FDA share the "common goal" of "preventing youth from initiating on nicotine" and "paraphrase[d] FDA Commissioner Gottlieb" in stating JLI wanted to be an "off-ramp" for adult smokers, "not an on-ramp" for youth initiation. (RX1926 (JLI) at 001).

930. Altria did not know in advance how JLI had planned to respond to the September 12 FDA Letter that JLI received or that JLI would discontinue sales of all non-traditional flavors at retail, as JLI announced on November 13, 2018. (Garnick (Altria) Tr. 1764).

931. Besides Altria, JLI was the only e-vapor manufacturer to remove flavored products before the FDA imposed a flavor ban, which went into effect in February 2020. (Garnick (Altria) Tr. 1775).

932. In November 2018, Altria began due diligence for the contemplated transaction. (Garnick (Altria) Tr. 1776).

933. In November 2018, a deal between Altria and JLI was not a sure thing. Performing due diligence is "always . . . a very, very important step in any transaction." (PX7024 (Crosthwaite (Altria/JLI) Dep. at 284)). Altria "had no idea" what due diligence might uncover and the parties "still had the actual [deal] documents to negotiate . . . ." (Garnick (Altria) Tr. 1776). "Until [Altria] had completed diligence, nothing was certain." (PX7024 (Crosthwaite (Altria/JLI) Dep. at 284)).

934. Due diligence took "at least a month" and involved "large volumes of people" undertaking an "exhaustive" review of the "financial, legal, technological, [and] strategic matters of the business[.]" (Valani (JLI) Tr. 954-55).

935. From the beginning of November 2018 until the closing of the Transaction on December 20, 2018, Altria and JLI exchanged draft transaction documents. (Pritzker (JLI) Tr. 802).

936. On November 15, 2018, the parties exchanged the first draft of the transaction documents. (Garnick (Altria) Tr. 1780-81; *see, e.g.*, RX0838 (Altria) at 001, 035 (Draft Voting Agreement), 306 (Draft Purchase Agreement), 354 (Draft Relationship Agreement) (collectively, "November 15 Draft Transaction Documents"). These were drafts of the "actual transaction documents," as distinguished from the term sheets. (Garnick (Altria) Tr. 1781).

937. The November 15 Draft Transaction Documents included a non-compete provision in the Draft Relationship Agreement, with a carve-out for MarkTen and MarkTen Elite "as such business is presently conducted," pending antitrust review and clearance, in accordance with other provisions in the draft. (RX0838 (Altria) at 373). As of November 15, 2018, Altria was selling MarkTen cig-a-likes in tobacco, menthol, and mint flavors. The non-compete provision in the draft contemplated that Altria's then-existing products would remain on the market through the antitrust review process. (Garnick (Altria) Tr. 1781-83; Gifford (Altria) Tr. 2831).

938. The November 15 Draft Transaction Documents would require Altria to submit its HSR filing "[o]n or prior to July 15, 2020." (RX0838 (Altria) at 325 (Draft Purchase Agreement).

939. On December 7, 2018, Altria announced the "discontinuation of production and distribution of all *MarkTen* and *Green Smoke* e-vapor products and Verve oral nicotine containing products." (PX9080 at 001 (Altria press release) ("December 7 Announcement").

940. JLI did not have any prior notice of Altria's December 7 Announcement, nor had anyone at JLI requested that Altria take that action. (Pritzker (JLI) Tr. 884-85; Valani (JLI) Tr. 957; *see also* PX7021 (Pritzker (JLI) Dep. at 164, 169); PX7032 (Valani (JLI) Dep. at 151-52); PX7025 (Burns (JLI) Dep. at 217-18); PX7035 (Masoudi (JLI) Dep. at 89, 128-29)).

941. Neither Pritzker nor Valani could remember learning, prior to this litigation, that Altria had shut down Nu Mark and removed its remaining cig-a-like products in December 2018. (Pritzker (JLI) Tr. 877-78; Valani (JLI) Tr. 951-52, 957; PX7021 (Pritzker (JLI) Dep. at 163-64) ("[The announcement] was of no consequence because [he] didn't think that [the products] were particularly competitive to Juul[.]"); PX7011 (Valani (JLI) IHT at 134) (calling the decision "irrelevant" because MarkTen was a "terrible" product)). As O'Hara explained: "[I]t barely even registered" because Nu Mark was not "a competitive entity in the market. I did not track them closely. It was not meaningful at all when they did that to [JLI's] competitive stake, you know, in the market." (PX7033 (O'Hara (JLI) Dep. at 176)).

942. On December 8, 2018, Altria's Garnick wrote to his JLI counterpart that Willard believed the principals needed to discuss "10 or so outstanding issues . . . in order to close by Dec. 21." (RX1591 (JLI) at 001; *see also* Gifford (Altria) Tr. 2844-45 (listing key unresolved issues in December, including "the [capitalization] table, pre-emptive rights," and "right up until the last minute," valuation); Gifford (Altria) Tr. 2765-66 (explaining that the capitalization table listed capital investors in JLI and the stock options they controlled, which is relevant to whether Altria's ownership interest in JLI could be diluted by "an IPO in the future or other stock sales")).

943. At a December 11, 2018 meeting of Altria's Board of Directors, Altria's leadership updated the Board on the status of the potential transaction with JLI, noting that Altria and JLI had agreed to non-binding terms on October 29; due diligence was underway; and that "[a]lthough progress has been made a potential deal with [JLI] is still highly uncertain and subject to many factors[.]" (RX0973 (Altria) at 017; *see also* RX0973 at 005 ("Significant negotiation continues on the deal documents[.]").

944. In early to mid-December 2018, JLI expressed concern that under the proposed transaction, JLI might be considered a controlled affiliate of Altria pursuant to Altria's JRDTA with PMI, which would require Altria to share all of JLI's intellectual property with PMI. On December 14, 2018, Garnick responded to JLI in an email to JLI's Masoudi that "the possibility of interpreting the PMI agreement in the way that you propose is not a notable risk. For that reason, we are not willing to give up voting or board rights" to address such a possibility. (PX7035 (Masoudi (JLI) Dep. at 98-102); PX2494 (JLI) at 001).

945. On December 15, 2018, Altria's Garnick wrote to JLI's Chief Legal Officer, Gerald Masoudi "to express a bit [of] dismay at some of the proposed terms" in the draft services agreement that Altria received from JLI, including "[a] provision that would have the effect of giving [JLI] a license, if not ownership, of the [Altria] IP it uses in providing the services" and "a provision that [Altria] pays [JLI's] taxes in certain instances[.]" Garnick

hoped that "[g]iven the severe time restraints . . . each side would propose reasonable terms from the very beginning and not seek to overreach." (RX1592 (JLI) at 001).

946. On December 15, 2018, Garnick advised his colleagues that the "deal may not survive the day" because of a dispute with JLI over how to present the companies' posture toward cigarettes in a press release. For Willard, JLI's push to present a "smoke-free future" was a "walk away point." (RX0910 (Altria) at 001-02).

947. On December 15, 2018, Willard, in text messages with Devitre, described "two remaining big issues" related to the deal. First, JLI was trying to dilute Altria's position by half a billion dollars. Devitre responded that the point was a "critical" one on which Altria "should not give in." Second, JLI wanted to issue a single press release with Altria, "that demeans our cigarette business and sign us up for a smoke free future." Willard concluded, "[i]f they do not give on both the deal will not proceed." (PX4167 (Altria) at 010); Willard (Altria) Tr. 1462-63).

948. "[O]ne of the most important terms of the [Altria/JLI] deal was value[.]" (Willard (Altria) Tr. 1464).

949. On December 16, 2018, as a result of the share dilution issue referenced in F. 945, JLI and Altria hit what Willard described to Devitre as "an impasse" on valuation, an "eleventh-hour" issue that required additional negotiation between the parties. By December 20, 2018, Altria and JLI had gotten past the impasse and finally reached an agreement on all terms. (PX4167 (Altria) at 010 (text message from Willard to Devitre); RX1417 (JLI) at 001; Willard (Altria) Tr. 1464-65).

8. Transaction Documents and Amended Transaction Documents

950. On December 20, 2018, Altria and JLI executed final transaction documents, which included a "Purchase Agreement," a "Relationship Agreement," a "Services Agreement," and a "Voting Agreement." (PX2141 (JLI) (Purchase Agreement); PX1276 (JLI) (Relationship Agreement); PX1275 (JLI) (Services Agreement); PX2216 (JLI) (Voting Agreement) (collectively, "Transaction Documents").

951. Pursuant to the Transaction, Altria invested $12.8 billion dollars in JLI in exchange for a 35 percent economic interest, obtained the right to appoint one-third of JLI's directors, pending HSR approval, imposed some restrictions on JLI's sale rights, and imposed some restrictions preventing Altria from acquiring control of JLI. (RX1001 (Altria) at 001; PX2216 (JLI) at 004-05, 052; PX1276 (JLI) at 029-32, 041).

952. The Services Agreement requires Altria to provide JLI with regulatory assistance in connection with the preparation and filing of JLI's PMTAs, among other services. (PX1275 (JLI) at 028).

953. The Relationship Agreement includes a non-compete provision under which Altria agreed "not to, directly or indirectly[,] . . . own, manage, operate, control, engage in or assist others

in engaging in, the e-Vapor Business" while the Services Agreement remained in effect. (PX1276 (JLI) at 025 § 3.1). The non-compete provision includes a carve-out provision permitting Altria to "engage in the business relating to . . . its Green Smoke, MarkTen [] and MarkTen Elite brands, . . . as such business is presently conducted," pending HSR approval. (PX1276 (JLI) at 026 § 3.1; Willard (Altria) Tr. 1194-95).

954. The non-compete provision in the Relationship Agreement is limited to Altria's activities in "the e-Vapor Business" and does not limit Altria's ability to market other inhalable alternatives such as IQOS and oral alternatives such as the On! product. (PX1276 (JLI) at 025 § 3.1; Willard (Altria) Tr. 1195; Gifford (Altria) Tr. 2709-10).

955. The non-compete provision in the Relationship Agreement provides for a six-year initial term, making it set to expire on December 20, 2024 unless extended by the parties. (PX1276 (JLI) at 025 § 3.1(a) (Relationship Agreement) (providing that the non-compete provision terminates at "the termination or expiration of the term (as set forth in the Services Agreement)"; PX1275 (JLI) at 005, 014 (Services Agreement) (defining the "Initial Discretionary Termination Date" for the Services Agreement as "the date that is the sixth (6^{th}) anniversary of the date hereof")).

956. The non-compete provision in the November 15 Draft Transaction Documents did not change between the Draft Relationship Agreement and the final Relationship Agreement executed on December 20, 2018. (Garnick (Altria) Tr. 1782-83).

957. Although Altria had withdrawn MarkTen and MarkTen Elite from the market, Altria has continued to own or hold the rights to the intellectual property for these products. (Garnick (Altria) Tr. 1783-84).

958. Because MarkTen and MarkTen Elite had been on the market as of August 8, 2016, the Deeming Rule would not necessarily prevent returning these same products to the market even though Altria had withdrawn the products previously. FDA regulations do not require the product to have been on the market continuously. (Murillo (Altria/JLI) Tr. 3022).

959. The Purchase Agreement provided that Altria would divest its e-vapor assets as needed to obtain HSR approval:

> The Investor [Altria], to the extent permitted . . . shall and, shall cause its Affiliates to . . . propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect) . . . the sale, divestiture, license, disposition or hold separate of such assets or businesses of the Investor or any of its Affiliates . . . in each case, as may be required in order to avoid the entry of any decree, judgment, injunction, or other order . . . that would restrain, prevent or delay the Antitrust Conversion . . . .

(PX2141 (JLI) at 036). "Antitrust Conversion" refers to the automatic conversion of Altria's initial non-voting shares to voting shares, in accordance with the antitrust clearance provisions of the Purchase Agreement. (PX2141 (JLI) at 009-11).

960. The final Purchase Agreement required both Altria and JLI to make their HSR filings within 90 days of the closing of the Transaction. (PX2141 (JLI) at 034 (Altria/JLI Purchase Agreement, Section 4.1(a))).

961. On January 28, 2020, Altria and JLI amended the Transaction Documents. (PX0010 (Altria) (Amended Purchase Agreement); PX0011 (Altria) (Amended Relationship Agreement); PX0012 (Altria) (Amended Services Agreement) (collectively, "Amended Transaction Documents")).

962. Pursuant to the Amended Services Agreement, Altria continues to provide JLI with regulatory affairs support for FDA filings but is not obligated to provide other services, including services related to distribution of JUUL, absent further agreement between the parties. (PX0012 (Altria) at 002 (terminating all distribution and other services except for services described in sections II(F), which would continue only through March 31, 2020, and IV(A) of the Services Agreement's "Initial Services"); PX1275 (JLI) at 028-29 (Services Agreement) (defining II(F) "Initial Services" to include regulatory services and IV(A) to include shelf-space placement); *see also* PX7040 (Gifford (Altria) Dep. at 32) (confirming that following the amendments, "the gist of" the remaining services "was to support [JLI's] PMTA filing and their MRTP [(modified risk tobacco product)]")).

963. The Amended Relationship Agreement added two clauses providing for the termination of the non-compete provision. Altria may "permanently terminate" the non-compete provision: (1) if JLI were "prohibited as a matter of federal law" from selling e-vapor products in the United States for at least 12 months, unless a PMTA had been pending for at least six months; or (2) if the "aggregate value" of Altria's shares in JLI were written down to $1.28 billion or less. (PX0011 (Altria) at 002-03).

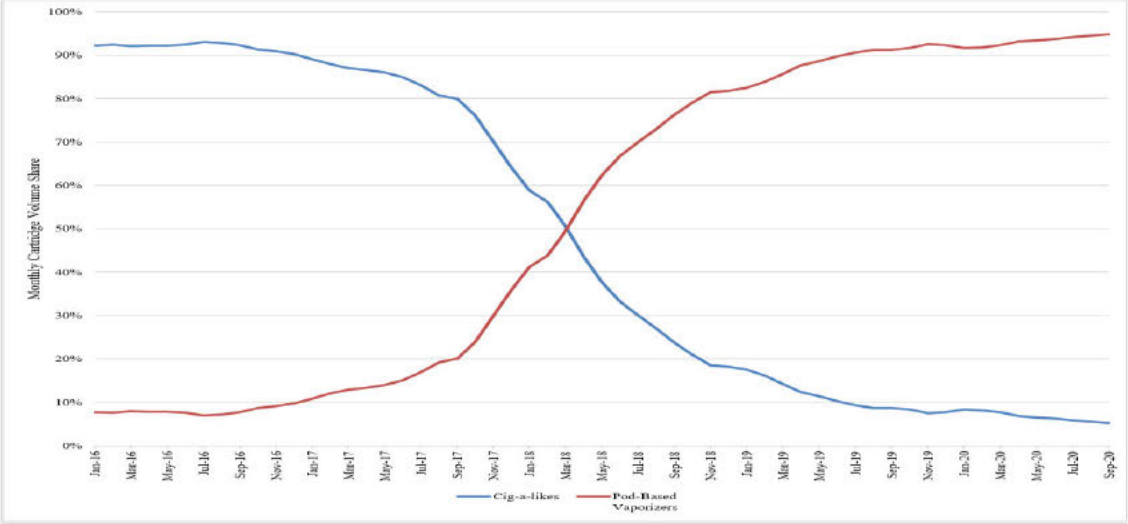
964. As of September 30, 2020, Altria valued its JLI investment at $1.6 billion. (RX2042 (Altria) at 003).

M. Market Conditions Around the Time of the Transaction

1. Decline of Cig-a-likes

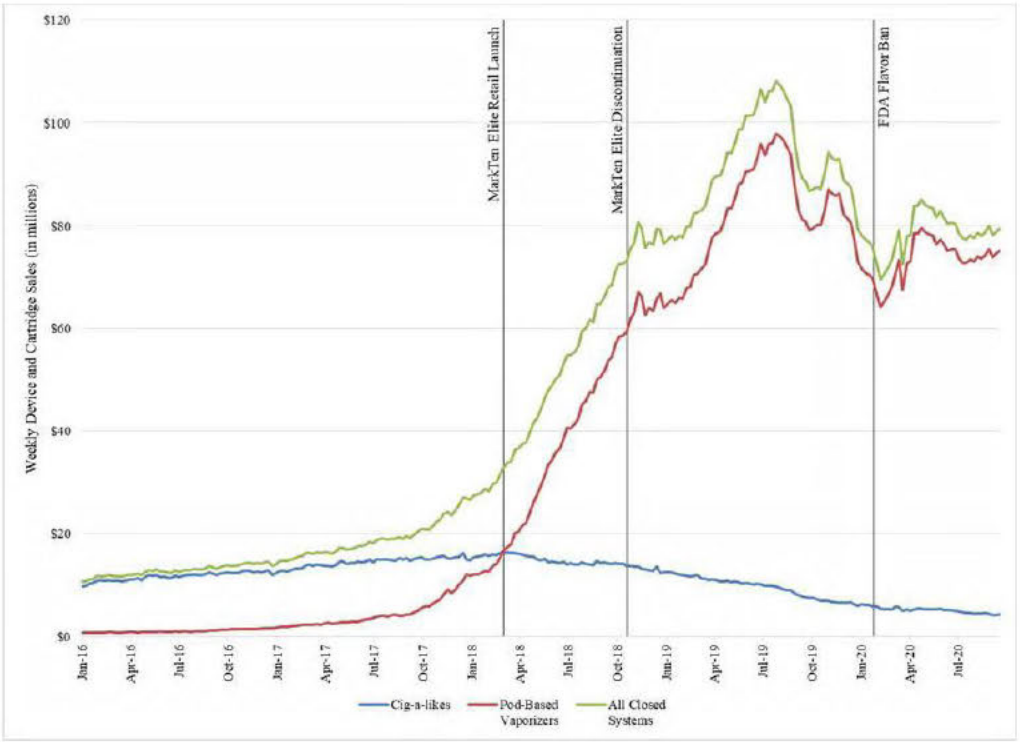
965. According to IRI Projected Data (F. 174) of sales of e-cigarette cartridges by volume reviewed and analyzed by Respondents' proffered expert witness, Dr. Murphy, the share of cig-a-likes in 2016 was more than 90 percent of the market; the share of cig-a-likes in January 2018 was about 59 percent; the share of cig-a-likes in December 2018 was less than 19 percent; and the share of cig-a-likes in September 2020, was 5 percent, with pod-based products capturing the other 95 percent. (RX1217 (Murphy Expert Report at 028, 030, 047, 062 ¶¶ 41, 62 n.143, 80, Fig. IV.3)).

966. The shift from cig-a-likes to pod-based products (F. 963) is depicted in the following chart showing relative volume shares for cartridges of cig-a-likes and pod-based products, based on IRI Projected Data analyzed by Dr. Murphy:



(RX1217 (Murphy Expert Report at 028, 030 ¶ 41, Fig. IV.3) (cartridges)).

967. Since March 2018, monthly sales of pod-based e-cigarettes have consistently and increasingly outpaced sales of cig-a-likes. Since March 2018, growth in closed system e-cigarette product sales has come entirely from pod-based products. Sales of e-cigarette devices and cartridges by type are depicted in the following chart based on IRI Projected Data analyzed by Dr. Murphy:



(RX1217 (Murphy Expert Report at 022-23 ¶ 32, Fig. IV.1)).

968. During the 12 months leading up to Altria's discontinuation of all e-cigarette products in December 2018, based on Dr. Murphy's analysis of IRI Projected Data for devices and cartridges, weekly sales of cig-a-likes were essentially flat, while weekly sales of pods grew by 619 percent. (RX1217 (Murphy Expert Report at 077-78 ¶ 105, Fig. VI.1)).

969. MarkTen cig-a-likes "were not viable . . . . They didn't have nicotine salts, they didn't satisfy nicotine cravings, and they were cigalikes." (O'Hara (JLI) Tr. 630). As explained by Joseph O'Hara, JLI's Director of Regulatory Strategy, the MarkTen cig-a-likes "were shaped like a cigarette, which isn't ideal for people that are trying to switch from cigarettes"; the nicotine formula for MarkTen Bold was low quality; and the nicotine formula for the other MarkTen cig-a-likes was not salt-based. (O'Hara (JLI) Tr. 624-25).

970. O'Hara believed that the MarkTen cig-a-likes were "extremely low quality" and, after a few months of tracking sales data, thought it "was pretty clear" that the MarkTen cig-a-likes were "a product failure." (O'Hara (JLI) Tr. 583-84). Bob Robbins, JLI's Chief Growth Officer, viewed the MarkTen cig-a-likes similarly to O'Hara: "They didn't sell well. They didn't appear to have attachment with adult smokers. They didn't really drive down cigarette use, and it didn't seem like the trade channel retailers or wholesalers had good feedback on them." (Robbins (JLI) Tr. 3245).

971. PMI concluded that the MarkTen cig-a-likes were not successful at converting smokers. (King (PMI) Tr. 2431, 2533). PMI had commercialized the MarkTen cig-a-like in a test market outside the United States under the brand name Solaris, but discontinued it based on low market share. (King (PMI) Tr. 2532).

972. NJOY has discontinued two of its cig-a-like products: NJOY Loop and NJOY King. NJOY Loop was a cig-a-like product that consisted of two cig-a-likes inside a charging case. NJOY launched the Loop in September 2018, but discontinued the product at most retailers in April 2019, because, from a business perspective, it did not make sense to continue to manufacture and sell that product. (Farrell (NJOY) Tr. 287-88, 352-53). NJOY King was a disposable cig-a-like product launched in approximately 2013. (Gardner (Altria) Tr. 2598; Farrell (NJOY) Tr. 290, 355-56). King contained high nicotine levels and no salts, which made the product experience "intensely harsh." (Gardner (Altria) Tr. 2598). It was so harsh that "[a]dult smokers could not use th[e] product on a routine basis" and it thus could not "deliver nicotine satisfaction." (Gardner (Altria) Tr. 2598, 2600). NJOY pulled the product from the market in 2019 for business reasons. (Farrell (NJOY) Tr. 354, 357-58).

973. NJOY continues to market a cig-a-like product called the Daily. In 2021, the Daily's sales volume was [redacted] of that for NJOY's Ace pod product. (Farrell (NJOY) Tr. 300-01, *in camera*).

974. Reynolds continues to market cig-a-like products called Vuse Ciro, Vuse Solo, and Vuse Vibe. (Huckabee (Reynolds) Tr. 377-78). Between 2018 and 2019, the shipments for Reynolds' Vuse Solo cig-a-like fell by almost [redacted] percent. Between 2019 and 2020, the shipments for Reynolds' Vuse Solo cig-a-like fell by an additional [redacted] percent. (Huckabee

(Reynolds) Tr. 432, *in camera*; *see also* PX7037 (Huckabee (Reynolds) Dep. at 26) (explaining that over the last two years the cig-a-like form factor products in Reynolds' portfolio have declined because pods are now substantially more popular)).

975. As summarized by K.C. Crosthwaite, the current CEO of JLI, cig-a-likes "are essentially irrelevant in the market today." (PX7024 (Crosthwaite (Altria/JLI) Dep. at 213-14); *see also* Crozier (Sheetz) Tr. 1560 (agreeing that the e-vapor category "is now overwhelmingly pods")).

2. Impact of Withdrawal of Altria's Products on JLI's Prices

a. Cig-a-likes

976. Based on Dr. Murphy's analysis of IRI Projected Data, 90 percent of Altria's sales of e-cigarettes were cig-a-likes in 2018. (RX1217 (Murphy Expert Report at 008-09 ¶ 12); Murphy Tr. 3106-07). Complaint Counsel's expert witness, Dr. Rothman, determined that Altria had a 10 percent share of the closed system market in the 12 months leading to October 2018 (F. 177) and agrees that Altria's Elite never had more than one percent of the share of closed system market. (PX7048 (Rothman Trial Dep. at 174)). One hundred percent of JLI's sales of e-cigarettes are of its JUUL pod-based product. (PX2534 (Danaher (JLI) Decl. at 003 ¶ 8)).

977. Dr. Murphy's analysis of sales volumes from August 2017 to August 2020, comparing all cig-a-likes, Altria cig-a-likes (Mark Ten and Green Smoke cig-a-like products) and non-Altria cig-a-likes, shows that as Altria's sales declined following the discontinuation of its cig-a-like products, sales of rival cig-a-like products increased by a nearly equal magnitude. This shows that sales lost by Altria's cig-a-likes diverted to other cig-a-likes, not to pod-based products, and that Altria's cig-a-likes did not constrain JLI's pricing. (RX1217 (Murphy Expert Report at 068-69, 082, 083 ¶¶ 88, 113, 115, Fig. VI.3); Murphy Tr. 3118).

978. Altria's cig-a-like products were not a significant constraint on JLI's pods because the cig-a-like category was declining and cig-a-likes were not close substitutes for pods at the time of the Transaction. (Murphy Tr. 3124-25).

979. JLI did not "ever change its pricing" or "its promotions" in response to the MarkTen cig-a-like products. (Robbins (JLI) Tr. 3245, 3248).

980. JLI did not change its pricing or promotions in response to the withdrawal of MarkTen cig-a-like products in December 2018. (Robbins (JLI) Tr. 3249; PX7025 (Burns (JLI) Dep. at 232-33)).

b. Pods

981. A McKinsey pricing study of e-cigarette competitors prepared for JLI in May 2018 compared the prices and price elasticity of JUUL products with the prices and price

elasticity of other e-vapor competitors' products, including MarkTen. (PX2252 (JLI) at 012, 048-49).

982. JLI tracked pricing and promotions by Altria. As one example, in June 2018, JLI's Bob Robbins widely shared with others internally at JLI, pricing and retail margin information about MarkTen Elite, which he had obtained from Altria at a trade show. (PX2477 (JLI) at 001 ("M10 Elite is running a 'buy a pack of pods for $8.99, get the device kit ($19.99 msrp [manufacturer's suggested retail price]) for free.' Plus, they are including an escalating retail clerk incentive of $100-$500 based on number of battery kits sold, which is a significant amount of $$ for a retail clerk. The trade flyer has retail margin expectations of 34% on pod packs and 28% on devices.")).

983. In March 2018, JLI launched a device promotion by dropping JUUL's starter kit price by $20. (PX2062 (JLI) at 016; PX2599 (JLI) at 014-15).

984. JLI's promotions were generally planned six months to a year in advance, meaning that a spring 2018 promotion would have been planned by the fall of 2017 at the latest, well before the launch of Altria's MarkTen Elite. (Robbins (JLI) Tr. 3255-56).

985. At Sheetz, after the launch of Elite in February 2018, JLI did not respond with new promotions, but ran its "normal" promotion, which was its "standard" $20 off the combined purchase of a battery and pods. The $20 off promotion was something that JLI had done at Sheetz before Elite was introduced and Crozier did not perceive JLI as "being concerned" about the introduction of Elite. (PX7019 (Crozier (Sheetz) Dep. at 76-77)).

986. Over the eight months that Elite was on the market in 2018, Elite never achieved more than a one percent share of cartridge unit sales among closed systems on the market. (RX1217 (Murphy Expert Report at 008-09 ¶ 12); PX7048 (Rothman Trial Dep. at 46-47)).[44] A product with a market share of less than one percent is unlikely to be an important constraint. (Murphy Tr. 3124).

987. Complaint Counsel's expert witness, Dr. Rothman, did not analyze whether JLI changed its prices in response to the introduction or the removal of Elite. (PX7048 (Rothman Trial Dep. at 171-72)).

44 Apex had minimal distribution and was removed a month after it launched. (PX0018 at 008). According to Altria's sales data, analyzed by Dr. Murphy, Altria sold only 460 Apex device units. (RX1217 (Murphy Expert Report ¶ 34 n.56)).

3. Competition from Pod-based Products

988. In the second half of 2018, NJOY and Reynolds both commercialized pod-based products (NJOY's Ace and Reynolds' Vuse Alto) that, unlike Elite, contained nicotine salts. (RX1456 (JLI) at 001-02; O'Hara (JLI) Tr. 633-34; *see also* Farrell (NJOY) Tr. 336).

a. NJOY's Ace

989. By November 2018, NJOY launched Ace, a pod-based product that had been on the market under different ownership prior to August 8, 2016. (Farrell (NJOY) Tr. 336).

990. NJOY considers Ace a "best in class" product capable of converting "a large percentage of the individuals who try" it. (Farrell (NJOY) Tr. 301-02). It comes in 2.4 and 5 percent nicotine strengths, both with salts. (Farrell (NJOY) Tr. 229-30, 297-98, 341 (discussing PX3216 (NJOY) at 003); *see also* Farrell (NJOY) Tr. 362 (confirming all NJOY products currently on the market contain nicotine salts)). The pod and the device, which are sold separately, connect together magnetically. (Farrell (NJOY) Tr. 214-15).

991. In December 2018 or January 2019, NJOY introduced a 99-cent price promotion on the Ace device (which has a Manufacturer's Suggested Retail Price ("MSRP") of $24.99) to incentivize product trial. (Farrell (NJOY) Tr. 304, 306-09; RX1711 (Reynolds) at 003, 020 (listing MSRP); *see also* Farrell (NJOY) Tr. 309 (stating that NJOY is not running these promotions because of the FTC investigation)). During the same time period, a JUUL device retailed for approximately $34.99. (RX1217 (Murphy Expert Report at 071 ¶ 91, Fig. V.11) (showing JUUL device price in January 2019 as approximately $35); RX1605 (JLI) at 001 (listing the MSRP of a JUUL device as $34.99)).

992. [redacted] (Crozier (Sheetz) Tr. 1516-17, *in camera*). Six months into the promotion, in June 2019, JLI's analysis showed that NJOY Ace was capturing 66 percent of device market share at Circle K, almost three-quarters of which came "at JUUL's expense." (PX2602 (JLI) at 019).

993. By September of 2019, NJOY had captured a 22.7 percent share of total volume of devices sold and 13.7 percent share of dollars in the e-cigarette market. (RX1061 (PMI) at 010).

994. IRI Projected Data shows that sales of NJOY's Ace devices increased from the time of its launch in 2018 to the peak of its promotion in September 2019, from roughly 2,500 devices per week to more than 200,000 devices per week. (RX1217 (Murphy Expert Report at 053-54 ¶ 70)).

995. [redacted] (Crozier (Sheetz) Tr. 1517-18, *in camera*; *see also* PX7033 (O'Hara (JLI) Dep. at 199) (explaining that NJOY has "seen their pod sales . . . increase as a result of their increased device sales")).

996. IRI Projected Data shows that sales of cartridges for NJOY's Ace devices increased from about 1,600 units in weekly cartridge volume in 2018 to about 1.16 million units in weekly cartridge volume starting in August 2019. (RX1217 (Murphy Expert Report at 053-54, 056 ¶ 70, Figure V.6)).

997. By the summer of 2019, "NJOY [was] cannibalizing [JUUL's] growth [and] threatening to take [its] established userbase[.]" (RX1537 (JLI) at 008).

998. As JLI's internal analysis explained in July 2019, NJOY Ace users did not see JUUL as offering "meaningful advantages to justify its cost," so "it [was] common and easy for users to try something else." (RX1550 (JLI) at 006).

999. In an August 2019 email, Jared Fix, JLI's Chief Strategy Officer, observed that, due to NJOY's discounting, JLI was "facing an aggressive competitive threat for the first time." (RX1547 (JLI) at 002). Kevin Cooke, JLI's Senior Vice President of U.S. Commercial, responded stating: NJOY's promotion was the "biggest disruptor to the growth of [JLI's] business." In "[a]ccounts that have NJOY, our business on avg is up about 1% in the last 3 months . . . . Accounts that don't have NJOY my biz is up 21% on average[.]" (RX1547 (JLI) at 002).

1000. NJOY has continued its 99-cent promotion for the NJOY Ace device into 2021. (Farrell (NJOY) Tr. 314; RX2026 (7-Eleven receipt dated June 2, 2021 showing $0.99 retail price for NJOY Ace)).

b. Reynolds' Vuse Alto

1001. Reynolds launched the Vuse Alto pod product in August 2018. (Huckabee (Reynolds) Tr. 395). Reynolds had acquired it from Smoore after August 2016 and reintroduced the product in August 2018. (PX8008 (Huckabee (Reynolds) Decl. at 010 ¶18(d))).

1002. Vuse Alto comes in three different nicotine strengths: 1.8, 2.4, and 5.0 percent, each of which contain nicotine salts. (Huckabee (Reynolds) Tr. 395, 414). The cartridge is held in place by a magnetic tip. (PX8008 (Huckabee (Reynolds) Decl. at 010 ¶ 18(d))).

1003. Reynolds made statements in a July 2018 earnings call that consumer research showed that "Alto rate[ed] significantly higher than any other nicotine salt Pod . . . product on a number of key consumer attributes and purchase intent." (RX1456 (JLI) at 001).

1004. By December 2018, JLI's internal analysis of Alto's performance concluded that "Alto is the best performing launch by a major competitor in the past few years[.]" (RX1618 (JLI) at 030).

1005. In its first six months on the market, based on dollar sales of devices and cartridges, Vuse Alto achieved monthly sales of roughly 4.7 times that of MarkTen Elite. (RX1217 (Murphy Expert Report at 109 ¶ 165 & at 095 Fig. VII.2)).

1006. Reynolds recognized that a "[q]uick, strong response to NJOY Ace 99¢ traction was necessary to secure Alto's market potential" and implemented a 99-cent promotion on the Alto device (which has an MSRP of $24.99) on a rolling basis in select stores in July 2019, and then expanded the promotion throughout August and September 2019. (RX1711 (Reynolds) at 003, 020; *see also* Huckabee (Reynolds) Tr. 428 (agreeing that neither Altria nor JLI "manipulated Reynolds into running [a] 99 cent promotion")).

1007. In August 2019, as JLI observed, in the wake of Reynolds' 99-cent promotion (F. 1004), "Vuse began to grow significantly." (Robbins (JLI) Tr. 3268; RX1529 (JLI) at 007 ("Vuse begins to grow with new price point[.]")). *See also* RX1547 (JLI) at 003) (JLI noting in August 2019 that Reynolds' Vuse Alto was "replicating [NJOY's] tactics").

1008. IRI Projected Data shows that sales of Vuse Alto devices rose continuously from September 2019 through December 2019. (RX1217 (Murphy Expert Report at 054, 056 ¶ 71 & Fig. V.6)).

1009. IRI Projected Data shows that sales of cartridges for Vuse Alto devices rose from an average of fewer than 50,000 devices per week over the period January to July 2019 to more than 200,000 devices per week in December 2019. (RX1217 (Murphy Expert Report at 054-55 ¶ 71 & Fig. V.5)). *See also* Huckabee (Reynolds) Tr. 449, *in camera* [redacted]

1010. By December 2019, Reynolds had overtaken JLI as the leading seller of devices. (RX1711 (Reynolds) at 004; PX7037 (Huckabee (Reynolds) Dep. at 70-72)).

1011. In 2021, Vuse was "selling more than twice the number of devices per week" than JLI. (PX7033 (O'Hara (JLI) Dep. at 199)).

1012. The increase in Vuse Alto's device sales were followed by "increased pod demand." (PX7033 (O'Hara (JLI) Dep. at 199)). By September 2020, Vuse Alto held a 21 percent market share of units of cartridges sold. (RX1217 (Murphy Expert Report at 057-58 ¶ 73 & Fig. V.8)).

1013. Reynolds has continued its 99-cent promotion for the Vuse Alto device into 2021. (Huckabee (Reynolds) Tr. 428).

c. Shift towards Pods with Nicotine Salts

1014. JUUL, Vuse Alto, NJOY Ace, and the ITG Brands *my*blu Intense cartridges all contain nicotine salts. (RX0962 (Altria) at 003 (listing nicotine-to-acid ratios of JUUL, Alto, and *my*blu Intense); Farrell (NJOY) Tr. 362 (confirming all NJOY products currently on the market, including Ace, contain nicotine salts)). JTI's Logic Pro does not contain nicotine salts. (RX1739 (ITG Brands) at 019).

1015. Crozier, the e-vapor category manager for Sheetz, believes that all the products that are currently leading in the pod-based category offer roughly the same nicotine satisfaction as

JUUL. "[B]oth NJOY and Alto use nicotine salt technology, and that provides greater nicotine satisfaction for the user than products that do not." (Crozier (Sheetz) Tr. 1519). NJOY and Vuse would not have had the same level of success without providing that satisfaction. (Crozier (Sheetz) Tr. 1520-21).

1016. Reynolds' e-vapor subsidiary regarded MarkTen Elite, which does not contain nicotine salts, "as inferior in quality to other competing products[.]" (PX8008 (Huckabee (Reynolds) Decl. at 024-25 ¶ 48)).

1017. PMI concluded that none of Altria's products were successful at converting smokers and [redacted] (King (PMI) Tr. 2433-34, 2532-33, *in camera*).

1018. NJOY emphasizes its use of nicotine salts in its promotional materials to retailers. (Farrell (NJOY) Tr. 297-98 (explaining that salts were an important enough factor to emphasize in promotional material to retailers); RX1761 (NJOY) at 003 (highlighting, in a presentation for Wawa, that "[e]very NJOY device contains industry leading liquids with nicotine salts and high-quality flavors"); *see also* PX3216 (NJOY) at 003).

1019. IRI Projected Data analyzed by Dr. Murphy shows that in September 2020, the device market share for Vuse Alto was approximately 60 percent, JUUL had fallen to under 30 percent, NJOY Ace was at approximately 10 percent, ITG's *my*Blu was near 3 percent, and JTI's Logic Pro, the only one of these devices without nicotine salts, was less than one percent. (RX1217 (Murphy Expert Report 056-57 ¶ 72, Fig. V.7); *see also* Murphy Tr. 3152-53 (specifying that Logic Pro was at 0.3 percent)).

1020. Dr. Murphy observed from analyzing the market data, "within the pod-based products, those that had nicotine salts tended to be far more successful than those that did not." (Murphy Tr. 3138; *see also* PX7047 (Murphy Dep. at 44-45)).

N. Post-Transaction Market Evidence

1. Prices

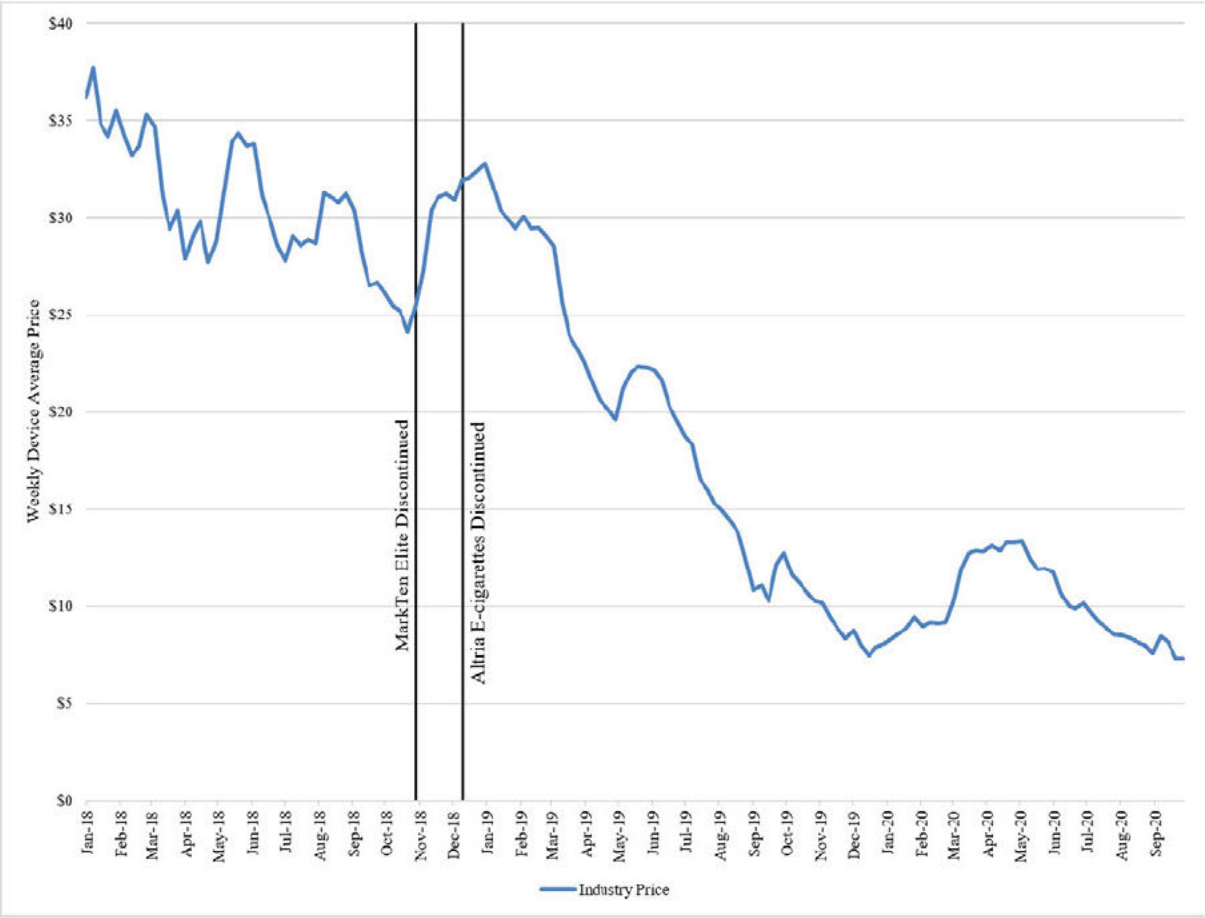
1021. In the summer of 2019, internal analysis of the e-vapor market by JLI recognized that JUUL was no longer "priced in line with consumer expectations of the category[.]" JLI abandoned its standard promotions and decided to "[c]lose out 2019 with deeper discounts[.]" (RX1529 (JLI) at 020, 023).

1022. In September 2019, JLI dropped its device price to $9.99, down from an MSRP of $34.99. (RX1061 (PMI) at 010; *see also* RX1711 (Reynolds) at 020 (similar); O'Hara (JLI) Tr. 571 ("[JUUL's] device price is even down to about $10 now."); PX7033 (O'Hara (JLI) Dep. at 121-22) (explaining that JLI "had to . . . bring down the price of [its] own device" in response to aggressive promotions)). In addition to running "deeper promotions," JLI later "permanently" lowered the price of its device. (Robbins (JLI) Tr. 3257).

1023. JLI's price decreases, combined with aggressive promotions by competitors, have "generally resulted in the overall market for devices being priced down significantly." (PX7033 (O'Hara (JLI) Dep. at 122); RX1061 (PMI) at 010 (observing in August 2019 that after NJOY "triggered [a] price war" in the e-vapor category, "JUUL's dollar share slipped for the first time")).

1024. The average price of a pod-based device "fell from about $27 in September 2018 to around $8 in September 2020, representing a roughly 72 percent price reduction." (RX1217 (Murphy Expert Report at 047-48 ¶ 62, Fig. V.1); *see also* Murphy Tr. 3146-47).

1025. The decline in the average industry price for pod devices (F. 1022) is depicted in the following chart showing industry price, based on IRI Projected Data analyzed by Dr. Murphy:



(RX1217 (Murphy Expert Report at 047-48 ¶ 62, Fig. V.1)).

1026. The average price of pod cartridges fell by over 15 percent from November 2018 to September 2020. (Murphy Tr. 3145-46; RX1217 (Murphy Expert Report at 048-49 ¶ 63, Fig. V.2)).

2. Output

1027. By October 2019, sales of pod-based devices had increased by more than 20 percent. Over the same time period, sales of pod cartridges increased by more than 30 percent. (RX1217 (Murphy Expert Report at 049-50 ¶ 65)).

1028. From October 2018 to October 2019, overall sales of cartridges used for pod-based devices increased by approximately 3.7 million cartridges per week. (RX1217 (Murphy Expert Report at 049-50 ¶ 65, Fig. V.3)).

1029. At the time Altria withdrew Elite in October 2018, sales of Elite cartridges were 100,000 a week. Less than two years later, sales by non-JUUL competitors had increased by 3.1 million cartridges a week (from 1 million to 4.1 million). (RX1217 (Murphy Expert Report at 066-67 ¶ 85, Fig. V.10); Murphy Tr. 3126-28). This data supports the opinion of Dr. Murphy that "these other sellers were able to expand the sales of their products on the market dramatically, 31 times what would be required to offset the loss of Elite in this case." (Murphy Tr. 3127-28).

1030. Using IRI Projected Data, Dr. Murphy found that among the top 20 retailers that carried MarkTen products in 2018, the average number of manufacturers per store with distribution of pod-based products increased from 3 to 3.8, comparing the period of October 2017 through September 2018 to the period of October 2019 through September 2020. (Murphy Tr. 3140; RX1217 (Murphy Expert Report at 059 ¶ 75)).

1031. [redacted]

3. Shelf Space

1032. Altria, as the largest tobacco company in the United States, had access to the best shelf space in the top retailers. (PX7004 (Willard (Altria) IHT at 22-23) ("And given the strength of some of our brands, we typically get quite good display space."); *see also* PX5000 (Rothman Expert Report at 099-101 ¶ 185) ("[L]arge tobacco companies like Altria can pay for shelf space by offering retailers rebates on traditional cigarettes."); [redacted], *in camera* (In addition to the upfront payments, Altria provided [redacted] with rebates on traditional cigarettes to secure shelf space for its e-cigarettes.)).

1033. Through its Innovative Tobacco Product ("ITP") program, Altria had obtained contracts with retailers for dedicated retail shelf space. (Schwartz (Altria) Tr. 1951; PX7013 (Brace (Altria) Dep. at 81-82); PX7009 (Burns (JLI) IHT 036-37); PX7003 (Quigley (Altria) IHT

at 50-51); PX8001 (Stout (7-Eleven) Decl. at 003 ¶ 15)). Pursuant to the Amended Services Agreement (F. 960), Altria leased shelf space for ITP to JLI for approximately one year, from early 2019 to early 2020. (Willard (Altria) Tr. 1231-32; PX0012 at 001-02 (January 28, 2020 amendment terminating aspects of services agreement, including the lease of ITP shelf space)).

1034. After Altria's products were withdrawn from the market and the Amended Services Agreement (F. 960) was terminated, there was increased competition for ITP shelf space. (Myers (Altria) Tr. 3369; Willard (Altria) Tr. 1231-32; PX2272 (JLI) at 001).

1035. While in 2018, MarkTen was "often at the top of the shelves," in 2019, Reynolds' Vuse "was often in the top half of the shelf." (Farrell (NJOY) Tr. 257).

1036. E-cigarette companies that do not sell cigarettes, NJOY and Turning Point Brands, have struggled to get shelf space for their e-cigarettes. (Farrell (NJOY) Tr. 272-73, 276; PX8003 (Wexler (Turning Point) Decl. at 005 ¶ 28); PX7029 (Farrell (NJOY) Dep. at 127-28, 167-69); PX8004 (Farrell (NJOY) Decl. at 005 ¶ 26)).

1037. In 2019, NJOY was able to establish a presence in major chains Wawa, 7-Eleven, Circle K, and QuikTrip. (Farrell (NJOY) Tr. 318-20).

1038. At Sheetz, while the Altria-JLI shelf-space lease was in place in 2019 (F. 1031), JUUL "occupie[d] the top three shelves in Sheetz's vapor displays." (PX8000 (Sheetz) Crozier Decl. at 003 ¶ 17)). Reynolds got "the next two shelves for its Vuse products. NJOY, Blu, Logic, Leap, and dry nicotine pouches [were] all located below Vuse." (PX8000 (Crozier (Sheetz) Decl. at 003 ¶ 17).

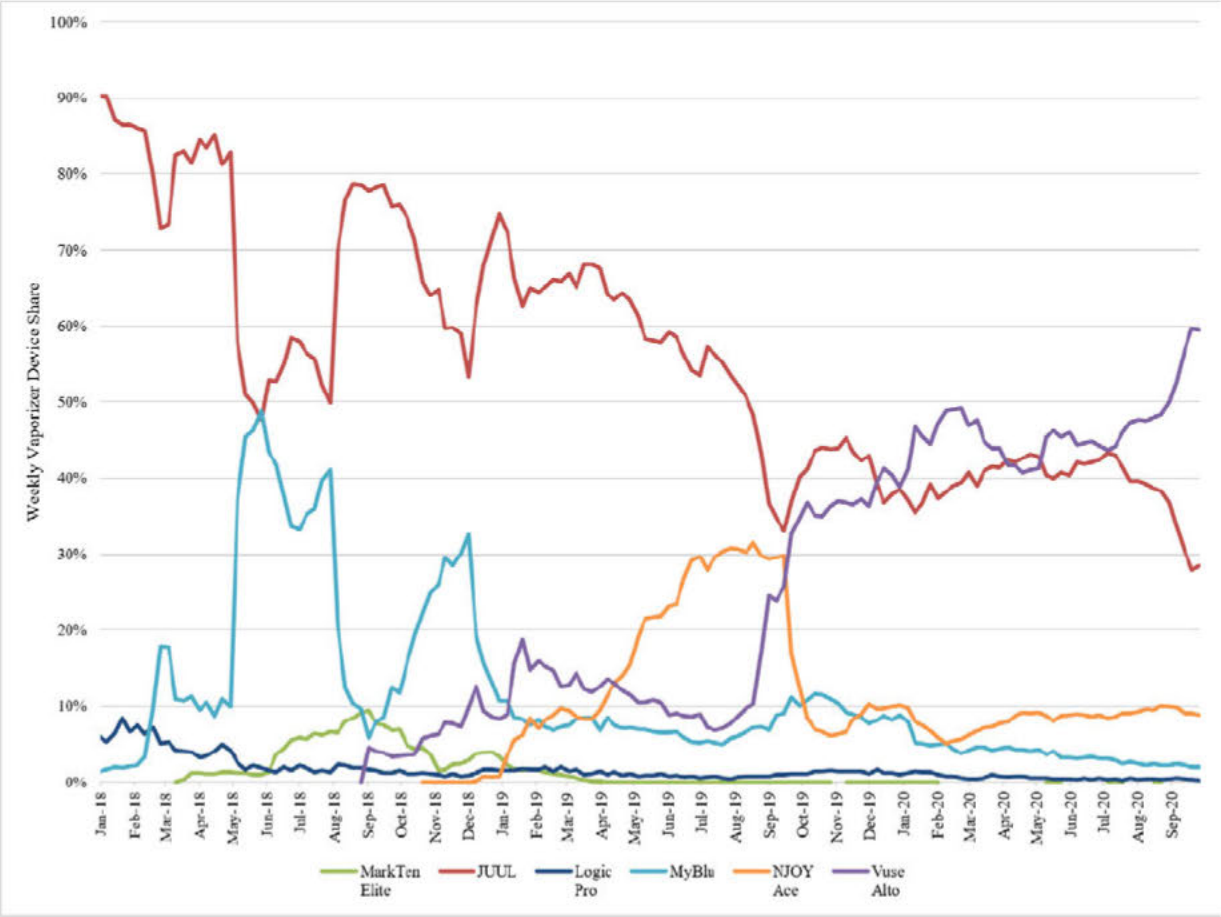
1039. At Wawa in 2018, Nu Mark, Reynolds, and NJOY paid to have their products displayed on "the best shelf space." After Nu Mark's products were withdrawn from the market, other companies also were on Wawa's shelves: "The third position [was] occupied by NJOY or ITG's Blu brand, and JTI's Logic [was] at the bottom of the display." (PX8006 (Kloss (Wawa) Decl. at 005 ¶ 20)).

4. Market Share[45] and Concentration

1040. JLI's share of pod device sales decreased from approximately 69 percent in October 2018, to approximately 43 percent in October 2019, to approximately 30 percent in September 2020. (RX1217 (Murphy Expert Report at 056-57 ¶ 72)). At different points during that same time period, NJOY Ace's device share reached as high as 31 percent and Vuse Alto's device share rose to nearly 60 percent. (RX1217 (Murphy Expert Report at 056-57 ¶ 72)).

45 The relevant market in this case is all closed system devices. (F. 105). Dr. Murphy's calculation of market share in F. 1038-1040 looked only at pods - either devices or cartridges. If Dr. Murphy analyzed market shares based on the market of all closed system e-cigarettes, which includes cig-a-likes, JLI's share of that market would have been even smaller, because JLI sold only pod devices.

1041. The decline in JLI's share of pod device sales (F. 1038) is depicted in the following chart showing device sales shares by units, based on IRI Projected Data analyzed by Dr. Murphy:



(RX1217 Murphy Expert Report at 056-57 ¶ 72, Fig. V.7).

1042. JLI's market share of pod cartridge sales decreased 20 percent from December 2018 to September 2020. (RX1217 (Murphy Expert Report at 057-58 ¶ 73)). During that same time period, NJOY Ace grew its cartridge share to 7.4 percent in September 2019 and Vuse Alto gained cartridge share almost continuously and held a 21.0 percent share at the end of September 2020. (RX1217 (Murphy Expert Report at 057-58 ¶ 73 & Fig. V.8)).

1043. Complaint Counsel's expert witness, Dr. Rothman, agrees that JLI has lost market share since December 2018. (PX7048 (Rothman Trial Dep. at 96); PX7046 (Rothman Dep. at 14)).

1044. Using actual market data from IRI Projected Data for cartridge volume by unit, Dr. Murphy calculated that the HHI for the relevant market in this case – all closed system e-vapor products – decreased by nearly 500 points from October 2018 to September 2020. (RX1217 (Murphy Expert Report at 051-52 ¶ 68, Fig. V.4) (Fig. V.4 showing that the HHI fell from 5,493 in October 2018, to 5,322 in October 2019, to 5,022 in September 2020, a decrease

of 471 points)). Looking at only pod-based e-vapor products, Dr. Murphy calculated that the HHI decreased by 3,052 points from 8,492 in October 2018, to 6,240 in October 2019, to 5,440 in September 2020. (RX1217 (Murphy Expert Report at 051, 052 ¶ 67, Fig. V.4)).

5. Industry Views

1045. Andrew Farrell, Chief Revenue Officer at NJOY, views the current competition in the e-vapor market as "intense." (Farrell (NJOY) Tr. 302-03). That is evident from the "deals" the leading brands are "offering to customers," their competition for the amount and visibility of shelf space, and "a whole number of other dynamics that [Farrell] consider[s] to characterize intense competition." (PX7029 (Farrell (NJOY) Dep. at 142-43)).

1046. Lamar Huckabee, Senior Vice President and General Manager of Traditional Categories at Reynolds, characterized the e-vapor market as "experiencing aggressive pricing," with "aggressive discounting on devices," designed to generate trial of the product by consumers. (Huckabee (Reynolds) Tr. 425-26).

1047. Jeff Eldridge, an area Vice President for ITG Brands, characterized the e-vapor market in December 2020 as having "lots of brands" engaging in "pricing action," with JUUL losing share in the last couple of years. (PX7012 (Eldridge (ITG Brands) Dep. at 109-11)).

1048. Paul Crozier, Category Manager at Sheetz, views the e-vapor marketplace as "increasingly competitive since Altria removed its vaping products." (Crozier (Sheetz) Tr. 1548).

1049. Jack Stout, Senior Vice President for Merchandising and Demand Chain for 7-Eleven, views the e-vapor market as "competitive" as of March 2020 and has no "reason to think that the category has become less competitive than it was in 2018." (PX7044 (Stout (7-Eleven) Dep. at 15, 33)).

1050. Complaint Counsel's expert witness, Dr. Rothman, acknowledges that since the time of the Transaction, "overall prices are lower, overall output is higher, [and] market concentration is lower." (PX7046 (Rothman Dep. at 28); *see also* PX7048 (Rothman Trial Dep. at 96-97)).

O. Future Competition

1051. At least five years is required to bring an e-vapor product to market and it can take as long as ten years, although an estimate of five to seven years is average. (Garnick (Altria) Tr. 1660-61 (agreeing it "would take five to ten years" to develop a product and "then do the necessary studies for a PMTA"); Gifford (Altria) Tr. 2777-78 (explaining new products likely would take "five to seven years" to bring to market because of the Deeming Rule); Murillo (Altria/JLI) Tr. 2936 (taking a product "from scratch . . . all the way to a market order" would take "five to ten years, you know, maybe seven on average")).

1052. VEEV is a pod-based e-cigarette product sold by PMI outside the United States. (King (PMI) Tr. 2343-44, 2346, 2355).

1053. PMI started selling VEEV internationally in late 2020. (King (PMI) Tr. 2355).

1054. PMI does not currently sell VEEV in the United States. (King (PMI) Tr. 2355).

1055. VEEV uses PMI's proprietary technology, referred to as "mesh technology." The name "mesh" refers to the mesh heater, rather than the standard wick and coil. (King (PMI) Tr. 2350). It is "like a fine-wire screen, in effect, where you pass electricity through the screen, and that creates the aerosol." (King (PMI) Tr. 2350-51).

1056. PMI's mesh technology was also used in the Apex product, but VEEV and Apex otherwise have a number of differences. (King (PMI) Tr. 2545-47; PX7020 (King (PMI) Dep. at 78-79)).

1057. PMI improved VEEV's form compared to Apex, "making it something that people could carry comfortably." VEEV is smaller, fits the hand better, and has a more appealing shape than Apex. (King (PMI) Tr. 2547).

1058. Under the Joint Research, Development and Technology Sharing Agreement between Altria and PMI ("JRDTA"), [redacted] (PX7020 (King (PMI) Dep. at 34), *in camera*; RX0873 (Altria) at 019-20 (JRDTA), *in camera*).

1059. The JRDTA did not include any terms as to distribution or "details of commercialization" for any e-vapor product. (PX7020 (King (PMI) Dep. at 195-96)). [redacted] (King (PMI) Tr. 2512-14, 2467-69, *in camera*; PX7020 (King (PMI) Dep. at 200) ("There would have to be additional discussions before the commercialization could take place.")).

1060. For the right to sell Apex in the United States, Altria signed a separate "distribution agreement with [PMI] in 2016[.]" (Jupe (Altria) Tr. 2133). [redacted] (King (PMI) Tr. 2467-69, *in camera*; PX7020 (King (PMI) Dep. at 200-02), *in camera* [redacted]

1061. At the time of Altria's investment in JLI in late 2018, VEEV was "several years away" from commercialization, given that "it's now 202[1] and [PMI is] still finalizing" the PMTA application. (King (PMI) Tr. 2542).

1062. [redacted] (King (PMI) Tr. 2387, *in camera*; *see also* King (PMI) Tr. 2539-40 ("[I]t's not possible to really give you an exact timing given the uncertainties of the regulatory process.")).

1063. At the time of trial, [redacted] (King (PMI) Tr. 2387, *in camera*).

1064. PMI and Altria are separate companies and have been since 2008. (F. 72 n.40).

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Complaint Counsel bears the burden of proving jurisdiction and liability by a preponderance of evidence.

2. 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).

3. Section 11 of the Clayton Act vests jurisdiction in the FTC to determine the legality of a corporate acquisition under Section 7. 15 U.S.C. § 21(b).

4. Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or . . . activity affecting commerce in any section of the country." 15 U.S.C. § 18.

5. Corporations are included within the definition of "persons" that are subject to jurisdiction under the Clayton Act, 15 U.S.C. § 12(a), and the FTC Act, 15 U.S.C. § 44.

6. Each Respondent is a corporation, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

7. Respondents' sales of e-cigarettes are in or affecting commerce in the United States, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

8. The Commission has jurisdiction over each Respondent and the subject matter of this proceeding, pursuant to Section 5 of the of the FTC Act, 15 U.S.C. § 45 and Sections 7 and 11 of the Clayton Act, 15 U.S.C. § 18, 21(b).

9. The FTC Act's prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act.

10. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ." 15 U.S.C. § 1.

11. Both a Section 1 rule of reason analysis and a Section 7 analysis require a determination of the relevant product market and the relevant geographic market.

12. The relevant product market identifies the product and services with which the Respondents' products compete, while the relevant geographic market identifies the geographic area in which the Respondents compete in marketing their products or services.

13. The relevant product market in this case is a closed system e-cigarettes market that includes both cig-a-likes and pod-based products.

14. The relevant geographic market in this case is the United States.

15. Section 1 of the Sherman Act requires proof that (1) there was a contract, combination, or conspiracy – or, more simply, an agreement; and, if so, (2) the agreement unreasonably restrained trade in the relevant market.

16. To establish an agreement forming an antitrust conspiracy, the evidence must prove that the alleged conspirators had a conscious commitment to a common scheme designed to achieve an unlawful objective. Put another way, the evidence must prove a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

17. An agreement may be demonstrated by direct or circumstantial evidence.

18. Circumstantial evidence of a conspiracy, when considered as a whole, must tend to rule out the possibility of independent action.

19. To determine whether an antitrust conspiracy exists, courts must consider the totality of the evidence.

20. Where an inference of conspiracy is equally consistent with an inference of independent conduct, the evidence of conspiracy would not preponderate. In order to find a conspiracy, the inference of a conspiracy must be more probable than the inference of independent action.

21. The crucial question in a Section 1 case is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express.

22. A litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.

23. At all times, the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff, which, in the instant case, is the government.

24. Where proof is lacking, the fact that a conspiracy may be difficult to prove does not mean that it is fair or appropriate to fill in the blanks where evidence is missing to assist the government in winning its case.

25. Actions against unilateral interest by an alleged participant in a conspiracy means conduct that would be irrational assuming that the Respondent operated in a competitive market. The conduct at issue must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it.

26. Proof of pretext standing alone is not sufficient to establish an agreement but can only strengthen an inference of joint action that is otherwise in evidence. At best, proof of pretextual excuses for challenged conduct can constitute circumstantial evidence that can disprove the likelihood of independent action.

27. The government cannot make its case just by asking the fact finder to disbelieve the Respondents' evidence.

28. Where there is an independent business justification for a Respondent's behavior, an inference of conspiracy is not easily drawn.

29. Antitrust inquiries must carefully account for the pervasive federal and state regulation characteristic of an industry.

30. The evidence fails to prove that Respondents had an unwritten agreement for Respondent Altria to stop competing with its then-existing products, as alleged in the Complaint.

31. Under a Section 1 rule of reason analysis, the government must prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market.

32. Under Section 7, the government must show a reasonable probability that the challenged transaction would substantially lessen competition in the future.

33. To establish a violation of Section 7, the FTC need not show that the challenged merger or acquisition will lessen competition, but only that the loss of competition is a sufficiently probable and imminent result of the merger or acquisition.

34. The government can establish a presumption of liability by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in that market.

35. Once the government establishes the prima facie case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the government's evidence as predictive of future anticompetitive effects.

36. Evidence on a variety of factors can rebut a prima facie case, including ease of entry into the market, the trend of the market either toward or away from concentration, the continuation of active price competition, or unique economic circumstances that undermine the predictive value of the government's statistics. Rebuttal evidence may also include other factors relating to competition in the relevant market.

37. If the respondent successfully rebuts the prima facie case, the burden of production shifts back to the government and merges with the ultimate burden of persuasion, which remains with the government at all times.

38. Complaint Counsel failed to demonstrate that the Transaction would lead to undue concentration in the market and therefore is not entitled to a presumption of anticompetitive effects.

39. Section 7 requires that the government show that the elimination of competition creates an appreciable danger of anticompetitive consequences in the future.

40. Courts must judge the probable anticompetitive effect of a challenged transaction functionally and based on a further examination of the particular market – its structure, history and probable future. Evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete.

41. The evidence fails to prove that Respondent Altria's removal of products from the market or discontinuation of Nu Mark has substantially harmed or is reasonably likely to substantially harm competition.

42. The evidence fails to prove that the elimination of competition from Respondent Altria creates an appreciable danger of anticompetitive consequences in the future.

43. Establishing liability through the actual potential competition doctrine requires establishing four separate facts. First, the FTC must establish that the relevant product and geographic markets are concentrated. In addition to establishing that the target market is concentrated, the FTC must second establish that independent entry would result in a substantial likelihood of ultimately producing deconcentration of the target market or other significant procompetitive effects. Third, the alleged actual potential entrant must be one of only a few equally likely actual potential entrants, since eliminating one of many potential entrants could not be expected to eliminate substantial future competition. Fourth and finally, the FTC must establish that the alleged actual potential entrant would have entered the market independently, either de novo or by making a toehold acquisition, but for the challenged merger. Establishing this last factor requires proof, not only that the alleged actual potential entrant possesses the capabilities, economic incentives, and interest to feasibly enter the relevant market, but also that entry would have occurred within the near future.

44. Finding a "reasonable probability" that the alleged potential entrant would have "eventually entered" the relevant market is insufficient because such an "eventual entry"

test is wholly speculative. Uncabined speculation cannot be the basis of a finding that Section 7 has been violated.

45. To sustain a claim based on potential future competition, the evidence must demonstrate a reasonable probability that the alleged entry will occur in the near future since remote possibilities are not sufficient to satisfy the test set forth in Section 7.

46. Complaint Counsel failed to aver or demonstrate a reasonable probability that Respondent Altria's efforts would result in its competing in the e-cigarette market in the near future, or even identify any reasonable range of time by which such alleged competitive entry was probable to occur.

47. The evidence fails to prove a reasonable probability that the Transaction would substantially lessen competition in the future, and therefore, Complaint Counsel has failed to meet its burden of proving that the Transaction is unlawful under Section 7.

48. Because the evidence fails to prove a reasonable probability that Altria would have competed in the e-vapor market in the near future, Complaint Counsel has failed to meet its burden under the Section 1 rule of reason analysis of proving anticompetitive effects from the non-compete provision.

49. Because Complaint Counsel has failed to meet its initial burden under the Section 1 rule of reason analysis, Complaint Counsel has failed to sustain its claim that the non-compete provision constitutes an unreasonable restraint.

ORDER

For the reasons stated above, **IT IS ORDERED** that the Complaint be, and hereby is, **DISMISSED**.

Complaint

IN THE MATTER OF

GLOBAL PARTNERS LP,
AND
RICHARD WIEHL

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

Docket No. C-4755; File No. 211 0050
Complaint, December 20, 2021 – Decision, March 1, 2022

This consent order addresses the $151 million acquisition by Global Partners LP of certain assets of Richard Wiehl. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition for the retail sale of gasoline in five local markets in Connecticut, and additionally by substantially lessening competition for the retail sale of diesel fuel in four of those same local markets. The consent order requires Respondents to divest certain retail fuel assets in five local markets in Connecticut to Petroleum Marketing Investment Group, LLC.

Participants

For the *Commission*: *Kurt Herrera-Heintz.*

For the *Respondents*: *David Smith* and *Hill Welford, Vinson & Elkins, LLP; Alycia Ziarno, Nixon Peabody LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Global Partners LP, has entered into an agreement to acquire twenty seven entities wholly owned by Respondent Richard Wiehl, that such 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, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS

1. Respondent Global Partners LP ("Global") is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 800 South Street, Suite 500, Waltham, Massachusetts, 02454.

2. Respondent Global is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

3. Respondent Richard Wiehl is a natural person with offices and principal place of business located at 497 Bic Drive, Milford, Connecticut 06461.

4. Respondent Richard Wiehl is, and at all times relevant herein has been, engaged in, among other things, the retail sale of gasoline and diesel fuel in the United States.

5. Each Respondent, either directly or through its subsidiaries, 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 Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

6. Pursuant to a Purchase and Sale Agreement dated December 9, 2020, Global proposes to acquire substantially all of Richard Wiehl's retail and wholesale assets ("the Acquisition") for approximately $151 million.

7. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

8. Relevant product markets in which to analyze the effects of the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets. No economic or practical alternative to the retail sale of gasoline or diesel fuel at retail fuel outlets exists.

9. Relevant geographic markets in which to analyze the effects of the Acquisition on the retail sale of gasoline include five local markets within the State of Connecticut. Relevant geographic markets in which to analyze the effects of the Acquisition on the retail sale of diesel fuel include four local markets within the State of Connecticut.

10. The relevant geographic markets for retail gasoline and retail diesel fuel are highly localized, ranging from a few blocks to a few miles, depending on local circumstances. Each relevant market is distinct and reflects the commuting patterns, traffic flows, and outlet characteristics unique to each market. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes.

IV. MARKET STRUCTURE

11. The Acquisition, if consummated, would reduce the number of independent market participants from three to two in three local markets for the retail sale of gasoline and in four local markets for the retail sale of diesel fuel. In two local markets for the retail sale of gasoline, the Acquisition, if consummated, would reduce the number of independent market participants from

four to three. The Acquisition would result in a highly concentrated market in each local market. In several local markets, the Acquisition, if consummated, would result in competitive harm for both the retail sale of gasoline and the retail sale of diesel fuel.

V. BARRIERS TO ENTRY

12. Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

VI. EFFECTS OF THE ACQUISITION

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

a. increasing the likelihood that Respondent Global would unilaterally exercise market power in the relevant markets; and

b. increasing the likelihood of collusive or coordinated interaction between any remaining competitors in the relevant markets.

VII. VIOLATIONS CHARGED

14. The Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

15. The Purchase and Sale Agreement entered into by Respondents Global and Richard Wiehl constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twentieth day of December, 2021, issues its Complaint against Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Global Partners LP of certain retail service station and convenience store assets from Respondent Richard Wiehl (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 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 issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Global Partners LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 800 South Street, Suite 500, Waltham, Massachusetts, 02454-9161.

2. Respondent Richard Wiehl is a natural person with his office and principal place of business located at 497 Bic Drive, Milford, Connecticut 06461.

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

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

A. "Decision and Order" means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.

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

II. Asset Maintenance

IT IS FURTHER ORDERED that until Respondents fully transfer each of the Divestiture Locations and related Retail Fuel Assets to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that each of the Divestiture Locations and related Retail Fuel Assets are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Operate the Retail Fuel Business relating to the Retail Fuel Assets in the ordinary course of business consistent with past practices and take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Retail Fuel Business;

B. Prevent the destruction, removal, wasting, deterioration, closing, or impairment (other than as a result of ordinary wear and tear) of the Retail Fuel Assets, including:

1. Maintaining, repairing, and replacing any Equipment to the extent and in a manner consistent with past practices;

2. Maintaining inventory levels in a manner consistent with past practices;

3. Not terminating, canceling, renewing, or amending any Contract, except as consistent with past practices; and

4. Not entering any Contract that would restrain or restrict the ability of the Acquirer to compete against Respondents;

C. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Retail Fuel Assets;

D. Provide the Retail Fuel Business relating to the Retail Fuel Assets with sufficient funds to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, promotional activities, and marketing activities;

E. Provide resources as may be necessary to respond to competition against the Retail Fuel Business relating to the Retail Fuel Assets, prevent diminution in sales of such

Retail Fuel Business, and maintain the competitive strength of such Retail Fuel Business;

F. Not reduce operating hours;

G. Not reduce, change, or modify in any material respect, the level of marketing, promotional, pricing, or advertising practices, programs, and policies for the Retail Fuel Business related to the Retail Fuel Assets, other than changes in the ordinary course of business consistent with changes made at Respondents' other businesses that Respondents will not divest;

H. Not target, encourage, or convert customers of the Retail Fuel Business relating to the Retail Fuel Assets to become customers of Respondents' other businesses that will not be divested; provided, however, that nothing in this subparagraph shall prevent Respondents from engaging in advertising, marketing, and promotion activities: (i) generally applicable to all of Respondent businesses, or (ii) in the ordinary course of business and in accordance with past practice;

I. Provide support services at levels customarily provided by Respondents;

J. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Retail Fuel Business relating to the Retail Fuel Assets, and otherwise operate such Retail Fuel Business in accordance and compliance with all regulatory obligations and requirements;

K. Not sell, transfer, encumber, or otherwise impair the Retail Fuel Assets (other than in the manner prescribed in the Orders);

L. Not take any action that lessens the full economic viability, marketability, or competitiveness of the Retail Fuel Assets;

M. Not terminate the operations of the Retail Fuel Business relating to the Retail Fuel Assets;

N. Preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, site operators, and others having business relationships with the Retail Fuel Business relating to the Retail Fuel Assets;

O. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Retail Fuel Business relating to the Retail Fuel Assets, including:

1. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

2. Not transferring any employees from the Retail Fuel Business relating to the Retail Fuel Assets to any of Respondents' assets or businesses that Respondents will not divest.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Locations and related Retail Fuel Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

III. Transitional Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Retail Fuel Assets to the Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to Business Information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the Business Information.

B. At the option of the Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the Retail Fuel Assets to the Acquirer and (2) allow the Acquirer to operate the acquired Retail Fuel Assets in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall provide Transitional Assistance:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section III, which shall be, at the option of the Acquirer, for up to 15 months after the Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a written request to extend the time period for providing Transitional Assistance in order to achieve the purposes of this Order.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transitional Assistance at any time upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of any agreement relating to Transitional Assistance.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Retail Fuel Assets to evaluate independently and offer employment to any Retail Fuel Employee.

B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Retail Fuel Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to privately interview any of the Retail Fuel Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Retail Fuel Employees;

3. Remove and not enter into any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Retail Fuel Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Retail Fuel Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Retail Fuel Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Retail Fuel Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Retail Fuel Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Retail Fuel Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section IV.

D. Respondent Global shall not enforce any noncompete provision or noncompete agreement against any Person seeking employment from or otherwise doing business with any of the Divestiture Locations.

V. Confidential Information

IT IS FURTHER ORDERED that:

A. Respondents shall not (x) disclose (including to Respondents' employees) or (y) use for any reason or purpose, any Confidential Information received or maintained by Respondents; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under this Order, the Decision and Order, or any Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, responding to investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or any Divestiture Locations, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Section V, Respondents shall limit such disclosure or use (1) only to the extent such information is required, (2) only to

those employees or Persons who require such information for the purposes permitted under Paragraph V.A, and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of Section V and take necessary actions to ensure that their employees and other Persons comply with the terms of Section V, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI. Monitor

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint a Person to serve as Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

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

C. Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VI or the Section relating to the Monitor in the Decision and Order ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

D. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with this Order on a schedule as determined by Commission staff, and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under the designated Sections of this Order, and files a final report.

E. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Order, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

F. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

G. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same

terms as the Commission-approved agreement referenced in Paragraph VI.C; or (b) receives Commission approval.

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

VII. Divestiture Trustee

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 the Retail Fuel Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section VII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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

C. Not later than 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 relevant divestitures required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

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

Order to Maintain Assets

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

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section VII 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

   Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

   Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Retail Fuel Assets required to be divested by the Decision and Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

F. 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 Section VII.

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

VIII. Prior Approval

IT IS FURTHERED ORDERED that Respondent Global shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, commission franchise interest, or any other interest, in whole or in part, in any Retail Fuel Business in any Prior Approval Location.

X. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent Global shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

2. Submit each complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit Compliance Reports 30 days after this Order to Maintain Assets is issued and every 30 days thereafter until this Order to Maintain Assets terminates, and additional Compliance Reports as the Commission or its staff may request.

   Provided, however, that Respondent Richard Wiehl shall submit interim Compliance Reports 30 days after this Order to Maintain Assets is issued and every 30 days thereafter only until he has completed his obligations under Sections II, IV and VI of the Decision and Order.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with its obligations under this

Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plans to implement to ensure that they have complied or will comply with each section of the Orders.

3. For a period of 5 years after filing a compliance report, Respondents shall retain all material written communications with each party identified in each compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling its obligations under this Order during the period covered by such compliance report. Respondents shall provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall file their compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XI. Change in Respondents

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

A. Any proposed dissolution of Global Partners LP;

B. Any proposed acquisition, merger or consolidation of Global Partners LP; or

C. Any other change in Respondent Global, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XII. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records

and all documentary material and electronically stored information as defined in Commission Rules 2.71(a)(1) and (2), 16 C.F.R. § 2.71(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; or

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

XIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the Retail Fuel Assets at least equivalent in all material respects to the manner in which the Retail Fuel Assets were operated prior to the Acquisition.

XIV. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Global Partners LP of certain retail service station and convenience store assets from Respondent Richard Wiehl (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as

required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Global Partners LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of Delaware, with its executive offices and principal place of business located at 800 South Street, Suite 500, Waltham, Massachusetts, 02454-9161.

2. Respondent Richard Wiehl is a natural person with his office and principal place of business located at 497 Bic Drive, Milford, Connecticut 06461.

3. Petroleum Marketing Group, Inc. is a corporation organized, existing, and doing business under, and by virtue of the laws of the state of Maryland, with its office and principal place of business located at 2900 Telestar Court, Falls Church, VA 22042.

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

ORDER

I. Definitions

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

A. "Global" means Global Partners LP, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Global Partners LP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Wiehl" means Richard Wiehl, a natural person, all partnerships, joint ventures, subsidiaries, divisions, and affiliates controlled by Richard Wiehl (including Wheels of CT, Inc., Consumers Petroleum of Connecticut, Inc., Putling Greens I, LLC, CPCI, LLC, and Wiehl Estate, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" means

1. PMG; or

2. Any other Person that the Commission approves to acquire the Retail Fuel Assets pursuant to this Order.

E. "Acquisition" means the proposed acquisition described in the agreement titled "Purchase and Sale Agreement by and between Sellers listed on Schedule 1, As Seller and Global Partners LP, As Buyer dated as of December 9, 2020."

F. "Acquisition Date" means the date Respondents consummate the Acquisition.

G. "Business Information" means books, records, data, and information, wherever located and however stored, used in or related to the operation of the Retail Fuel Business relating to the Retail Fuel Assets, including documents, written information, graphic materials, and data and information in electronic format, along with the knowledge of employees, contractors, and representatives. Business Information includes books, records, data, and information relating to sales, marketing, logistics, products and SKUs, pricing, promotions, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, vendors, research and development, Equipment operations, and all other information used in the operation of the Retail Fuel Business relating to the Retail Fuel Assets.

H. "Confidential Information" means all Business Information not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

I. "Consent" means an approval, consent, ratification, waivers, or other authorization.

J. "Contract" means an agreement, contract, lease, license agreement, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), whether or not legally binding with third parties.

K. "Direct Cost" means the cost of labor, materials, travel, and other expenditures directly incurred. The cost of any labor included in Direct Cost shall not exceed the hours of labor provided times the then-current average hourly wage rate, including benefits, for the employee providing such labor; *provided, however*, that with respect to the transitional supply of Fuel Products, the Direct Cost shall be calculated net of any rebates, Renewable Identification Number sharing, or other discounts or allowances and shall not include any mark-up, profit, overhead, minimum volume penalties, or other upward adjustments by Respondents.

L. "Divestiture Agreement" means:

1. The Asset Purchase Agreement by and among Alliance Energy LLC, Global Montello Group Corp. and Petroleum Marketing Investment Group, LLC entered into on September 13, 2021, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Nonpublic Appendix A; or

2. Any other agreement between Respondents (or a Divestiture Trustee appointed pursuant to Section IX of this Order) and an Acquirer for the purchase of any of the Retail Fuel Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

M. "Divestiture Date" means the closing date of any of the Divestiture Locations by the Acquirer as required by this Order.

N. "Divestiture Locations" means any Retail Fuel Business operated by Respondents prior to the Acquisition Date at the following locations:

1. 82 Stony Hill Road, Bethel, Connecticut, 06801;

2. 1139 Post Road, Fairfield, Connecticut, 06430;

3. 2093 Post Road, Fairfield, Connecticut, 06824;

4. 25 Bridgeport Avenue, Milford, Connecticut, 06460;

5. 300 Bridgeport Road, Milford, Connecticut, 06460;

6. 7294 & 7296 Main Street, Stratford, Connecticut, 06614; and

7. 210 Danbury Road, Wilton, Connecticut, 06897.

O. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

P. "Employee Information" means, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

Q. "Equipment" means all tangible personal property (other than Inventories) of every kind owned or leased by Respondents in connection with the operation of any Divestiture Locations, including, but not limited to all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems, registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, canopies, fuel dispensing equipment, UST systems (including all fuel storage tanks, fill holes and fill hole covers and tops, pipelines, vapor lines, pumps, hoses, Stage I and Stage II vapor recovery equipment, containment devices, monitoring equipment, cathodic protection systems, and other elements associated with any of the foregoing), parts, tools, supplies, and all other items of equipment or tangible personal property of any nature or other systems used in the operation of any Divestiture Locations, together with any express or implied warranty by the manufacturers, sellers, or lessors of any item or component part, to the extent such warranty is transferrable, and all maintenance records and other related documents.

R. "Fuel Products" means refined petroleum gasoline and diesel products.

S. "Governmental Authorization" means any Consent, license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.

T. "Intellectual Property" means all intellectual property, including: (1) commercial names, assumed fictional business names, trade names, "doing business as" (d/b/a names), registered and unregistered trademarks, service marks and applications, and trade dress; (2) patents, patent applications and inventions and discoveries that may be patentable; (3) registered and unregistered copyrights in both published works and unpublished works; (4) rights in mask works; (5) know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; and (6) rights in internet web sites and internet domain names.

U. "Inventories" means all inventories of every kind and nature for retail sale associated with any Divestiture Locations, including: (1) Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) usable, non-damaged and non-out-of-date products and items held for sale to the public, including, without limitation, food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.

V. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

W. "Orders" means this Order and the Order to Maintain Assets entered in this action.

X. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity, or a governmental body.

Y. "PMG" means Petroleum Marketing Group, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Petroleum Marketing Group, Inc., including Petroleum Marketing Investment Group, LLC. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Z. "Prior Approval Location" means a Retail Fuel Business within a 2-mile driving distance from a Divestiture Location.

AA. "Retail Fuel Assets" means all of Respondents' right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, used in, or relating to the Retail Fuel Business operated at the Divestiture Locations, including:

1. All real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. All Equipment, including any Equipment removed from any Divestiture Location since the date of the announcement of the Acquisition and not replaced;

3. All Inventories;

4. All accounts receivable;

5. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

6. All Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;

7. All Business Information; and

8. All intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondent, going concern value, goodwill, and telephone and telecopy listings;

Provided, however, that the Retail Fuel Assets need not include the Retained Assets.

BB. "Retail Fuel Business" means all business activities related to (1) the retail sale of Fuel Products, and (2) the operation of any associated convenience store and other business or service.

CC. "Retail Fuel Employee" means any full-time, part-time, or contract individual employed by Respondents, as applicable, at any Divestiture Locations, as of September 13, 2021.

DD. "Retained Assets" means:

1. Corporate or regional offices;

2. Intellectual property;

3. Trade names and trademarks that Respondents use primarily for businesses other than the Divestiture Locations to be divested;

4. Software that can readily be purchased or licensed from sources other than Respondents and that has not been materially modified (other than through user preference settings);

5. Enterprise software that Respondents use primarily to manage and account for businesses other than the relevant businesses to be divested;

6. The portion of any Business Information that contains information about any business other than the businesses to be divested, and from which Confidential Information has been redacted; and

7. Inventory that an Acquirer agrees not to purchase or that cannot be transferred by law in the applicable jurisdiction.

EE. "Transitional Assistance" means technical services, personnel, assistance, training, the supply of Fuel Products, and other logistical, administrative, and other transitional support as required by an Acquirer to facilitate the transfer of the Retail Fuel Assets from the Respondents to the Acquirer, including, but not limited to, services, training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, information technology and systems, maintenance and repair of facilities and equipment, Fuel Products supply, purchasing, quality control, R&D support, technology transfer, use of Respondents' brands for transitional purposes, operating permits and licenses, regulatory compliance, PCI Compliance, EMV Compliance, sales and marketing, customer service, supply chain management, and customer transfer logistics.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 20 days after the Acquisition Date, Respondent Global shall divest the Retail Fuel Assets, as ongoing businesses, absolutely and in good faith, to PMG;

Provided, *however*, that if within 12 months after issuing the Order, the Commission determines, in consultation with the Acquirer and the Monitor, should one be appointed, the Acquirer needs one or more Retained Assets to operate the Retail Fuel Assets in a manner that achieves the purposes of the Order, Respondents shall divest, absolutely and in good faith, such needed Retained Assets to the Acquirer; and

Provided further, *however*, that if Business Information relating to the Retail Fuel Assets includes information (1) that also relates to other retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Retail Fuel Assets or (2) where Respondents have a legal obligation to retain the original copies, then Respondents shall provide only copies of the materials containing such information with appropriate redactions to the Acquirer and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes.

B. If Respondents have divested the Retail Fuel Assets to PMG 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:

1. PMG is not acceptable as the acquirer of the Retail Fuel Assets, then Respondents shall rescind the divestiture to PMG within 5 days of notification, and shall divest the Retail Fuel Assets no later than 180 days from the date this Order is issued, as on-going businesses, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval

of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture to PMG was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to modify the manner of divestiture of the Retail Fuel Assets as the Commission may determine is necessary to satisfy the requirements of this Order.

C. Respondents shall obtain, no later than the Divestiture Date and at their sole expense, all Consents from third parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to the Acquirer and for Acquirer to operate any aspect of the relevant Divestiture Locations;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all Consents from third parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant third party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and

2. With respect to any Governmental Authorizations relating to the Retail Fuel Assets that are not transferable, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the Retail Fuel Assets under Respondents' Governmental Authorizations pending the Acquirer's receipt of its own Governmental Authorizations, and Respondents shall provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Authorizations.

D. Respondents shall assist each Acquirer to conduct a due diligence investigation of the Retail Fuel Assets and Divestiture Locations the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording the Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Governmental Authorizations, Business Information, and other documents and data relating to the relevant Divestiture Locations, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

III. Divestiture Agreement

IT IS FURTHER ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order; *provided, however*, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in this Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transitional Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Retail Fuel Assets to the Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to Business Information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the Business Information.

B. At the option of the Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the Retail Fuel Assets to the Acquirer and (2) allow the Acquirer to operate the acquired Retail Fuel Assets in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall provide Transitional Assistance:

1. As set forth in a Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, for up to 15 months after the Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a written request to extend the time period for providing Transitional Assistance in order to achieve the purposes of this Order.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transitional Assistance at any time upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of a Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of any agreement relating to Transitional Assistance.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Retail Fuel Assets to evaluate independently and offer employment to any Retail Fuel Employee.

B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Retail Fuel Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to privately interview any of the Retail Fuel Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Retail Fuel Employees;

3. Remove and not enter into any impediments within the control of Respondents that may deter Retail Fuel Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to an Retail Fuel Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Retail Fuel Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Retail Fuel Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Retail Fuel Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Retail Fuel Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Retail Fuel Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

D. Respondent Global shall not enforce any noncompete provision or noncompete agreement against any Person seeking employment from or otherwise doing business with any of the Divestiture Locations.

VI. Asset Maintenance

IT IS FURTHER ORDERED that until Respondents fully transfer each of the Divestiture Locations and related Retail Fuel Assets to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that each of the Divestiture Locations and related Retail Fuel Assets are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Operate the Retail Fuel Business relating to the Retail Fuel Assets in the ordinary course of business consistent with past practices and take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Retail Fuel Business;

B. Prevent the destruction, removal, wasting, deterioration, closing, or impairment (other than as a result of ordinary wear and tear) of the Retail Fuel Assets, including:

1. Maintaining, repairing, and replacing any Equipment to the extent and in a manner consistent with past practices;

2. Maintaining inventory levels in a manner consistent with past practices;

3. Not terminating, canceling, renewing, or amending any Contract, except as consistent with past practices; and

4. Not entering any Contract that would restrain or restrict the ability of the Acquirer to compete against Respondents;

C. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Retail Fuel Assets;

D. Provide the Retail Fuel Business relating to the Retail Fuel Assets with sufficient funds to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on at least at their scheduled pace all capital projects, business plans, development projects, promotional activities, and marketing activities;

E. Provide resources as may be necessary to respond to competition against the Retail Fuel Business relating to the Retail Fuel Assets, prevent diminution in sales of such Retail Fuel Business, and maintain the competitive strength of such Retail Fuel Business;

F. Not reduce operating hours;

G. Not reduce, change, or modify in any material respect, the level of marketing, promotional, pricing, or advertising practices, programs, and policies for the Retail Fuel Business related to the Retail Fuel Assets, other than changes in the ordinary course of business consistent with changes made at Respondents' other businesses that Respondents will not divest;

H. Not target, encourage, or convert customers of the Retail Fuel Business relating to the Retail Fuel Assets to become customers of Respondents' other businesses that will not be divested; provided, however, that nothing in this subparagraph shall prevent Respondents from engaging in advertising, marketing, and promotion activities: (i) generally applicable to all of Respondent businesses, or (ii) in the ordinary course of business and in accordance with past practice;

I. Provide support services at levels customarily provided by Respondents;

J. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Retail Fuel Business relating to the Retail Fuel Assets, and otherwise operate such Retail Fuel Business in accordance and compliance with all regulatory obligations and requirements;

K. Not sell, transfer, encumber, or otherwise impair the Retail Fuel Assets (other than in the manner prescribed in the Orders);

L. Not take any action that lessens the full economic viability, marketability, or competitiveness of the Retail Fuel Assets;

M. Not terminate the operations of the Retail Fuel Business relating to the Retail Fuel Assets;

N. Preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, site operators, and others having business relationships with the Retail Fuel Business relating to the Retail Fuel Assets;

O. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Retail Fuel Business relating to the Retail Fuel Assets, including:

1. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

2. Not transferring any employees from the Retail Fuel Business relating to the Retail Fuel Assets to any of Respondents' assets or businesses that Respondents will not divest.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Locations and related Retail Fuel Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

VII. Confidential Information

IT IS FURTHER ORDERED that:

A. Respondents shall not (x) disclose (including to Respondents' employees) or (y) use for any reason or purpose, any Confidential Information received or maintained by Respondents; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under this Order, the Order to Maintain Assets, or any Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, responding to investigations, or enforcing actions threatened or brought against the Retail Fuel Assets or any Divestiture Locations, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Section VII, Respondents shall limit such disclosure or use (1) only to the extent such information is required, (2) only to those employees or Persons who require such information for the purposes permitted under Paragraph VII.A, and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees and other Persons comply with the terms of Section VII, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint a Person to serve as Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

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

C. Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VIII or the Section relating to the Monitor in the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor

Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

D. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with this Order on a schedule as determined by Commission staff, and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all

obligations under the designated Sections of this Order, and files a final report.

E. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Order, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

F. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

G. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights,

powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.C; or (b) receives Commission approval.

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

IX. Divestiture Trustee

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 the Retail Fuel Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for

opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than 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 relevant divestitures required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Retail Fuel Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

F. 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 Section IX.

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

X. Prior Approval

IT IS FURTHERED ORDERED that Respondent Global shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, commission franchise interest, or any other interest, in whole or in part, in any Retail Fuel Business in any Prior Approval Location.

XI. Acquirer

IT IS FURTHER ORDERED that:

A. For a period of 3 years after the Divestiture Date, PMG or any other Acquirer shall not sell, or otherwise convey, through subsidiaries or otherwise, without the prior approval of the Commission, any of the Divestiture Locations that were divested pursuant to Section II, to any Person; and

B. For a period of 7 years after the term of Paragraph XI.A. ends, PMG or any other Acquirer shall not sell, or convey, through subsidiaries or otherwise, without the prior approval of the Commission, any of the Divestiture Locations that were divested pursuant to Section II, to any Person who owns, directly or indirectly,

through subsidiaries or otherwise, leasehold, ownership interest, or any other interest, in whole or in part, any Retail Fuel Business in a Prior Approval Location.

Provided, however, PMG is not required to obtain prior approval of the Commission under this Section XI for:

1. a change of control, merger, reorganization, or sale of

   a. all or substantially all of PMG's business, or

   b. the PMG business entities that contain all or substantially all of PMG's Retail Fuel Business, or

2. any sale of a Divestiture Location to an existing dealer of a Divestiture Location that has exercised a right of first refusal under any statute or other law.

XII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent Global shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

2. Submit each complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent Global shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondent Global shall submit interim compliance reports 30 days after this Order is issued, and every 30 days thereafter until Respondent Global has fully complied with the provisions of Sections II and VI of this Order; annual compliance reports one year after the date this Order is issued, and annually thereafter for the next nine years on the anniversary of that date; and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent Global is in compliance with the Order. Conclusory statements that Respondent Global has complied with its obligations under this Order are insufficient. Respondent Global shall include in its reports, among other information or documentation that may be necessary to

demonstrate compliance, a full description of the measures Respondent Global has implemented or plans to implement to ensure that it has complied or will comply with each section of the Order.

3. For a period of 5 years after filing a compliance report, Respondent Global shall retain all material written communications with each party identified in each compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling its obligations under this Order during the period covered by such compliance report. Respondent Global shall provide copies of these documents to Commission staff upon request.

4. Respondent Global shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent Global shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondent Global shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XIII. Change in Respondents

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

A. Any proposed dissolution of Global Partners LP;

B. Any proposed acquisition, merger or consolidation of Global Partners LP; or

C. Any other change in Respondent Global, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIV. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records

and all documentary material and electronically stored information as defined in Commission Rules 2.71(a)(1) and (2), 16 C.F.R. § 2.71(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; or

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

XV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the Retail Fuel Assets at least equivalent in all material respects to the manner in which the Retail Fuel Assets were operated prior to the Acquisition.

XVI. Term

IT IS FURTHER ORDERED that this Order shall terminate on March 1, 2032.

By the Commission.

Nonpublic Appendix A

Divestiture Agreement

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Global Partners LP ("Global") and Richard Wiehl ("Wheels") (collectively, the "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from Global's proposed acquisition of retail fuel assets from Wheels.

Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, Respondents must divest certain retail fuel assets in five local markets in Connecticut to a Commission-approved buyer. Respondents must complete the divestiture within 20 days after the closing of the acquisition. The Commission has issued, and Respondents have agreed to comply with, an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date the approved buyer acquires the divested assets.

The Commission has placed the Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the proposed Order final.

II. The Respondents

Respondent Global, a publicly traded independent owner, supplier, and operator of gasoline stations and convenience stores, is headquartered in Waltham, Massachusetts. Global operates approximately 1,550 retail fuel outlets, primarily in the Northeastern United States. Global also operates petroleum products terminals, through which it distributes gasoline, distillates, residual oil, and renewable fuels to wholesalers, retailers, and commercial customers.

Respondent Wheels is a family-owned chain of retail service stations and convenience stores headquartered in Milford, Connecticut. It has approximately 27 retail locations in its network, all in Connecticut, which operate under the Wheels convenience store brand. All of Wheels' retail outlets offer either Sunoco or Citgo branded fuel. Wheels also operates a small wholesale fuel distribution business, serving 24 locations in Connecticut and New York under the Consumers Petroleum brand.

III. The Proposed Acquisition

On December 9, 2020, Global entered into an agreement to acquire the retail and wholesale fuel assets of Wheels and related entities (the "Acquisition"). The Commission's Complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the Acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline in five local markets in Connecticut, and additionally by

substantially lessening competition for the retail sale of diesel fuel in four of those same local markets.

IV. The Retail Sale of Gasoline

The Commission's Complaint alleges that the relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel fuel constitute separate relevant markets because the two are not interchangeable. Vehicles that run on gasoline cannot run on diesel fuel, and vehicles that run on diesel fuel cannot run on gasoline.

The Commission's Complaint alleges that the relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of gasoline are five local markets in and around the following cities: Fairfield, Connecticut; Bethel, Connecticut; Milford, Connecticut; Wilton, Connecticut; and Shelton, Connecticut. The relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of diesel fuel are the local markets in and around Fairfield, Bethel, Milford, and Shelton.

The geographic markets for retail gasoline and retail diesel fuel are highly localized, depending on the unique circumstances of each area. Each relevant market is distinct and fact-dependent, reflecting many considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel fuel are similar to the corresponding geographic markets for retail gasoline, as many diesel fuel consumers exhibit preferences and behaviors similar to those of gasoline consumers.

The Acquisition would substantially lessen competition in each of these local markets, resulting in five highly concentrated markets for the retail sale of gasoline and four highly concentrated markets for the retail sale of diesel fuel. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics.

In each of the local gasoline and diesel fuel retail markets where the Commission alleges harm, the Acquisition would reduce the number of competitively constraining independent market participants to three or fewer. Absent the Acquisition, Global and Wheels would continue to compete head to head in these local markets. Post-Acquisition, the combined entity would be able to raise prices unilaterally in markets where Global and Wheels are close competitors.

Moreover, the Acquisition would enhance the incentives for interdependent behavior in local markets where only two or three competitively constraining independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors to easily observe each other's fuel prices. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions

give retail fuel outlets familiarity with how their competitors price and how changing prices affect fuel sales.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time and uncertainty associated with obtaining necessary permits and approvals.

V. The Consent Agreement

The proposed Order would remedy the Acquisition's likely anticompetitive effects by requiring Global to divest certain Global and Wheels retail fuel assets to Petroleum Marketing Investment Group, LLC ("PMG") in each local market. PMG is an experienced operator of retail fuel sites and will be a new entrant into the local markets.

The proposed Order requires that the divestiture be completed no later than 20 days after Global consummates the Acquisition. The proposed Order further requires Global and Wheels to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestiture to PMG is complete.

In addition to requiring outlet divestitures, the proposed Order requires Respondents to obtain prior approval from the Commission before acquiring retail fuel assets within a 2-mile driving distance of any divested outlet for ten years. The prior approval provision is necessary because an acquisition in close proximity to the divested assets likely would raise the same competitive concerns as the Acquisition. The proposed Order further requires PMG to obtain prior approval from the Commission for a period of 3 years before transferring any of the divested stations to any buyer, and for a period of 7 years to any buyer with an interest in a retail fuel outlet within 2 miles of a divested station.

The Consent Agreement contains additional provisions designed to ensure the effectiveness of the relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date the Respondents complete the divestiture. The proposed Order also includes a provision that allows the Commission to appoint an independent third party as a Monitor if necessary to oversee the Respondents' compliance with the requirements of the Order.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

LIFESPAN CORPORATION,
AND
CARE NEW ENGLAND HEALTH SYSTEM

COMPLAINT, FINAL ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9406; File No. 211 0031
Complaint, February 17, 2022 – Decision, March 2, 2022

This case addresses the merger of Lifespan Corporation and Care New England Health System. The complaint alleges that the merger, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by significantly reducing competition in the market for inpatient general acute care hospital services in Rhode Island. The order dismissed the Complaint without prejudice.

Participants

For the *Commission*: *Nathan Brenner, Kennan Khatib, Amy Ritchie, Josh Smith, Anusha Sunkara, Albert Teng, Goldie Walker,* and *Kati Williams.*

For the *Respondents*: *Joseph Farside, Jr.* and *Steve Murphy, Locke Lord LLP; Nicole Castle* and *Stephen Wu, McDermott Will & Emery LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Lifespan Corporation ("Lifespan") and Care New England Health System ("CNE") have executed a definitive agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Lifespan and CNE, the first and second largest healthcare providers in the state of Rhode Island, seek to merge (the "Proposed Transaction"). Lifespan's and CNE's inpatient GAC hospitals overlap significantly in the medical, surgical, and diagnostic services they offer that require an overnight hospital stay. These overlapping services account for the majority of inpatients the Respondents treat. Further, Lifespan and CNE operate the only two standalone inpatient behavioral health facilities in Rhode Island.

2. The Proposed Transaction is likely to substantially lessen competition in Rhode Island for inpatient general acute care ("GAC") hospital services sold and provided to commercial insurers and their members ("inpatient GAC hospital services") and inpatient behavioral health services sold and provided to commercial insurers and their members ("inpatient behavioral health services") in violation of Section 7 of the Clayton Act.

3. Currently, Lifespan and CNE are close competitors and frequently refer to each other with terms like [redacted] and [redacted] or [redacted] both internally and to third parties.

4. Respondents compete to sell inpatient GAC services and inpatient behavioral health services to commercial insurers and to provide these services to commercial insurers' members. This competition has spurred Respondents to invest in clinical services, access, and quality, to the benefit of all Rhode Island residents. CNE has added services at its Kent hospital, noting they would [redacted] Similarly, Lifespan has improved access because [redacted]

5. The Proposed Transaction would eliminate this competition and create a dominant health system controlling most inpatient GAC services and inpatient behavioral health services in Rhode Island. If this merger is allowed to proceed, Respondents would control at least 70 percent of the markets for inpatient GAC hospital services and inpatient behavioral health services.

6. If allowed to consummate, the Proposed Transaction would significantly increase market concentration in already highly concentrated markets. Under the thresholds established by the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("2010 Merger Guidelines"), the Proposed Transaction is presumptively illegal in the markets for inpatient GAC services and inpatient behavioral health services in Rhode Island. Even including hospitals located in the 19 Massachusetts towns bordering Rhode Island, Respondents would still exceed the 2010 Merger Guidelines thresholds in each market; therefore, the Proposed Transaction is presumptively illegal.

II.

JURISDICTION

7. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

8. The Proposed Transaction constitutes a transaction subject to Section 7 of the Clayton Act, 15 U.S.C § 18.

III.

RESPONDENTS

9. Respondent Lifespan, the largest healthcare provider in Rhode Island based on inpatient GAC admissions, is a not-for-profit health system with a principal place of business in Providence, Rhode Island. Lifespan operates three inpatient GAC hospitals, Rhode Island's only dedicated children's hospital, and a freestanding behavioral health hospital. Lifespan's Rhode Island Hospital is the largest hospital in the state and is located in downtown Providence, Rhode Island and shares a campus with Lifespan-owned Hasbro Children's Hospital and CNE-owned Women & Infants Hospital. In addition to these facilities, Lifespan operates two other GAC hospitals in Rhode Island – The Miriam Hospital ("Miriam") on the East Side of Providence and Newport Hospital ("Newport") in Newport. Lifespan's behavioral health hospital ("Bradley") is located in East Providence, Rhode Island. Lifespan has 1,165 licensed beds across all its locations. Lifespan employs or affiliates with over 900 primary and specialty care physicians. Through a for-profit joint venture, Lifespan operates the Lifespan Health Alliance, an accountable care organization ("ACO") comprised of the three Lifespan hospitals and approximately 2,100 physicians. Lifespan is the largest private employer in Rhode Island with nearly 16,000 employees, including approximately 3,370 registered nurses. In fiscal year 2021, Lifespan generated approximately $2.8 billion in revenue and approximately $89.1 million in operating income.

10. Respondent CNE is a not-for-profit community-based health system made up of two inpatient GAC hospitals and a freestanding behavioral health hospital. CNE's principal place of business is in Providence, Rhode Island. CNE's Women & Infants GAC hospital and CNE's behavioral health hospital, Butler Hospital ("Butler"), are located in downtown Providence and the East Side of Providence, respectively. CNE's Kent County Hospital ("Kent") is the second-largest GAC hospital in Rhode Island and is located in Warwick. CNE has 749 licensed beds across all its locations. CNE employs approximately 442 healthcare providers and, through its ACO, Integra, CNE closely affiliates with an additional 240 primary care providers. CNE employs approximately 1,950 registered nurses. In fiscal year 2021, CNE garnered approximately $1.25 billion in revenue and approximately $16.2 million in operating income.

IV.

THE PROPOSED TRANSACTION

11. On February 23, 2021, Lifespan and CNE signed an agreement to combine into a new Rhode Island nonprofit corporation.

12. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, and a modified timing agreement entered into between Respondents and Commission staff, absent this Court's action, Respondents would be free under federal law to close the Proposed Transaction after 11:59 p.m. EST on February 22, 2022.

V.

RELEVANT SERVICE MARKETS

13. The Proposed Transaction is likely to substantially lessen competition in two service markets sold and provided to commercial insurers and their members in Rhode Island: (1) inpatient GAC hospital services; and (2) inpatient behavioral health services (collectively "Healthcare Service Markets"). Hospitals compete on rates offered to commercial insurers to achieve "in-network" status. For each Healthcare Service Market, a hypothetical monopolist profitably could impose a small but significant and non-transitory increase in price ("SSNIP"). Because commercial insurers would accept a SSNIP rather than market a network to employers and individuals that omitted inpatient GAC hospital services and would accept a SSNIP rather than market a network that omitted inpatient behavioral health services, each of these Healthcare Service Markets constitutes a relevant market for analyzing the Proposed Transaction.

14. Inpatient GAC hospital services sold and provided to commercial insurers and their members is a relevant market in which to analyze the Proposed Transaction. Inpatient GAC hospital services include a broad cluster of hospital services—medical, surgical, and diagnostic services requiring an overnight hospital stay—offered by both Lifespan and CNE and for which competitive conditions are substantially similar. Here, inpatient GAC hospital services include all overlapping inpatient primary, secondary, and tertiary services offered by Lifespan and CNE. Non-overlapping services are not included in the relevant market.

15. Although the Proposed Transaction's likely effect on competition could be analyzed separately for each individual inpatient GAC hospital service, it is appropriate to evaluate the Proposed Transaction's likely effects across this cluster of inpatient GAC hospital services because these services are offered to patients under similar competitive conditions. Thus, grouping the hundreds of individual, overlapping inpatient GAC hospital services into a cluster for analytical convenience enables the efficient evaluation of competitive effects without forfeiting the accuracy of the overall analysis.

16. Outpatient services are not included in the inpatient GAC hospital services market because commercial insurers and patients cannot substitute outpatient services for inpatient services in response to a price increase for inpatient GAC hospital services. Additionally, outpatient services are offered by a different set of competitors under different competitive conditions than inpatient GAC hospital services.

17. The inpatient GAC hospital services market does not include services related to psychiatric care, substance abuse, or rehabilitation services. These services are offered by a different set of competitors under different competitive conditions than inpatient GAC hospital services.

18. Inpatient behavioral health services sold and provided to commercial insurers and their members is a relevant market in which to analyze the Proposed Transaction. Inpatient behavioral health services include a cluster of inpatient services that treat, among other conditions, depressive disorders, personality disorders, and eating disorders, offered by both Lifespan and

CNE and for which competitive conditions are substantially similar. Further, narrower relevant markets may exist for: (1) inpatient behavioral health services for adults sold and provided to commercial insurers and their members; and (2) inpatient behavioral health services for adolescents sold and provided to commercial insurers and their members.

19. Although the Proposed Transaction's likely effect on competition could be analyzed separately for each individual inpatient behavioral health service, it is appropriate to evaluate the Proposed Transaction's likely effects across the cluster of inpatient behavioral health services because treatment services across different disorders are offered to patients under similar competitive conditions. Thus, grouping these inpatient behavioral health services into a cluster for analytical convenience enables the efficient evaluation of competitive effects without forfeiting the accuracy of the overall analysis.

20. Partial hospitalization behavioral health programs and intensive outpatient behavioral health programs are not included in the inpatient behavioral health services market because they do not provide the same level of treatment intensity; thus, commercial insurers and patients cannot substitute these services for inpatient behavioral health services in response to a SSNIP for inpatient behavioral health services. Additionally, partial hospitalization behavioral health programs and intensive outpatient behavioral health programs are offered by a different set of competitors under different competitive conditions than inpatient behavioral health services.

VI.

RELEVANT GEOGRAPHIC MARKETS

21. For each Healthcare Service Market alleged above, a relevant geographic market in which to analyze the effects of the Proposed Transaction is Rhode Island.

22. Rhode Island is the main area of competition between Lifespan and CNE for inpatient GAC hospital services and inpatient behavioral health services. Lifespan and CNE each analyze competition within Rhode Island and identify hospitals within Rhode Island as their competitors.

23. Rhode Island residents strongly prefer to obtain inpatient GAC hospital services and inpatient behavioral health services close to where they live, with approximately 90 percent obtaining services from a Rhode Island provider. Therefore, it would be very difficult for a commercial insurer to market successfully a health plan to Rhode Island employers and residents that excluded all Rhode Island GAC hospitals. It would also be very difficult for a commercial insurer to market successfully a health plan to Rhode Island employers and residents that excluded all Rhode Island hospitals providing inpatient behavioral health services.

24. A hypothetical monopolist of inpatient GAC services in Rhode Island—e.g., the entity that would result from the merger of *all* Rhode Island hospitals providing these services—profitably could impose a SSNIP for these services on commercial insurers. The same is true for a hypothetical monopolist of inpatient behavioral health services in Rhode Island.

25. Because a hypothetical monopolist of all inpatient GAC hospitals in Rhode Island profitably could impose a SSNIP on insurers, Rhode Island is a relevant geographic market in which to analyze the Proposed Transaction.

26. A hypothetical monopolist of all hospitals in Rhode Island that provide inpatient behavioral services also profitably could impose a SSNIP on insurers and, thus, Rhode Island is a relevant geographic market in which to analyze the Proposed Transaction.

27. In the alternative, residents of Rhode Island and the 19 surrounding Massachusetts towns (collectively, the "MARI area") strongly prefer to obtain inpatient GAC hospital services and inpatient behavioral health services close to where they live. Therefore, it would be very difficult for a commercial insurer to market successfully a health plan to MARI-area employers and residents that excluded all MARI-area GAC hospitals. It would also be very difficult for a commercial insurer to market successfully a health plan to MARI-area employers and residents that excluded all MARI-area hospitals providing inpatient behavioral health services.

28. Because a hypothetical monopolist of all inpatient GAC hospitals in the MARI area profitably could impose a SSNIP on insurers, the MARI area is also a relevant geographic market in which to analyze the Proposed Transaction.

29. A hypothetical monopolist of all hospitals in the MARI area that provide inpatient behavioral services also profitably could impose a SSNIP on insurers and, thus, the MARI area is a relevant geographic market in which to analyze the Proposed Transaction.

VII.

MARKET STRUCTURE AND THE PROPOSED TRANSACTION'S PRESUMPTIVE ILLEGALITY

30. The Proposed Transaction will substantially increase concentration in already highly concentrated markets for inpatient GAC hospital services and inpatient behavioral health services sold to commercial insurers and their members in Rhode Island as well as the MARI area.

31. Based on commercial inpatient admissions for patients seeking care at Rhode Island hospitals, post-transaction, Respondents would control at least 70 percent of inpatient GAC hospital services and at least 70 percent of inpatient behavioral health services in Rhode Island.

32. Based on commercial inpatient admissions for patients seeking care at hospitals located in the MARI area, post-transaction, Respondents would control roughly 60 percent of inpatient GAC hospital services and at least 50 percent of inpatient behavioral health services in the MARI area.

33. The 2010 Merger Guidelines and courts measure concentration using the Herfindahl-Hirschman Index ("HHI"). HHI levels are calculated by totaling the squares of the market shares of each firm in the relevant market. A relevant market is "highly concentrated" if it has an HHI level of 2,500 or more. A merger or acquisition is presumed likely to create or enhance

market power—and is therefore presumptively illegal—when it would increase the HHI by more than 200 points and result in a post-merger HHI exceeding 2,500.

34. The Proposed Transaction would increase the HHI in each of the Healthcare Service Markets in Rhode Island by over 1,500 points, resulting in a post-transaction HHI of over 5,000 in each of the relevant Healthcare Service Markets, far exceeding the threshold over which the Proposed Transaction is presumed likely to create or enhance market power and to be presumptively illegal. As such, the Proposed Transaction is presumptively illegal.

35. The Proposed Transaction would increase the HHI in each of the Healthcare Service Markets in the MARI area by over 1,000 points, resulting in a post-transaction HHI of over 3,000 in each of the relevant Healthcare Service Markets, far exceeding the threshold over which the Proposed Transaction is presumed likely to create or enhance market power and to be presumptively illegal. As such, the Proposed Transaction is presumptively illegal.

VIII.

ANTICOMPETITIVE EFFECTS

A.

Competition Between Hospitals Benefits Patients

36. Competition between hospitals occurs in two distinct but related stages. First, hospitals compete for inclusion in commercial insurers' health plan provider networks. Second, in-network hospitals compete to attract patients, including commercial insurers' health plan members. These dynamics apply to hospital competition for inpatient GAC services and inpatient behavioral health services.

37. In the first stage of hospital competition, hospitals compete to be included in commercial insurers' health plan provider networks. To become an "in-network" provider, a hospital negotiates with a commercial insurer and enters into a contract if both sides agree on terms. The financial terms under which a hospital is reimbursed for services rendered to a health plan's members are a central component of those negotiations.

38. Health plan members typically pay far less to access in-network hospitals than those that are out-of-network. In-network status thus benefits hospitals because, all else being equal, an in-network hospital will attract more patients from a particular health plan than an out- of-network one. This dynamic motivates hospitals to offer lower rates and other more favorable terms to commercial insurers to win inclusion in their networks.

39. From the insurers' perspective, having hospitals in-network is beneficial because it enables the insurer to create a health plan provider network in a particular geographic area that is attractive to current and prospective members, typically local employers and their employees.

40. A critical determinant of the relative bargaining positions of a hospital and a commercial insurer during contract negotiations is whether other, nearby comparable hospitals, or combinations of hospitals, are available to the commercial insurer and its health plan members as alternatives in the event of a negotiating impasse. Alternative comparable hospitals limit a hospital's bargaining leverage and constrain its ability to obtain more favorable reimbursement terms from commercial insurers. Where there are fewer meaningful alternatives, a hospital will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more favorable reimbursement terms.

41. A merger between hospitals that are substitutes in the eyes of commercial insurers and their health plan members tends to increase the merged entity's bargaining leverage. Such mergers lead to higher reimbursement rates by eliminating an available alternative for commercial insurers.

42. Changes in the reimbursement terms negotiated between a hospital and a commercial insurer, including increases in reimbursement rates, significantly impact the commercial insurer's health plan members. When hospital rates increase, commercial insurers generally pass on a significant portion of these increased rates to their customers, employers and their employees and individuals, in the form of higher premiums, co-pays, and deductibles. Customers' employees and individual plan members may bear some portion of the increased cost through increased premiums, co-pays, and deductibles.

43. In the second stage of hospital competition, hospitals compete to attract patients to their facilities. Because health plan members often face similar out-of-pocket costs for in- network hospitals, hospitals in the same network compete to attract patients on non-price features, such as quality of care, access to services and technology, reputation, physicians and faculty members, amenities, convenience, and patient satisfaction. Hospitals compete on these non-price dimensions to attract all patients, regardless of whether they are covered by commercial insurance, a governmental insurance program, or lack any insurance. A merger of competing hospitals reduces this competition for patients and reduces the merged entity's incentive to improve and maintain service, access, and quality. As CNE's CEO explained, [redacted] The Proposed Transaction weakens the competitive pressure motivating Respondents to improve their respective service offerings and quality today, and Rhode Islanders will lose their ability to choose between Respondents.

B.

The Proposed Transaction Would Eliminate Beneficial Head-to-Head Competition Between Respondents

44. Lifespan and CNE compete vigorously and treat each other as [redacted] They compete with one another on rates offered to commercial insurers and they constantly vie to innovate and improve the quality of the care they provide, in direct response

to each other. This competition has spurred Respondents to invest in clinical services, access, and quality, to the benefit of all Rhode Island residents.

45. Lifespan and CNE also track each other's market shares, quality scores, advertising, and brand recognition, implementing strategies and tactics to win patients from the other. For example, [redacted]. In response, Lifespan [redacted].

46. Economic analysis confirms that Lifespan and CNE are close competitors for inpatient GAC hospital services and inpatient behavioral health services. Diversion analysis, an economic tool that uses data on where patients receive hospital services, shows that if CNE's hospitals were to become unavailable to patients for inpatient GAC hospital services or inpatient behavioral health services, a significant number of those patients would seek care at a Lifespan hospital. Likewise, if Lifespan hospitals were to become unavailable to patients for inpatient GAC hospital services or inpatient behavioral health services, a significant fraction of Lifespan's patients would seek care at a CNE hospital.

47. Today, this close head-to-head competition between the Respondents incentivizes them to keep prices lower and quality of care higher than they would without this competition.

C.

The Proposed Transaction Would Increase Respondents' Bargaining Leverage in Negotiations with Insurers

48. The reduction in competition caused by the Proposed Transaction would increase Respondents' already significant bargaining leverage in contract negotiations with commercial insurers. This increase in bargaining leverage would apply to contract negotiations for all healthcare services Respondents offer and would result in Respondents commanding higher reimbursement rates and more favorable reimbursement terms.

49. Respondents serve as key alternatives to one another for most inpatient GAC and inpatient behavioral health services, and Respondents each have added or considered adding services with the express purpose of competing with the other on rates offered to commercial insurers. Consequently, insurers have achieved more favorable rates and other terms through separate, independent negotiations with each Respondent.

50. Such competition would be eliminated as a result of the Proposed Transaction, thereby reducing Respondents' incentive to offer lower rates and leading to increased prices. Merging will enhance Respondents' already significant leverage when negotiating with commercial insurers and lead to higher reimbursement rates and terms that are more favorable to Respondents. Both Respondents also operate accountable care organizations ("ACOs") through which they negotiate with commercial insurers. The combination of the Respondents' ACOs may provide another avenue through which they can exercise their increased bargaining leverage for

higher rates or more onerous terms that give Respondents less incentive to control healthcare spending and improve quality.

51. Regulation from the Rhode Island Office of the Health Insurance Commissioner ("OHIC") will not be sufficient to prevent the Respondents from exercising market power after the Proposed Transaction. OHIC's regulation does not apply to all types of healthcare services or all health insurance products; thus, Respondents can exercise market power through healthcare services or insurers' lines of business that OHIC does not regulate.

D.

The Proposed Transaction Would Eliminate Vital Quality and Service Competition

52. Lifespan and CNE compete with one another to attract patients, which incentivizes them to improve the quality of care they provide, enhance access, recruit high quality physicians, and expand their service offerings. The Proposed Transaction would eliminate this competition, weakening Respondents' incentives to invest in new or expanded services, innovation, and technology.

53. Lifespan and CNE track and respond to one another's service offerings. CNE has added several significant services in direct competition with Lifespan and Lifespan has responded by increasing access to or further promoting its own services.

54. For example, CNE [redacted] CNE emphasized [redacted]. Upon starting its [redacted] service [redacted] service line today. In preparing to start performing [redacted] a CNE executive described [redacted] and noted that [redacted]

55. Lifespan and CNE have also taken steps to increase patient access to their respective hospitals to avoid losing patients to one another. In response to Lifespan's CEO's instruction that [redacted] because [redacted] Lifespan [redacted].

56. Lifespan and CNE also track quality recognitions and considers these achievements when developing their own strategy. CNE pursued [redacted] noting Kent was [redacted]

[redacted] and that it would [redacted]

57. Lifespan and CNE have competed with one another to employ or affiliate with physicians, an important source of patient referrals. CNE [redacted] pursued [redacted] noting the physician [redacted] Lifespan began recruiting [redacted] because it had a [redacted]

58. Patients benefit from this direct non-price competition. The Proposed Transaction will diminish the combined firm's incentive to compete on quality of care, access to care, and service offerings to the detriment of all patients who use these hospitals, including commercially insured, Medicare, Medicaid, and self-pay patients.

IX.

LACK OF COUNTERVAILING FACTORS

A.

Entry Barriers

59. Neither entry by new market participants nor expansion by current market participants is likely to deter or counteract the Proposed Transaction's likely harm to competition for inpatient GAC hospital services or inpatient behavioral health services.

60. New entry into inpatient GAC hospital services and inpatient behavioral health services or significant expansion by current providers or employers of these services is not likely, nor would such entry or expansion be timely or sufficient to offset the Proposed Transaction's likely harmful competitive effects. Entry or significant expansion is unlikely due to high costs and risks associated with constructing and opening inpatient GAC or inpatient behavioral health hospitals, or significantly expanding these services. Construction of a new hospital (including inpatient GAC services and/or inpatient behavioral health services) or substantial expansion of an existing one would involve high costs and significant financial risk, including the time and resources to conduct studies, develop plans, acquire land or repurpose a facility, obtain regulatory approvals, including a CON, and build or renovate and open the facility.

61. Additionally, Respondents' reputations, size, and breadth and depth of the inpatient GAC hospital services and inpatient behavioral health services they provide make it unlikely that there will be entry on a sufficient scale to counteract or constrain post-Transaction competitive effects.

62. Even if *de novo* hospital construction or significant expansion by incumbent providers were likely, such entry or significant expansion would not be timely. In addition to the

time and costs associated with planning and constructing a hospital or significantly expanding existing facilities, Rhode Island's CON regulations pose a significant barrier to entry.

63. Rhode Island's CON regulations require anyone seeking to build a new hospital or significantly modify an existing hospital to undergo an extensive application process and justify the need for such construction or modifications. Applicants must demonstrate, among other things, demand and community need and their ability to fund the project. Obtaining CON approval is a time-consuming process and there is no guarantee such approval will be granted.

64. Even a successful entrant would be unlikely to counteract the loss of competition resulting from the Proposed Transaction, as a new provider would face significant challenges to replicate CNE's competitive significance and reputation.

B.

Efficiencies

65. Respondents have not substantiated merger-specific, verifiable, and cognizable efficiencies that likely would be sufficient to reverse the Proposed Transaction's potential to harm customers in the markets for inpatient GAC services or inpatient behavioral health services.

X.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

1. The allegations of Paragraphs 1 through 65 above are incorporated by reference as though fully set forth.

2. The Proposed Transaction constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

3. The allegations of Paragraphs 1 through 65 above are incorporated by reference as though fully set forth.

4. The Proposed Transaction, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the thirtieth day of June 2022, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary 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 and the Clayton 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 you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. 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 3.2l(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.3l(b) obligates counsel for each party, within five days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Proposed Transaction challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. A prohibition against any transaction between Lifespan and CNE that combines their businesses, except as may be approved by the Commission.

2. If the Proposed Transaction is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Lifespan and CNE were offering and planning to offer prior to the Proposed Transaction.

3. A requirement that, for a period of time, Lifespan and CNE provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Requiring that Respondents' compliance with the order may be monitored at Respondents' expense by an independent monitor, for a term to be determined by the Commission.

6. Any other relief appropriate to correct or remedy the anticompetitive effects of the Proposed Transaction or to restore CNE as viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this seventeenth day of February, 2022.

By the Commission.

Concurring Statement

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss Complaint. The Joint Motion states that Respondents have withdrawn their Hart-Scott-Rodino Notification and Report Forms for the proposed acquisition. Having considered the Joint Motion, we have determined that it should be granted. Accordingly,

IT IS HEREBY ORDERED THAT the Joint Motion to Dismiss Complaint, dated February 28, 2022, is **GRANTED**, and the Complaint in this proceeding is dismissed without prejudice.

By the Commission.

CONCURRING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER AND CHAIR LINA M. KHAN

Today, the Commission voted unanimously to file, together with the state of Rhode Island, a complaint to block the merger of Lifespan Corporation ("Lifespan") and Care New England Health System ("CNE"). Our staff has done a thorough investigation that has culminated in a bipartisan action to challenge a merger that we have reason to believe will extinguish competition between the two dominant hospital systems in the state of Rhode Island.

Lifespan and CNE are the largest and second largest healthcare providers in Rhode Island. As alleged, the merged entity would control at least 70 percent of the markets for inpatient general acute care ("GAC") hospital services and inpatient behavioral health services in Rhode Island. In a broader market that includes surrounding Massachusetts towns (the "MARI area"), the parties would hold roughly 60 percent of the market for inpatient GAC hospital services and at least 50 percent of the market for inpatient behavioral health services. As the complaint alleges, the merger will eliminate the head-to-head competition among the parties in these markets that helps to keep prices lower and quality of care higher.

In addition to supporting the allegations of competitive harm in these markets, we write separately to note that we also would have supported an allegation that the effect of the proposed transaction may be to substantially lessen competition in a relevant labor market in violation of the Clayton Act. Staff's analysis found that [redacted].

Concurring Statement

Just as we want firms to compete with each other to sell goods and services to their customers, we want employers to compete with each other to attract and retain workers. Just as consumers are worse off when mergers diminish competition for goods and services based on price, quality, and innovation, workers suffer when mergers diminish competition for their labor and employers are insulated from competition driving improved wages, benefits, working conditions, and other terms of employment.

Indeed, there is a growing body of empirical research about the potential for competitive harm to labor markets from consolidation and concentration.[1] The loss of competition from mergers may be especially pernicious in the health care sector where skilled medical professionals are uniquely limited in employer options within their local geographic area.

Empirical research suggests that increased employer labor market power via hospital mergers can contribute to wage stagnation for skilled health care professionals.[2] We are grateful for the commitment of healthcare workers to serve our communities day in and day out, especially for these past two years on the front lines of the COVID-19 pandemic. They, just as all workers, deserve the protection of fair competition for their labor.

We take seriously concerns about competition in labor markets and will be vigilant in probing the effects mergers may have on competition for workers' labor. We applaud the staff for their thorough and diligent investigation of the labor market implications of this transaction, and we expect such analysis to continue in future cases.

1 See José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, Concentration in US Labor Markets: Evidence from Online Vacancy Data, 66 Lab. Econ. 101886 (Oct. 2020), https://www.sciencedirect.com/science/article/abs/pii/S0927537120300907; Ioana Marinescu and Herbert J. Hovenkamp, Anticompetitive Mergers in Labor Markets, 94 Ind. L. J. 1031 (2019), https://www.repository.law.indiana.edu/ilj/vol94/iss3/5/; Yue Qiu & Aaron J. Sojourner, Labor-Market Concentration and Labor Compensation (Jan. 8, 2019), https://ssrn.com/abstract=3312197; Council of Econ. Advisors, Labor Market Monopsony: Trends, Consequences, and Policy Responses, (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf).

2 Elena Prager and Matt Schmitt, Employer Consolidation and Wages: Evidence from Hospitals, 111(2) Am. Econ. Review 397 (Feb. 2021), https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20190690.

CONCURRING STATEMENT OF COMMISSIONERS CHRISTINE S. WILSON AND NOAH JOSHUA PHILLIPS

Today, the Commission issued an administrative complaint and authorized staff to seek a preliminary injunction to challenge the proposed combination of Lifespan Corporation and Care New England, two hospital systems in Rhode Island. We voted for the complaint, which reflects the diligent and much-appreciated investigative work of Commission lawyers and economists.

Chair Khan and Commissioner Slaughter write separately to state that they would have added a count in the complaint alleging harm in a relevant labor market. The Commission has challenged monopsony concerns in input markets in prior merger challenges.[1] Where the evidence supports such a challenge, we support bringing one. Here, we do not agree that it does. Including the additional count would also add complexity to the litigation and demand further resources to try the case, without changing the relief the Commission will obtain from a successful challenge to the current product market case or improving the Commission's odds of success. For these reasons, we did not support a labor-market count in this matter.

1 See Analysis of Agreement Containing Consent Orders to Aid Public Comment at 2, Grifols S.A., File No. 181-0081 (Aug. 1, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_analysis.pdf.

Complaint

IN THE MATTER OF

FASHION NOVA, LLC

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

Docket No. C-4759; File No. 192 3138
Complaint, March 18, 2022 – Decision, March 18, 2022

This consent order addresses Fashion Nova, LLC's marketing of its Fashion Nova brand apparel. Fashion Nova primarily sold its apparel through its www.fashionnova.com website. The complaint alleges that Fashion Nova violated Section 5(a) of the Federal Trade Commission Act by misrepresenting that the product reviews on www fashionnova.com accurately reflected the views of all purchasers who submitted product reviews to the website. The consent order prohibits Fashion Nova from misrepresenting: (1) that product reviews on its website accurately reflect the views of all purchasers who submitted reviews of its products; (2) that product reviews are unedited; (3) that product reviews are displayed regardless of the reviewer's opinion or rating; or (4) how product reviews factor into any composite or overall rating of a product..

Participants

For the *Commission*: *Amber Lee* and *Michael Ostheimer.*

For the *Respondents*: *Timothy Muris* and *Chad Hummel, Sidley Austin LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Fashion Nova, LLC, a limited liability company ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Fashion Nova, LLC is a California limited liability company with its principal office or place of business at 2801 E. 46th Street, Vernon, California 90058.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed Fashion Nova brand apparel.

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

Course of Conduct

4. Respondent has sold its Fashion Nova brand apparel primarily online through the fashionnova.com website.

5. Respondent specializes in "fast fashion" apparel designed and manufactured quickly and inexpensively to allow the mainstream consumer to buy the latest fashion trends. Most

Fashion Nova merchandise sells for under $49.99. Respondent has added as many as 1,000 or more new clothing designs per week.

6. Each product page on the Fashion Nova website provides consumers with the opportunity to review the product and rate it on a five-star scale. At the bottom of each product page is a section entitled "REVIEWS." Next to that is a button labeled "WRITE A REVIEW." Consumers who click on the button are encouraged to give the product a star rating from one to five, write a review, and "POST" it. If there are no customer reviews for a particular product, consumers are encouraged to "BE THE FIRST TO WRITE A REVIEW." Fashion Nova also sent its customers emails soliciting product reviews of the customers' recent purchases.

7. Each product page with existing reviews displayed the product's average star rating and a summary graph of the number of reviews with each star rating, followed by individual consumers' reviews and ratings.

8. Fashion Nova installed a third-party online product review management interface. The interface allows users to choose to have certain reviews automatically post based upon their star ratings and hold lower-starred reviews for client approval prior to posting.

9. From as early as late 2015 through mid-November 2019, Fashion Nova chose to have four- and five-star reviews automatically post to the website, but did not approve or publish hundreds of thousands lower-starred, more negative reviews.

Count I

Deceptive Review Practices

10. In connection with the advertising, promotion, offering for sale, or sale of Fashion Nova brand apparel, Respondent has, through the means described in Paragraphs 6 and 7, represented, directly or indirectly, expressly or by implication, that the product reviews on the Fashion Nova website accurately reflect the views of all purchasers who submitted reviews of Fashion Nova products to the website.

11. In fact, the product reviews on the Fashion Nova website did not accurately reflect the views of all purchasers who submitted reviews of the products because in numerous instances the Respondent suppressed product reviews with ratings lower than four stars. Therefore, the representation set forth in Paragraph 10 is false or misleading.

Violations of Section 5

12. 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 eighteenth day of March, 2022, has issued this Complaint against Respondents.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Fashion Nova, LLC, a California limited liability company with its principal office or place of business at 2801 E. 46th Street, Vernon, California 90058.

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

ORDER

Definitions

For purposes of this Order, the following definition applies:

A. "Respondent" means Fashion Nova, LLC, a limited liability company, and its successors and assigns.

Provisions

I. Prohibited Misrepresentations

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of any product must not make any misrepresentation, expressly or by implication, about product reviews or endorsements of the product, including any misrepresentation:

A. That product reviews on Respondent's website accurately reflect the views of all purchasers who submitted reviews of Respondent's products on the website;

B. That product reviews or endorsements of any products are unedited;

C. That product reviews or endorsements of any products are presented regardless of the endorser's opinion or rating; or

D. About how product reviews factor into any composite or overall rating of a product.

II. Product Review Display

IT IS FURTHER ORDERED that Respondent must display, on each of its websites displaying product reviews, all reviews for products currently offered for sale that are or were submitted by consumers to such website, including all reviews that Respondent or its agents previously withheld from public view. *Provided that* Respondent: (a) is not required to display reviews that are unrelated to Respondent's products and unrelated to Respondent's customer service, delivery, returns, or exchanges; (b) is not required to display reviews that contain unlawful, profane, obscene, vulgar, or sexually explicit content, or content that is inappropriate with respect to race, gender, sexuality, or ethnicity, so long as the criteria for withholding reviews is applied uniformly to all reviews submitted to such website; and (c) is not required to offer the opportunity to submit reviews for any or every product offered for sale on such website.

III. Monetary Relief

IT IS FURTHER ORDERED that:

A. Respondent must pay to the Commission $4,200,000 as monetary relief.

B. Such payment must be made within 8 days of the effective date of this Order by electronic fund transfer in accordance with instructions provided by a representative of the Commission.

IV. Additional Monetary Provisions

IT IS FURTHER ORDERED that:

A. Respondent relinquishes dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission to enforce its rights to any payment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by or on behalf of the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other relief (including consumer information remedies) as it determines to be reasonably related to Respondent's practices alleged in the Complaint. Any money not used is to be deposited to the U.S. Treasury. Respondent has no right to challenge any activities pursuant to this Provision.

E. In the event of default on any obligation to make payment under this Order, interest, computed as if pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for 10 days beyond the date that payment is due, the entire amount will immediately become due and payable.

F. Each day of nonpayment is a violation through continuing failure to obey or neglect to obey a final order of the Commission and thus will be deemed a separate offense and violation for which a civil penalty shall accrue.

G. Respondent acknowledges that its Taxpayer Identification Number (Employer Identification Number), which Respondent has previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

V. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

VI. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. Ninety days after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must:

1. Identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent;

2. Identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses;

3. Describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales;

4. Describe in detail whether and how the Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and

5. Provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Any designated point of contact; or

2. The structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re *Fashion Nova, LLC.*

VII. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer or other complaints relating to customer reviews, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

E. A copy of each unique advertisement or other marketing material making a representation subject to this Order and a copy of each product review submitted to Respondent; and

F. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondent, that tend to show any lack of compliance by Respondent with this Order.

VIII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

IX. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years;

B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Fashion Nova, LLC ("Fashion Nova").

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

This matter involves Fashion Nova's marketing of its Fashion Nova brand apparel. Fashion Nova primarily sold its apparel through its www.fashionnova.com website. The company invited customers to leave product reviews on its website and sent its customers emails soliciting product reviews for recent purchases. Each product webpage on the website with existing reviews displayed the product's average star rating and a summary graph showing the number of reviews with each star rating, followed by individual consumers' reviews and ratings. According to the

Commission's proposed complaint, from late 2015 through November 2019, Fashion Nova had four- and five-star reviews automatically posted to its website, but did not approve for posting or publish lower-starred, more negative reviews.

The proposed complaint alleges that Fashion Nova violated Section 5(a) of the FTC Act by misrepresenting that the product reviews on www.fashionnva.com accurately reflected the views of all purchasers who submitted product reviews to the website.

The proposed order contains provisions designed to prevent Fashion Nova from engaging in similar acts and practices in the future and to provide monetary relief.

Provision I prohibits Fashion Nova from misrepresenting: (1) that product reviews on its website accurately reflect the views of all purchasers who submitted reviews of its products; (2) that product reviews are unedited; (3) that product reviews are displayed regardless of the reviewer's opinion or rating; or (4) how product reviews factor into any composite or overall rating of a product.

Provision II requires Fashion Nova to display all product reviews for products currently offered for sale that are or were submitted to its website. The provision provides that Fashion Nova is not required to display reviews that are unrelated to its products and to its customer service, delivery, returns, or exchanges. The provision also provides that Fashion Nova is not required to display reviews that contain unlawful, profane, obscene, vulgar, or sexually explicit content, or content that is inappropriate with respect to race, gender, sexuality, or ethnicity, so long as the criteria for withholding reviews is applied uniformly to all reviews submitted. Finally, the company is not required to offer the opportunity to submit reviews for any or every product offered for sale on its website.

Provision III requires Fashion Nova to pay the Commission $4,200,000 within 8 days of the effective date of the order. Provision IV sets out additional requirements related to the monetary relief.

Provisions V through VIII of the proposed order are reporting and compliance provisions. Provision V requires acknowledgement of the order and dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Provision VI ensures notification to the FTC of changes in corporate status and mandates that the company submit an initial compliance report to the FTC. Provision VII requires the company to create and retain certain documents relating to its compliance with the order. Provision VIII mandates that the company make available to the FTC information or subsequent compliance reports, as requested.

Provision IX states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

LOUISIANA REAL ESTATE APPRAISERS BOARD

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

Docket No. 9374; File No. 161 0068
Complaint, May 30, 2017 – Decision, April 1, 2022

This consent order addresses the Louisiana Real Estate Appraisers Board's restraints on price competition for appraisal services in Louisiana. The complaint alleges that the Board's promulgation and enforcement of Rule 31101 displaced competition and introduced a regime of rate regulation and that the Board's actions exceeded the scope of its obligations under the appraisal independence provisions in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. The consent order prohibits the Board from enforcing Rule 31101, or adopting or enforcing any other rule that sets, determines, or fixes compensation levels for appraisal services. The order also prohibits the Board from raising, fixing, maintaining, or stabilizing compensation levels for appraisal services; requiring or encouraging an AMC to pay any specific fee or range of fees for appraisal services; or requiring or encouraging appraisers to request any specific fee or range of fees for appraisal services.

Participants

For the *Commission*: *Lisa Kopchik, J. Alexander Ansaldo, Thomas H. Brock, Wesley Carson, Rachel Frank,* and *Kenneth Merber.*

For the *Respondents*: *W. Stephen Cannon, Seth Greenstein, Richard Levine, James Kovacs, Allison Sheedy,* and *Wyatt Fore, Constantine Cannon LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (the "Commission"), having reason to believe that the Louisiana Real Estate Appraisers Board has violated Section 5 of the Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

NATURE OF THE CASE

1. The Louisiana Real Estate Appraisers Board (the "Board"), a state agency controlled by licensed real estate appraisers, has unreasonably restrained price competition for real estate appraisal services provided to appraisal management companies ("AMCs") in Louisiana. AMCs act as agents for lenders in arranging for real estate appraisals.

2. The Board adopted a regulation, effective as of November 20, 2013, purportedly implementing a requirement under federal and Louisiana law that AMCs pay appraisers a "customary and reasonable" fee for real estate appraisal services. In both promulgating and subsequently enforcing that regulation, the Board has unlawfully restrained price competition.

3. First, by its express terms, the Board's fee regulation unreasonably restrains competition by displacing a marketplace determination of appraisal fees. Under the regulation, AMCs must compensate appraisers at a rate determined by one of three methods: (1) an AMC may use a survey of fees recently paid by lenders in the relevant geographic area; (2) an AMC may use a fee schedule established by the Board; or (3) an AMC may identify recently paid fees and adjust this base rate using six specified factors. By requiring one of these three methods, the Board prevents AMCs and appraisers from arriving at appraisal fees through bona fide negotiation and through the operation of the free market.

4. Second, in subsequently enforcing its regulation, the Board has unlawfully restrained price competition, effectively requiring AMCs to match or exceed appraisal rates listed in a published survey. To that end, the Board commissioned the Southeastern Louisiana University Business Research Center ("SLU Center") to survey recent fees paid by lenders. The SLU Center conducted three annual surveys, in 2013, 2014, and 2015, and produced three reports on fees paid in 2012, 2013, and 2014, respectively. According to the Board, the SLU Center reports identify the median fees paid by lenders for five types of appraisals in nine geographic regions in Louisiana, stated separately for urban, suburban and rural settings. The Board provided AMCs with notice of the SLU Center reports and posted the reports on its website.

5. The Board has effectively required AMCs to pay appraisal fees that equal or exceed the median fees identified in the SLU Center reports. For example, the Board initiated two enforcement actions against AMCs for allegedly violating fee requirements under the Board's regulation. In each case, the Board resolved the enforcement action by securing the AMC's agreement to pay appraisal fees at or above the level set forth in the SLU Center reports. Other AMCs that learned of the Board's enforcement actions, in order to avoid disciplinary action, now use the SLU Center reports to determine the fees that they pay appraisers.

6. Through the promulgation of its regulation and through its investigative and enforcement actions, the Board—controlled at all relevant times by active market participants—has harmed competition through its regulation of fees paid by AMCs for appraisal services.

7. Independent state officials have not supervised the Board's discretionary actions. The actions of the Board restrict price competition among appraisers without any legitimate justification or defense, including the "state action" defense, and therefore violate Section 5 of the Federal Trade Commission Act.

RESPONDENT

8. The Louisiana Real Estate Appraisers Board is organized, exists, and transacts business under and by virtue of the laws of the State of Louisiana, with its principal office and place of business located at 9071 Interline Avenue, Baton Rouge, Louisiana 70809. The Board regulates and licenses both appraisers and AMCs.

9. AMCs are independent companies engaged by lenders to procure real estate appraisals. AMCs generally may not operate in Louisiana without first obtaining a license from the Board. The Board is empowered to discipline an AMC that violates any applicable Louisiana

statute or regulation, including by revoking or suspending an AMC's license and imposing fines or civil penalties.

10. By statute, the Board consists of eight licensed appraisers and two representatives of the lending industry. One of the eight appraiser members must also be engaged in the business of appraisal management. The Governor of Louisiana appoints each Board member for a three-year term.

11. Collectively, the appraiser members control the operation of the Board. Appraiser members are active market participants because, among other things, appraiser members are licensed by the Board and have private interests in the Board's acts and practices.

JURISDICTION

12. The Board is a "person" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

13. The acts and practices of the Board, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. Appraisers offering appraisal services in Louisiana contract with AMCs based outside of Louisiana, including for the transfer of money across state lines. In addition, AMCs that contract for appraisal services in Louisiana act as agents for lenders based outside of Louisiana.

THE PROVISION OF APPRAISAL SERVICES THROUGH APPRAISAL MANAGEMENT COMPANIES

14. Most residential real estate purchases are financed by a mortgage on the real estate that is the subject of the transaction. In most cases, a residential mortgage requires an appraisal of the real estate used as collateral for the loan, performed by an appraiser licensed under state law.

15. Institutions that lend money for residential real estate transactions engage appraisers directly or through an agent, including an AMC. An AMC typically maintains a "panel" of licensed appraisers in each locality in which it does business, negotiates with and engages an appraiser from the panel, pays the appraiser for an appraisal report, reviews and edits the appraisal report, and provides the appraisal report to the lender, in exchange for a fee.

Federal Law Regarding AMCs

16. In the wake of the financial crisis of 2007-2008, policy makers perceived that inflated appraisals had contributed to a housing "bubble," *i.e.*, an unsustainable run-up in housing prices. One concern was that some appraisers experienced undue pressure from, or had ties to, lenders or other parties with financial interests in mortgage transactions.

17. In response to these concerns, Congress included in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") provisions intended to ensure that

appraisers would operate independently, shielded from inappropriate influence exerted by lenders or other interested parties.

18. One set of appraisal independence provisions in Dodd-Frank and its implementing rules prohibits contacts between lender personnel and retained appraisers that might influence an appraiser's independent judgment. In part because of these prohibitions, lenders increasingly turned to AMCs to arrange for required appraisal services. Today, lenders engage AMCs to obtain an appraisal in most residential real estate transactions.

19. Also to promote appraisal independence, Dodd-Frank requires lenders and their agents, in covered transactions, to compensate appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." Covered transactions are loans that extend consumer credit secured by the consumer's principal dwelling, such as mortgages and home equity loans.

20. Dodd-Frank includes a provision known as an "antitrust savings clause." Dodd-Frank provides that "[n]othing in this Act … shall be construed to modify, impair, or supersede the operation of any of the antitrust laws." In other words, Congress specifically directed that Dodd-Frank was not intended to displace generally applicable antitrust principles, including the prohibition on unreasonable agreements in restraint of trade.

21. Under Dodd-Frank, Congress tasked the Board of Governors of the Federal Reserve System (the "Federal Reserve") with issuing rules on behalf of the Federal Reserve and other federal banking agencies to further specify appraisal independence requirements.

22. In October 2010, the Federal Reserve issued rules implementing Dodd Frank's appraisal independence requirements. In its commentary on the rules, the Federal Reserve interpreted the statutory requirement that lenders pay "customary and reasonable" appraisal fees to mean "that the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rate of compensation" for appraisers.

23. The October 2010 rules specify that lenders or their agents presumptively comply with the statutory customary and reasonable appraisal fee requirement in one of two ways ("presumptions of compliance"). A lender or its agent may pay to an appraiser a fee "reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property," as informed by six identified factors: (i) the type of property; (ii) the scope of work; (iii) the time in which the appraisal must be performed; (iv) the appraiser's qualifications; (v) the appraiser's experience and professional record; and (vi) the appraiser's work quality. Alternatively, a lender or its agent may pay a fee based on "objective third-party information," including fee schedules, studies, and independent surveys of recent appraisal fees (excluding fees paid by AMCs).

24. In commentary on the October 2010 rules, the Federal Reserve clarified that the two identified presumptions of compliance are not the only permissible ways to comply with the customary and reasonable fee requirement under Dodd-Frank. If a lender or its agent arrives at an

appraisal fee in another way, whether the fee is customary and reasonable shall depend on all relevant facts and circumstances, without a presumption of either compliance or violation.

25. Another provision in Dodd-Frank directs federal banking agencies to establish minimum requirements for states that choose to regulate AMCs. Among other things, these requirements must ensure that "appraisals are conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards" set forth in Dodd-Frank. Congress did not require states to delegate regulation of customary and reasonable fee requirements to active market participants.

26. In 2015, federal banking agencies jointly issued rules implementing this Dodd-Frank provision. The rules provide that any state that chooses to regulate AMCs must require any AMC that is not regulated by a federal banking agency to "[e]stablish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with [Dodd Frank's appraisal independence requirements]." The rules also provide that any state that chooses to regulate AMCs must maintain an AMC licensing program within the state appraiser licensing agency with mechanisms to discipline AMCs for violations of appraisal-related laws. The rules do not require states or state appraiser licensing agencies to impose standards for customary and reasonable fee requirements beyond what federal law provides, or to set customary and reasonable fees at any particular level.

Louisiana Statutes Regarding AMCs

27. In 2009, the Louisiana legislature passed a new law subjecting AMCs to oversight by the Board (the "AMC Law"), and requiring any AMC that wishes to operate in Louisiana to obtain a license from the Board. The Board is empowered to investigate, censure, and discipline AMCs that violate the law.

28. In 2012, the Louisiana legislature amended the AMC Law to require AMCs to "compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the presumptions of compliance under federal law." The AMC Law authorizes the Board to promulgate regulations necessary for enforcement of the AMC Law. The AMC Law does not require the Board to impose standards for customary and reasonable fee requirements beyond what federal law provides, or to set customary and reasonable fees at any particular level.

THE BOARD'S ACTIONS TO SUPPRESS COMPETITION

29. The Board suppresses competition among appraisers and displaces market forces. The Board's executive director has stated: "Any semblance of a free market approach went out the window with the exponential growth & power of AMCs as a result of Dodd-Frank."

30. In 2013, driven by its apparent dissatisfaction with the free market, the Board adopted a regulation purporting to implement the AMC Law, known as Rule 31101. The regulation, which specifies how AMCs must comply with the customary and reasonable fee

requirement, unlawfully restrains competition on its face by prohibiting AMCs from arriving at an appraisal fee through the operation of the free market.

31. Specifically, Rule 31101 requires AMCs to pay fees set pursuant to one of three prescribed methods. First, an AMC may rely on third-party fee schedules, studies, or surveys of fees paid by lenders. Second, an AMC may rely on a fee schedule formally adopted by the Board. Third, an AMC may rely on rates recently paid in the relevant geographic market, adjusted by the six factors identified in the parallel federal rules (set out in paragraph 23 above). Because Rule 31101 identifies these methods as the exclusive ways for arriving at customary and reasonable fees, it precludes AMCs from arriving at appraisal fees through the operation of the free market.

32. In enforcing Rule 31101, the Board has also unlawfully restrained price competition. Although Rule 31101 identifies three methods of compliance, the Board has effectively required payment of appraisal fees at least as high as median fees listed in fee surveys that the Board itself has commissioned.

33. Beginning in 2013, the Board commissioned the SLU Center to survey recent fees paid by lenders to appraisers in Louisiana. The SLU Center surveyed lenders and, at the Board's request, appraisers. The SLU Center encountered difficulties, however, in getting sufficient responses from lenders and therefore could not generate statistically significant lender data.

34. In contrast, appraisers were eager to participate in the survey. The Board, through its executive director, encouraged appraisers to participate, suggesting that survey results could be used to set future fees. Appraisers responded, generally reporting fees significantly higher than the fees reported by the lenders that participated in the survey.

35. For fees paid in each of 2012, 2013, and 2014, the SLU Center prepared a report identifying median appraisal fees for urban, suburban, and rural areas statewide and in nine geographic regions in Louisiana, for each of five common types of real estate appraisals. For example, the 2014 survey reported that the median statewide fee for the appraisal of an individual condominium unit in a suburban area was $450. Reported median fees combined survey responses from lenders and appraisers. The Board provided AMCs with notice of the SLU Center survey results and posted them on its website.

36. The Board views the SLU Center survey results as setting a floor for appraisal fees that AMCs must pay appraisers. As the Board's executive director reportedly said at an industry conference, the survey "sets out our expectations regardless of what presumption might be used, regardless of what analytics and magic formulas an AMC might have, this is our expectation." AMCs that do not follow the rates set forth in the SLU Center reports risk investigation and discipline by the Board.

37. One investigation, against an AMC known as CoesterVMS ("Coester"), began after an appraiser complained that the AMC was paying fees "well below a [customary and reasonable] fee for the area." The investigation led to a Board complaint alleging that Coester had violated customary and reasonable fee requirements under Louisiana law. The matter was resolved by a stipulated order under which Coester agreed to "follow the current Louisiana fee schedule," *i.e.*,

the median fees set forth in SLU Center reports. Coester also agreed to pay the Board $5,000 in administrative costs.

38. The Board publicized its settlement with Coester. The settlement was closely followed within the industry. Trade press reported that the Board had "made history" with its enforcement against an AMC of the customary and reasonable fee requirement.

39. Another investigation, against an AMC known as iMortgage Services ("iMortgage"), similarly began after an appraiser complained that the AMC had offered low fees. The investigation led to a Board complaint alleging that scores of appraisal fees paid by iMortgage failed to meet the customary and reasonable fee requirement under Louisiana law. Over the course of proceedings, the Board dropped allegations about most of these transactions. Among others, the Board dropped all allegations related to appraisal fees that it could not directly measure against SLU Center survey results, and allegations related to fees that were equal to or exceeded median fees reported in the survey. In the end, the Board limited the proceeding to nine appraisal fees that were lower than corresponding median fees set forth in the SLU Center report.

40. After a hearing, the Board entered findings and an order against iMortgage. The Board determined that iMortgage violated the customary and reasonable fee requirement under Louisiana law in each of the nine instances addressed at the hearing. The Board censured iMortgage, fined it $10,000 plus administrative costs, and conditionally suspended iMortgage's license to operate as an AMC. The Board stayed the suspension pending iMortgage's submission of an acceptable plan to comply with the Board's ruling. The Board rejected iMortgage's first proposed compliance plan and accepted iMortgage's compliance plan only when iMortgage agreed to pay fees consistent with the most recent SLU Center report.

41. The Board's proceeding against iMortgage was public and closely followed within the industry. Trade press reported on the Board's ruling that iMortgage had not paid customary and reasonable appraisal fees and on the sanctions that the Board imposed on the AMC.

42. The Board investigated other AMCs in response to appraiser complaints about low fees. In at least two other instances, the Board discontinued investigations after AMCs agreed to adhere to median fees set forth in SLU Center reports.

43. The conduct of the Board constitutes concerted action among the Board and its members.

EFFECTS ON COMPETITION OF THE BOARD'S ACTIONS

44. The Board's actions have unreasonably restrained competition and harmed consumers. The Board's actions tend to restrain significantly appraisal fee negotiations between appraisers and AMCs, and to raise prices paid by AMCs for appraisal services in Louisiana above competitive levels.

45. As a result of the Board's actions, Louisiana appraisers have demanded that AMCs pay appraisal fees at least as high as the median fees reported in Board-commissioned SLU Center

surveys. In one case, the Board's Chairman, acting in his capacity as an active appraiser, wrote to an AMC:

> I am not willing to accept and/or complete your application for your appraisal panel…. The fee(s) schedule that [the AMC] is offering does not meet Customary and Reasonable fee(s) for the state of Louisiana…. See attached Louisiana Residential Real Estate Appraisal Fees 2014 Study…. The Louisiana real estate appraisers board is taking these issues very seriously.

Other appraisers sent similar letters to AMCs.

46. In another case, an appraiser explicitly demanded the corresponding median fee set forth in a Board-commissioned SLU Center survey: "I am requesting a fee increase to $450 which is the R&C [reasonable and customary] fee that is indicated in the fee survey for this type of product."

47. In another case, an appraiser advised an AMC: "Appraisers in Louisiana have gone to great lengths to establish customary and reasonable fees statewide. You can find a list of reasonable and customary fees by area in the state of Louisiana on the appraisal board's website."

48. As a result of these demands and the Board's enforcement campaign, AMCs operating in Louisiana have increasingly used median fees reported in SLU Center surveys to set appraisal fees. Several AMCs that have been the target of Board investigations and enforcement actions, including Coester and iMortgage, have explicitly agreed with the Board to use the SLU Center reports to set appraisal fees. Other AMCs have decided to use SLU Center reports to set fees after learning of the Board's enforcement campaign, in an effort to avoid Board scrutiny and sanctions.

49. The relevant market for purposes of analyzing the Board's conduct consists of real estate appraisal services sold to AMCs in Louisiana. While appraisal fees may vary by region or metropolitan area within Louisiana, the Board possesses and has exercised the power to raise fees paid by AMCs statewide through its regulation of AMCs.

50. The Board possesses and has exercised the power to restrain competition among appraisers in the relevant market. The Board's actions have tended to suppress, and will continue to suppress, price competition among appraisers for the provision of real estate appraisal services to AMCs in Louisiana.

51. Neither Congress nor the Louisiana legislature has required the Board to set customary and reasonable fees at a particular level. Rather, the Board, acting in its discretion, has effectively required AMCs to pay appraisal fees that equal or exceed the median fees identified in SLU Center survey reports.

52. The Louisiana AMC Law does not clearly articulate an intention to displace competition in the setting of appraisal fees.

53. A controlling number of Board members are active market participants. The Board's actions have not been supervised by independent state officials, that is, by persons who are not participants in the Louisiana appraisal industry.

54. Congress did not, through Dodd-Frank or any other statute, require, authorize, or intend that unsupervised active market participants shall regulate appraisal fees. States may comply with Dodd-Frank requirements without violating the antitrust laws.

VIOLATION OF THE FTC ACT

55. The acts and practices of the Board described above constitute concerted action that unreasonably restrains trade and are unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, and the effects thereof, are continuing and will continue or recur in the absence of appropriate and effective relief.

NOTICE

Notice is hereby given to the Respondent that the thirtieth day of January, 2018, at 10:00 a.m., is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington, DC 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 the 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 the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 hearing as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of said Rules.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an 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., Washington, DC 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 five days of receiving the 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 the Board has violated or is violating 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 the Board to rescind and to cease and desist from enforcing Rule 31101, any order based on an alleged violation of Rule 31101, and any agreement with an AMC or other person resolving an alleged violation of Rule 31101.

2. Requiring the Board to cease and desist from raising, fixing, maintaining, or stabilizing prices or price levels, rates or rate levels, or engaging in any other pricing action in connection with the sale of real estate appraisal services.

3. Requiring the Board to cease and desist from adopting, promulgating, or enforcing any regulation, rule, or policy relating to the determination of compensation levels for real estate appraisal services.

4. Requiring the Board to provide appropriate notice of the Commission's order, including by:

    a. placing a prominent notice on the Board's website stating that the Board has been ordered to rescind and cease and desist from enforcing Rule 31101, together with a link to the Commission's order;

    b. sending by mail or email to each AMC licensed in Louisiana a copy of the notice placed on the Board's website, together with a link to the Commission's order; and

    c. distributing a copy of the Commission's order to every current and future Board member; and every officer, manager, representative, agent and employee of the Board.

5. Such additional relief as is necessary to correct or remedy, or prevent the recurrence of, the anticompetitive acts alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of May, 2017, issues its complaint against the Board.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") issued its complaint charging Respondent Louisiana Real Estate Appraisers Board ("LREAB" or "Respondent") with violation of Section 5 of the Federal Trade Commission Act, as amended. The Commission served Respondent with a copy of the complaint, together with notice of contemplated relief, and Respondent filed its answer to the complaint denying said charges.

The Respondent, its attorney, and counsel for the Commission have executed an Agreement Containing Consent Order ("Consent Agreement") containing (1) an admission by the Respondent of all the jurisdictional facts set forth in the complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the complaint, or that the facts alleged in the complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R §2.34. Now in further conformity with the procedure prescribed in Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent Louisiana Real Estate Appraisers Board is an industry regulatory board of the State of Louisiana with its office and principal place of business located at 9071 Interline Avenue, Baton Rouge, Louisiana 70809.

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. Definitions

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

A. "LREAB" or "Respondent" means Louisiana Real Estate Appraisers Board, its members, officers, committees, subcommittees, representatives, district review members, employees, agents, consultants, successors, and assigns.

B. "Appraisal Fee Survey" means any survey of fees paid for Real Estate Appraisal Services.

C. "Appraisal Management Company" means any person or entity that (1) administers a network of independent contract appraisers to perform real estate appraisal services for lenders or other clients or (2) receives requests for residential appraisal services from clients and enters into agreements, written or otherwise, with one or more independent appraisers to perform the real estate appraisal services contained in the request.

D. "ASC" means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

E. "Clear and Conspicuous Notice" means a visual communication that, by its size, contrast, location, and other characteristics, stands out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

F. "LREAB Employee" means a person employed by Respondent's Administrative Division, Investigative Division, or any future division to which comparable duties and responsibilities are assigned.

G. "Real Estate Appraiser" means any person or entity that performs Real Estate Appraisal Services.

H. "Real Estate Appraisal Services" means residential valuation services, including appraisal, appraisal review, and appraisal consulting, as these services are defined under the Uniform Standards for Professional Appraisal Practice.

I. "Rule 31101" means subparts A, B, and C of Rule 31101 of Title 46 Part LXVII of the Professional and Occupational Standards of the Louisiana Administrative Code, La. Admin. Code tit. 46, pt. LXVII, §31101 (A, B, and C) (2013, 2017).

II. Prohibitions

IT IS FURTHER ORDERED that Respondent, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from, directly or indirectly:

A. Adopting, promulgating, or enforcing any regulation or rule that sets, determines, or fixes compensation or compensation levels for Real Estate Appraisal Services, including enforcing Rule 31101 or any order entered against any person or entity based on an alleged violation of Rule 31101;

B. Raising, fixing, maintaining, or stabilizing prices or price levels, compensation or compensation levels, rates or rate levels, or payment terms, or engaging in any other action relating to pricing for Real Estate Appraisal Services, including:

1. Adopting, promulgating, or enforcing a fee schedule for Real Estate Appraisal Services;

2. Requiring, encouraging, or advising an Appraisal Management Company to pay any specific fee or range of fees for Real Estate Appraisal Services, including but not limited to a fee reported in an Appraisal Fee Survey; or

3. Requiring, encouraging, or advising any Real Estate Appraiser to request a specific fee or range of fees from an Appraisal Management Company for Real Estate Appraisal Services; or

C. Discriminating against an Appraisal Management Company based, in whole or part, on the fees the company pays for Real Estate Appraisal Services, including by requesting information from, conducting audits or investigations of, or holding enforcement hearings concerning, the company.

Provided, however, that this Paragraph II.C. shall not prohibit Respondent from taking any action necessary to comply with specific written instructions to the Board from the ASC pursuant to an ASC Compliance Review of the Louisiana Appraisal Management Company compliance program and identified by the ASC as necessary to comply with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, *provided further,* that no later than 15 days after receiving such instructions, Respondent shall provide Commission staff with a copy of the instructions and a description of how Respondent will comply with them.

III. Additional Obligations

IT IS FURTHER ORDERED that:

A. No later than 30 days from the date this Order is issued, Respondent shall rescind (1) Rule 31101 and (2) any enforcement order that Respondent has entered against any person or entity based on an alleged violation of Rule 31101.

B. No later than 60 days after the date of implementation, Respondent shall notify the Commission of a new rule or an amendment to an existing rule relating to compensation or compensation levels for Real Estate Appraisal Services.

Respondent shall send the notification electronically to bccompliance@ftc.gov and include the text of the rule or amendment and a statement of the reasons for adoption of the rule or amendment.

IV. Notice

IT IS FURTHER ORDERED that Respondent shall:

A. No later than 30 days from the date this Order is issued:

1. Post and maintain for one year on the homepage of LREAB's website a Clear and Conspicuous Notice that states "IMPORTANT: The Federal Trade Commission has ordered LREAB to rescind and cease enforcing the customary and reasonable fee rule, LAC 46:LXVII.31101 (A, B, and C). The Order is available at [hyperlink to Order on ftc.gov];"

2. Send a copy of this Order and the Commission's complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to each LREAB member and each LREAB Employee; and

3. Send a letter on LREAB's official letterhead containing only the text shown in Appendix A of this Order, by first-class mail with delivery confirmation or electronic mail with return confirmation, to each Appraisal Management Company licensed by the state of Louisiana. If sent by first-class mail, the letter shall be placed in an envelope containing only the text shown in Appendix B of the Order. If sent by electronic mail, the subject line of the electronic mail shall contain only "Important Information About Louisiana's C&R Fee Rule."

B. For a period of 5 years from the date this Order is issued, send a copy of this Order and the Commission's complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to each new LREAB member and each new LREAB Employee, no later than 10 days from the date that such new member or person assumes his or her position with LREAB.

V. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondent shall submit an interim compliance report 60 days after the date this Order is issued; annual compliance reports one year after the date this Order is issued, and annually for the next 4 years on the anniversary of that

date; and additional compliance reports as the Commission or its staff may request; and

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is in compliance with the Order. Conclusory statements that Respondent has complied with its obligations under this Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondent has implemented or plans to implement to ensure that it has complied or will comply with each paragraph of this Order.

B. For a period of 5 years after filing a compliance report, Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under this Order during the period covered by such compliance report. Respondent shall provide copies of these documents to Commission staff upon request.

C. Respondent shall verify its compliance reports in the manner set forth in 28 U.S.C. § 1746 by the Executive Director of the Board or the Chairman of the Board. Respondent shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a).

VI. Change in Respondent

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

A. Any proposed dissolution of Respondent; or

B. Any other change in Respondent if such change may affect compliance obligations arising out of this Order.

VII. Access

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 and upon 5 days' notice to Respondent made to its principal place of business as identified in this Order, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession, or under the control, of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and

B. To interview members or employees of the Respondent, who may have counsel present, regarding such matters.

VIII. Term

IT IS FURTHER ORDERED that this Order shall terminate on April 1, 2042.

By the Commission.

Appendix A Notice

[Louisiana Real Estate Appraisers Board Letterhead]

To Appraisal Management Companies licensed in Louisiana:

The Federal Trade Commission has alleged that our customary and reasonable fee rule, 46:LXVII.31101, subparts A, B, and C ("Rule"), and our enforcement of those parts of the Rule violate federal antitrust laws. We deny the charges.

As part of a settlement with the FTC, we are contacting Appraisal Management Companies licensed in Louisiana to tell them that the Rule, and any Order based on an alleged violation of the Rule, have been rescinded and will no longer be enforced.

If you have questions about this lawsuit or the settlement, you can contact Federal Trade Commission staff:

Lisa B. Kopchik, Attorney PMcDermott@FTC.gov	or	Patricia M. McDermott, Attorney LKopchik@FTC.gov
202-326-3139		202-326-2569

Sincerely, [Signature]

Bruce Unangst, Executive Director

Appendix B Envelope

Louisiana Real Estate Appraisers Board
[Return address or printed text as found on the Board's usual business stationery]

[Postage]

FORWARDING AND RETURN POSTAGE GUARANTEED
ADDRESS CORRECTION SERVICE REQUESTED

[Appraisal Management Company]
Attn: [Contact Name
Street Address
City, State and Zip Code]

IMPORTANT INFORMATION ABOUT LOUISIANA'S C&R FEE RULE

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. INTRODUCTION

The Federal Trade Commission ("Commission") has accepted, subject to final approval by the Commission, an Agreement Containing Consent Order ("Consent Agreement") with the Louisiana Real Estate Appraisers Board ("the Board"). The Consent Agreement resolves allegations against the Board in the administrative complaint issued by the Commission on May 31, 2017.

The Commission has placed the Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or issue the proposed Order.

The proposed Order is for settlement purposes only and does not constitute an admission by the Board that it violated the law, or that the facts alleged in the complaint, other than jurisdictional facts, are true.

II. CHALLENGED CONDUCT

This matter involves allegations that the Board unreasonably restrained price competition for appraisal services in Louisiana. The Board is a state regulatory agency controlled by Louisiana-licensed appraisers. The Commission's complaint challenges the Board's promulgation and enforcement of subparts A, B, and C of Rule 31101 of Title 46 Part LXVII of the Professional and Occupational Standards of the Louisiana Administrative Code ("Rule 31101").

The complaint alleges that the Board's promulgation and enforcement of Rule 31101 displaced competition and introduced a regime of rate regulation. The Board's actions had the effect of requiring appraisal management companies ("AMCs") to pay rates for appraisal services consistent with median fees identified in fee surveys commissioned and published by the Board. Specifically, the Board investigated and issued complaints against AMCs that paid fees below the rates specified in the surveys, and entered into settlement agreements with AMCs that required those companies to pay fees at or above the median fee survey levels.

The complaint alleges that the Board's actions exceeded the scope of its obligations under the appraisal independence provisions in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The complaint further alleges that the Board's conduct resulted in anticompetitive harm in the form of higher appraisal fees paid by AMCs in Louisiana, and that this harm is not outweighed by any procompetitive benefits.

III. LEGAL ANALYSIS

The factual allegations in the complaint support a finding that the Board violated Section 5 of the FTC Act, 15 U.S.C. § 45, by promulgating and enforcing Rule 31101.

Section 5 of the FTC Act prohibits unfair methods of competition, including unlawful agreements in restraint of trade prohibited by Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] Under Section 1, a plaintiff must show (1) concerted action that (2) unreasonably restrains competition.[2]

1 15 U.S.C. § 45; see, e.g., FTC v. Cement Inst., 333 U.S. 683, 693–94 (1948).

2 15 U.S.C. § 1; see, e.g., Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 342–343 (1982).

Analysis to Aid Public Comment

A state regulatory board that consists of market participants with distinct and potentially competing economic interests engages in concerted action when it adopts or enforces rules that govern the conduct of its members' separate businesses.[3] Rule 31101, adopted and enforced by the Board, regulates the fees paid by AMCs to appraisers in Louisiana, including those appraisers that serve as members of the Board.

Price regulation practiced by market participants is a form of price fixing and is per se unlawful.[4] In the alternative, a restraint on price competition may be judged inherently suspect: that is, the agreement is presumed to be anticompetitive because the anticompetitive nature of the challenged conduct is obvious.[5]

The state action defense is not applicable here. On a motion for partial summary decision, the Commission concluded that: (1) the Board is controlled by active market participants; (2) therefore, in order to constitute state action, the Board's conduct must be actively supervised by the State; and (3) the Board's promulgation and enforcement of Rule 31101 were not actively supervised by the State of Louisiana.[6]

The Dodd-Frank Act also does not give rise to a defense to antitrust liability. Exemptions from the antitrust laws are to be narrowly construed,[7] and the general rule is that, except where federal statutes impose conflicting obligations, courts will give effect to both statutes.[8] The "good faith regulatory compliance defense" to antitrust liability is a narrow, rarely invoked defense. The defense applies only when there is an inconsistency between the antitrust laws and the imperatives imposed on the respondent by federal regulation, such that the respondent is not able to comply

3 See N.C. Bd. of Dental Exam'rs v. FTC., 574 U.S. 494, 510–12 (2015); In re N.C. Bd. of Dental Exam'rs, 2011 FTC LEXIS 290 at *38–39, 2011-2 Trade Cas. (CCH) P77,705 (Comm'n Op. and Order, Dec. 7, 2011); see also Mass. Bd. of Registration in Optometry, 110 FTC 549, 1988 WL 1025476 at *47–48 (Comm'n Op. and Order, June 13, 1988).

4 FTC v. Ticor Title Ins. Co., 504 U.S. 621, 639 (1992) (equating price regulation by market participants with per se unlawful price fixing); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103–106 (1980) (same); Goldfarb v. Va. State Bar, 421 U.S. 773, 781–82 (1975) (same); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386–390 (1951) (same); Ky. Household Goods Carriers Ass'n., Inc. v. FTC, 199 F. App'x 410, 411 (6th Cir. 2006) (same).

5 N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 359–63 (5th Cir. 2008); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35–36 (D.C. Cir. 2005).

6 In the Matter of La. Real Est. Appraisers Bd., No. 9374, Op. and Order of the Comm'n, at 19–20 (Apr. 10, 2018).

7 Union Labor Life Ins. Co., v Pireno, 458 U.S. 119, 126 (1982).

8 See Pom Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 107 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); United States v. Borden Co., 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.")

with both laws.[9] "The defense does not insulate anticompetitive conduct that a respondent freely chooses to undertake; the conduct must be necessitated by regulatory and factual imperatives."[10]

With regard to the Board's conduct at issue here, there is no conflict or inconsistency between the Board's obligations under the Dodd-Frank Act and its obligations under the antitrust laws; the Board may readily comply with both laws. The Dodd-Frank Act invites States (and not private actors such as the Board) to cooperate with federal authorities in regulating the real estate appraisal industry. The antitrust laws constrain the actions of private actors (such as the Board), but do not apply to states acting in their sovereign capacity.[11] It follows that, if the State of Louisiana wishes to use a regulatory board as its instrument for implementing Dodd-Frank responsibilities, it can avoid antitrust complications by complying with the requirements of the state action doctrine. This assures that the resulting regulatory regime furthers the governmental interests of the State, and not the private interests of market participants.[12]

IV. THE PROPOSED ORDER

The proposed Order remedies the Board's anticompetitive conduct by requiring rescission of Rule 31101 and prohibiting the Board from regulating or fixing appraisal fees in Louisiana.

Sections II and III of the proposed Order address the core of the Board's anticompetitive conduct.

Paragraph II.A prohibits the Board from enforcing Rule 31101, or adopting or enforcing any other rule that sets, determines, or fixes compensation levels for appraisal services.

Paragraph II.B prohibits the Board from raising, fixing, maintaining, or stabilizing compensation levels for appraisal services; requiring or encouraging an AMC to pay any specific fee or range of fees for appraisal services; or requiring or encouraging appraisers to request any specific fee or range of fees for appraisal services. Prohibited conduct includes adopting a fee schedule for appraisal services or requiring AMCs to pay fees consistent with a fee survey or schedule of appraisal fees.

Paragraph II.C prohibits the Board from discriminating against any AMC based on the fees that the company pays for appraisal services except in the limited circumstance described below. Prohibited discrimination includes requesting information, conducting audits or investigations, or

9 In the Matter of La. Real Est. Appraisers Bd., No. 9374, Op. and Order of the Comm'n, at 5–7 (May 6, 2019) ("May 6 Comm'n Order"); see also PhoneTele, Inc. v. Am. Tel. & Tel. Co., 664 F.2d 716, 737-38 (9th Cir. 1981) (defendant must establish that "at the time the various anticompetitive acts alleged here were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority").

10 May 6 Comm'n Order at 7 (citing PhoneTele, 664 F.2d at 737-38).

11 Parker v. Brown, 317 U.S. 341, 350–51 (1943).

12 See N.C. Dental, 574 U.S. at 505–12.

holding enforcement hearings based on the AMC's fees. The non- discrimination provision includes a proviso that permits the Board to take actions necessary to comply with specific written instructions it receives in conjunction with a compliance review by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council, which monitors States' implementation of minimum requirements for registration and supervision of AMCs under the Dodd-Frank Act. A copy of these instructions must be provided to Commission staff no later than 15 days after receipt, together with a description of how the Board will comply with them. The proviso does not apply to or limit the broad prohibitions on interfering with price competition set forth in Paragraphs II.A and II.B of the proposed Order.

Paragraph III.A requires the Board to rescind Rule 31101, and any enforcement order based on an alleged violation of Rule 31101, within 30 days of the issuance of the Order.

Paragraph III.B requires the Board to notify the Commission within 60 days any time the Board adopts a new rule or amends an existing rule relating to compensation levels for appraisal services.

Section IV requires the Board to provide notice of the Order to the Board's members and employees, as well as each AMC licensed by the Board.

Section V requires the Board to file with the Commission verified written compliance reports.

Section VI requires the Board to notify the Commission in advance of changes in the Board's structure that would affect its compliance obligations.

Section VII requires that the Board provide the Commission with access to certain information for the purpose of determining or securing compliance with the Order.

Section VIII provides that the Order will terminate 20 years from the date it is issued.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed Order. It does not constitute an official interpretation of the proposed Order or in any way modify its terms.

Complaint

IN THE MATTER OF

DUN & BRADSTREET, INC.
D/B/A
D&B

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

Docket No. C-4761; File No. 172 3196
Complaint, April 6, 2022 – Decision, April 6, 2022

This consent order addresses Dun & Bradstreet, Inc.'s sale of paid CreditBuilder and related products. The complaint alleges that several of D&B's CreditBuilder sales and renewal practices are deceptive, and that certain conduct was unfair in violation of Section 5(a) of the Federal Trade Commission Act. The consent order prohibits D&B from misrepresenting: (1) that using D&B's product is likely to allow a business to have its previously unreported commercial payment experiences added to its credit report; (2) that D&B will actively assist a business in adding its unreported commercial payment experiences to its credit report; (3) that using D&B's product is likely to help a business build or improve its credit report; (4) the ease with which information or payment experiences can be added to a business's credit report; and (5) that D&B's product is needed when it is not, and that a product will enable a prospective customer to have a "complete" file.

Participants

For the *Commission*: *Dana C. Barragate,* and *Harris A. Senturia.*

For the *Respondents*: *Rachel Mossman, Richard Schwed,* and *Christina Urhausen, Shearman & Sterling LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Dun & Bradstreet, Inc., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Dun & Bradstreet, Inc. ("D&B"), also doing business as D&B, is a Delaware corporation with its principal office or place of business at 101 John F. Kennedy Parkway, Short Hills, NJ 07078. D&B is a wholly owned subsidiary of The Dun & Bradstreet Corporation.

2. From at least May 2015, Respondent has advertised, marketed, offered for sale, sold, and distributed products to small and mid-sized business consumers, including products Respondent claims will help a business monitor, manage, and build its business credit report. Respondent claims that the products offer a business an easy way to provide D&B with positive payment history, otherwise unreported by D&B, to improve the business's credit report. In fact, Respondent rejects a majority of the submissions, and thousands of businesses that have paid for these products cannot get even a single payment experience added to their credit reports.

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

Respondent's Business Practices

Overview

4. Respondent is involved in the commercial credit reporting business. Respondent maintains files containing information on over 300 million businesses and other entities, including nonprofits, cities, counties, municipalities, and other governmental entities (hereinafter, collectively referred to as "affected businesses") worldwide.

5. Among other things, Respondent creates and maintains commercial credit reports on affected businesses. These commercial credit reports contain a variety of information about affected businesses, as well as proprietary scores and ratings that Respondent generates and assigns.

6. Respondent makes its credit reports available to entities, including an affected business's potential suppliers and vendors, for a fee. Respondent has represented that a strong credit report may improve an affected business's chances to qualify for loans, attract new customers, increase cash flow, lower interest rates, and negotiate better payment terms.

7. In many instances, Respondent's credit reports on small and mid-sized affected businesses reflect incorrect or incomplete information, including incorrect information about the affected business itself or incomplete information about an affected business's payment experiences with other entities and its overall financial health.

8. Unlike an individual credit report, a D&B credit report does not identify by name the entities that have provided payment information about an affected business. Nor does a D&B credit report list the specific amount and specific date of any transaction reflected in the report. Moreover, even when an affected business questions the accuracy of the payment information appearing on the report, Respondent will not tell affected businesses the specific sources of Respondent's information about the affected business except when the source permits such disclosure.

9. If Respondent's credit report reflects incorrect or incomplete information about an affected business, the affected business's only recourse is to deal directly with Respondent to seek to correct or supplement the report.

10. If an affected business contacts Respondent to dispute a payment experience appearing on its credit report, Respondent's policy is to contact the entity that reported the information to Respondent and ask it to recheck the payment experience. Respondent provides no new or additional information to the source about the reported payment experience. Thus, in some instances, affected businesses cannot obtain changes through this process, or on their own by reaching out directly to the reporting entity.

11. Affected businesses have suffered negative consequences as a result of incomplete and inaccurate information appearing on their credit report, including denial of credit, less favorable contract terms, and loss of contracts with other businesses.

12. Respondent also offers various paid products to small and mid-sized affected businesses, purportedly to help them monitor, manage, and improve their own credit reports. Respondent uses the term "credit-on-self" to describe these products, as they purportedly allow an affected business to monitor, and have information added to, its own credit report, including information that would correct or supplement the information reported by Respondent.

13. Respondent's "credit-on-self" products have included products called CreditBuilder, CreditBuilder Plus, and CreditBuilder Premium and related products or services, including Credit Essentials, a product that includes CreditBuilder features. Collectively, these "credit-on-self" products are referred to herein as "CreditBuilder Line products."

14. Respondent has generated sales of CreditBuilder Line products through multiple deceptive acts and practices.

15. For affected businesses dissatisfied with the accuracy or completeness of the information Respondent reports about them, Respondent has routinely deceptively claimed that purchasing a CreditBuilder Line product is the path by which an affected business can add payment history and improve its scores and ratings.

16. Respondent has routinely deceptively claimed that if an affected business would simply purchase a CreditBuilder Line product and provide information to Respondent, Respondent would verify that information and add it to the credit report. For example, in pitching CreditBuilder Line products, Respondent's telemarketers have made specific deceptive claims including, "we will contact those companies that you add … [and] verify that payment history going back a full 12 months," and "[i]t's a really easy process[,] I just need a little bit of information from you and we basically take over the rest from there."

17. In addition, in numerous instances Respondent's telemarketers have deceptively pitched CreditBuilder Line products to new businesses, and to businesses unfamiliar with Respondent, through misleading claims that the affected business needs to purchase a CreditBuilder Line product in order to "complete" its credit file.

18. Respondent has also employed deceptive practices to enable it to collect payments from CreditBuilder Line product customers for products different from the ones to which they agreed to subscribe. Moreover, Respondent has deceptively collected credit card information from CreditBuilder Line product customers without adequately disclosing material aspects of its charging practices, including, in many instances, failing to disclose that at the end of the product's subscription term, Respondent will automatically charge the customer's credit card again for a subscription to a CreditBuilder Line product.

Background on Respondent's Credit Reporting Business

19. To establish a credit file on an affected business, Respondent gathers information from sources including public records, payment information supplied to D&B by an affected business's vendors and creditors, and information supplied to D&B by the affected business itself.

20. At the time it establishes an affected business's credit file, Respondent also assigns the affected business a DUNS number, a unique, nine-digit identifier of a single affected business that ties directly to an affected business's D&B credit file, and which D&B is solely responsible for issuing. In numerous instances, Respondent opens a credit file and assigns a DUNS number on its own initiative. In other instances, Respondent does so after an affected business contacts D&B to request a DUNS number. The request for a DUNS number and the creation of a credit file and report are free.

21. Affected businesses often need a DUNS number, because certain entities require an affected business to obtain a DUNS number before they will work with the affected business, and the federal government has required an affected business to have a DUNS number in order to apply for certain federal government contracts or grants.

22. Although an affected business should only receive a single DUNS number, in some instances, Respondent has assigned a single affected business multiple DUNS numbers attached to multiple credit files, and has included different information about the affected business in each credit file.

23. An affected business's D&B credit report includes basic information about the affected business, such as its name, address, and principals, and public information on any judgments or liens. In numerous instances, Respondent reports incorrect or incomplete basic and public information about an affected business.

24. An affected business's D&B credit report may include information relating to how the affected business pays its bills, such as whether the affected business pays its bills on time, is late, or is delinquent. Respondent bases this element of its business credit reports on commercial payment information that it receives from other entities.

25. Respondent sometimes refers to the sources that supply commercial payment information to D&B as "Trade References," and other times uses the term "Trade References" to refer to the payment information these entities provide to D&B.

26. According to Respondent, only a small number of entities have agreements with D&B to automatically report commercial payment information or "payment experiences" to D&B on a regular basis about affected businesses with which the entities do business. Respondent sometimes refers to these entities as "Trade Tape Providers." The Trade Tape Providers have varied over time.

27. Of the tens of millions of businesses in the United States, at any given time only approximately 3,000-5,000 companies are Trade Tape Providers.

28. In numerous instances, an affected business's payment experiences will go unreported by D&B. First, an affected business's suppliers, vendors, and other entities the affected business works with often are not Trade Tape Providers and therefore do not automatically report an affected business's payment experiences to D&B. Second, even if the affected business has a relationship with a Trade Tape Provider, in some instances, D&B fails to report the payment experiences because the Trade Tape Provider may not have provided the particular affected business's payment experiences to D&B, and/or D&B fails to match the reported payment experiences to the affected business.

29. Even when Respondent reports payment experiences, in some instances, such payment experiences may be incorrect. Because Respondent reports what Trade Tape Providers send to Respondent, any errors in the Trade Tape Provider's data are inherently reflected in what Respondent reports on an affected business's credit report.

30. If Respondent contacts a Trade Tape Provider about a dispute from an affected business, and receives no response at all from the Trade Tape Provider, Respondent's practice is to delete the disputed payment experience. However, if the same Trade Tape Provider later provides another file to Respondent that contains the same disputed payment experience, Respondent will again report it. Thus, an affected business may believe that it has effectively disputed erroneous payment experience data only to later see it reappear.

31. In addition to reporting on an affected business's payment experiences, Respondent assigns an affected business various scores and ratings, which appear on the affected business's credit report. These scores and ratings purportedly reflect the creditworthiness of the affected business, including predicting the likelihood that the affected business will experience financial distress or cease operations over the next year.

32. Respondent calculates many of the scores and ratings by using payment experience information that it receives from Trade References regarding how an affected business pays its bills. As Respondent often receives limited or no payment experience information about an affected business, and as data provided from Trade Tape Providers may contain errors, in many instances the scores and ratings that Respondent assigns, particularly as to small and mid-sized businesses, may not accurately reflect how the affected business has performed in the past and/or how it will perform in the future.

33. The manner in which Respondent gathers and maintains data can result in it reporting errors and incomplete information. Even in the course of producing CreditBuilder Line product information to the Commission during the investigation of this matter, Respondent produced data containing errors such as incorrect basic information about Respondent's customers.

Background on Respondent's CreditBuilder Line Products

34. Respondent has represented that CreditBuilder Line products allow an affected business to submit the names of the entities it does business with—its own Trade Reference information—to Respondent so that Respondent can add the affected business's payment experiences with these entities to the affected business's credit report.

35. The number of Trade References that Respondent permits a subscriber to add to its credit report differs depending on the CreditBuilder Line product. The basic CreditBuilder product allows subscribers to add up to four Trade References per year, CreditBuilder Plus allows subscribers to add a maximum of 12 Trade References per year, and CreditBuilder Premium allows subscribers to add an unlimited number of Trade References.

36. Most of Respondent's CreditBuilder Line products are sold as annual subscriptions and are generally non-refundable during their term. Respondent typically collects subscribers' credit card information and collects full payment for the term up-front. Respondent then automatically renews and charges for CreditBuilder Line products at the beginning of each succeeding term unless the subscriber notifies D&B before the end of the term that it does not want to renew.

37. For annual subscriptions, the current list price for the basic CreditBuilder product is $899, for CreditBuilder Plus it is $1,499, and for CreditBuilder Premium it is $1,999. Respondent sometimes charges an additional $149 one-time activation fee at the time of purchase.

38. In approximately August 2017, Respondent introduced Credit Essentials for $1,599 per year. Credit Essentials included access to two products, the basic CreditBuilder product and Respondent's Credit Reporter product, which, among other things, allowed a subscriber to monitor the reports of five other companies.

39. In approximately April 2018, Respondent stopped selling the Credit Essentials product described in Paragraph 38 above and began offering a new Credit Essentials product (sometimes referred to as Credit Essentials Plus) for $2,499 per year. This new Credit Essentials product combined features of CreditBuilder Premium and Credit Reporter.

How Respondent Introduces CreditBuilder Line Products to Potential Subscribers

40. In numerous instances, after learning about what they believe to be incomplete or inaccurate payment-related information and/or inaccurate scores and ratings appearing on their D&B credit reports, affected businesses have contacted Respondent to complain. Respondent has routinely offered these affected businesses a CreditBuilder Line product as a way to improve their reports. Respondent's telemarketers have routinely told such affected businesses that purchasing a CreditBuilder Line product is the only way to improve their D&B credit reports.

41. Respondent has also offered CreditBuilder Line products when an affected business calls after receiving one or more of Respondent's "business credit notification" mailers. These

mailers represent, for instance, that the affected business's scores have declined and urge the affected business to call a D&B "Credit Advisor" or "Account Manager" to learn how to "safeguard" the affected business.

42. For example, one mailer claims that a D&B customer has purchased the affected business's file, and the file contains the affected business's "Delinquency Predictor Score, which has declined." It warns, "a low Delinquency Predictor Score may mean that you have an increased risk of delinquent payments." The mailer advises:

> Many companies, banks, government agencies—even current and potential business partners—may be using information in your D&B credit file to help make decisions about doing business with you. Having a complete and well-managed D&B credit profile can help you:
>
> • Show your company's financial health in the best possible light
>
> • Negotiate better payment terms with suppliers
>
> • Qualify for better insurance premium and mortgage rates

Affected businesses are urged to call Respondent to learn more about the inquiry and how D&B may help the affected business impact its score.

43. Respondent also has marketed CreditBuilder Line products directly to affected businesses through outbound calls and emails. In many instances, Respondent initiates these marketing calls and emails after an affected business has submitted a request for a free DUNS number or free credit report, or after Respondent has sent the affected business one or more business credit notification mailers as described in Paragraphs 41 and 42, above.

Respondent's Telemarketers Tell Potential Subscribers that it Is Easy to Add Trade References and that Respondent Will Actively Help Them

44. Respondent's telemarketers have routinely begun their sales pitch for CreditBuilder Line products by representing that the affected business's credit report contains limited and/or negative payment information, that the vast majority of companies do not report payment experiences automatically to D&B, and that therefore, it is up to the affected business to manage, report, and update its own D&B credit report.

45. Respondent has claimed that CreditBuilder Line products allow an affected business to manually submit or self-report to D&B its Trade References, and/or add the names of its vendors and suppliers to increase the positive payment experiences in its credit report. Respondent has claimed that once an affected business submits its Trade References using the CreditBuilder Line product, Respondent contacts the Trade References to verify the payment history and then adds the payment information to the affected business's credit report.

46. Respondent has claimed that CreditBuilder Line products will improve, build, and/or establish an affected business's credit report, and move its credit scores and ratings in a positive direction.

47. Respondent has represented that it will actively assist the affected business in getting its payment experiences added to the credit report.

48. Specifically, Respondent's telemarketers have represented:

- [T]here's only a small percentage of companies that actually automatically record [sic] payment history to Dun & Bradstreet…. So when you're in a niche type of line of business, then it's even harder to get payment history on here…. If you want to build the report up, you can actually self-report some of the expenses that aren't being captured on here where you provide … the contact information for the vendor. We'll go to that vendor to get the payment history to verify and add to your credit report.
  [Ex. A, Sales Call Tr. 8:20-10:1]

- [T]o have an impact on your scores and your ratings, you are going to need to add more references in here – more payment references to help improve your payment summary…. So that's where the service comes in. So that's done through the CreditBuilder. So that's a service that you pay for, and that allows you to add the payment history to help improve your status on Dun & Bradstreet.
  [Ex. B, Sales Call Tr. 14:2-14:11]

- [T]here's only a handful of companies that report to Dun & Bradstreet…. We make it so we give you full access to your files so you can give us all that – those companies that you pay out to operate your business, and we put them – we help you get that on the report…. So basically you give us the names and the address of those companies and then we go and help them get all that financial date [sic] on the report for you.
  [Ex. C, Sales Call Tr. 9:7-9:16]

- [I]t's up to you to self-report…. So what I would actually do is set you guys up with a service called CreditBuilder Premium that allows you guys to self-report your operating expenses by giving us the names of the companies that you guys are doing business with so that we can reach out to them and gather all your payment history to get the information updated for you on the file ….
  [Ex. D, Sales Call Tr. 7:22, 9:14-9:20]

- So usually a company will pay for the service fee, they'll log in, they'll add their top 25 vendors. It takes about 20, 25 minutes. And then we do the rest of the work. We contact them; verify the credit limits and terms; and they mainly input that information on your report for you. That way, when you have customers or vendors and banks and whoever is pulling the report, they're more likely to see that financial strength.
  [Ex. E, Sales Call Tr. 7:16-7:24]

49. Respondent listened to the stored recordings of the calls described in Paragraph 48, above, after businesses filed complaints against it with the Better Business Bureau. Although Respondent occasionally cited some of the telemarketers for violating company policies, such as "using fear to sell product," Respondent did not cite any of the telemarketers for violating company policy regarding their presentation of and their statements made about CreditBuilder Line products.

50. Despite notice of complaints from business customers concerning the sale of CreditBuilder Line products, Respondent has continued to make claims similar to those in Paragraph 48. For instance:

- [T]he way that a credit report works in the business world is once you get a number assigned, there are scores and ratings that are going to showcase how you're operating and how you pay your bills…. So we do not get that information automatically usually. So what you're going to need to do is, you know, the 30 vendors that you had mentioned that you have…we're going to need to physically submit and add them on to your credit report.
  [Ex. F, Sales Call Tr. 13:12-24]

- [Y]ou simply give us the names and the contact detail of the company that you pay bills to. Even if you're paying up-front using your own debit card right now, paying in cash, it doesn't matter. However you're paying, you log in here, you give us the names and contact detail, we will contact those companies that you add. We verify that payment history going back a full 12 months and we manually (recording malfunction) that payment history on the report….Now, this DUNS number is free. The credit report for the business is free. Again, there's only a cost involved in you submitting the bills because, again, we're not a reporting company, we don't know who you're paying. You're essentially hiring us to work for you.
  [Ex. G, Sales Call Tr. 17:4-12, 19:13-18]

- Just email me the contact information of who you're going to be making payments to and then our trade department is going to do the rest of the work from there by calling those companies to verify how much you spent with them, the percentage that was paid on time, and if you have any terms with them. And then once we verify that information, then that gets added into the report. It's a really easy process. I just need a little bit of information from you and we basically take over the rest from there.
  [Ex. H, Sales Call Tr. 7:18-8:2]

Subscribers Find that it Is Not Easy to Get Trade References Accepted and Payments Added, and Respondent Does Not Actively Help Them

51. Although Respondent has represented to affected businesses that it is easy to have their Trade References accepted and unreported payment experiences added to their credit

reports, in numerous instances and for various reasons, Respondent has rejected Trade References added by CreditBuilder Line customers and declined to include the information on their credit report.

52. For example, if a CreditBuilder Line customer submits a company that is a Trade Tape Provider, Respondent rejects that submission regardless of whether the entity has actually reported on the customer; if the Trade Tape Provider has not reported on the customer, Respondent will not bother to contact the entity to let it know it should be doing so.

53. Respondent also rejects submissions of entities that appear on its no-contact list. In numerous instances, these companies are precisely the types of large and well-known vendors and suppliers that an affected business may seek to have added to its credit report. While the companies on the no-contact list have varied over time, examples have included prominent vendors such as Fortune 500 computer companies, internet and telecommunications companies, a very large and well-known shipping company, a supplier of paints, coatings and related products, a hardware company, and a construction rental company.

54. On the other end of the spectrum, when affected businesses submit smaller vendors or suppliers as Trade References, Respondent rejects any entity that itself does not have a DUNS number and a credit file that is complete, active, and in good standing. Respondent has claimed that basic information missing from the potential Trade Reference's D&B file renders the file incomplete, and has caused Respondent to reject the submission. In the past, that has included minor gaps such as a missing telephone number or address.

55. Contrary to its telemarketing pitch, Respondent does not help subscribers in their efforts to have payment experiences added to their credit report. For example, Respondent does not tell affected businesses why it rejects specific submitted Trade References. Individual CreditBuilder Line subscribers have submitted the same proposed Trade References multiple times, unaware that Respondent is automatically rejecting the proposed Trade Reference because it is a Trade Tape Provider or on a no-contact list.

56. Moreover, in prior years, if a submitted Trade Reference simply asked Respondent for confirmation that the CreditBuilder Line customer had authorized the Trade Reference to disclose payment information, D&B rejected the submission outright. If Trade Reference contact information provided to D&B by an affected business was not accurate, Respondent did not request corrected or updated contact information from the submitter, nor did it check its own database or public records to see if it had or could locate current contact information for the Trade Reference. Instead, Respondent just rejected the Trade Reference.

57. Respondent knows CreditBuilder Line product subscribers often cannot get their Trade References accepted. In fact, when customers attempt to cancel their CreditBuilder Line product because their Trade References are being declined, Respondent has trained its telemarketers to pitch higher-priced, upgraded products that purportedly provide subscribers with a dedicated D&B employee to help get Trade References added. Contrary to Respondent's previous claims about the ease of getting their Trade Reference information added, Respondent has instructed its telemarketers to explain to customers who complain that their CreditBuilder

Line product was a waste of money that submitting Trade References is not really an easy process, and that the higher-priced product would allow a dedicated D&B employee to use a variety of "tips" and "tricks" to help get the payment experiences added.

58. For thousands of affected businesses that have purchased and attempted to use a CreditBuilder Line product, Respondent has not accepted even a single submitted Trade Reference, which means that using a CreditBuilder Line product did not allow these affected businesses to have any unreported payment experiences added to their D&B credit reports. Overall, Respondent has rejected more than half of the total number of Trade References its customers have submitted through the CreditBuilder, CreditBuilder Plus, and CreditBuilder Premium products.

Respondent Tells Potential Subscribers they Need a CreditBuilder Line Product to Complete their Report, for Scores and Ratings, or for their Background Check

59. In addition to making the Trade Reference claims described above, Respondent has represented to potential subscribers, typically those that have applied for a free DUNS number and/or are newer businesses, that the D&B credit file will not be useful without a CreditBuilder Line product. In numerous instances, Respondent has claimed that a CreditBuilder Line product is needed to complete the credit file and enable the potential subscriber to become eligible for D&B scores and ratings. Respondent has also represented that a CreditBuilder Line product is necessary for D&B to conduct a background check that is required to establish the affected business's file.

60. For instance, in the course of making CreditBuilder Line product sales pitches, Respondent's telemarketers have represented:

- [T]he application you submitted, typically, it would take 30 business days. But, again, it does leave your file incomplete. So you wouldn't even yet qualify for the full set of ratings. So we will initiate a background check so that way you have that completed report. That will only take … three to five business days. And then once that is completed, we typically start your scores and ratings in the mid-range. That way, you're not showing poor ratings right from the beginning.… In order for us to initiate the background check and to get the links and logins so that way you'll have the full access to self-report. That would be through a Credit Builder basic platform. We just roll this out to newer companies or companies who don't have the DUNS number just yet.
  [Ex H, Sales Call Tr. 10:10-20, 11:5-10]

- [T]he application that you submitted, typically it would take up to 30 business days to receive, but what happens is it does leave the file incomplete. So you wouldn't yet qualify for all seven scores and ratings that are attached to the DUNS number. So since you're using this for commercial purposes -- and that's one reason, we want to make sure at the very minimum you do have that completed report. So we will initiate a

> background check. We don't need any legal documents from you. We'll get all of that squared away over here. And then within three to five business days, once you confirm the company was registered and if there's been any lawsuits or bankruptcies, we complete your file for the lifetime of the company…. In order for us to initiate the background check and to get the links and logins so that way you have the full access to the report, that is through a Credit Builder Basic platform. We just roll this out to newer companies.
> [Ex I, Sales Call Tr. 11:19-12:9, 14:25-15:4]

- So you actually already have the DUNS number. It's just that it's attached to an incomplete credit file…. So what we need to do is get you set up so that you get a completed report. That's just going to mean that we confirm operations, make sure there are no lawsuits, liens, judgments … bankruptcies…. and then we'll set you up so that you can add in the names of those suppliers so we can help you start to build the credit…. So what we'll do is we'll set you up on the entry-level service. It's only $1,499, and it's going to complete your report for the life of the business."
  [Ex J, Sales Call Tr. 15:13-16:5, 17:12-15]

61. In fact, an affected business does not need to purchase a CreditBuilder Line product in order for Respondent to conduct a background check or to verify background information for a credit file.

62. A CreditBuilder Line product also is not needed to "complete" an affected business's credit file. In the context of determining whether a Trade Reference is qualified, Respondent has represented that a "complete" file means it includes all basic information, such as name and contact information. However, affected businesses can use one of Respondent's free online platforms to add or update their basic information and submit financial statements. Affected businesses also can, and often do, provide much of this information to Respondent over the telephone.

63. Moreover, a CreditBuilder Line product cannot "complete" a business's credit file in terms of ensuring that the file contains all relevant credit information, since, in numerous instances, payment experience information will still be missing or incomplete. For instance, as described above, Respondent often does not add payment experience information to an affected business's credit file automatically or manually.

64. An affected business with a DUNS number and credit file is eligible to receive its D&B scores and ratings without a CreditBuilder Line product. At the same time, a CreditBuilder Line product cannot ensure that an affected business will in fact receive them all. For instance, Respondent requires an affected business to have three payment experiences for a score that Respondent refers to as a PAYDEX score. In numerous instances, an affected business that purchases a CreditBuilder Line product will not be able to add sufficient payment experiences to generate this score.

65. Respondent has used its claim that an affected business's credit file is or will be incomplete in a marketing campaign to "drive customer traffic" and "maximize" its CreditBuilder Line sales opportunities. Respondent has referred to this marketing campaign as its "incomplete file campaign."

66. Information produced by Respondent to the Commission during the investigation of this matter shows that thousands of CreditBuilder Line customers have never submitted even a single Trade Reference and never once logged in to their CreditBuilder Line accounts on D&B's online portal. This evidence supports a strong inference that Respondent's deceptive claims that an affected business must purchase a CreditBuilder Line product to avoid having an "incomplete" D&B file have been material and effective.

Respondent's Deceptive Product Renewal Practices

67. Many times, Respondent's telemarketers have failed to tell affected businesses that, at the end of the subscription term, D&B will automatically charge the affected business again for a subscription to the CreditBuilder Line product being purchased, and that the charge will be in the amount of the product's "then current price."

68. In the instances when Respondent's telemarketers have made this auto-renewal disclosure, or something similar, Respondent's telemarketers have typically buried it in a statement after the affected business has already agreed to the purchase and provided its payment information. At the time of the initial purchase, Respondent's telemarketers have not informed subscribers that D&B may later substitute a different CreditBuilder Line product for the one that the customer is purchasing.

69. In numerous instances, Respondent has automatically renewed an affected business's CreditBuilder Line subscription at a materially higher price than the price the subscriber agreed to at the time of the purchase, without notice or adequate notice to the customer in advance of the price increase. Respondent has done this by routinely increasing the list price of CreditBuilder Line products and charging the higher price at the time of the automatic renewal. Respondent has also done this by eliminating certain CreditBuilder Line products and moving existing subscribers into different and higher-priced CreditBuilder Line products, a practice Respondent has referred to as "product migration."

70. As an example of an automatic renewal at a materially higher price, in November 2015, Respondent increased the annual list price of CreditBuilder Plus from $1,099 to $1,399, and increased it again in July 2016 to $1,599. By 2016, subscribers that purchased CreditBuilder Plus at $1,099 were automatically renewed at the "then current price" of $1,599. Despite the 45% price increase, there was no change to the CreditBuilder Plus features. In numerous instances, Respondent did not provide affected businesses with notice or adequate notice of the price increase before automatically renewing the product.

71. Two examples of Respondent's product migration and price increase practices involve the basic CreditBuilder product and a product called "Credit Monitor." In Spring 2015, Respondent temporarily stopped making the basic CreditBuilder product available. At that time,

the basic CreditBuilder product had a list price of $949. At the time of automatic renewal, instead of renewing the product to which the affected business had subscribed, Respondent moved numerous basic subscribers into a higher-priced CreditBuilder Plus product that, by July 2016, cost $1,599 per year, a price increase of more than 65% for a product the subscriber did not order. Also in July 2016, Respondent stopped offering its $499 Credit Monitor product and moved those subscribers to Respondent's $1,599 CreditBuilder Plus at the time of their automatic renewal. In numerous instances, Respondent did not provide affected businesses with notice or adequate notice before the product migration.

72. Although Respondent has used its "then current price" disclosure to justify charging an affected business more for a product than it agreed to pay for its initial subscription, when Respondent has reduced the list price of a CreditBuilder Line product, Respondent has continued automatically renewing existing CreditBuilder Line customers at the former higher list price rather than the new, reduced, "then current price."

73. Nor has Respondent applied its product migration practices and automatic renewal "at the then current price" in a way that would restore subscribers' original purchases and reduce the amount Respondent charges. Not long after Respondent eliminated the basic CreditBuilder and Credit Monitor products in 2015 and 2016, respectively, it reintroduced both in early 2018. However, Respondent did not move any of the subscribers it had previously moved from these products to the materially higher-priced CreditBuilder Plus through product migration back to the lower-priced products they had originally agreed to purchase.

74. In addition to the automatic renewal and product migration practices described above, in numerous instances, Respondent has affirmatively misrepresented to affected businesses the CreditBuilder Line product that Respondent is attempting to renew, allowing Respondent to move subscribers from one CreditBuilder Line product to another product or into higher-priced products without notice to subscribers.

75. For instance, beginning in approximately August 2017, when Respondent attempted to auto-renew a CreditBuilder Plus subscription for a customer whose payment method on file was no longer valid, Respondent's telemarketers would call the subscriber to get updated payment information. In some of those instances, Respondent's telemarketers moved CreditBuilder Plus subscribers to Respondent's new, $1,599 Credit Essentials product by falsely representing to the CreditBuilder Plus subscribers that Respondent was calling to renew their current subscription, the subscriber needed to provide updated payment information for the renewal, and the CreditBuilder Plus product had been renamed Credit Essentials but was the same as the subscriber's current product.

76. Although Respondent represented to these CreditBuilder Plus subscribers that CreditBuilder Plus and Credit Essentials were the same product, they were not. For instance, among other material changes in features, Credit Essentials allowed subscribers to add only four Trade References per year, while CreditBuilder Plus allowed subscribers to add 12 Trade References per year.

77. As another example, in approximately April 2018, Respondent stopped offering the Credit Essentials product described in Paragraphs 75 and 76, above, and began offering a new $2,499 Credit Essentials product (sometimes referred to as Credit Essentials Plus), which allowed the subscriber to add an unlimited number of Trade References. If the affected business's payment method on file was not valid and did not allow for an automatic renewal of the $1,599 Credit Essentials product, Respondent called the subscriber and represented that the subscriber's service was set to renew and that Respondent needed to collect updated payment information. In fact, Respondent was not calling to renew the affected business's current $1,599 Credit Essentials product, but instead, to move the affected business into the different, higher-priced Credit Essentials Plus product.

78. Respondent has routinely moved affected businesses from one product to another, told affected businesses that they have one product when in fact they have a different product, and has sold additional related products and add-on products. As a result, affected businesses often experience confusion about what product or products they are paying for and what the current features of those products are.

Count I

False or Misleading Claims Regarding CreditBuilder Line Products: Trade References

79. In numerous instances in connection with the advertising, promotion, offering for sale or sale of CreditBuilder Line products, Respondent has represented, directly or indirectly, expressly or by implication, that:

a. Using a CreditBuilder Line product allows an affected business to have its previously unreported commercial payment experiences added to the affected business's credit report.

b. Respondent will actively assist CreditBuilder Line product subscribers in adding such unreported commercial payment experience information to the affected business's credit report.

80. In fact, in numerous instances in which Respondent has made the representations set forth in Paragraph 79, using a CreditBuilder Line product does not allow an affected business to have its previously unreported commercial payment experiences added to the affected business's credit report, and Respondent does not actively assist CreditBuilder Line product subscribers in adding unreported commercial payment experience information to the affected business's credit report. Therefore, the representations set forth in Paragraph 79 are false or misleading.

Count II

False or Misleading Claims Regarding CreditBuilder Line Products: Status of Report

81. In numerous instances, in connection with the advertising, promotion, offering for sale, or sale of its CreditBuilder Line products, Respondent has represented, directly or indirectly, expressly or by implication, that CreditBuilder Line products are required for Respondent to conduct a background check on the affected business or will provide an affected business with a complete report including a full set of scores and ratings.

82. In fact, CreditBuilder Line products are not required for Respondent to conduct a background check on the affected business, and will not always provide an affected business with a complete report including a full set of scores and ratings. Therefore, the representations set forth in Paragraph 81 are false or misleading.

Count III

False or Misleading Claims Regarding CreditBuilder Line Products: Collection and Renewal

83. In numerous instances in connection with collecting updated payment information for CreditBuilder Line products that are scheduled to renew, Respondent has represented, directly or indirectly, expressly or by implication, that Respondent is collecting payment for and is renewing the product that the affected business purchased the prior term.

84. In fact, in numerous instances in which Respondent has made the representation set forth in Paragraph 83, Respondent is not collecting payment for and is not renewing the product that the affected business purchased the prior term. Therefore, the representation set forth in Paragraph 83 is false or misleading.

Count IV

Failure to Disclose: Renewal Practices

85. In numerous instances in connection with the advertising, promotion, offering for sale, or sale of its CreditBuilder Line products, Respondent has represented that it collects customer credit card data for payment so that the customer may subscribe to a CreditBuilder Line product for a designated period (*e.g.*, 12 months).

86. In fact, in numerous instances in which Respondent has made the representation set forth in Paragraph 85, Respondent has failed to disclose or disclose adequately, that:

a. At the end of the designated period, and at the end of each succeeding designated period until cancelled, Respondent will automatically charge the customer's credit card again for a subscription to a CreditBuilder Line product.

b. At Respondent's unilateral choice, the CreditBuilder Line product for which Respondent will charge the customer at the end of the designated period, or any succeeding designated period, may be materially different from the CreditBuilder Line product to which the customer originally subscribed.

c. If the list price of the CreditBuilder Line product to which the customer is subscribing increases, Respondent will charge the customer the increased price, but if the list price of the CreditBuilder Line product to which the customer is subscribing is reduced, Respondent will not give the customer the benefit of the price reduction and will charge the customer at the higher previous price.

d. If at any time Respondent unilaterally moves the customer into a different CreditBuilder Line product from the one to which the customer is subscribing, Respondent will not unilaterally move the customer back to the product to which the customer originally subscribed.

87. These facts would be material to affected businesses in their purchase decisions regarding CreditBuilder Line products.

88. Respondent's failure to disclose or disclose adequately the material information described in Paragraph 86, in light of the representation set forth in Paragraph 85, is a deceptive act or practice.

Count V

Unfair Dispute Investigation and Resolution Practices

89. As described in Paragraphs 7-11, 22, 23, 29-33 and 40, in numerous instances, Respondent has reported incorrect information on affected businesses' D&B credit reports, yet has not provided affected businesses with a reasonable means to dispute such information.

90. This practice has caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. This practice is an unfair act or practice.

Violations of Section 5

91. 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 6th day of April, 2022, has issued this Complaint against Respondent.

By the Commission.

Complaint

Exhibit A

In the Matter of:

Dun & Bradstreet

February 12, 2019
FTC-00008796

Condensed Transcript with Word Index

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

FTC Exhibit A

FTC-00008796

Dun & Bradstreet 2/12/2019

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OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: FEBRUARY 6, 2019

PAGES 1 THROUGH 17

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FEDERAL TRADE COMMISSION
I N D E X

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FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
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The following transcript was produced from a digital file provided to For The Record, Inc. on January 31, 2019.

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P R O C E E D I N G S
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STEVE: [redacted].
RACHEL: Hi, is Steve available?
STEVE: This is Steve.
RACHEL: Hi, Steve. It's Rachel from Dun & Bradstreet on a recorded line. We were chatting online there about the credit files.
STEVE: Yes. Can I close my chat file now?
RACHEL: Yeah, you can close that out.
STEVE: All right. Okay.
RACHEL: All right. So is this the first time that you (inaudible) about your credit file; that you've ever really needed the credit report before?
STEVE: Yeah.
RACHEL: Okay.
STEVE: We got it in 2005.
RACHEL: Okay.
STEVE: We were applying for a federal grant from the Department of Education. We had to have a Dun & Bradstreet number. And after we got the grant, I just didn't -- didn't even know what my number was after that. I could go back on my original -- look all that up and find it. But I was like, okay, huh.

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RACHEL: Okay. And what's going on? You said that you went to a new laboratory? Like, what exactly is it that your company does?

STEVE: Drug testing.

RACHEL: Oh, okay, okay. So you're using a new facility. Is this for expansion or --

STEVE: We wanted to use a new laboratory because of some of the services they offer. Yeah, they've got some -- you know, some advanced equipment and stuff that does a better job. But they said our Dun & Bradstreet is kind of a muck.

RACHEL: Yeah. So your scores and ratings are all currently in the high-risk range.

STEVE: Okay.

RACHEL: And the scores and ratings are built off of two different types of information. They're built off of basic demographic info like where you're located, what your line of business is, how long you've been in business, how large the company is, stuff like that. And then financial information, which for your entity is going to be payment history. That's --

STEVE: Right.

RACHEL: -- reported to us from your vendors. Because of the niche type of line of business that you're in, you don't have a lot of vendors that you pay who

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actually report payment history to us. So the first issue is there's not really a lot of information in here to build strong reporting --

STEVE: That's what they said. There's just no information in there.

RACHEL: Yeah.

STEVE: They said it was like -- it was like almost we don't exist.

RACHEL: Yeah. Can you give me an idea of what -- like, what your annual sales are as an organization?

STEVE: $104,000 last year.

RACHEL: Okay. All right. So right now there's only a couple of payments on file. Of the payments that are currently on file, there have recently been a few that have been reported as paid slow. And they actually tank your scores quite a bit.

STEVE: Okay.

RACHEL: Okay? So you've got --

STEVE: Two of those?

RACHEL: Two -- two main components that you need to work on here.

STEVE: Okay.

RACHEL: The industries that are listed associated with these payments are short-term business credits.

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STEVE: Okay.

RACHEL: Recently reported last month with a high credit of $1,000 and now owes $1,000, low by up to 30 days. And a miscellaneous business service industry for $250. And then something pretty big that looks like it went to some type of a collection service for $20,000. It doesn't give an actual company name or industry.

The way that business credit works is the industries get listed on the credit report initially. And if there's a slow payment, you can put it in for dispute with us and we'll go back to the company that reported it on your behalf to confirm the details of the payment and then ask for a name release to come back to you and say, well, it was ABC Company and have you check your record.

So the first thing that we want to do is put these payments in for dispute so that you can get an idea of where it's coming from.

STEVE: Okay.

RACHEL: This one in particular is a pretty hefty payment and it is listed as an unfavorable comment on your credit file, which probably doesn't mean anything to you because you don't quite know what that means. It basically just means that it was like a company that -- some type of payment or line of credit or expense was

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sent to a third party collection.

STEVE: And I don't know who that would have been.

RACHEL: Yeah. I mean, you're not going to have a ton of expenses as -- you know, with your line of business. So I'm not quite sure where these payments are coming from.

STEVE: We have like Office Depot and our phone, our rent, but that's about it, you know, other than lab fees.

RACHEL: Yeah. So what I'm going to recommend you do is work with our customer support department. They can put these payments in (inaudible) to help you get to the bottom of where they're coming from, and that will help clean up your scores.

STEVE: Okay.

RACHEL: Okay?

STEVE: So it's just there's -- there's not much there really to work with.

RACHEL: Yeah. I mean, most companies, there's only a small percentage of companies that actually automatically record payment history to Dun & Bradstreet.

STEVE: I see.

RACHEL: And it's something like less than 5 percent. So when you're in a niche type of line of

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business, then it's even harder to get payment history on here.
STEVE: So most of our -- most of our companies that we deal with don't even report to y'all. So --
RACHEL: Yeah.
STEVE: -- if we don't check up on it and then update it, then it doesn't get done.
RACHEL: Any further than what it is now because, I mean, there is $22,800 in here. So it's not like there's zero dollars. It's just it's not a lot. You can use --
STEVE: Right.
RACHEL: -- services that we provide. So you can update all that basic and demographic information that I was talking about. You can update all of that for free online.
STEVE: Okay.
RACHEL: If you want to build the report up, you can actually self-report some of the expenses that aren't being captured on here where you provide --
STEVE: Okay.
RACHEL: -- the contact information for the vendor.
STEVE: Okay.
RACHEL: We'll go to that vendor to get the

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payment history to verify and add to your credit report.
STEVE: So how do I do that? Do I do that -- where do I do that at?
RACHEL: That's (inaudible) of self-reporting vendors. So that process of self-reporting vendors is a service that we provide. It's a paid-for service. So your company --
STEVE: Okay.
RACHEL: -- would purchase the service with us. It's called Credit Builder Plus. It gives you access to monitor your scores for a year and it gives you the ability to report vendor information for up to 12 vendors over the course of the year.
And at the same time, you can dispute those payments. But you can dispute those for free. You don't need a paid-for service to do that. Okay?
STEVE: Okay.
RACHEL: Now, the service retails at $1,599. But based off of the size of your business and the limited number of expenses that you have, we'll offer you a discount if you're interested in proactively building the report. That brings the cost of the service down to $800.
STEVE: Well, I'd like to know what it is first. You know, I'd like to go in there and check on

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that.
RACHEL: On what is in the report currently?
STEVE: Right.
RACHEL: Okay. So you can do that right on our website for free.
STEVE: Okay.
RACHEL: What you want to do is go on the website and register your email address.
STEVE: What is my number anyway?
RACHEL: Your DUNS number -- let me give it to you -- is [redacted] --
STEVE: Okay, [redacted] --
RACHEL: No, it's [redacted] --
STEVE: Oh, [redacted] I'm sorry.
RACHEL: Yes. [redacted]
STEVE: So [redacted].
RACHEL: Yes.
STEVE: So three zeroes and [redacted]
RACHEL: And at the very beginning is a [redacted]
STEVE: Got that.
RACHEL: Yeah. So it's a total of nine digits.
STEVE: I always worry about the big zeroes. You know, the zeroes, man, you can tell -- that gets you off real quick. It's got to be the right number.
RACHEL: Right, yeah.

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STEVE: Sorry about my bad joke about owner and chief bottle washer. I -- when you're a small business, you do a lot of things.
RACHEL: Oh, no, no. That's okay. It wasn't a problem at all. I mean, I understand exactly how -- how that works. You're a jack of all trades. You do all kinds of stuff for the company.
STEVE: Yes, yes, yes, yes.
RACHEL: I mean, realistically your scores and ratings, I don't know how long ago this company pulled a copy of your report. It looks like they pulled it -- the most recent pulls happened in the last 90 days. But they didn't happen, like --
STEVE: Probably one of those was [redacted] --
RACHEL: -- last March.
STEVE: -- [redacted]
RACHEL: Yes. So it doesn't look like they checked it last month. And last month is when that $20,000 payment, the negative payment, was reported to the credit file. So if you go onto our website and you register for a free account right on the website, you can take a look at the free information in the credit file, the basic info for free, including that payment history.
STEVE: Right.

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RACHEL: And you can put the disputes in to at least start getting access and figuring out, you know, what's in here and get to the bottom of that part.
STEVE: Sure. Excellent. Okay. Well, I will take care of that.
RACHEL: Okay?
STEVE: And I appreciate your help. So I'll know what to do. Like I say, after we got the grant, I didn't really want a DUNS number because we're such a small business.
RACHEL: Mm-hmm. Yes. Well, and you're not going to need it for a lot of things. It's just every once --
STEVE: No.
RACHEL: -- in a while, you know, you're going to run into a situation where somebody wants to look at it. So --
STEVE: Well, and I'll tell you this: We got -- there was another [redacted] --
RACHEL: Mm-hmm.
STEVE: -- that we got a lot of mail for. It was collection stuff. But it wasn't us. They were a -- some type of construction type thing.
RACHEL: Okay. So that could be part of the problem as to what is showing up on your credit files.

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STEVE: Yeah. We got some stuff and it had another person's name on it that we didn't recognize. And the phone number was different. And I guess they -- and we actually had a lady call us one time from, like, Georgia --
RACHEL: Mm-hmm.
STEVE: -- and said, you know, is this [redacted] And I said yes. And she said, well, I had a credit card payment that came out to an [redacted] in [redacted] and what did I buy from there? I said, did you have a drug test? And she said no. I said, well, that's not us, then.
RACHEL: Yeah. Wow. That's crazy.
STEVE: We do drug tests. All we do is drug and alcohol testing, and DNA testing.
RACHEL: Yeah.
STEVE: And it was --
RACHEL: That's so weird.
STEVE: -- a company, [redacted] in [redacted] that actually had ran a credit card on her.
RACHEL: Wow. So then it is a very good chance that some of this information in the report could be connected with --
STEVE: Now, I think they since --
RACHEL: -- this company.

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STEVE: -- went out of business --
RACHEL: Oh, okay.
STEVE: -- a couple or three years ago. But that's been four or five years ago that happened. I think they went out of business a couple or three years ago. They were -- they did, like, home improvement type stuff, you know, remodeling and things like that.
RACHEL: Mm-hmm.
STEVE: Did some concrete and custom rock work, you know, stone work, patios and things like that.
RACHEL: Right, yeah. Like general construction stuff. Gotcha.
STEVE: Yeah, basically.
RACHEL: Well, I mean, once you put these payments in for dispute, we'll get to the bottom of them with you.
STEVE: Okay.
RACHEL: And if we find that there's a situation where the payment really doesn't belong to your business, then we're going to remove it from the credit report.
STEVE: Excellent.
RACHEL: Let me give you a phone number, too, to follow up with in case you have any issues getting into the account or if you have any problems or anything

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like that.
STEVE: Okay.
RACHEL: You can call ([redacted] --
STEVE: [redacted] --
RACHEL: --[redacted]
STEVE: [redacted] And I've got everything else here now that I need. I'm going to print all this off and that way I'll have all my information. And --
RACHEL: Perfect. Yeah, reach out to us --
STEVE: Okay.
RACHEL: -- if you need anything else. Okay?
STEVE: I appreciate that.
RACHEL: Have a good day.
STEVE: Uh-huh.
RACHEL: Bye-bye.
(The call was concluded.)
(The recording was concluded.)

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Dun & Bradstreet 2/12/2019

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CERTIFICATE OF TRANSCRIPTIONIST

I, George Quade, do hereby certify that the foregoing proceedings and/or conversations were transcribed by me via CD, videotape, audiotape or digital recording, and reduced to typewriting under my supervision; that I had no role in the recording of this material; and that it has been transcribed to the best of my ability given the quality and clarity of the recording media.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

DATE: 2/6/2019 s/George Quade
GEORGE QUADE, CERT

Complaint

Exhibit B

In the Matter of:

Dun & Bradstreet

February 12, 2019
FTC-00008797

Condensed Transcript with Word Index

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FTC Exhibit B

FTC-00008797

Dun & Bradstreet 2/12/2019

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OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
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PAGES 1 THROUGH 36

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FEDERAL TRADE COMMISSION
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FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
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The following transcript was produced from a digital file provided to For The Record, Inc. on January 31, 2019.

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P R O C E E D I N G S

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STEVE: [redacted], this is Steve. May I help you?

MICKEY: Hi, Steve. This is Mickey with Dun & Bradstreet.

STEVE: Oh -- We're on a recorded line. Hello, how are you?

STEVE: Yeah, I was told earlier that I can go on there and -- without having to pay --

MICKEY: Uh-huh.

STEVE: -- contest a report.

MICKEY: So you can dispute --

STEVE: Because it's showing a $20,000 --

MICKEY: Slow payment?

STEVE: Something that is on there that I wasn't aware of.

MICKEY: Okay. And I wanted to let you know the call is recorded for quality.

STEVE: Sure.

MICKEY: So I'm just -- my system is loading up your report right now. So I'm trying to take a look at it so that we can address the situation here.

STEVE: Okay.

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MICKEY: All right. And then --
STEVE: We had a lab that we were trying to do business with. I know there's not much on ours so -- I tried to log in. It kept trying to charge me for stuff, wanting me to put a credit card in and everything. And I'm like, ahhh, no.
MICKEY: You were probably -- yeah, the system was probably trying to -- to, like, let you purchase a copy of the report. Steve, what is your title with the business?
STEVE: I am -- as I told her, owner and chief bottle washer.
MICKEY: Okay. So all of the above.
STEVE: All of the above, yes.
MICKEY: Okay.
STEVE: Other duties as assigned.
MICKEY: Right. Now, let's see. Oh, yeah, there's -- there's a lot of issues with your report. Have you ever actually looked at this other than today?
STEVE: No. I haven't even looked at it today. Just what little I saw on there. We got that in 2005. We had applied for a grant from the Department of Education and had to have a DUNS number.
MICKEY: Okay.
STEVE: -- to apply for the grant. And that's

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how we ended up with it. And I haven't touched it since.
MICKEY: Okay. All right. So a couple of things. The person that you spoke with earlier, do you know who that was?
STEVE: I don't.
MICKEY: Okay. So what I'm going to do is I'm going to set you up with -- it's a quick view. So it's a little bit different than logging in. But there's some stuff that you need to see on here that you're not going to have access to see unless you pay for service. So I'm just going to set it up here for you. It's a snapshot of the report.
STEVE: Okay.
MICKEY: Give me a second while I'm doing that in the system. Okay?
STEVE: Are you going to email that to me or something?
MICKEY: It should send you an email, but give me a second.
STEVE: Yeah. She said there was a $20,000 collection on us. I haven't heard of anything.
MICKEY: Yeah. Honestly, there's a lot of problems with this report. A lot.
STEVE: Okay.
MICKEY: So -- okay. So you know the login

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that you did for the credit signal where you see the trends of your scores?
STEVE: Yeah, it's --
MICKEY: Okay.
STEVE: -- of course our email address and [redacted], apostrophe.
MICKEY: Okay. So it's going to be that same login, but give me one second while I add it in. I'm still filling out your address and everything. It makes me re-fill out everything for your business --
STEVE: Sure.
MICKEY: -- before it will send it to you. The lab that you're talking about, was that like a customer that you were working with or a vendor or --
STEVE: It was a new vendor that we were looking at.
MICKEY: Oh. So you were going to be buying from them?
STEVE: Well, yeah, services. Just lab services. But they said in a report -- the other lady said, yeah, there's a lot of weird stuff on there. Some of it is just -- it's just like there's not been a whole lot, though.
MICKEY: Yeah. There's not a whole lot. And what is on here is not good.

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STEVE: What it is is negative, and -- yeah.
MICKEY: Exactly. You don't have enough positive to outweigh the [redacted] right. So go ahead and log into that account.
STEVE: Okay. Hang on. Okay, come on. Oh, come on. Really? You going to do this to me now? Hang on.
MICKEY: Sure.
STEVE: My ESAP is scanning. If it sees unusual activity, it kind of kicks back --
MICKEY: Wants to make sure it's safe.
STEVE: Oh, yeah.
MICKEY: Well, that's good.
STEVE: It scans --
MICKEY: It's good and annoying at the same time.
STEVE: Yeah, it is. Okay, here we go. Now we're cooking. Dun & Bradstreet reports; company name, [redacted]; search; boom, [redacted], there I am; select.
MICKEY: Let me know once it gets you in there.
STEVE: Here I go.
MICKEY: Okay. And you can always just view it

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and look at the basic information for free online. This is just going to be a different portal just so you can actually see some of the scores on the report so that you understand the status of this file.

So what do you see right now?

STEVE: It's asking for a credit card.

MICKEY: Oh, it shouldn't ask you for a credit card. You're just logging in, right?

STEVE: Right. Let's see, let's try it again here.

MICKEY: It does not ask you for a credit card in this screen.

STEVE: Google Dun & Bradstreet login. Let's see if that works.

MICKEY: Yeah. Well, you know what, go to -- because we have two websites. So make sure you're on www.d, like David, a-n-d, so apple, Nancy, David --

STEVE: Okay. Hang on a second.

MICKEY: B like boy --

STEVE: Okay. Give me just a second here. Come on. Okay. Www-dot --

MICKEY: D as in David, and, a-n-d, apple, Nancy, boy -- D again like David. So dandb, like Dun & Bradstreet.com.

STEVE: Dunandb.

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MICKEY: But you don't spell out Dun, okay? Just the letter D.

STEVE: DandB.

MICKEY: Yes.

STEVE: Right.

MICKEY: Okay.

STEVE: Dot-com. There.

MICKEY: It should look different, right?

STEVE: Right.

MICKEY: Okay. On the left-hand corner, there's a log-in screen. Click on that.

STEVE: There it is, got it. Boom, there it is. Never save, no. Don't save those. Okay. [redacted] I've got a quick view and a credit signal.

MICKEY: Under quick view, click view report.

STEVE: Okay.

MICKEY: And then the business summary is going to come up. So since a lot of that stuff is blank, how many employees do you guys have?

STEVE: Three.

MICKEY: Okay. What do you -- what is it that the company does?

STEVE: Drug testing.

MICKEY: Okay. And then the estimated revenue per year is about 120?

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STEVE: We did 104 last year.

MICKEY: Okay. And then you can take a look at the scores and the readings. This is your current status, your Paydex score. When you click on the top on the left, it says click --

STEVE: Right.

MICKEY: Mm-hmm. So the first one is Paydex. What this does is it showcases how you pay your bills. That scoring system goes from a one to 100, and 80 means that you pay within terms. So right now yours is a five. Okay? The next one --

STEVE: Rating, CR-4.

MICKEY: Yeah. You can click around on all of those. You know, it's pretty obvious your credit limit recommendation is going to be a zero. But if you click on the payments, this will show you the unfavorable comment for $20,000.

STEVE: Comments.

MICKEY: You've got to scroll down.

STEVE: Where do I find that?

MICKEY: When you click on payments, you have to scroll down a little bit and it shows you --

STEVE: Oh, okay.

MICKEY: -- trends. Yeah, and then underneath that it shows the unfavorable comment for $20,000. So

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that's -- that's number one problem. And then you also have these other -- other two vendors reporting yearly on the short-term business credit for $1,000 and then the business service for 250.

Now, the main problem -- one of the main problems is when you click under public filings, you have all kinds of tax liens coming up.

STEVE: And those are all taken care of.

MICKEY: Like, paid taken care of or you set up arrangements --

STEVE: No. I have a payment plan. I've got that --

MICKEY: Okay.

STEVE: -- in writing from the IRS.

MICKEY: Okay. So, you know, there's two of the same one reporting it looks like. But --

STEVE: Right.

MICKEY: It looks -- you know, when somebody else looks at it, I mean, it looks like you owe like $80,000 or probably more because that same one posted on there twice. Let me see the total amount of open liens showing. Yeah, like it looks like you guys owe $90,287 total.

STEVE: No.

MICKEY: Because this one posted on there

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twice.
STEVE: Hang on just a second here.
(Brief pause.)
STEVE: Yeah, it's actually $34,000. And I have an agreement -- payment agreement for $100 a month. That's going to be reduced even further. They actually -- because I have an attorney working on it.
MICKEY: Mm-hmm.
STEVE: They are looking into that because they were saying we didn't file some 1120Ss, which we did, and 941s. So I had to turn all those over that I had here.
MICKEY: Okay.
STEVE: And they're going to go back and renegotiate that. It's probably going to be closer to $14,000 is what the attorney said.
MICKEY: Oh, good. So you guys should be able to pay that off.
STEVE: So that's why they just did it for $100 a month because, I mean, you can't owe that much money to the IRS and they're going to let you pay $100 a month.
MICKEY: Right.
STEVE: Yeah. And so they even deferred the payments until March, the end of March, so they could get all this cleaned up before the payments start.
MICKEY: Okay. So you can just view those.

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Like I said earlier, basic updates and disputes are done at no charge. But to be honest with you, to have an impact on your scores and your ratings, you are going to need to add more references in here -- more payment references to help improve your payment summary.
STEVE: Okay.
MICKEY: So that's where the service comes in. So that's done through the CreditBuilder. So that's a service that you pay for, and that allows you to add the payment history to help improve your status on Dun & Bradstreet.
STEVE: Okay. And these -- these loans that are out --
MICKEY: The [redacted] --
STEVE: [redacted], all of that, those are probably going to be --
MICKEY: Validated?
STEVE: No. Those are probably going to be wiped out. Those were -- the State Attorney General is fixing to go after some of these companies. And I -- we took this money out, we were the first part of last year. We took some big hits in our business. We do the drug and alcohol testing. We lost about $6,000 a month in gross revenues, and $12,000 in bad debt invoices from oil and gas producers and oil fill service companies that

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went out of business.
MICKEY: Oh, no.
STEVE: And -- yes. And so I took out some -- a couple of these advances just to kind of bridge. They are -- the attorney general here I think is fixing to file a class action lawsuit, it sounds like. Because some of these places are doing those daily pays, which they were doing with us, and it's the way they're compounding them. It looks like interest rate, which I didn't understand.
They said, you know, we're giving you this -- you know, this rate at 15 percent. But what it is it's 15 percent of your daily gross revenues, and so it ends up to be like 200, 300 percent interest, which is illegal in the State of [redacted] because the State of [redacted] has a set maximum interest rate that can be charged on loans.
MICKEY: Oh, okay. Well, as soon as you get that, if you do get those paid or if you want to dispute those, you can always dispute them off of the report, too. And that's part of the free service. The only problem is is you're only able to dispute five items at a time.
STEVE: Right.
MICKEY: So you can dispute the five and then --

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STEVE: The only one I need to -- the only one I need to fix right now, the main one, is that lien because that's -- of course, the lien stays in force, but we do have a agreement --
MICKEY: Yeah. And at this point --
STEVE: -- which I have in writing.
MICKEY: -- I mean, it looks like there's two that are the same lien being reported.
STEVE: Right.
MICKEY: Okay. So that -- because it's on there twice, it looks like it's two separate liens when you look, like, on paper. You know what I mean?
STEVE: Right.
MICKEY: So you're going to need to dispute those. And then plus that $20,000 slow payment, or the unfavorable comment. That also needs to be taken care of, too.
STEVE: Right.
MICKEY: And then in the meantime, you're going to need start adding in the tradelines. Now you can't see this on your end, but there have been 11 inquiries on the report.
STEVE: Right.
MICKEY: So those are other companies purchased a new report to run a risk assessment on you. Other than

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that lab, who else would have been looking at this?
STEVE: I'm not sure. Two labs, that's about it.
MICKEY: Two?
STEVE: Two --
MICKEY: Okay.
STEVE: -- is all I know of.
MICKEY: Okay. Yeah, because there's been 11 of them on here within the last 12 months, which is a lot.
STEVE: Huh. So how do I contest these? You said I --
MICKEY: So -- yeah.
STEVE: -- can do five of them for free?
MICKEY: Uh-huh. So what you do is on the upper right-hand corner of the screen where it says Welcome, Steven, click on that, and then click on company update. And then you can go through that process --
STEVE: Okay.
MICKEY: -- to get access. Now, were you wanting to set up the service to help build and improve your scores and your ratings, or --
STEVE: Well, I want to get this done first.
MICKEY: Yeah, that's fine.
STEVE: Because this is a pressing matter

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because I need to get this new lab on board. And to do that, I need to get this cleaned up.
MICKEY: Mm-hmm. The only issue is, is that even when you get that $20,000 payment removed --
STEVE: Right.
MICKEY: -- your payment history is only $22,000 on here. So when you get the $20,000, if it comes off, then that's going to drop the payment history to $2,000. So it still may not put your report in the best shape, if that makes any sense. You're going to have -- you're going to have to do more than one thing at once to really get the ball rolling with the report.
STEVE: Okay.
MICKEY: You know? You're going to need -- because this is a time-consuming process. So even during the disputes, I mean, that still takes usually about seven to 10 business days to even get that process completed.
STEVE: Okay. So I've got dashboard, company update, account settings --
MICKEY: Company update.
STEVE: Company update. Okay. Company update is fast, free and easy to use.
MICKEY: Close out of that.
STEVE: Okay.

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MICKEY: Click Get Started.
STEVE: Get Started.
MICKEY: You're going to have to search for your business.
STEVE: Okay. Search. So there's a bunch of [redacted]. All right.
MICKEY: Now, is this the Dun & Bradstreet number that they gave to you?
STEVE: Yes, [redacted]. Okay, I clicked on the name of my company; submit. [redacted] --
MICKEY: Yours was the first one that came up, right?
STEVE: Right.
MICKEY: Okay. There are quite a few in [redacted] there with your business name, huh?
STEVE: There used to be another one here in town.
MICKEY: Really? That's strange.
STEVE [redacted]. Yeah, there were a general contractor, general construction. Because we had -- we got some mail for them, but it was at our address. But they've never been here. We've been here since 2002 at this address.
MICKEY: Mm-hmm.
STEVE: But the phone number was not our phone

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number, and the contact name was not me.
MICKEY: So did you decide to give it a call, or --
STEVE: I called them and they said, well, you have an outstanding debt for something from a lumber supplier or something like that. Anyway, it was, you know -- and I said, well, we do drug testing, so we don't use much lumber. And they said -- and I said, and I don't know who this person is. And they said, well, we just tried to find the company because they kind of dropped off the map; we've just been looking for them.
MICKEY: Wow.
STEVE: They come up with [redacted], us, and then it wasn't a month-and-a-half after that I had a lady from, like, Georgia or someplace call me and she said, is this [redacted]? I said, yes, it is. And she said, well, I've got a credit card charge from y'all and I need to know what it was for. And I said, well, it must have been a drug or alcohol test or a DNA test. And she said, I haven't had any of that. I said, has any of your family members? She said no.
I said, well, that's all we do. So she said, no, it was for something else. And I said, that's nothing that we provide here. And I said, who is it processed through? And she told me it was some credit

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card processing company here in town. I said, we don't use them; we use Intuit QuickBooks for all of our credit card processing. And so -- it was weird.

MICKEY: That is. That is really weird. Okay. Because it's strange that the state would even let them register the name so close to yours, or even the exact same name.

STEVE: Now, I use -- I don't use my home address on anything because of what we do for a living. We have -- we don't give out our address. We've had our house vandalized twice.

MICKEY: Uhhh, really?

STEVE: Yes.

MICKEY: So -- so what you're doing right now, it is going to make you verify that. But we're not posting it anywhere.

STEVE: Right.

MICKEY: What you're doing is you have to authenticate to confirm you are who you say you are in order to have access to the disputes --

STEVE: Okay. So nobody has access to this?

MICKEY: No. We don't publish that or anything.

STEVE: Okay. That's good. Because -- yeah, we do drug testing for the courts here. And --

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MICKEY: Oh, I see.

STEVE: Yeah. You have people lose their children. They tend to get a little upset.

MICKEY: Oh, yeah. Oh, yeah. Even though it's really their fault.

STEVE: Well, it's never their fault.

MICKEY: Oh, right, right.

STEVE: And [redacted] is no longer in the business.

MICKEY: Okay. Yeah, I seen her listed --

STEVE: [redacted]

MICKEY: Okay. I wasn't sure if she was your [redacted] or not or --

STEVE: [redacted]

MICKEY: -- business partner. Okay.

STEVE: [redacted]

MICKEY: [redacted]

STEVE: [redacted]

MICKEY: [redacted]

STEVE: [redacted] arrangements. So, yeah, it's bad.

MICKEY [redacted]

STEVE: It [redacted]

MICKEY: [redacted]

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[redacted]

STEVE: [redacted]

MICKEY: Right.

STEVE: Okay. Oh, wow, what's this? Professional license. We don't really have one even though I have them. It's not required --

MICKEY: What is that? What is it asking you?

STEVE: Professional license. You're not going to have ours on here.

MICKEY: Yeah. Is it a requirement to put something there? If not, I would just skip that.

STEVE: I don't think so, no.

MICKEY: Okay.

STEVE: No, it's not.

MICKEY: Okay.

STEVE: It does not have an asterisk or anything.

MICKEY: Okay.

STEVE: We don't have a website. I have a Facebook, but not really.

MICKEY: That's fine.

STEVE: I don't twiddle, twitter or -- I call it tweedle and -- because to me it's useless.

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MICKEY: Yeah. I have a Facebook, but that's it. I don't do Instagram and --

STEVE: I don't do all that.

MICKEY: -- Twitter and --

STEVE: No, we have a Facebook page --

MICKEY: -- Snapchat and --

STEVE: -- but it's more -- it's more -- we have people that get us on Facebook to ask questions, I had this drug test at such and such and it did this, and, you know, I was told that you guys can help me and tell me what to do. And so it's more professional. It's a business Facebook page. We don't really use it that much. It's a question and answer thing for me.

MICKEY: Yeah. And if you're doing it for the court, you really don't have to, like, market your business out. Right? Unless you --

STEVE: We do.

MICKEY: -- guys are trying to find more --

STEVE: We do. But we don't --

MICKEY: -- companies to reach out to.

STEVE: -- market much because it all comes from our other -- our customers. So we're loading your information; this may take a few minutes. But, yeah, we -- we don't really -- we used to have a website and, I don't know, I'm a quirky person. I'm not -- what are the

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first two digits of my Social Security number. No, your business. Oh, sorry.
MICKEY: No, you're fine. Don't ask me why it makes you go through this. But it's really for your security, just to --
STEVE: Right, right.
MICKEY: Because you wouldn't want somebody else going on here and updating this or changing the address to something else.
STEVE: No. Absolutely not. That's why we use the ESAP. There we go, complete. Update your Dun & Bradstreet report; review and dispute payments. There we go. Is that what I need to do?
MICKEY: Yeah. Well, that's where you -- yeah, click on the review and dispute and then it's going to give you a list of them. Click on -- next to the $20,000, click on that.
STEVE: Okay.
MICKEY: And then press dispute. Now, the only issue is is try -- try -- if you can, try to make sure everything is selected at once. Okay? As far as the liens and then that slow payment because I think if you submit the slow payment without doing the liens then it's going to lock you out of the system automatically. Then you're not going to be able to dispute the liens. Does

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that make sense?
STEVE: Yes. I've got to do up to five.
MICKEY: And then the liens are going to be -- let me remember how to get there. Click on -- try to click on public filings.
STEVE: Review public filings.
MICKEY: Yeah. And then --
STEVE: It says, do you want to cancel update.
MICKEY: Oh, so it's going to make you do one. You can give it a shot to go ahead and dispute that one and then come over to this other part.
STEVE: Okay.
MICKEY: Hopefully it's going to let you do both without locking you out.
STEVE: I don't know what these cash accounts are.
MICKEY: If they're showing you paid on time, I would just leave them. Because it could be, like, a purchase from, like, I don't know, some paper or something that you bought.
STEVE: I don't have any cash accounts. Now, lease agreement, I don't have any lease agreements except for my lease on my office, and it never was $750.
MICKEY: And they can round that up. So if it was, like, $720, it's going to be rounded.

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STEVE: Yeah. It's -- it was $1,194.70, and then when we started losing the business we moved down to a smaller office, and that's just the first of the year. So --
MICKEY: Oh, okay.
STEVE: -- it's -- or the end of last year. So this thing has been going since 4 of 2016. So I don't know what that is; never seen that before. I don't have any leases.
MICKEY: I'm not sure. It could be like a computer lease, a copier lease.
STEVE: Nothing. I don't lease things.
MICKEY: Okay. Well, if it's not reporting you late, I would leave it on there. If it's reporting you late --
STEVE: Not reporting -- it's not reporting -- now owes $750; past due, zero. So I don't know what that is.
MICKEY: Yeah. I would just -- it looks -- it sounds like it's being paid on time. So I would just leave that on there for now.
STEVE: Leave that one on there?
MICKEY: Yeah.
STEVE: Okay.
MICKEY: If it starts doing you harm or showing

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that you're not paying it or that it's not being paid, then dispute it. And then after you do that, then you click --
STEVE: Yeah. $20,000 is what now? That's the one that's the loan.
MICKEY: Unfavorable comment.
STEVE: Okay. What do I put, incorrect terms?
MICKEY: Yeah, I would -- I would just mark any one of them. Because we're going to go through an investigation.
STEVE: Okay, good. Okay, incorrect terms. Now it says back. So I guess that goes back so I can do some other ones?
MICKEY: It doesn't show me the screen that you're on so I have no idea.
STEVE: Let me just hit review public findings.
MICKEY: Yeah, try to do that.
STEVE: Okay. It says back. Now it lets me go back to that and it's got that one checked; review public findings.
MICKEY: And then what is it showing you?
STEVE: Cancel update.
MICKEY: Oh, go ahead and do the update. Go ahead and finalize that other one.
STEVE: Okay. Liens, review public filings,

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details. Huh. Liens for -- there it is. There's four of those. So I could do all -- I could do two of those, couldn't I?

MICKEY: You should be able to, yeah.

STEVE: Because they're all for the same amount. Is that what you're showing?

MICKEY: The two, the two bottom ones were for the same amount.

STEVE: What is that showing, the $40,000?

MICKEY: Forty -- yeah, like 43 each. Let me pull it back up.

STEVE: And what are the top ones for?

MICKEY: Yeah, 43.

STEVE: That one should be the 4,800.

MICKEY: The top one is for 2,900, and then the second one down doesn't have a number.

STEVE: Okay. They were filed on the same day. So it's probably the same filing.

MICKEY: Start with the two bottom ones because those are the worst or the largest amounts --

STEVE: Okay.

MICKEY: -- I should say.

STEVE: All right. Okay. Now, one of those -- I'm going to do both of them because that's not the amount. That's the same filing.

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MICKEY: Yeah. Just put not correct amount.

STEVE: Upload -- it says upload.

MICKEY: Oh, that's right. You've got to put some documents in there.

STEVE: Okay.

MICKEY: I'm sorry, I forgot about that. So you -- you have the document right now, right?

STEVE: So I can put that agreement -- I can put that payment agreement in there --

MICKEY: Yeah.

STEVE: -- and that would -- okay.

MICKEY: Hopefully -- hopefully it's going to remove it. I can't guarantee that it's going to remove it. But if not, I'm hoping at least they're going to remove one so that there's not the two listings on there so it doesn't look like you owe 90 grand. I mean, that's a lot of money.

STEVE: Right. Yeah, yeah. And it's not actually much even. So --

MICKEY: Mm-hmm. I mean, you're -- you're like a third of that. So if we can get it down to 30,000, that will probably look a lot better.

STEVE: Hang on a second. Let me get the phone. IRS. Yeah, that was pretty strange dealing with all that. Well, you sure need an attorney, though.

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MICKEY: What's that? And then when you try to call and to get it straightened out, you're spending hours on the line.

STEVE: Well, it's -- you know, it's one of those things that you do stupid things when you panic.

MICKEY: Mm-hmm.

STEVE: And I thought, okay, well, what I'll do is I'll just hold off on paying some of these 941s and business will pick up and I'll pay a little late fee and a penalty and that will be all she wrote and we'll catch up.

MICKEY: Yeah. It doesn't work out that way, huh?

STEVE: Yeah. That was stupid.

MICKEY: Well, at least now you know for the future.

STEVE: [redacted]

MICKEY: [redacted]

STEVE: Yeah. [redacted]

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[redacted]

MICKEY: Oh, no.

STEVE: Mm-hmm.

MICKEY: That's terrible.

STEVE: So I had to go down today and take care of that. That was always good.

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MICKEY: A lot going on.
STEVE: There's little piddly crap that, you know, you just want to pull your hair out after a while. But, you know it's -- I'm trying to -- I'm sure it's here in a pile of junk somewhere. We have -- we just moved our office so I'm discombobulated right now.
MICKEY: Nothing is where it should be.
STEVE: No, absolutely not.
MICKEY: Yeah.
STEVE: I've got -- we're having to redo our files because we don't have the space that we used to have. So I'm having to refile everything.
MICKEY: Oh, yeah. As soon as you find it, you can just, you know, upload it into the account and then that's going to allow you to dispute it. And then, you know, as far as the disputes, like I was saying, they normally take about seven to ten business days.
STEVE: Okay.
MICKEY: Sometimes they take a little bit longer. But as long as you can get the documents uploaded in there, then it should -- should go pretty quickly.
STEVE: Okay, good. Well, that's all I'll need. If I need anything, I've got the toll-free number she gave me. I was just --

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MICKEY: All righty.
STEVE: -- thinking maybe, you know, we can get that done quicker this way. But I couldn't negotiate that too well. So, anyhoo, it's -- but I'll get that uploaded and -- there it is. I'll get that uploaded to you --
MICKEY: Okay. Sounds good.
STEVE: -- and, like I say, this is showing how much is actually --
MICKEY: Currently owed, the balance. Okay.
STEVE: Yeah, yeah.
MICKEY: That's fine. Yeah, and if you are wanting to set up that credit builder service, this way you can focus on, you know, multiple things at once to get the file cleaned up. That would be the best option for you guys. Even if you set the service up on a monthly basis for now, I would definitely recommend you to do that. Okay?
STEVE: How much does that run?
MICKEY: So the -- the yearly cost, retail, it's $1,599, $1,599. We can put in some discounts. I can -- because I know you're a smaller company and you guys have a lot going on. So we can discount it down to $799 -- $799.50.
STEVE: Okay.

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MICKEY: Or monthly. Monthly is going to be more expensive just because we -- we have no control over your discount. So monthly is going to be $159 a month.
STEVE: Okay. All right. Well, very good. Listen, thank you very much. I appreciate your help.
MICKEY: No problem. Enjoy the rest of your day.
STEVE: Thank you.
MICKEY: Bye-bye.
(The call was concluded.)
(The recording was concluded.)

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CERTIFICATE OF TRANSCRIPTIONIST

I, George Quade, do hereby certify that the foregoing proceedings and/or conversations were transcribed by me via CD, videotape, audiotape or digital recording, and reduced to typewriting under my supervision; that I had no role in the recording of this material; and that it has been transcribed to the best of my ability given the quality and clarity of the recording media.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

DATE: 2/6/2019 s/George Quade
GEORGE QUADE, CERT

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Exhibit C

In the Matter of:

Dun & Bradstreet

February 12, 2019
FTC-00008800

Condensed Transcript with Word Index

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FTC Exhibit C

FTC-00008800

Dun & Bradstreet 2/12/2019

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OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: FEBRUARY 6, 2019

PAGES 1 THROUGH 21

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FEDERAL TRADE COMMISSION
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FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
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The following transcript was produced from a digital file provided to For The Record, Inc. on January 31, 2019.

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P R O C E E D I N G S
- - - - -
FTC-00008800

RONNIE: Thank you for calling Dun & Bradstreet. All calls are recorded. This is Ronnie. How may I help you?

PHILIP [redacted] Hey, there, Ronnie. Philip [redacted] How are yo

RONNIE: Hello. I'm great, how are you?

PHILIP [redacted] Good. Hey, trying --

RONNIE: Good.

PHILIP [redacted] -- to pull up these reports on my business here, and I -- I don't know what to do. It's my first time doing it. I was trying to get credit somewhere and somebody said some shit's showing up on my Dun & Bradstreet report. So I need to see what it looked like.

RONNIE: Okay. Let's -- let me help you with that. Let's see here. May I have your DUNS number?

PHILIP [redacted] No, I didn't even know I had one.

RONNIE: Oh, okay. Let me see if you have one here. So a lot of times you could be given one organically once you get recognized as a business.

PHILIP [redacted] I had to look it up by telephone

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number when I was on your website. It wouldn't accept the business name for some reason.

RONNIE: Okay. What's your business name?

PHILIP [redacted]

RONNIE: Okay.

PHILIP [redacted]

RONNIE: And where is your business located?

PHILIP [redacted]

RONNIE: [redacted] Okay, awesome. Thank you. And may I have your name for compliance purposes?

PHILIP [redacted] Phil [redacted]

RONNIE: All right, Phil.

PHILIP [redacted] Phil [redacted]

RONNIE: Thanks, Phil. All right, Phil. I'm looking at your company credit report right now. Your DUNS number is [redacted]. It says the CEO is Matthew [redacted].

PHILIP [redacted] Yes.

RONNIE: Is that -- is that right, Phil?

PHILIP [redacted] That is correct.

RONNIE: All right; perfect. It shows that you're a $9 million company.

PHILIP [redacted] Yep.

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RONNIE: You have inquiries on your report. I guess, Phil, how familiar are you with Dun & Bradstreet, sir?

PHILIP [redacted] I remember talking about you guys when I was in college.

RONNIE: Okay, nice.

PHILIP [redacted] But other than that...

RONNIE: What was you talking about in college?

PHILIP [redacted] You know, I just remember it being mentioned it one of my college classes.

RONNIE: Okay. Well, you're familiar with your personal credit, Phil, how that works with TransUnion --

PHILIP [redacted] Yes.

RONNIE: -- Equifax, Experian, how they hold your personal credit? So we -- Dun & Bradstreet, we hold your business credit. That DUNS number is like the Social Security number to your business, and attached is your company credit report that I'm currently looking at right now. There is activity on the report. Typically what that means is that activity is companies or businesses that you are currently working with, it looks like they reached out to Dun & Bradstreet and they purchased a copy of your company credit file.

PHILIP [redacted] Okay. Yeah, that should have been [redacted] recently.

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RONNIE: Yeah, yeah. It's -- is [redacted] the manufacturing company?

PHILIP [redacted] No. It's a [redacted] company.

RONNIE: Okay. And why would they be purchasing your report, Phil?

PHILIP [redacted] Because we're increasing the amount of business we're doing with them.

RONNIE: Oh, nice. Okay. Let me go over this basic demographics with you really quick. I want to make sure this is going out correctly. [redacted]; your DUNS number is [redacted]. That's on the report. Your phone number is [redacted]. Is that correct, Phil?

PHILIP [redacted], that is correct.

RONNIE: Perfect. And then your address is [redacted], [redacted] (inaudible) thousand six. So I've got to ask you for -- being a $9 million company, you only have three employees?

PHILIP [redacted] Yeah.

RONNIE: And then Matthew [redacted], single location; sales is $9 million; business services is your line of business. What is it you guys do? What is [redacted]?

PHILIP [redacted] We're in the telecommunication industry.

RONNIE: So I would -- like, if I want to do a

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conference meeting, you would set that up for me? That's how, I'm assuming?

PHILIP [redacted] Yeah, mm-hmm.

RONNIE: Okay, cool. How do you get your customers?

PHILIP [redacted] They come to us.

RONNIE: All right, nice. Well, you have ten inquiries. Typically that means, like I was telling you, businesses you're more than likely working with purchased a copy of your company credit report. They spend up to 188 bucks to look at your financial resume.

PHILIP [redacted] Yeah. Apparently something bad is on there.

RONNIE: Okay. Why do you say that? What's going on?

PHILIP [redacted] Well, because -- because they said after looking at our Dun & Bradstreet they wouldn't give us the credit. We have to give them cash to cover our --

RONNIE: Okay. Okay.

PHILIP [redacted] I need to know what's wrong on there so I can fix it.

RONNIE: Okay.

PHILIP [redacted] And that's why I'm calling you.

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RONNIE: Okay. So there's -- well, you have your company credit report and there's five scores and ratings on the report currently. And because you haven't got in this report and managed this report, you're showcasing that you only paid out $7,700 in the last 24 months to operate your business. And the reason why that is, there's only a handful of companies that report to Dun & Bradstreet. Okay?

PHILIP [redacted] Yeah.

RONNIE: We make it so we give you full access to your files so you can give us all that -- those companies that you pay out to operate your business, and we put them -- we help you get that on the report. Okay? So basically you give us the names and the address of those companies and then we go and help them get all that financial date on the report for you.

PHILIP [redacted] Okay.

RONNIE: Right now currently, because it's only showing $7,700 and your -- you got some slow pays on the report that you're not aware of. So your Paydex score is a 51. So the Paydex score is like the FICO score to your personal credit. Okay?

PHILIP [redacted] I got you.

RONNIE: Because of the financial data that's on the report currently, that's why it's showing that.

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That's probably why they're not going to lend you or extend any kind of credit towards you because of your report.

PHILIP [redacted] Yeah.

RONNIE: The way it shows on -- because this is important to showcase your full financial strength of your company. Your SER score is a five. The SER score, it's called the supplier evaluation risk. Basically what this score lets companies know how long -- how much longer you're going to be in business based on that score. You're currently at a five right now. So nine is the highest.

PHILIP [redacted] Oh, okay.

RONNIE: So you're kind of right in the middle there. Typically it likes to see below the five. So you're right on that line. But -- so we make it capable so you have full access to your file so you can showcase that. And we make it so you get verified on the report. What that means is when we do a background check, this basically shows you're a legitimate company. When you are -- when you do get your company credit report pulled from Dun & Bradstreet.

PHILIP [redacted] Okay.

RONNIE: Does that make sense?

PHILIP [redacted] Yeah.

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RONNIE: How many -- how many bills or expenses do you pay out on a monthly basis?

PHILIP [redacted] Hold up.

RONNIE: Ten, 15?

PHILIP [redacted] I don't know, $300,000?

RONNIE: Okay. That's about right for $9 million. So you got your mascot in there?

PHILIP [redacted] Yeah.

RONNIE: That's awesome. What kind of dog is he?

PHILIP [redacted] He's a yellow lab mutt.

RONNIE: Nice, nice. You just got one?

PHILIP [redacted] Yeah, yeah.

RONNIE: Yeah. Yeah, I love dogs. I got four of them myself.

PHILIP [redacted] Oh, fantastic.

RONNIE: I know. It keeps me -- keeps my hands full for sure. So you're paying out about $300,000. We need to make sure that this showcases on the report for you to give you -- you can always update, view and dispute any of that basic information for free. But to have full access to your file and to be able to get in here and give us all that financial information that you're paying out to that the report's lacking, and to get your scores and ratings fixed so you can have -- with

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the communication company that you were telling me about --

PHILIP [redacted] Uh-huh.

RONNIE: -- so you can extend that credit, you need full access to it. And it's a fee-based service that we provide for you. It's an annual fee to get in here and start doing this, Phil.

PHILIP [redacted] Okay.

RONNIE: I mean, I recommend the premium because of the size company you are. (Inaudible) looking at about 25 trade references, you can pull ten reports on others, and you get full monitoring. And this is going to help with that background check. So once I send you out your links and logins, you'll have full access and you can start building this up. We show you how to do this so you can start leveraging your DUNS number to grow your business. What is your email address, Phil?

PHILIP [redacted]

RONNIE: And that -- is it with one L?

PHILIP [redacted] Yes, one L, P-h-I-l --

RONNIE: Okay, okay [redacted]. So, yeah, the annual fee for the premium credit builder, it's $1,999. Typically you would have an activation fee of $149. I'll get that waived for you today.

PHILIP [redacted] Okay. I got to talk to the

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partners about this, though.
RONNIE: Okay.
PHILIP [redacted] I can't just --
RONNIE: I --
PHILIP [redacted] -- (inaudible) right now.
RONNIE: Okay. How soon -- I mean, how soon do you need this report fixed?
PHILIP [redacted] Well, I'm only giving them $7,500 to continue working with them. So --
RONNIE: Yeah. I mean, I --
PHILIP [redacted] (Inaudible).
RONNIE: Typically, I mean, we have the CreditBuilderPlus, which is a smaller one. That's $1,599. That will give you access to put in 12 trade references.
PHILIP [redacted] Yeah.
RONNIE: What I can do, Phil, is -- are you at your email right now?
PHILIP [redacted] Yes, I am.
RONNIE: Here, let me -- let me do this. Let me send you over the PDF so you can see these. For everything that you're trying to accomplish, I mean, I understand, you know, I don't -- we're not trying to break the bank by no means --
PHILIP [redacted] Yeah. It's just weird that --

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it's just weird because in 11 years of doing business, I've never even come across this.
RONNIE: Yeah. And you're -- you know what, honestly, Phil, you're going to find it more and more and more. I mean, it's -- I've been with Dun & Bradstreet for about a year now, and the more companies that require business credit and it makes -- they look at them scores and ratings. I -- it's crazy. I'm not kidding you. It absolutely is. And that's why you've been in business for as long as you have and then you're hearing it for the first time.
PHILIP [redacted] Yeah.
RONNIE: And this is -- I mean, this is where you want to make sure that you're -- we give you the opportunity to make sure you're leveraging yourself by making sure you got a full file and you get that correct information. Because this is the way companies -- it's more than a handshake and a smile anymore, man. Again, you can go on -- you can -- I don't know if you -- you obviously never logged into your report before. You can go to the iUpdate again --
PHILIP [redacted] Mm-hmm.
RONNIE: It's iupdate.dndb.com.
PHILIP [redacted] Okay.
RONNIE: It's -- yeah, the I-dot --

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iupdate.dndb.com. And that will get authenticated to your report. And then once you get -- you'll be able to see everything.
PHILIP [redacted] Okay.
RONNIE: I just sent you the PDF.
PHILIP [redacted] Okay.
RONNIE: What I'll send you is -- well, I'll send you that CreditSignal, Phil, so you can see an overview of your report. This just kind of gives you an overview of your scores and ratings.
PHILIP [redacted] Perfect.
RONNIE: You can see this. Typically once you move forward with the service, obviously you'll hold onto the receipt for tax purposes and then, again, you have full access to the file. I get you over to our engagement team, which is our product specialist, and they -- they help you and they help navigate you through your company credit report and help you get your -- they show you how to get your trade references onto the report so it showcases that financial strength. Then they go over the scores and ratings with you.
PHILIP [redacted] Yeah.
RONNIE: So you know what's going on. Hey, Philip, can you spell your last name for me?
PHILIP [redacted].

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RONNIE: Okay, thank you. Okay. This is the CreditSignal I'm sending you. And then you'll get a temporary password. It takes a few minutes to get this one. It's a big file. Are you -- are you -- are you in your report yet, or --
PHILIP [redacted] No, I'm not.
RONNIE: Okay.
PHILIP [redacted] I haven't received it from you.
RONNIE: Did you get the CreditSignal yet?
PHILIP [redacted] No. I got --
RONNIE: Oh, okay.
PHILIP [redacted] -- just the first one that you sent me, which was the CreditBuilder and the -- just the premium and the plus.
RONNIE: Okay. Them are the two different services that you would need to get your file to where it needs to be. The CreditSignal, it should be there. It takes a few minutes. It's a huge file.
PHILIP [redacted] Okay.
RONNIE: Who is John [redacted]
PHILIP [redacted] One of the partners.
RONNIE: Yeah? Okay. Did you get it?
PHILIP [redacted] Your account has been created. Okay.
RONNIE: Okay. This is the dashboard to the

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CreditSignal. You're going to get a temporary password. Through CreditSignal, you'll be able to look at your company update as well. If you launch your CreditSignal once you're in it -- tell me when you're in it.

PHILIP [redacted] I'm in the dashboard here. It's at product license agreement. All right. Then I got temporary password (inaudible) new password.

RONNIE: Yep.

PHILIP [redacted] All right. I already have a DUNS number. All right. Now what do I do? It says getting your unique global identifier, and then I got CreditSignal here. Am I supposed to click on learn more? Yes/no?

RONNIE: Yes, I think -- I mean, once you put in your temporary password, did it come -- did it bring you to your dashboard?

PHILIP [redacted] Yeah, I'm on the dashboard right now.

RONNIE: Okay. And then did you click on CreditSignal?

PHILIP [redacted] It just -- it's faded black or faded out and it just says learn more. I can't look into it.

RONNIE: Okay. I guess --

PHILIP [redacted] Add my company --

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RONNIE: That's interesting. I thought you'd just get access like I had. I can look at what you're looking at and just kind of walk you through and explain some things to you.

PHILIP [redacted] Maybe I've got to add the -- no. I don't see any place to add the -- it says get free DUNS number.

RONNIE: You already have a DUNS number.

PHILIP [redacted] Well, yeah, but I -- I have to add it to my account, I guess.

MICKIE: Oh, I see.

PHILIP [redacted] I've got to put in so much crap to do this. Complete one of four steps -- I have to complete all sorts of shit to do this. All right. (Inaudible) professional license. Well, I'm not going to be on the company. So is this thing going to kick me back out trying to get on it since I'm not --

RONNIE: Kick you back out? What do you mean?

PHILIP [redacted] Well, because I'm not --

RONNIE: No. It --

PHILIP [redacted] -- (inaudible).

RONNIE: No. It should -- yeah, you're fine.

PHILIP [redacted] Okay.

RONNIE: I just wanted you to see it and go over it. I wanted -- I guess I wanted to make sure that

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you understood the scores and ratings and what that looks like and just be available to answer any questions for you.

PHILIP [redacted] Okay, yeah. Ronnie, I think I got somebody showing up for a meeting here.

RONNIE: Okay.

PHILIP [redacted] Can I reply to your email and that will get to you?

RONNIE: Yeah, absolutely. Let me know how I can help. I mean, typically the first time you're getting into this is -- I'm going to waive the activation fee and I can help you guys with a discount when you're ready. I mean, I don't -- we're not trying to break the bank. I just want to help you and set you up for success. Okay, Phil?

I mean, I understand, I get it. But at the same time, I just want to make you understand what the investment is and how easy we make it for you. So it is a business as well. So, anyways -- so, yeah, just send me an email, Phil, and we'll get you taken care of. Let me know.

PHILIP [redacted] All right. Thank you very much.

RONNIE: All right, sir. Thank you. Have a great day.

PHILIP [redacted] Yep. Bye-bye.

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RONNIE: Bye.

(The call was concluded.)

(The recording was concluded.)

Complaint

CERTIFICATE OF TRANSCRIPTIONIST

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DATE: 2/6/2019 s/George Quade
GEORGE QUADE, CERT

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Exhibit D

In the Matter of:

Dun & Bradstreet

February 13, 2019
FTC-00009300

Condensed Transcript with Word Index

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FTC Exhibit D

FTC-00009300

Dun & Bradstreet 2/13/2019

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OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: FEBRUARY 7, 2019

PAGES 1 THROUGH 26

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FEDERAL TRADE COMMISSION
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FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
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The following transcript was produced from a digital file provided to For The Record, Inc. on January 30, 2019.

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P R O C E E D I N G S

FTC-00009300

NICOLE MOORE: Dun & Bradstreet. This is Nicole. How can I assist you?

RHONDA [redacted] Nicole, my name's Rhonda [redacted] and I have a -- a Dun & Bradstreet number, and someone's reported that I'm $1,000 late on a bill for the month of -- month of December.

NICOLE MOORE: Okay.

RHONDA [redacted] I pay $18 million worth of bills a year --

NICOLE MOORE: Mm-hmm.

RHONDA [redacted] -- and this $1,000 bill, I don't know who it is, I need to find out so we can get it corrected.

NICOLE MOORE: Okay. All right. Give me one second here --

RHONDA [redacted] How do I go about finding it out?

NICOLE MOORE: Well, let's go over your account here. What's your DUNS number that's at the top of that notification?

RHONDA [redacted] One -- 10 --

NICOLE MOORE: Your DUNS number -- oop, okay.

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RHONDA [redacted] -- [redacted] --
NICOLE MOORE: Mm-hmm.
RHONDA [redacted] -- [redacted]
NICOLE MOORE: Okay, give me one second. For [redacted]
RHONDA [redacted] Yep.
NICOLE MOORE: Okay. And, Rhonda, what's your position with the company?
RHONDA [redacted] I'm the owner.
NICOLE MOORE: Okay. All right. Let's see what's coming up here. You guys have had a lot of inquiries here. But I'm showing --
RHONDA [redacted] Evidently.
NICOLE MOORE: -- one, two -- I'm showing three slow payments sitting on this report. I'm showing one was just filed in January of 2018 in the amount of $50 slow paid. I'm also showing --
RHONDA [redacted] $50?
NICOLE MOORE: Mm-hmm. There's also one, $250, that was filed back in September of 2017. And as of right now, there's a payment for $1,000 that's past due, and that was in December of 2017.
RHONDA [redacted] Can you tell me who they were?
NICOLE MOORE: Well, it's only going to be

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listed by the industry, but let me just see here if I can figure it out. One of them was a manufacturer of paint products.
RHONDA [redacted] Paint?
NICOLE MOORE: Paint, mm-hmm.
RHONDA [redacted] Is that the $50 one or what?
NICOLE MOORE: That's the $250 one.
RHONDA [redacted] Okay.
NICOLE MOORE: And this other one here, I'm not really sure. Yeah, it was just reported, so it's not really a lot of detail coming up on that one. But the $20,000 one with the $1,000 past due, let me see if I can figure that one out. And that one is coming from a short-term business credit.
RHONDA [redacted] A what?
NICOLE MOORE: Short-term business credit from the looks of it here.
RHONDA [redacted] How do I go about finding these --
NICOLE MOORE: I'm sorry, you know what, it's a wholesale --
RHONDA [redacted] -- (inaudible).
NICOLE MOORE: -- yeah, wholesale hardware. So basically, you don't need to know who it is in order to dispute it. Once you dispute that information, it starts

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a process on this end, where we're reaching back out to those companies that have reported that information to let them know that you are not in agreement with the payment history.
So they either have one of three things that they can do. Either they're going to come back to us and tell us that this information is accurate and show proof, or they're going to say, well, you know what, or they could potentially say, you know what, we made a mistake, there was an invoice mixup, and they'll correct it on our end. Or if we don't hear anything back from them in a certain amount of time, we automatically remove it from the file.
RHONDA [redacted] Okay.
NICOLE MOORE: Okay?
RHONDA [redacted] So what do I have to do to get that ball rolling?
NICOLE MOORE: So basically there's several things that you need to do. Okay, so it's not just disputing the information, but given the fact that you guys aren't really doing anything with the file, it's up to you to self-report because not all your vendors and suppliers are reporting just a lot of information. So I know earlier you said you guys spend millions of dollars in bills, but only 136,000 has been reported over the

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last two years. So that information needs to get updated as well.
Let me just see what else is sitting on here that could be impacting you. I am seeing here you have two lawsuits that are pending, and you have 11 UCC filings. So the whole file in general just needs to be cleaned up and updated.
RHONDA [redacted] The two -- the two UCC filings, I contacted an attorney and he contacted the courthouse, and it satisfied the bank that those were dismissed --
NICOLE MOORE: Right, but that was --
RHONDA [redacted] -- you know --
NICOLE MOORE: Mm-hmm. Are you talking about the UCC --
RHONDA [redacted] But what do I do here?
NICOLE MOORE: -- filings or --
RHONDA [redacted] Yes.
NICOLE MOORE: -- the lawsuits?
RHONDA [redacted] The lawsuits.
NICOLE MOORE: Okay. So if those have been dismissed, then it's up to you to provide us with supporting documentation showing us that so that we can get the information updated on this end, because without that documentation, no one's told us anything. So it

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still looks like it's still pending on paper.
RHONDA [redacted] All right.
NICOLE MOORE: Okay? So this is what everyone is seeing when they're looking at your report, like your vendors, suppliers, potential customers. And this file has actually gone out over 52 times already. So they're definitely looking at this report. Actually, 57 times. So one of the things I would definitely recommend, because you guys are set up for CreditSignal, which is basically something for a startup company. It just tells if your scores are good (inaudible). You guys are too big of a company to do that. You need to know what your numerical scores and ratings are. Okay?
So what I would actually do is set you guys up with a service called CreditBuilder Premium that allows you guys to self-report your operating expenses by giving us the names of the companies that you guys are doing business with so that we can reach out to them and gather all your payment history to get the information updated for you on the file, as well as monitoring your scores and ratings and being alerted to credit score changes, as well as running reports on other companies to mitigate your risk in doing business with them, like they're doing with you. So this just kind of keeps you guys proactive.
RHONDA [redacted] But this is all free --

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NICOLE MOORE: That is not a free service, no. To dispute the information and to update basic company information like name, address, phone number, officers, that's all free. But to update this report as far as the payables and monitor your scores and ratings, which I would definitely recommend because it looks like other people are and you guys aren't, I would definitely recommend getting into that service that allows you guys to do so.
RHONDA [redacted] And how much is that?
NICOLE MOORE: That service is $1,999 for the entire year. It's definitely --
RHONDA [redacted] And where do I --
NICOLE MOORE: I'm sorry, go ahead.
RHONDA [redacted] Where do I contact the -- where do I contact to get these -- these disputed ones cleared up --
NICOLE MOORE: So --
RHONDA [redacted] -- in the --
NICOLE MOORE: Okay, so, what you would do for the --
RHONDA [redacted] -- (inaudible) --
NICOLE MOORE: -- dispute is you'd have to go to the free website portal to dispute that information, which is CompanyUpdate.com.

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RHONDA [redacted] CompanyUpdate.com?
NICOLE MOORE: Mm-hmm. And you're going to register to use that website if you haven't already. So you can see the report, see the things that are on it. You just can't see any of your scores, ratings, or any of the 57 inquiries. And you'll just --
RHONDA [redacted] Okay.
NICOLE MOORE: -- dispute the information. And it asks you for the reason for the dispute, and it takes about 7 to 14 business days. And the lawsuits, any public filings, that can take up to 30 business days, but we need the supporting documentation for each of those. And that's how you'll go to submit that.
RHONDA [redacted] And how do I get the supporting documentation?
NICOLE MOORE: So you'll have to either call the courthouse to get it, or if it's for UCC filings, the Secretary of State may have it on their website listed. So you'll just need to get that information.
Now, is there something going on that brought this to your attention?
RHONDA [redacted] Well, we're applying for an SBA loan, and it stopped because this is on there. And I'm like, what the hell.
NICOLE MOORE: Right. I understand.

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RHONDA [redacted] (Inaudible) crap.
NICOLE MOORE: Well, I mean, what are you guys needing the loan for? Like, what are you attempting to do with the loan?
RHONDA [redacted] We're -- we're expanding our business.
NICOLE MOORE: Okay. And how soon are you --
RHONDA [redacted] (Inaudible) basically --
NICOLE MOORE: Okay, I'm sorry. I didn't mean to cut you off. You're expanding the business?
RHONDA [redacted] (Inaudible) yes, by a substantial amount.
NICOLE MOORE: Okay.
RHONDA [redacted] We've grown by about $4 million, so...
NICOLE MOORE: Oh, wow. Okay. And what was your --
RHONDA [redacted] And to have $1,000 (inaudible) and a 250 and a 50 --
NICOLE MOORE: Right.
RHONDA [redacted] -- is just -- it's like freaking payments (inaudible) drive you crazy.
NICOLE MOORE: Right. Now --
RHONDA [redacted] It's basically (inaudible) you get stupid girls in the office. I've got people at

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Dun & Bradstreet calling me, you know, and I guess if our customer's of good standing, I -- and they're a couple days late, I don't -- I don't report it.

NICOLE MOORE: Mm-hmm.

RHONDA [redacted] You know, and you got some ding-dong in your office that doesn't know, understand business, why -- and they -- you could be a couple days late and then they -- they say, oh, yep, we're late, let's report this, which is (inaudible).

NICOLE MOORE: Yeah. Yeah, and unfortunately, too, sometimes what happens is, too, like, if you guys had, like, a dispute, like with an invoice, maybe it wasn't the right price or, you know, they may have shipped you guys something that was incorrect. By the time they report that information to Dun & Bradstreet, they're getting it straight out on -- straightened out on your end, then they report it to us as a slow payment. So, I mean, it could be something that simple. But how soon are you actually looking to get this information up-to-date?

RHONDA [redacted] Well, it's holding up our loan.

NICOLE MOORE: Oh, wow, okay.

RHONDA [redacted] It's --

NICOLE MOORE: So --

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RHONDA [redacted] Yeah.

NICOLE MOORE: -- all right. So let me do this.

RHONDA [redacted] And it's (inaudible) our company.

NICOLE MOORE: Okay. Now, what should -- I know you said you guys pay millions of dollars, you know, just in payables a month, but what was your total revenue last year?

RHONDA [redacted] Twenty -- 20 or 21 million.

NICOLE MOORE: Okay. Because we do have a faster option to get this updated quickly for you, and that means everything in the file gets updated very fast, faster than what you would be able to do it on your own. And basically that would be what's called our Concierge Service. So you would actually get a dedicated account rep. So basically they will get started on this account within 24 hours and start disputing, updating everything, getting things removed if they need to. So, I mean, again, that would probably be the fastest option for you, as opposed to you guys trying to do this on your own.

RHONDA [redacted] How much is that?

NICOLE MOORE: That service typically retails, for a company your size, $14,999 for the year.

RHONDA [redacted] Oh, I'm not doing that.

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NICOLE MOORE: I mean, I can work with you on the price. We do have payment options available as well. You guys do qualify for that where we break the payments up 30/60/90, but I can work with you with the pricing, but this would be definitely the fastest option in getting this report up-to-date, quickly as possible if this is the only thing that's holding you up.

RHONDA [redacted] I -- I'd probably just as soon bitch about it as pay $14,000 to get it cleaned up.

NICOLE MOORE: I mean, I can --

RHONDA [redacted] That's crazy.

NICOLE MOORE: -- well, I mean, there's other companies --

RHONDA [redacted] (Inaudible).

NICOLE MOORE: Go ahead.

RHONDA [redacted] No, do they -- are -- banks use Equifax and other -- other forms of credit checking, and, you know, this is the first time I ran into this problem. Obviously, I've gotten other loans in the past ten years, and those loans -- those lawsuits have never showed up or been a concern. Now all of a sudden they're a concern ten years later, is just -- it's mind-boggling.

NICOLE MOORE: Well, the thing is, too, keep in mind that we have all the UCC filings here with [redacted] Bank, so, yeah, you're getting the loans, but

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under what it costs, because you're having to give up some type of collateral, which means that you may also be paying higher rates. Okay, because there's just not enough equity built up in the loan -- or I'm sorry, on your business credit file for the business credit to stand on its own. So, again, I mean, yeah, you're getting the loan but at what cost?

RHONDA [redacted] Well, it's not $14,000 worth of credit reporting that's going to save me here.

NICOLE MOORE: Well, again, I can work with you on the price. Let me see here.

RHONDA [redacted] If you can do that for 1,400, I'd probably say (inaudible) but I'm not going to do it for 14,000.

NICOLE MOORE: Okay, let me see what I can do.

RHONDA [redacted] If you can do it for 1,400.

NICOLE MOORE: Well, I can't do it for 1,400. That would be a self-service, which means that you guys are going to be in standard and normal time frames along with thousands of other customers. But let me just see what I can do on this end, okay?

RHONDA [redacted] Well, I'm -- all right.

NICOLE MOORE: Hold on just a second.

(Call on hold.)

NICOLE MOORE: Okay, Rhonda?

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RHONDA [redacted] Yeah.
NICOLE MOORE: Okay. So the only thing that I would be able to do --
RHONDA [redacted] Yes, I'm here.
NICOLE MOORE: -- the only thing I would be able to do is drop it down to $10,000, and then like I said, we can --
RHONDA [redacted] (Inaudible).
NICOLE MOORE: -- set it up on payments for you, but that would actually get someone assigned to you guys within 24 hours to start working on this for you to get it all cleaned up.
RHONDA [redacted] No.
NICOLE MOORE: And you'd only have to pay $2,499 today.
RHONDA [redacted] Nope.
NICOLE MOORE: Okay.
RHONDA [redacted] That's highway robbery. That's holding me up. It's just not right, but I guess you do whatever you need to do, but --
NICOLE MOORE: I mean, you can -- okay. So you can do the self-service option.
RHONDA [redacted] I'll have to (inaudible).
NICOLE MOORE: Again, that'll allow you to monitor the scores and -- but you're going to be

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responsible for updating the report. And, again, like I said, you will be in the standard time frames along with everyone else. So to dispute the information, it would be 7 to 14 business days, and to dispute the public filings, it could take up to 30 business days. But, again, with the Concierge Service, though, everything gets expedited, so that -- it's going to cut that time in half.
RHONDA [redacted] Yeah.
NICOLE MOORE: I mean, they're able to get things updated a lot faster than what you or I are able to do.
RHONDA [redacted] Yeah. I'm not going to pay four -- $10,000 to save 5 days or 15 days or whatever.
NICOLE MOORE: Well, I mean, it could save a lot more than that, but, yeah, it could save a lot more than that. And the file would be up-to-date. And they don't need the supporting documentation to get the things updated to where you guys have to go out, get the supporting documentation, so that's going to take time, and then to submit that information so then you have more time.
RHONDA [redacted] I'll tell you what --
NICOLE MOORE: I can tell you --
RHONDA [redacted] -- what's your direct-dial

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number?
NICOLE MOORE: Sure, my --
RHONDA [redacted] What's your direct-dial number, and I will (inaudible) okay.
NICOLE MOORE: Sure. It's (866) 257-9158. And my extension is 6212.
RHONDA [redacted] And your name?
NICOLE MOORE: Nicole. And the last name is Moore.
RHONDA [redacted] Okay. So I can do the Concierge Service for 10,000.
NICOLE MOORE: Mm-hmm.
RHONDA [redacted] They'll clear it up in how many days?
NICOLE MOORE: It's going to be -- I mean, I can't give you exact time frames, but I've seen things done in a week, just in my experience, and I've seen things done sooner than that. And I've seen things done within two weeks.
RHONDA [redacted] Okay. And to clear up the -- the payment disputes, doing it on the CompanyUpdate.com will take two weeks?
NICOLE MOORE: Yeah, but they'll do all that for you --
RHONDA [redacted] (Inaudible).

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NICOLE MOORE: -- yeah, but if you go with the Concierge Service, oh, they're doing everything for you, so you guys don't actually have to do anything. They're doing all the updating, disputing, they're doing all of that. And they're going to be doing all of that throughout the year for you.
RHONDA [redacted] Yeah.
NICOLE MOORE: So they're actually going to be managing your credit report moving on for 12 months.
RHONDA [redacted] Oh, so -- yeah. So I go to CompanyUpdate.com and I register to use it.
NICOLE MOORE: Mm-hmm.
RHONDA [redacted] And then I can dispute the information and as far as the lawsuits, I have to provide supporting documentation.
NICOLE MOORE: Correct. But I would definitely --
RHONDA [redacted] Everything else I would just --
NICOLE MOORE: Yep, but I -- I would honestly suggest that if you're thinking about going with the Concierge Service, don't do anything. Let them handle it.
RHONDA [redacted] (Inaudible).
NICOLE MOORE: But if you want to -- yeah.

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RHONDA [redacted] I'm going to talk to my bank, but I don't -- I don't really believe that that Concierge Service is necessary and I for God's sake don't think it's necessary at that dollar amount.

NICOLE MOORE: Okay.

RHONDA [redacted] It's not like I (inaudible) I'm going to shrivel up and fall away here if I don't get this loan done in 14 days. It's just -- yeah.

NICOLE MOORE: Well, and keep in mind, though, too, I mean, it could take longer because there could be other things that may be hindering it as well. But you do have the lawsuits on there. You do have the UCC filings as well.

RHONDA [redacted] Okay.

NICOLE MOORE: But it's not just about the loan, though, too. It could be business, I mean, because you have a lot of people looking at this report, so they could have looked at this report, too, and decided to go elsewhere, because there's nine different scores and ratings on this report.

RHONDA [redacted] Yeah, you know, I've never had anybody turn me down for credit before.

NICOLE MOORE: And they may not. They --

RHONDA [redacted] So I don't think the report is (inaudible).

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NICOLE MOORE: Yeah, they -- they may not, but they're --

RHONDA [redacted] All these --

NICOLE MOORE: -- definitely looking at it.

RHONDA [redacted] -- it's the Government -- it's the Government bureaucracy at work at its finest. This is all this is. And I'll have to deal with it, I guess. I'll -- I just can't imagine that -- I'll -- I'll talk to my banker, but I can't imagine -- I'm sure he'll agree with me that $10,000 is outrageous and we'll just deal with it on our own, but I appreciate all your help, Nicole.

NICOLE MOORE: Okay. Well, I mean, did you want me to put you into --

RHONDA [redacted] Thank you.

NICOLE MOORE: -- the self-service?

RHONDA [redacted] No, I don't want to pay $2,400 a year either, or 2,000 or whatever the amount is.

NICOLE MOORE: Well, yeah, it's not per year, though.

RHONDA [redacted] That's --

NICOLE MOORE: Okay?

RHONDA [redacted] What?

NICOLE MOORE: So this is not per year. So the thing is our services, yes, they are designed to auto-

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renew, however, you have the option to auto-renew or not auto-renew every year.

RHONDA [redacted] Right.

NICOLE MOORE: Okay? So I would just say at least do it for a year. That way, you get the file up-to-date, get the payment history up-to-date, start monitoring your scores and ratings so you guys can actually get an idea for what you guys are doing that's causing people to look at this report, as well as putting yourself in a better position financially to where you guys actually know what your scores and ratings are, because as of right now, you don't. So everyone else looking at this report, they do. So they're coming to you telling you what's in your report.

RHONDA [redacted] I -- all these -- all the Equifax and all the other reports that the lenders use --

NICOLE MOORE: Mm-hmm.

RHONDA [redacted] -- tell us that we have a very good, very high credit score, so --

NICOLE MOORE: But we're --

RHONDA [redacted] -- Dun & Bradstreet's the only one that's (inaudible) so, you know, I don't know. I don't know how it's credit --

NICOLE MOORE: -- well, the thing is -- yeah, I mean, the thing is, too, I mean, this is what we

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specialize in. We're a data-collection agency. So the thing is is that in just my experiences listening to other people talk about their Experian business credit report, there is about five times more information that is sitting on our report than it is on any other company's report, because this is what we do. We're a data collection, so we have a lot of different sources of data.

RHONDA [redacted] Well --

NICOLE MOORE: But the problem is it's just not all your --

RHONDA [redacted] (Inaudible).

NICOLE MOORE: -- vendors and suppliers are reporting. So that's the other part, too.

RHONDA [redacted] Oh, okay. All right. So I'll --

NICOLE MOORE: Okay, but you have my -- yeah, you have my contact information, just let me know what you guys decide to do. Just give me a call back. I'm going to -- again, like I said, we do have payment options, too.

RHONDA [redacted] Okay.

NICOLE MOORE: All right?

RHONDA [redacted] Sounds good.

NICOLE MOORE: All right, thank you.

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RHONDA [redacted] Thank you so much.
NICOLE MOORE: You're welcome.
RHONDA [redacted] Uh-huh.
NICOLE MOORE: Bye-bye.
(The call was concluded.)
(The recording was concluded.)

CERTIFICATE OF TRANSCRIPTIONIST

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DATE: 2/8/2019 s/Sara J. Vance
SARA J. VANCE, CERT

Complaint

Exhibit E

In the Matter of:

Dun & Bradstreet

February 13, 2019
FTC-00008997

Condensed Transcript with Word Index

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FTC Exhibit E

FTC-00008997

Dun & Bradstreet 2/13/2019

OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: FEBRUARY 7, 2019

PAGES 1 THROUGH 9

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FEDERAL TRADE COMMISSION
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FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
----------)

The following transcript was produced from a digital file provided to For The Record, Inc. on January 30, 2019.

P R O C E E D I N G S

FTC-00008997

JIM: Dun & Bradstreet. All calls are recorded. This is Jim.

MICHAEL [redacted] Jeff [sic], this is Michael [redacted], DUNS Number [redacted]

JIM: Just give me a second or two to pull up your report. I guess in the meantime, how familiar are you with Dun & Bradstreet, like who we are and what we do?

MICHAEL [redacted] Pretty much.

JIM: Okay. I have it. And what prompted your call today?

MICHAEL [redacted] Okay, I got a letter from you guys that's saying that we have a low delinquency predictor score. I'm very unhappy about that. We pay all our bills on time without fail forever. And, so, why you're coming up with this number, I don't know. I don't like the fact that if anybody checks on us they're going to see this. It needs fixed.

JIM: Okay. Well, I'll be happy to help you with that. So let me look. Yeah, your payment behavior is really good. The issue is -- is there's just not a

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lot of payment history at all. So, you know, I know you said you're pretty familiar with Dun & Bradstreet. Most companies don't report to D&B automatically, so I'm looking at the payment history. The total showing for the last two years is only showing $137,000 in payment history over the --

MICHAEL [redacted] (Inaudible).

JIM: -- last -- so the vendors and suppliers you guys pay.

MICHAEL [redacted] (Inaudible).

JIM: So any good or service that the company uses to run your business, any kind of bill or invoice, that's what the payment history is showing. And for a $10.4, $10.5 million company, that's -- that's dangerously low.

MICHAEL [redacted] Yeah, well, I don't know how you're crunching your numbers. I really don't care, but you can't be putting this out. You know, if you don't give us the top-rated score, then we just need to get off of there because you're putting out something that's not factual. And how you came up with it, I don't care, but this is not acceptable.

JIM: Okay. So what we need to do then, we need to send you access to your D&B report. That way, you can start adding in your vendors and suppliers.

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MICHAEL [redacted] I -- I don't have time to do that. You know --

JIM: But we -- then you can hire us to do it for you.

MICHAEL [redacted] -- (inaudible). No, I'm not hiring and paying you guys anything. If you can't give us the proper score, then I want off the listing. I'm not happy with what's going on --

JIM: Well, what --

MICHAEL [redacted] -- because I'm busy. I don't have time to run checks or paperwork. I don't want to be paying you guys for baloney, and so, you know, either fix it or turn me off.

JIM: Okay. Well, with all due respect, sir, the DUNS number is there. You know, it's been there since 1982 for --

MICHAEL [redacted] Yeah.

JIM: -- this individual company. You're going to have a DUNS number until the business closes. You're going to have this credit report until the business closes. So (inaudible) --

MICHAEL [redacted] Oh, it sounds more like a threat to me, so anyway, if that's how you're going to be, I'm not going to send you any more financial statements or anything. You guys -- you need to -- I

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don't know why you've turned into this where you become a detriment instead of an asset to us, but --

JIM: Well, it's just my job, sir. You're -- you know, you want to get rid of your DUNS number because your scores and ratings are a concern to you, and, no, you don't have to do anything, you know, but if you want this report to look good, and that's what you said, you know, I'm giving you the best advice to do that.

MICHAEL [redacted] No, I just don't have time to do a bunch of extra data entry, you know --

JIM: It doesn't -- to be honest, it takes about 20 minutes. You know, usually my customers take about 20 minutes --

MICHAEL [redacted] Twenty minutes, what, every -- every day or what?

JIM: No. So usually a company will pay for the service fee, they'll log in, they'll add their top 25 vendors. It takes about 20, 25 minutes. And then we do the rest of the work. We contact them; verify the credit limits and terms; and they mainly input that information on your report for you. That way, when you have customers or vendors and banks and whoever is pulling the report, they're more likely to see that financial strength.

MICHAEL [redacted] And how much does that cost?

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JIM: It's only 1,748 for the year.

MICHAEL [redacted] Forget it.

(The call was concluded.)

(The recording was concluded.)

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DATE: 2/8/2019 s/Sara J. Vance
SARA J. VANCE, CERT

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Exhibit F

In the Matter of:

Dun & Bradstreet

April 20, 2020
FTC-00009741 [redacted]

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OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
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PAGES 1 THROUGH 21

FTC-00009741 ([redacted])

FEDERAL TRADE COMMISSION
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FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
)
Date Unknown

The following transcript was produced from a digital file provided to For The Record, Inc. on April 9, 2020.

P R O C E E D I N G S

FTC-00009741

PETER: Hello.

NICKI: Hi, is this Peter?

PETER: Yes, it is.

NICKI: Hi, this is Nicki with Dun & Bradstreet on a recorded line.

PETER: Yes.

NICKI: All right. So what are you trying to get done?

PETER: I'm trying to establish credit in the company. We have decent revenue, we have 30 probably vendors we pay every month, and I realized we're not establishing any credit. So I wanted to figure out how -- what's the best process to do that. We've acquired a couple companies so I'm just trying to figure out what our steps are to get our holding company to establish credit.

NICKI: Absolutely. So I can definitely help you with that. Now, is the holding company -- which I may be looking at something totally different. But attached to your phone number, there is a business by the name of [redacted]. Is that the one that you're referring to?

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PETER: No, that's another company I own.
NICKI: Okay. So which one are we talking about here?
PETER: What I'm trying to do -- it's called [redacted] -- [redacted].
NICKI: [redacted] okay.
PETER: Yeah.
NICKI: It sounds like you're used to saying the website on a regular basis.
PETER: Yeah, yeah.
NICKI: All right. And then what state is the holdings company in?
PETER: It's in [redacted]
NICKI: In [redacted] okay. Is that where you're at, too?
PETER: Yes.
NICKI: Okay. That's a nice area to be. I'm in Tucson, Arizona --
PETER: Oh, nice.
NICKI: -- in the desert.
PETER: That's not bad.
NICKI: Yeah. It's not bad because we do get the warm weather in the winter, [redacted]. So --
PETER: Yeah.

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NICKI: -- it's unfortunate. What city in [redacted] is it?
PETER: [redacted]. I have an EIN number from some -- does that help?
NICKI: Do you have the Dun & Bradstreet number?
PETER: I don't have one yet I don't believe.
NICKI: Okay, all right. So we may have to generate it. So what are the businesses that fall underneath the holdings?
PETER: I have -- let me see. I have -- they're all on -- [redacted] own all of them and -- but they're just fictitious. They're DBAs.
NICKI: Okay.
PETER: And I own like seven schools.
NICKI: Oh, like elementary schools or --
PETER: Oh, preschools. I own two [redacted] schools and then I owe one, two, three, four Immersion schools for (inaudible).
NICKI: Wow.
PETER: Oh, yeah. We're opening another one in --
NICKI: That's amazing.
PETER: -- well, a seventh location in August.
NICKI: Wow, congratulations. That's awesome.

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PETER: Yeah.
NICKI: Yeah, I have two -- I have three kids, but two smaller ones. I have a three-year-old, so preschool age, and then a one-year-old.
PETER: Okay, okay.
NICKI: Yeah. So fortunately, my mother-in-law does a lot of the babysitting for me while I'm at work. But I am looking for a preschool.
PETER: Huh. Well, you -- I'm sure -- well, [redacted], you looked that up first, we're the distributors for [redacted] for schools.
NICKI: Oh, okay.
PETER: Have you seen [redacted]? Have you guys used that?
NICKI: No, I'm going to Google it right now. What is it called? [redacted]
PETER: [redacted]
NICKI: [redacted]?
PETER: Yeah.
NICKI: Okay. Yeah, I'm going to -- and does that reach all the way out to Arizona?
PETER: Oh, yeah, it's a website for kids ages two to eight.
NICKI: Oh.
PETER: And it's a (inaudible) program. You've

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probably seen it on TV. It's on TV like a hundred times a day on Sprout, Super Y, Disney, and --
NICKI: Yeah.
PETER: -- Nickelodeon.
NICKI: Yeah, I've seen this.
PETER: That kind of stuff, yeah. That's --
NICKI: You said that you --
PETER: Yeah, [redacted], my first company that you brought up, that -- we distribute -- we have 11,000 schools using that throughout the United States.
NICKI: That is amazing. That is really quite -- I'm actually going to copy this down and show it to my son because he's so into like electronics and TV and, you know good thing for him, he really likes the learning stuff and the learning songs and stuff like that. But --
PETER: Yeah, there's so much (inaudible). They get their own --
NICKI: -- there's so much out there.
PETER: Yeah, they get their own avatar, they get all the biomes. They travel the world. So -- and it's all 100 percent educational. There's no popups, there's no ads, there's no markup. You know, most games, you know, websites, you know, they try to sell you something once you already bought it.
NICKI: Yeah.

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PETER: Yeah. You know, there's no -- there's no selling -- selling up or anything like that.
NICKI: Yeah. I'm going to -- I'm actually pulling it up on my phone, too, so that I have it when I get home. That is really cool.
PETER: Yeah, yeah.
NICKI: Okay.
PETER: We're on iTunes and Android, all the Google Play store, everything.
NICKI: Okay, cool. Yeah, I'm going to go on it. All right. So, yes, we do need to get a number generated for [redacted].
PETER: Okay.
NICKI: And it's [redacted] like a [redacted] egg, right?
PETER: Correct, yeah, [redacted], yes.
NICKI: Okay.
PETER: It's [redacted].
NICKI: Okay. And then what I'm doing now is I'm loading your other business. So I'm going to pull up that credit information. This way, we can compare and see like if the address is going to be the same and I can just copy and paste a lot of it. Which is it -- is this business at [redacted] Road?
PETER: No, that's old, yeah.

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NICKI: Oh, okay.
PETER: Yeah.
NICKI: So what's your new address or current?
PETER: Our address -- our current address is [redacted] --
NICKI: Okay.
PETER: And it's [redacted] --
NICKI: [redacted]
PETER: -- [redacted] --
NICKI: Okay.
PETER: -- [redacted] just an NW --
NICKI: Uh-huh.
PETER: -- and then Suite [redacted]
NICKI: Okay.
PETER: And it's [redacted]
NICKI: Okay, [redacted] -- you said [redacted]
PETER: Yeah, [redacted]
NICKI: Okay, perfect. All right. And you are 100 percent owner or do you have business partners?
PETER: I have a partner. I'm [redacted]
NICKI: Okay. So we list your partner, too, or is it okay just to have your name for now?
PETER: Yeah, mine for now because he's silent.
NICKI: Okay, okay, perfect. And how many employees do you have?

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PETER: 250.
NICKI: Okay. So you've definitely grown over the last few years. That's amazing.
PETER: Yeah. Well, that -- in this company, yes, with the schools.
NICKI: Okay. 250. And --
PETER: And this is under [redacted] not [redacted]
NICKI: Yeah, no, no, no, no, yeah, under [redacted]
PETER: Yeah, okay.
NICKI: Yep. I have to -- because there's not a number in this (inaudible) have to fill in all of the spaces.
PETER: Okay.
NICKI: Yeah.
PETER: Okay.
NICKI: And then what are your -- your revenue per year? Your revenue?
PETER: Let me see. We added some new schools, so let me (inaudible). 4.8 million.
NICKI: Okay. Oh, yeah, we definitely need to start showcasing some credit history for your business. And then I'm sure once you use -- you said that you were opening some new schools, right?

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PETER: Yes, uh-huh.
NICKI: Okay. Are you projecting that -- is that what's going to make you hit the 4 -- 4 million, 4.8?
PETER: Well, we're currently doing 4.8.
NICKI: Okay, okay. So once you open those new locations, then it's going to grow quite a bit more?
PETER: Yes, yeah, exactly.
NICKI: Okay. Now, as far as Dun & Bradstreet is concerned, you know, I'm going to help you build this credit report and showcase the financial stability of the business. Are you planning on using this number for any purpose, you know, a bank loan, new vendor accounts, customers?
PETER: Nothing -- yeah, but I've had some, you know, vendors ask us, you know, for a Dun & Bradstreet number. We acquired these two [redacted] schools and, you know, they were schools that are 15 years old. So they have a lot of history.
NICKI: Wow. Mm-hmm. Yeah, and that could be concerning because some of the vendors and suppliers that they're already dealing with because -- not saying that your business is going to fail or anything, but a lot of times when people buy companies, the percentages of that business succeeding goes down quite a bit, especially new

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owners.
PETER: Mm-hmm.
NICKI: I mean, you're an existing business owner, so you're not going to have any problems.
PETER: Right.
NICKI: But give it to a brand new person, you know, who wants to try to buy a business, you know, the chances of them running it into the ground is a lot higher than, you know, an experienced person like yourself.
PETER: Mm-hmm.
NICKI: So it's common. You know, the way that a credit report works in the business world is once you get a number assigned, there are scores and ratings that are going to showcase how you're operating and how you pay your bills.
PETER: Right.
NICKI: So we do not get that information automatically usually. So what you're going to need to do is, you know, the 30 vendors that you had mentioned that you have --
PETER: Yeah.
NICKI: -- we're going to need to physically submit and add them on to your credit report.
PETER: Okay.

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NICKI: This way, you can work on building your business credit.
PETER: Okay, good.
NICKI: Now, the phone number -- so is this your cell phone or is this a business phone number?
PETER: This is my cell phone.
NICKI: Okay. So what's your business phone number? I don't want to put your cell phone on the credit report unless you don't mind people calling you.
PETER: Yeah, that's okay, yeah. Yeah, put that on there for now.
NICKI: Okay, all right. And if you ever want to change that, you can.
PETER: Okay.
NICKI: Yeah. So just keep in contact with me and I'll show you where the update the free information.
PETER: Okay.
NICKI: And then this business -- when did [redacted] start, what year?
PETER: 2017.
NICKI: Okay. And you said 250 employees?
PETER: Mm-hmm.
NICKI: Okay. And you registered in the State of [redacted]
PETER: Yes.

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NICKI: Okay, perfect. Now, do you have any like specific time frames as far as how soon you wanted to start building the business credit or do you have a few months to work on it?
PETER: Yeah, I have a few months to work on it.
NICKI: Okay. So there's two options. For now since you have a few months to work on it, I'm going to set you up with the Credit Builder Service. So that's what's going to allow you to self-report your payment history, to work on building and establishing a credit for the company.
The other option, if this does become too much and you don't have the time to manage and maintain it, then we'll just have a representative here, like myself, assigned to maintain the report for you.
PETER: Okay.
NICKI: All right. So the DUNS number is going to be emailed over to you in three to five business days. It's the completed file. And then once you get the number, that's when you're going to be able to log in and start reporting the 30-plus vendors that you do have, Peter.
PETER: Okay.
NICKI: The yearly service -- there is a yearly

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service fee. It's 2,148 for the year, 2,148. And for that, you could use either a credit or a debit card. How did you want to take care of that?
PETER: Okay. Credit.
NICKI: Okay. And that number whenever you're ready?
PETER: [REDACTED].
NICKI: And the expiration?
PETER: [REDACTED].
NICKI: [REDACTED], okay. And then the billing address is the new one that you gave me, right? The [redacted]
PETER: Yeah, the [redacted] Yes.
NICKI: Okay, perfect. Now, the Dun & Bradstreet number itself is free. What we're setting you up with the tools to start building and establishing the credit behind the business. So you will be getting the receipt in just a couple of minutes emailed over to you. Again, it's the Credit Builder Premium. With the activation, it's 2,148 for the year.
We partner with two separate companies. So one is LegalZoom, which you get some free documents, some legal documents. We'll share your basic information with them. And then the other is a company called Redact-It and they do dark web monitoring. So we'll share your

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information with them. What they really do is -- I guess it's a platform where if, for some reason, they see like your business information or your email on the dark web, they'll send you alerts and notifications so that you can, you know, change your passwords or something like that to help prevent you from getting hacked.

PETER: Okay.

NICKI: And then the service is set for auto-renewal each year at the current price -- at the then current price.

PETER: Okay.

NICKI: So I submitted everything. Let's schedule a call sometime next week, Peter. Once you get the number, I would like to show you where to submit your payment history and kind of walk you through it so that you know what you're doing because it can be a little confusing at first. But once you get the hang of it --

PETER: Okay.

NICKI: -- it's pretty simple.

PETER: Okay.

NICKI: So you should have your number in three to five days. How about this? Let me email you my contact and if you get it sooner, then you can call me. If not, then we can schedule for like next Friday. Would that work for you?

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PETER: Yeah, that would work.

NICKI: Okay. But if you get it sooner, then I want you to call me.

PETER: Okay. Yeah, I just got all the stuff that you just --

NICKI: Okay, cool. And you can actually log in now and reset your passwords and everything.

PETER: Okay.

NICKI: Let me --

PETER: Yeah, I'm (inaudible).

NICKI: Where's my email?

(Pause.)

NICKI: Hold on one second. I don't know where -- my email was closed out for some reason.

(Pause.)

NICKI: So how did you come up with that program?

PETER: Oh, it's just years of previous stuff that we were doing (inaudible).

NICKI: That is so cool. And it's such a nice website, too.

PETER: Oh, yeah, there's -- it's very cool. There's like a thousand employees out in [redacted] that actually do all the -- the animation and graphic design and all that.

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NICKI: Yeah.

PETER: (Inaudible).

NICKI: They did such a good job on it.

PETER: Yeah, it's -- it's really -- there's over six million kids using it. So it's pretty cool.

NICKI: That is so awesome. And actually you said that there is an app, right?

PETER: Yeah, there's apps and you can just log in once you get a subscription. Send me your stuff. I'll send you a code next week so you can use it.

NICKI: Okay.

PETER: I'll give you a free year.

NICKI: Yeah, cool.

PETER: Okay. That way -- I'll send it to you next week. All my staff's leaving right now.

NICKI: Okay, okay, awesome. Like just my Gmail email and stuff like that?

PETER: Yeah, send that to me and then I'll send you a code that will give you a free subscription for a year.

NICKI: Okay.

PETER: And it's up -- it's good for up to three kids.

NICKI: Awesome. That is so exciting. Okay. And I just sent you an email with my contact information,

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too. So, yeah, let's schedule some time next week and I'll give you the walk through and show you how to do it. And like I said, I mean, I know that you are a growing business and opening and running, you know, seven schools is probably not the easiest.

PETER: I have -- yeah, I have a whole staff, though. So I --

NICKI: Okay.

PETER: -- I'll have my operations person, her name is Brittany.

NICKI: Okay.

PETER: And I'll introduce you -- I'll introduce her to you Friday. And then you can show her and she can do everything.

NICKI: Yeah, okay, perfect. Sounds good.

PETER: All right. Okay, sounds good. Thanks a lot.

NICKI: Okay, you're welcome.

PETER: All right, all right, see ya, bye.

NICKI: Bye. Have a good weekend.

PETER: You, too.

NICKI: All right.

PETER: See ya, bye.

(The call was concluded.)

(The recording was concluded.)

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DATE: 4/20/2020 s/Elizabeth M. Farrell
ELIZABETH M. FARRELL, CERT

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Exhibit G

In the Matter of:

Dun & Bradstreet

April 20, 2020
FTC-00009781 [redacted]

Condensed Transcript with Word Index

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FTC Exhibit G

FTC-00009781 [redacted]

Dun & Bradstreet 4/20/2020

OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: APRIL 20, 2020

PAGES 1 THROUGH 27

FTC-00009781 ([redacted]

FEDERAL TRADE COMMISSION
I N D E X

FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
)
Date Unknown

The following transcript was produced from a digital file provided to For The Record, Inc. on April 9, 2020.

P R O C E E D I N G S

FTC-00009781

JOSEPH: Hello. Hello.

JONATHAN: Yes, Joseph, please.

JOSEPH: This is he.

JONATHAN: Hey, Joseph. My name is Jonathan. I'm with Dun & Bradstreet on a monitored line, sir. How are you?

JOSEPH: Good.

JONATHAN: Good. You may have received notification from LegalZoom that we would reach out to you in regards to the DUNS number and the credit report that we're going to be setting up for the business as part of the process. Did you get that application?

JOSEPH: Yeah. No, I haven't seen it yet, but I understand it's coming.

JONATHAN: Okay, perfect. Are you familiar at all with Dun & Bradstreet, what we are, what we do, where we come into play?

JOSEPH: Yes.

JONATHAN: Okay. Just so we're on the same page, can you tell me what your understanding is of what this DUNS number is and how it's going to be used?

JOSEPH: Well, it's a -- you're basically going

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to publish -- you publish like my business name, correct?
JONATHAN: Yeah, go ahead.
JOSEPH: And I understand it will be categorized so people know how to get to me and they'll be able to see how big the business is, you know, that kind of thing, correct?
JONATHAN: Yeah, that's -- let me just kind of cover the bases just to be safe, okay?
JOSEPH: Sure. Certainly.
JONATHAN: Dun & Bradstreet, kind of like how Equifax or Transunion hold our personal credit, we're the ones who house the credit reports for companies worldwide, strictly business. So to put this into perspective, okay, your legal structure, the LLC, I assume you set it up to help protect yourself from tax and liability purposes, right?
JOSEPH: Yes, correct.
JONATHAN: So let's just say, for example, you go out there and you open a credit card for the business and you end up putting down your Social Security number to secure the card, which is oftentimes what these banks may try and get you to do, regardless of the legal structure that you have. If you use your Social Security number, you end up putting that liability back on yourself. You're still responsible.

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JOSEPH: Ah, I see.
JONATHAN: That's where we come into play.
JOSEPH: I see.
JONATHAN: Dun & Bradstreet, we're going to assign to you what's called a DUNS number. You're going to have a DUNS number throughout the life of the business, whether you want it, need it, or know it. It's still nine digits. So any time you're setting up any type of credit accounts moving forward, it's important that you are proactively using this DUNS number alongside that tax ID number or the EIN number to help you build real credit for the business or, more importantly, use it in place of your own Social Security number. So you're helping to separate yourself financially. You're helping to protect your personal credit and your assets and you're letting the company stand on its own.
JOSEPH: Yeah.
JONATHAN: Does that make more sense?
JOSEPH: Yes, of course.
JONATHAN: Okay. So my job, Joseph, is to make sure the information LegalZoom is sending us is accurate and make sure the report is set up correctly for what you're trying to accomplish because --
JOSEPH: Excuse me.
JONATHAN: No, no worries, man. Make sure the

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report is set up correctly for what you're trying to accomplish because business credit is reported a lot differently than personal credit.
JOSEPH: Yeah.
JONATHAN: So I'm just going to run through what we have. First, if there's anything that you need changed or updated, you let me know so I can submit the changes for you, okay?
JOSEPH: Okay.
JONATHAN: Okay. So, Joseph, almost -- we have you currently listed as the owner of the company. Is there any other titles that you want to be listed as? Principal, president?
JOSEPH: Um, yeah.
JONATHAN: CEO?
JOSEPH: President. Yes, president probably, okay?
JONATHAN: Yeah.
JOSEPH: CEO, that would be fine, too. It's just -- basically, it's just me at this point.
JONATHAN: Okay, I got ya. Address that I show for the business is [redacted].
JOSEPH: That's correct, yes.
JONATHAN: Is that also going to be the mailing

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address?
JOSEPH: Yes.
JONATHAN: Perfect. The phone number that I show for the business is [redacted].
JOSEPH: Yes, correct.
JONATHAN: And any other phone number or fax number that you need listed?
JOSEPH: Yeah, fax number is [redacted].
JONATHAN: Okay. And do you have a website that you would like listed?
JOSEPH: I don't at the moment.
JONATHAN: Okay.
JOSEPH: I do not.
JONATHAN: Now, is there anybody else that you need listed on the report besides yourself?
JOSEPH: Nope, just me.
JONATHAN: Perfect. You're the only one that's going to be able to use this DUNS number in place of your Social. You started the business this year, 2019. Congratulations, again. Do you have any employees or just yourself?
JOSEPH: No, it's just myself at the moment.
JONATHAN: All right. How about the estimated sales? What are you projecting for the first year? What's your goal?

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JOSEPH: Well, we're just developing several products at the moment. But no idea exactly. 50,000, something like that. That's not much.
JONATHAN: I got ya. Starting point, I got ya.
JOSEPH: Okay.
JONATHAN: Now, the company name, was it actually accepted by the state yet or was that still in the planning process?
JOSEPH: Yes, it -- yes, it was, uh-huh.
JONATHAN: What name was accepted?
JOSEPH: [redacted]
JONATHAN: [redacted]
JOSEPH: Yes.
JONATHAN: Perfect. Are you going to be doing business under any other name?
JOSEPH: [redacted]
JONATHAN: Yes.
JOSEPH: Possibility. I've got another idea, another product that I'm looking at and that has a whole different name.
JONATHAN: Okay. Did you register any DBAs with LegalZoom?
JOSEPH: No. Um, a DBA, yes, I did.
JONATHAN: So which DBA?

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JOSEPH: It's [redacted]
JONATHAN: So the legal name is [redacted]
JOSEPH: Correct.
JONATHAN: And what -- the DBA is doing business as.
JOSEPH: Correct.
JONATHAN: So if you're going to be doing business under any other name, what other names did you get registered?
JOSEPH: The other -- I haven't actually taken out a DBA with the other name yet.
JONATHAN: Okay. No worries then. We'll just leave it as is. Now, the line of business, just so I can help you understand where this report might come into play, tell me a little bit more about the business. What exactly do you do?
JOSEPH: Well, designing products, just kind of all over the board. At the moment, I've got one product that's dealing with coffee, the other one is with a patrol car. So, you know, the manufacturing, sheet metal design, plastic injection molding, plastics. So it's kind of all over the board.
JONATHAN: Okay.
JOSEPH: But I want to put it under one

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umbrella.
JONATHAN: I got ya.
JOSEPH: I have mechanically -- a mechanical engineering background for 50 years.
JONATHAN: Nice.
JOSEPH: Just putting it to use here. Actually, I retired a couple years ago --
JONATHAN: You're developing a --
JOSEPH: -- (inaudible).
JONATHAN: -- product -- tell me about the product that you're developing for coffee you said.
JOSEPH: Yeah. It's a -- for pour-over coffee. It's a tapper type of device for compacting coffee and a spotter for when they pour -- are you familiar with pour-over coffee?
JONATHAN: Yeah, absolutely.
JOSEPH: A lot of people -- a lot of people do that. Well, they're missing one key element I just discovered and that is the coffee needs to be compacted and a spot in the center for the first pour.
JONATHAN: Okay.
JOSEPH: So I developed a little plastic device and now I turned it into a stainless steel device that's basically a compactor.
JONATHAN: Nice.

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JOSEPH: Or tapper as they call it, tapper.
JONATHAN: Just -- so you're trying to get this tapper into different baristas and things of that nature?
JOSEPH: Correct.
JONATHAN: Gotcha.
JOSEPH: 4.5 million people make pour-over coffee every day and they're -- they're missing one key element. This, which makes the coffee slightly stronger, fuller-body, better coffee.
JONATHAN: Okay, okay. So you have another -- you've already developed this product and now you're in the manufacturing stage?
JOSEPH: I'm just -- I'm just finishing the prototyping stage and I just -- I gave it a name. I've got a flyer how it operates and will be sending it out to -- I guess more a focus group type of thing first, get a response out of it.
JONATHAN: Absolutely. What's your next step?
JOSEPH: Next step would be to research coffee forums online to see where I can get into and get some exposure and go from there.
JONATHAN: Okay. That's kind of where this report may come into play, especially if you're going to deal with like -- I'm just going to use Starbucks for an example because --

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JOSEPH: Mm-hmm.
JONATHAN: -- huge opportunity there, right?
JOSEPH: Sure. Sure. I may go do it.
JONATHAN: So it's -- exactly. If Starbucks wants to make sure that you can deliver as many tappers as they need, that's typically where they pull the report. Make sure you're financially stable yourself. There's no lawsuits, liens, judgments, bankruptcies, things of that nature.
Have you -- have you set up any type of credit accounts with like vendors, suppliers, sheet metal company?
JOSEPH: Not yet, but that's another step. That's coming up.
JONATHAN: Okay. That's also where the report may come into play. When they're negotiating giving you terms of even credit lines, a lot of times they pull the report, again, just to make sure you're financially stable yourself. It's a common business practice.
Where do you see the -- that product in the next, let's say, 6 to 12 months?
JOSEPH: Well, it should be -- it should be in full production by then and -- yeah. And it should be -- after I've done all the research of getting -- you know, you got to get to the right people --

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JONATHAN: Yeah.
JOSEPH: -- obviously trade shows that do all this as well --
JONATHAN: Mm-hmm.
JOSEPH: -- and to many of those. You know, just exposure is probably going to be a big -- you know, getting that first exposure out there is my big push.
JONATHAN: Absolutely. What about the -- you said something about a product that you're developing for a patrol car?
JOSEPH: Yeah. It's a -- you've seen -- you've seen the way there's patrol cars with a push bumper in the front?
JONATHAN: Yes.
JOSEPH: Yeah, yeah. Well, one of the things that I've known -- I've seen and watched many times when the police pull somebody over, they usually -- they actually detain that person. They usually make them sit on the ground.
JONATHAN: Mm-hmm.
JOSEPH: I'm developing -- I'm developing a fold-down seat that mounts right in that front bumper so they sit there instead of the ground --
JONATHAN: Got it.
JOSEPH: -- facing the policy, so they can

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contact them and talk to them --
JONATHAN: Okay.
JOSEPH: -- and secure them. Once that police officer puts cuffs on him, he's there responsibility to (inaudible) --
JONATHAN: Oh, yeah, absolutely.
JOSEPH: -- and walks out into traffic, he's dead and it's his fault.
JONATHAN: Yeah, I got ya.
JOSEPH: It's a -- it's basically a very simple fold-down seat -- I'm surprised nobody's done it before -- to sit is basically what it comes down to. And I'm in the process of building a prototype of that at the moment as well.
JONATHAN: Where are you in the development stage?
JOSEPH: We've got one piece that is -- we're waiting for a latch. Everything else is done. We should have it up and running here in the next couple of months.
JONATHAN: Okay.
JOSEPH: And, again, it will have to be -- you know, we'll get it in front of the people that can give us feedback and we can go from there.
JONATHAN: Absolutely. So oftentimes -- oh, so you're going to be dealing with like the state, the city

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and things of that nature, law enforcement?
JOSEPH: Yeah, right.
JONATHAN: Okay. So the city, the state, they will primarily use this DUNS number so they can pay you on the products they purchase from you, okay?
JOSEPH: Mm-hmm.
JONATHAN: They use --
JOSEPH: Yeah, right.
JONATHAN: -- they use the DUNS number like a tracking system between you two. Now, same concept. If they want to make sure if you're -- you know, that aspect alone, just having a DUNS number is for -- just so they can pay you. But in the same -- in the same respect, if they want to make sure you can deliver goods as promised, they want to make sure you're financially stable, that's within your best interest to start reporting the bills. Business credit, it's not like our personal credit. Like my personal credit, for example, my mortgage company, credit card payments, car payments, these things report on me automatically. As an individual, all I really have to do is pay my bills on time.
Now --
JOSEPH: Mm-hmm.
JONATHAN: -- in the business world, it's really more about the cash flow. Where are you going to

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be spending the money that you're going to be spending? The sheet -- sheet metal company, the vendors and suppliers, the materials that you buy. You got to log in to your report and you simply give us the names and the contact detail of the company that you pay bills to. Even if you're paying up-front using your own debit card right now, paying in cash, it doesn't matter. However you're paying, you log in here, you give us the names and contact detail, we will contact those companies that you add. We verify that payment history going back a full 12 months and we manually (recording malfunction) that payment history on the report.

Now, you're not just building the company's credit. Now, you're starting to showcase your company's financial strength and stability. So if you're -- if you're Starbucks, okay, and you need, oh, man, let's say -- let's say 100, 100 tappers for 100 different stores. You know, if they want to make -- if you -- if you're Starbucks, you (recording malfunction) tappers, if you pull my company's report and I'm not reporting my bills, what gives you that piece of mind that I can deliver what you need whenever you need it?

JOSEPH: Yeah, I hear you. Got it.

JONATHAN: Same thing with a -- with the sheriff's departments, the city policy, you know. Again,

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showcase that strength and stability, report the bills, earn the credit you deserve and put your company in a much better position to get your products where they need to be.

JOSEPH: Okay, yes, I hear, yeah.

JONATHAN: That's it. The next step is getting you set up to go through what's called a Credit Builder program. This is what gives you full administrative rights so you can log in here and start giving us some names and the contact details of the company that you pay. How much do you think you've invested so far in the developing -- the developing, the manufacturing --

JOSEPH: Oh, probably 3- to 5,000.

JONATHAN: That's what you're going to start reporting. Right now, it's not about you paying a ton of bills; it's really just about that consistency, showcasing or at least paying the bills on time. Once you get that payment history in here, you go back to your vendors, your suppliers and say, hey, look, here's my DUNS number, give me terms, give me credit lines. Because let's be honest, as the company grows, you're going to need more product, you're going to have to develop more product. The manufacturing company -- can you pay for everything up-front?

JOSEPH: No, no, well, I can't.

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JONATHAN: Exactly. So report what bills you have right now and put your company in a much better position to start negotiating the terms and credit lines from the very, very start instead of being forced to pay up-front. Make sense?

JOSEPH: Understand, yes.

JONATHAN: Any questions so far?

JOSEPH: No.

JONATHAN: Okay. The credit --

JOSEPH: Yes. What is -- what's this -- what's it going to cost to put all this together?

JONATHAN: I'm going to -- I'm going to go over that right now. Now, this DUNS number is free. The credit report for the business is free. Again, there's only a cost involved in you submitting the bills because, again, we're not a reporting company, we don't know who you're paying.

You're essentially hiring us to work for you. You went to LegalZoom, you get their discounts. Anybody outside LegalZoom, they typically pay full price for the Credit Builder Plus Program, which is normally 1,499 for the year, plus an activation fee. LegalZoom customers, we're not only waiving the activation fee, we're going to give you the Credit Builder Program for $899. And if it helps you, I can even split it up into three payments.

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That way, you don't have to absorb the whole 899 at once.

JOSEPH: Yeah, that would -- that would work.

JONATHAN: Okay.

JOSEPH: Splitting it up, yeah.

JONATHAN: You make the first payment. What we do then is contact the Secretary of State. We make sure the DUNS number that we assign is actually the link to the legal structure you created. That way, it's set up for credit purposes for the life of the business and that way other companies have the peace of mind that you're going to be safe and reliable to do business with.

And in three to five business days when this DUNS number is assigned, I'm going to be on the phone with you again. We're going to log in together and I'm going to show you how to add the bills to the business. Pretty simple process after.

JOSEPH: Got it.

JONATHAN: Okay.

JOSEPH: Yeah, yeah.

JONATHAN: Okay.

JOSEPH: Good. Okay.

JONATHAN: Bear with me. Hold on one second. Let me just get everything -- so you're going to receive the links and passwords here shortly. Now, you can log in right away. But, again, you're going to see

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everything listed as pending for the next three to five business days. So we have the DUNS number linked to the legal structure.

Now, I'm assuming your territory is going to be all of the U.S., right?

JOSEPH: That's correct, yes.

JONATHAN: Canada as well or --

JOSEPH: Yeah. I'm sure Canada would be -- they drink coffee.

JONATHAN: Yeah. I don't know anybody that doesn't. Oh, that's funny. So what made you --

JOSEPH: Well, actually the world.

JONATHAN: -- take a stab?

JOSEPH: I mean, just watching -- I've been drinking coffee the same way all my life and I just realized that I get a better cup of cappuccino -- I mean, they compact that coffee really tight. You've seen -- they have a specific tapper there as well.

JONATHAN: Yeah.

JOSEPH: This is -- this is -- this is slightly different, but it's on the same line, same concept. And so they're missing -- they're missing one important step to making the best coffee.

JONATHAN: Okay. How did you discover it, though? That's my question.

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JOSEPH: Watching videos of people making the best coffee -- pour-over coffee and thinking --

JONATHAN: Okay.

JOSEPH: -- well --

JONATHAN: I got ya.

JOSEPH: -- well, they want -- put (inaudible) and they weigh it. They weigh the water. They have the water at a particular temperature.

JONATHAN: Mm-hmm.

JOSEPH: But they don't -- they don't compress the coffee. You need -- you need to compress it. You need to tap it down and compress it. And they also talk about making sure you pour that coffee directly in the center of that pile of --

JONATHAN: Mm-hmm.

JOSEPH: -- you know, coffee. Well, I put a little spot there so that's like a target. It's like a little pit.

JONATHAN: Yeah.

JOSEPH: The name of the product is (inaudible). It's called [redacted]

JONATHAN: Yeah. Nice. I love it. I love it.

JOSEPH: It takes seconds, but I'm telling you, you'll see a different cup of coffee.

JONATHAN: I got ya. Okay. You'll get the

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links and passwords here shortly. It's the Credit Builder Program. We're splitting it up into three payments, 899. The first payment is going to be 299.67. What's the method of payment you want to use?

JOSEPH: It would be a credit card.

JONATHAN: Visa, Mastercard, Amex or Discover?

JOSEPH: Oh, let's -- let's say -- hold on. Let me -- let me get to that.

Okay. It would be Visa.

JONATHAN: Okay. Go ahead with the number whenever you're ready.

JOSEPH: Okay.

JONATHAN: Same billing address, right? The [redacted]

JOSEPH: That's correct, yes.

JONATHAN: Okay.

JOSEPH: It is [REDACTED].

JONATHAN: And the expiration date?

JOSEPH: [REDACTED].

JONATHAN: You're getting the Credit Builder Program. Let me just reiterate this for -- just for compliance purposes. Again, you're getting the Credit Builder Program, $899 with the LegalZoom discount, splitting it up into three payments, 299.67 for the first payment. You have a second payment due 30 days from

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today. Final payment, 60 days. That will give you full access for the next 12 months. We do have your permission to process that Visa ending in [redacted] in the amount of 299.67 for the Credit Builder Program?

JOSEPH: Yes.

JONATHAN: Perfect. You'll get the receipt there shortly. Make sure that you save that for tax purposes because you can possibly write it off as a business expense. You're also going to be getting a Business Advantage Plus from LegalZoom. Now, this is absolutely free. They're going to provide you with a comprehensive calendar that's going to alert you to any key filings that might be essential for the business and you'll also have access to the legal library, which you can use for business or personal use throughout the course of the Credit Builder Program.

Lastly, the program is typically set up to automatically renew same time next year at the then-current price. What I would recommend that you do is just set yourself up a time reminder for about nine, ten months down the road. The payment history that we capture and verify and put in the report now, it (audio malfunction) in the report for up to 24 months.

So if you're going to be doing business with the same (audio malfunction) year after year, you may

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only need to do this every two or three years. But in the same respect, if you bring on new vendors and new suppliers throughout the year, consider renewing it so you consistently build that credit, you consistently showcase that strength and stability.

Does that make sense?

JOSEPH: Yes.

JONATHAN: Okay. You're going to get an email from me here shortly with your login information. Again, you'll see everything listed as pending for three to five business days. But my information's going to be there. Whenever you get the notification that the DUNS number is assigned, by all means, reach out to me, we'll log in together. I do check my system periodically. So if I notice it's been assigned before you do, then I'll probably reach out to you. But other than that, I appreciate your time, man. I look forward to working with you and welcome to Dun & Bradstreet.

Any questions for me?

JOSEPH: Very good. No, that's it. Thank you very much.

JONATHAN: Definitely. I'll talk to you soon, okay?

JOSEPH: You bet. Thanks.

JONATHAN: Have a good one.

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JOSEPH: Bye. Mm-hmm, bye.

(The call was concluded.)

(The recording was concluded.)

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CERTIFICATE OF TRANSCRIPTIONIST

I, Elizabeth M. Farrell, do hereby certify that the foregoing proceedings and/or conversations were transcribed by me via CD, videotape, audiotape or digital recording, and reduced to typewriting under my supervision; that I had no role in the recording of this material; and that it has been transcribed to the best of my ability given the quality and clarity of the recording media.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

DATE: 4/20/2020 s/Elizabeth M. Farrell

ELIZABETH M. FARRELL, CERT

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Exhibit H

In the Matter of:

Dun & Bradstreet

April 20, 2020
FTC-00009825 [redacted]

Condensed Transcript with Word Index

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FTC Exhibit H

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Dun & Bradstreet 4/20/2020

OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: APRIL 20, 2020

PAGES 1 THROUGH 17

FTC-00009825 [redacted]

FEDERAL TRADE COMMISSION
I N D E X

FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
)
Date Unknown

The following transcript was produced from a digital file provided to For The Record, Inc. on April 9, 2020.

P R O C E E D I N G S

FTC-00009825

IGOR: Hello.

CHELSEA: Hi, this is Chelsea from Dun & Bradstreet, monitored line. How are you doing today?

IGOR: Hi, hello, this is Igor. I just left a message.

CHELSEA: Yes, thank you so much for giving me a call. I was assigned to the application that you submitted for the DUNS number. So I just need to go over the information that's listed here so we can get everything set up for you.

IGOR: Okay, great.

CHELSEA: All right, wonderful. So before I dive into the application, what was the reason for requesting the DUNS number?

IGOR: Well (inaudible) the ratings -- to get a rating started.

CHELSEA: Sure.

IGOR: So that we could get our -- registered first and then get a rating --

CHELSEA: Okay.

IGOR: -- and a record for our company.

CHELSEA: Perfect. I can definitely help you

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with that. So do you have like a prospective customer who may be looking into your report or are you going to be applying for any sort of like credit or financing in the future?

IGOR: No, we're planning to deal the -- have a business with government agencies and -- especially GSA and (inaudible) asking for a record -- to have a rating -- a credible -- to have -- to be credible and having a rating and record --

CHELSEA: Sure.

IGOR: -- from your company.

CHELSEA: Perfect, yep. (Inaudible) the free DUNS number so that makes sense. So what is the line of business? What do you do exactly?

IGOR: Architect. Architectural company.

CHELSEA: Okay, great. So do you typically only deal with government or do you have like commercial clients as well?

IGOR: No, we deal with commercial and private clients and now we would like to reorient our company toward the public sector.

CHELSEA: Okay, great. Yeah, so especially when you're dealing with commercial clients, they will typically come to us to look at your information as well. They want to make sure, of course, you're safe to deal

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with, you're financially stable and see the credibility of your company. So the way you submitted the application, it leaves your file incomplete, which means you don't yet qualify for all seven scores and ratings that are attached to the DUNS number.

So what we'll do is we will initiate a background check. It only takes three to five business days. We don't need any legal documents from you. We just simply --

IGOR: Mm-hmm.

CHELSEA: -- just confirm that the company is registered, verify if there's been any lawsuits, liens, judgments, bankruptcies, things of that nature, and then once completed, you'll be qualified for the full set of scores and ratings for the lifetime of your business.

IGOR: So your ratings are mainly driven off of your payment history. Do you have any idea how much you've spent within the last 12 months? We can go back a year in payment history and capture those expenses you had and get that added into the report to help you build up your file.

IGOR: Is that -- is that spending including the employees' salaries, office expenses, those type of expenses?

CHELSEA: Yep. Any -- yeah. Any products or

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services that you're paying for.

IGOR: Okay. Yeah, I can provide it, sure.

CHELSEA: Do you have like a rough estimate of how much that would be?

IGOR: An estimate, it should -- for the past 12 months?

CHELSEA: Mm-hmm.

IGOR: Something about 300- to 350,000.

CHELSEA: Wow, that's huge. So especially if you're going to be anticipating to have customers looking at your report, we want to make sure that you're showcasing that so that way they can see the size of the company, the financial stability and the credibility of your business. So what we'll do is we'll get links and logins sent to your email once the DUNS number is assigned to you.

IGOR: Mm-hmm.

CHELSEA: Just email me the contact information of who you're going to be making payments to and then our trade department is going to do the rest of the work from there by calling those companies to verify how much you spent with them, the percentage that was paid on time, and if you have any terms with them. And then once we verify that information, then that gets added into the report. It's a really easy process. I just need a

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little bit of information from you and we basically take over the rest from there.

What is your projection for revenue for this year? Do you have an idea of what that would be?

IGOR: It's tough. With today's market, I cannot really tell. But --

CHELSEA: Sure.

IGOR: -- we hope that it's going to meet -- I don't know. I mean, in the same -- I cannot really tell you. I don't know.

CHELSEA: Okay. We can leave that blank.

IGOR: (Inaudible).

CHELSEA: Yeah, no, that's fine.

IGOR: We're hoping between 3- to 400.

CHELSEA: You said 2- to 400?

IGOR: In between 3- to 400. It's various.

CHELSEA: Okay, all right. Great. So how much is one customer usually worth? Is it different for each one or are they roughly the same?

IGOR: It's -- we're dealing with a different -- with private sector customers through developers.

CHELSEA: Sure.

IGOR: So we're working with the different types of projects. So they could be $5 million to $30 million projects.

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FTC-00009825 [redacted]

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CHELSEA: Wow.
IGOR: So -- at this point.
CHELSEA: That's huge. Okay, great. Well, yeah, we definitely want to make sure we keep that up properly so that way you can continue to grow and expand the company. If that's the size of the contracts, then that could mean a lot for your business. So it's good that we're getting you set up with this now.
So the company, was it registered in [redacted] at the [redacted] address?
IGOR: Yes.
CHELSEA: Okay, wonderful.
IGOR: Yeah, the company was actually at [redacted] We relocated. We relocated office.
CHELSEA: Okay.
IGOR: But the company is registered at -- so it does not really matter probably. The company used to be at [redacted]
CHELSEA: Okay.
IGOR: But we just relocated. We expand the office.
CHELSEA: Okay, perfect. So we'll make sure that that gets updated. And we have the new address listed here. Perfect. Okay, great.
And then the commercial phone number, is it the

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[redacted]
IGOR: That's correct.
CHELSEA: Okay, perfect. And then the email that I reached you on, the [redacted] (inaudible) -- is that dot-com.
IGOR: (Inaudible) dot-com, mm-hmm.
CHELSEA: That's the best email to get everything sent to as well?
IGOR: Yes.
CHELSEA: Okay, wonderful. So the application you submitted, typically, it would take 30 business days. But, again, it does leave your file incomplete. So you wouldn't even yet qualify for the full set of ratings. So we will initiate a background check so that way you have that completed report. That will only take --
IGOR: Mm-hmm.
CHELSEA: -- three to five business days. And then once that is completed, we typically start your scores and ratings in the mid-range. That way, you're not showing poor ratings right from the beginning. And then once the DUNS number is assigned to you, that's when we'll get links and logins sent to your email so that way we can start self-reporting your expenses, build up your scores and ratings in your file, so that way any time anyone's looking at your report, whether it be a

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financial institution or a potential customer, you're already set up and you're showcasing your company in the best way. That way you can continue to grow and expand the company.
In order for us to initiate the background check and to get the links and logins so that way you'll have the full access to self-report. That would be through a Credit Builder basic platform. We just roll this out to newer companies or companies who don't have the DUNS number just yet. This does retail at 899. However, it can be broken up into three payments over a 60-day period. So each payment would only be 299.67 to get that processed and with a Visa, Master, Discover, American Express.
IGOR: Okay. May I ask a question? You said that -- I received a couple days ago that we have already the Dun & Bradstreet assigned a number for our company.
CHELSEA: You do? Okay. Let me take a look. Sometimes it can happen, especially if you've been in business for a while. But it typically doesn't notify me. So let me check.
(Pause.)
CHELSEA: Okay, all right. So I was able to find one. It has -- it needs the information updated. So we can just keep the same DUNS number and just get

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that updated for you. But the thing is is that your file is still incomplete because we wouldn't -- or we didn't initiate the background check. So right now, your file is in an incomplete status and your scores and ratings are saying not applicable. So we want to make sure that that background check gets done, so that way, we can have that completed for you.
IGOR: Okay, okay.
CHELSEA: And then -- and then for the payment history, you're only showcasing roughly $700 and that's nowhere near what you've already spent. So the links and logins will be sent to you as soon as we get all of that processed with the first initial payment of the 299.67.
IGOR: Okay.
CHELSEA: All right.
IGOR: So I should do this online?
CHELSEA: Now, what kind of card do you want to use? We don't have this platform online. The one that we do have is $1,499. So I want to make sure you can take advantage of the lower cost one since you'd be saving $600 for essentially the same platform.
IGOR: Okay. So what the total will be for that to start (inaudible)?
CHELSEA: Yep. So the total would be --
IGOR: (Inaudible).

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CHELSEA: Yeah. So the total would be 899, but if you want to break it up into payments, it would only be 299.67 and then plus any applicable tax.
IGOR: Okay.
CHELSEA: All right.
IGOR: Is it 899 for the year or is it just for one?
CHELSEA: It's all -- so it's going to cover you for 12 months. You can choose to renew it at the end of the year if you would like after the 12 months is done. So ultimately up to you.
IGOR: All right. Okay.
CHELSEA: Okay.
IGOR: Okay. I'm going to -- okay. You going to take the card or call me back?
CHELSEA: Yep. I take method of payment over the phone. I can get everything processed on my end, and then once that's completed, you'll receive the receipt and the links and logins to your email.
IGOR: Okay.
CHELSEA: All right.
IGOR: Hold on one sec.
CHELSEA: Okay.
(Pause.)
IGOR: Okay, go ahead.

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CHELSEA: Okay.
IGOR: American -- American Express.
CHELSEA: All right.
IGOR: And the card number [REDACTED].
CHELSEA: Okay.
IGOR: [REDACTED].
CHELSEA: Okay.
IGOR: [REDACTED].
CHELSEA: And the expiration?
IGOR: [REDACTED]
CHELSEA: [REDACTED].
IGOR: [REDACTED].
CHELSEA: [REDACTED], okay, perfect. And then the billing address attached to the card, is it the updated address?
IGOR: No, it's the previous address, [redacted]
CHELSEA: Okay, perfect. And th n do you want to have it paid in full or do you want to break it up into three payments?
IGOR: I'd like to break it up into three payments.
CHELSEA: Okay, perfect. So I'll get you set up with your Credit Builder Basic for the total of the 899, but we're just going to process the American Express

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for the 299.67, plus any tax today. Hang on to your receipt because it would be a potential tax writeoff at the end of the year.
And we do have a partnership with LegalZoom. They're going to send you an email. You have additional benefits with them at no extra cost to you.
IGOR: Mm-hmm.
CHELSEA: And then you already have the DUNS number, so you're set with that. Give me three to five business days for the background check to be completed. And, again, once that's completed, it completes it for the lifetime of the business. So you'll be all set with that. You won't have to worry about that moving forward.
Do I have your authorization to run your American Express ending in [REDACTED]?
IGOR: I guess you're going to send me an email of this, no? Can you do that?
CHELSEA: Yep. So you'll have the confirmation with that once I process the payment.
IGOR: Okay.
CHELSEA: So let's see here. And then I have your authorization to process that, correct?
IGOR: Okay, yeah.
CHELSEA: Yep, okay, perfect. All right. So you'll receive that receipt here in just a moment. And

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then I will be back in contact with you as soon as we have the report completed to let you know that everything is squared away with that and then, of course, just feel free to give out the DUNS number any time you're being asked for it, okay?
IGOR: Okay. Sounds good.
CHELSEA: All right.
IGOR: Thank you very much.
CHELSEA: You're welcome. You have a great rest of your day.
IGOR: You, too. Bye-bye.
CHELSEA: Thank you. Bye.
(The call was concluded.)
(The recording was concluded.)

4 (Pages 13 to 16)

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DATE: 4/20/2020 s/Elizabeth M. Farrell
ELIZABETH M. FARRELL, CERT

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Exhibit I

In the Matter of:

Dun & Bradstreet

April 20, 2020
FTC-00009660 [redacted]

Condensed Transcript with Word Index

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FTC Exhibit I

FTC-00009660 [redacted]

Dun & Bradstreet 4/20/2020

OFFICIAL TRANSCRIPT PROCEEDING
FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: APRIL 20, 2020

PAGES 1 THROUGH 18

FTC-00009660 [redacted]

FEDERAL TRADE COMMISSION
I N D E X

FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
)
Date Unknown

The following transcript was produced from a digital file provided to For The Record, Inc. on April 9, 2020.

P R O C E E D I N G S

FTC-00009660

CHELSEA: Thank you for calling Dun & Bradstreet. All calls are monitored. This is Chelsea.

MARK [redacted] Good morning, Chelsea. My name is Mark [redacted] I'm returning your call. You left me a voicemail.

CHELSEA: Hi. Yeah, thank you so much for giving me a call back. Let me pull up your application. So I was assigned to the application that you submitted for the DUNS number.

MARK [redacted] Yes.

CHELSEA: So I just need to review the information listed here so we can get everything set up for you.

MARK [redacted] Thank you.

CHELSEA: Okay, you're welcome. So, Mark, you are the CEO of the company. Is that correct?

MARK [redacted] Yes, I am.

CHELSEA: Okay. Is there anyone else that should be listed on file or would it just be yourself?

MARK [redacted] Not today, maybe in a few months. But as of right now --

CHELSEA: Okay.

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MARK [redacted] -- it's just me.
CHELSEA: All right, sounds good. So before I go any further into the application, what was the reason for requesting the DUNS number?
MARK [redacted] Because most of my potential customers, they require a DUNS number.
CHELSEA: Sure.
MARK [redacted] That's one.
CHELSEA: Okay.
MARK [redacted] And that's on the commercial side. And then I'm also an Apple software developer.
CHELSEA: Got it.
MARK [redacted] You know, I can -- and then Apple requires that for enterprises.
CHELSEA: Okay.
MARK [redacted] And then, also, I'd like to go after government contracts, so they require a Dun & Bradstreet number as well.
CHELSEA: Yeah, absolutely. So you're doing everything, huh? Yeah, you're absolutely right, whereas as Apple and government, they do require the free DUNS number that we're getting you set up with now. Have you had a DUNS number before?
MARK [redacted] No, ma'am.
CHELSEA: No? Okay, perfect.

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MARK [redacted] No.
CHELSEA: So I'll make sure we get you set up properly, so that way you're able to do the things that you're looking to for the company. So what do you do specifically with this company or like what is the -- what is the description that should be listed here?
MARK [redacted] Yeah. So this is a -- the name of the company, you know, ends with [redacted]
CHELSEA: Okay.
MARK [redacted] And essentially it's a laboratory for ideas and innovation for technology applications focused on supply chain.
CHELSEA: Okay, wonderful, all right. And then so I have supply chain and logistics technology consultants. So --
MARK [redacted] Correct.
CHELSEA: -- basically that sounds (inaudible) what you just (inaudible).
MARK [redacted] It's kind of broad, but I kind -- it refers to --
CHELSEA: Yeah.
MARK [redacted] -- the industries I'm going after, yeah.
CHELSEA: It's easier that way, for sure. Yeah, that was going to be my next question is, who

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exactly would your customers be on the commercial side?
MARK [redacted] Like consumer package goods companies, distributors, you know. When I say CPG, like Kellogg, Pepsi --
CHELSEA: Oh.
MARK [redacted] -- and then those kinds of companies. And then on the -- on the other side, it would be retailers like, you know, Walmart, Target, grocery stores. So anyone that kind of, you know, receives products, anyone that ships products, and everything that's in between.
CHELSEA: Gotcha. Okay, perfect. Yeah. So Walmart, they require the free DUNS number as well. So if you ever are trying to do business with them, then you'll be all squared away with that, too. But it definitely makes sense as to why they may be asking for the DUNS number or if you're anticipating them to ask. Usually if you're going to be dealing with larger companies like that, they're going to come to us to review your information, make sure you're safe to deal with, you're financially stable, things of that nature.
MARK [redacted] Correct.
CHELSEA: So you have a set of seven scores and ratings attached to the DUNS number. That's usually what they're looking at. Those scores and ratings are mainly

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driven off of your payment history. Have you invested money into the company so far? I know you're fairly new.
MARK [redacted] Just -- just -- it's very new. I invested just enough to buy my first asset, which was --
CHELSEA: Okay.
MARK [redacted] -- you know, a computer for myself.
CHELSEA: (Inaudible).
MARK [redacted] So that's all I've done.
CHELSEA: All right.
MARK [redacted] And so if you were to do a bank account check, then you'll see the money that's in there, which is my $3,000.
CHELSEA: Okay.
MARK [redacted] That's about all I had --
CHELSEA: All right.
MARK [redacted] -- to put into the bank.
CHELSEA: Sure, of course.
MARK [redacted] But the -- but the bank that I've been using, I've been with this bank for, you know, since 1994, [redacted]
CHELSEA: Mm-hmm.
MARK [redacted] And they have my history.
CHELSEA: Okay.

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MARK [redacted] And if required, I can also put you guys in touch with my accountant --
CHELSEA: Okay.
MARK [redacted] -- that's been doing my books for personal stuff for like the last 20 years. So --
CHELSEA: Awesome.
MARK [redacted] Okay, great. Yeah, because I was going to say, you don't always have to have like credit cards and revolving lines of credit, things of that nature to build up your report. Even like with your accountant that you have, if you're paying for a web domain. That could also be a good expense to have added into your report to help build --
MARK [redacted] Okay.
CHELSEA: -- and impact your scores and ratings. And then if you ever need any credit, then it will help with your credit recommendation as well and companies can use that as a guide to determine how much credit to extend to you. But it sounds like it's more so a service-based business. So I'm sure that your expenses will stay fairly minimal. Sound about right?
MARK [redacted] Yep, yep.
CHELSEA: All right, perfect.
MARK [redacted] I mean, at least for the foreseeable future, you know, unless a big opportunity

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comes in and then I'll have to go get a line of credit --
CHELSEA: Sure.
MARK [redacted] -- to kind of invest and -- I don't see that happening like in the next three to six months.
CHELSEA: Sure. Okay, perfect. So we'll make sure you get set up now, so that way when the time does come, you'll already be squared away with that and you're not having to scramble last minute to get all that information together. So that's perfect.
So as you're making expenses, even cash expenses, let me know who you're making payments to so that way we can start submitting that into the report, so that when these customers are looking at your report or if a bank or a vendor is looking, they're able to see that information and you're not showing that you're basically just at a standstill with the business. They can see that you're actively doing business and making payments on time and you are financially stable and a credible company to get involved with.
MARK [redacted] Okay.
CHELSEA: Okay, perfect. So what is your projection for revenue for this year?
MARK [redacted] For the balance of the year, I project about $250,000.

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CHELSEA: Okay, all right. All right. And then number of employees I have listed is one. So if that changes, then just let me know. We can always get that updated for you.
MARK [redacted] Okay.
CHELSEA: And the address is [redacted]. Is that the registered address?
MARK [redacted] Correct.
CHELSEA: Okay, perfect. And is this the best number to have listed on file as well?
MARK [redacted] Yes.
CHELSEA: Okay, awesome. All right. And then your email will [redacted]
MARK [redacted] Yep.
CHELSEA: Is that the email that you would like everything set up to? Awesome.
MARK [redacted] Yep.
CHELSEA: All right, perfect. So the application that you submitted, typically it would take up to 30 business days to receive, but what happens is it does leave the file incomplete. So you wouldn't yet qualify for all seven scores and ratings that are attached to the DUNS number. So since you're using this for commercial purposes -- and that's one reason, we want

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to make sure at the very minimum you do have that completed report.
So we will initiate a background check. We don't need any legal documents from you. We'll get all of that squared away over here. And then within three to five business days, once you confirm the company was registered and if there's been any lawsuits or bankruptcies, we complete your file for the lifetime of the company. Typically, we start your scores and ratings in the mid-range and we assign a credit recommendation right from the start. So feel free to hand out the DUNS number to the potential clients that you may have. And, again, within three to six months, whenever you may be needing to seek some sort of funding or credit, you'll have that established already.
MARK [redacted] So -- sorry.
CHELSEA: (Inaudible)
MARK [redacted] While you're doing all of that, so am I allowed to let potential clients know that the process is underway? That I've been given a number, but the background checks are still underway? Can I -- or should I not even mention that I -- that I have a number?
CHELSEA: So you won't -- when you receive the DUNS number, the file will be completed. So you won't have to --

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MARK [redacted] Oh, okay.
CHELSEA: It's not like you receive the DUNS number and then we initiate the background check. It all gets done at once. So that way --
MARK [redacted] Okay, got it.
CHELSEA: -- you're not having to run into situations like that. Yeah. So it makes it a lot easier. And, again, that only needs to be done once. So you'll be all squared away and then they'll be able to see that we have confirmed your background, your operations, you'll have the full set of scores, and then they can evaluate your company based off of that data.
MARK [redacted] Okay.
CHELSEA: So obviously, the more information you report, the better off you're going to be. So we will get the links and logins sent to your email, so that way we can self-report the expenses that you're going to have for the business. So the money that you've already spent -- and I would even try getting your accountant to add it in here if you're going to be having that individual help you with the business, too. That would be a good expense to have submitted into the report.
MARK [redacted] Yep.
CHELSEA: So back checks, your payment history and, of course, whatever expenses you're going to have

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moving forward, send me that information so I can log it into your report and our trade team can begin calling those companies to build up the report as time goes on. In order --
MARK [redacted] So post this call -- after this call, will you send me like a little email so I know what I need to send you?
CHELSEA: Absolutely, of course. And I was assigned your application, so I'll be with you every step of the way. So what I'll do is I'll send you a list of trade references. We can go through that list together and see what you do have, get that information added in there first. And then, also, it just gives me an idea of what types of companies or industries to get set up with in the future, that will have a good impact to your report.
And you don't even have to have a credit account set up, but at least salvage some sort of relationship, make payments, whether it be like Office Max or Staples, something like that. So that way we're continuing to build up the report. And when your clients are looking at it, you're showcasing your company in the best light. So I'll get all of that sent to the email address that we have listed here.
In order for us to initiate the background

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check and to get the links and logins so that way you have the full access to the report, that is through a Credit Builder Basic platform. We just roll this out to newer companies. This does retail at $899 and then we do take debit, credit or e-check with the account number, routing number, whichever you prefer.
MARK [redacted] I'll do the credit.
CHELSEA: Okay.
MARK [redacted] I'll do the credit card.
CHELSEA: Okay. And then is it a Visa, Master, Discover, American Express?
MARK [redacted] It is a Visa. Hold on one second. Let me --
CHELSEA: Okay. Take your time.
MARK [redacted] Let's see, I just got it. Okay. It's a -- it's a Visa.
CHELSEA: Okay.
MARK [redacted] You ready for the number?
CHELSEA: Yeah.
MARK [redacted] It's [REDACTED].
CHELSEA: Okay.
MARK [redacted] [REDACTED].
CHELSEA: Okay. And the expiration?
MARK [redacted] [REDACTED].
CHELSEA: Okay, perfect. And the billing

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address attached to the card, is it going to be the same one that's on the application?
MARK [redacted] Correct.
CHELSEA: Okay, perfect. All right. So we'll get you set up with the Credit Builder Basic. So the total amount's going to be the 899, no tax in your area, so you're all good with that. Hang on to your receipt because it could be a potential tax writeoff at the end of the year. And then we do have a partnership with LegalZoom and Redact-It, so you'll have additional benefits with those companies at no extra cost to you.
MARK [redacted] Got it.
CHELSEA: And then do I have your authorization to run the Visa ending in [REDACTED]?
MARK [redacted] Yes.
CHELSEA: Okay. So you'll receive that receipt here in just a moment. And I will be back in contact with you as soon as we get everything set up. I'll walk you through the report if you would like me to and, in a little bit, I'll send you the list of references. So that way, whenever you get a free moment or over the weekend, you can get a list together and then do some research. And once everything's assigned to you and you get the links and logins, you can just send that over to me. All right?

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MARK [redacted] Yep, thank you so much.
CHELSEA: You're very welcome. You have a great rest of your day. Enjoy your weekend, okay?
MARK [redacted] Bye-bye.
CHELSEA: Bye-bye.
(The call was concluded.)
(The recording was concluded.)

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CERTIFICATE OF TRANSCRIPTIONIST

I, Elizabeth M. Farrell, do hereby certify that the foregoing proceedings and/or conversations were transcribed by me via CD, videotape, audiotape or digital recording, and reduced to typewriting under my supervision; that I had no role in the recording of this material; and that it has been transcribed to the best of my ability given the quality and clarity of the recording media.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

DATE: 4/20/2020
ELIZABETH M. FARRELL, CERT

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Exhibit J

In the Matter of:

Dun & Bradstreet

February 13, 2019
FTC-00009577

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Dun & Bradstreet 2/13/2019

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. 1723196

TITLE DUN & BRADSTREET

DATE RECORDED: DATE UNKNOWN
TRANSCRIBED: FEBRUARY 11, 2019

PAGES 1 THROUGH 26

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FEDERAL TRADE COMMISSION

In the Matter of:)
Dun & Bradstreet) Matter No. 1723196
)
---)

The following transcript was produced from a digital file provided to For The Record, Inc. on January 31, 2019.

PROCEEDINGS

FTC-00009577

DAN [redacted] Dan.

PETREA DICKINSON: Hi, this is Petrea Dickinson (phonetic) with Dun & Bradstreet on a monitored line. Did you say this is Dan?

DAN [redacted] This is Dan. How are you?

PETREA DICKINSON: Doing great, Dan. How are you doing?

DAN [redacted] Good, good. Thanks for the call.

PETREA DICKINSON: Absolutely. I just wanted to give you a call so I could better assist you. Could I get your title?

DAN [redacted] Yeah, sure. So I'm the chief operations officer.

PETREA DICKINSON: Okay. And what's going on exactly? What brings you to chat?

DAN [redacted] So we are getting ramped up -- out of the last year, we've been [redacted] primarily, and we've just kind of entered the wholesale and retail market, and we had a great summer, great shows, a lot of press behind our brand, et cetera, et cetera. So, naturally, this has created kind of a demand for

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our product now. And we're getting set up with some new accounts, for instance, like Neiman Marcus last call, and we're in the process of getting everything set up for [redacted] purposes.

PETREA DICKINSON: Mm-hmm.

DAN [redacted] And one of their requests was -- I just received an email earlier from the implementation team over at [redacted] and they were asking that, you know, we can complete your setup once we receive the following information from you, which is basically your DUNS number. I don't believe we ever set one up, so I know a little bit about DUNS. I just -- we never set it up. I didn't know if it was standard or needed to be done for every single, you know, corporation or company in the world, but maybe you can better assist me.

PETREA DICKINSON: Absolutely. I can definitely help you with that, Dan. How familiar are you with your DUNS number and how other companies usually use it?

DAN [redacted] I know it's pretty much a unique nine-digit number that identifies your businesses. That's pretty much -- I think it's got something to do with your credit file as well, but that's about all I know for DUNS.

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PETREA DICKINSON: That's exactly right, Dan. So it's attached to your company's credit report, and this is usually where other companies are going to come when they want to do either a background or a credit check on the business.

DAN [redacted] Oh, okay. So it's a credit -- so you can -- so you can actually run credit reports if you're looking to work with somebody?

PETREA DICKINSON: Exactly, yep, and do a risk assessment, make sure that they're paying their bills on time, that there's nothing risky about doing business with them, like a bankruptcy or a lien or something like that.

DAN [redacted] Oh, interesting. Okay, all right. That makes sense.

PETREA DICKINSON: So if you're trying to set up [redacted] with -- are these customers that you're trying to do that with?

DAN [redacted] Yeah, they're customers. This is all -- I mean, so we're -- we're in retail. We're nationwide in a few stores. However, we did, you know, paper purchase orders, and just now they're finally requesting [redacted] and then we just picked up a new customer, Neiman Marcus. They're requesting [redacted] So, you know, this is probably good that it happened

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now because I would have needed to do it at some point or another anyway.

PETREA DICKINSON: Absolutely. Absolutely. So we'll make sure that we get you set up the right way so that Neiman Marcus and anybody else who looks sees that you're a credible company and, you know, safe to do business with.

DAN [redacted] Absolutely.

PETREA DICKINSON: So let me just do a quick search to make sure you don't already have a DUNS number, Dan. What's the name of the company?

DAN [redacted] Okay. So the IRS name is [redacted] -- so basically it's [redacted] with an [redacted] in front of it, like [redacted]

PETREA DICKINSON: (Inaudible).

DAN [redacted]

PETREA DICKINSON: Okay. And what state are you located in?

DAN [redacted] We are in [redacted] and we're a registered company in the State of [redacted]

PETREA [redacted] All right, perfect. Are you in [redacted]

DAN [redacted] That's -- no, that was -- are you finding the old address, [redacted]

PETREA DICKINSON: Let me just try --

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DAN [redacted] We're in [redacted] We moved into that office in May.

PETREA DICKINSON: Okay, so this one is on [redacted]

DAN [redacted] Yeah, that's -- that's no longer -- that's -- that's not the correct one anymore. Do you have the capability of changing that?

PETREA DICKINSON: Absolutely. We'll get everything all up-to-date and make sure that we get the report completed. It looks like you've already had eight inquiries, so other companies, you know, that have already requested a copy of the report from us.

DAN [redacted] Hmm, okay.

PETREA DICKINSON: So it's definitely good timing that you reached out to us today so that we can make sure we get it completed and everything is accurate and up-to-date.

DAN [redacted] For sure.

PETREA DICKINSON: So I know you said we need to update the address. And, then, what year did the company start?

DAN [redacted] So the company was established in 2015, but we came to market last

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August.
PETREA DICKINSON: Oh, wow, congratulations.
DAN [redacted] Thank you, thank you. Well, actually -- yeah, we came to -- when I say we came to market, we took our -- our website live, [redacted], in August, [redacted]...
PETREA DICKINSON: Wow, that's fantastic. And what are you selling exactly?
DAN [redacted] So if you go to [redacted], we are selling -- we're -- we're shoes. [redacted]
PETREA DICKINSON: Sure.
DAN [redacted]
PETREA DICKINSON: Oh, wow. Very nice. So comfortable.
DAN [redacted] Very comfortable, absolutely.
PETREA DICKINSON: Very nice.
DAN [redacted] Mm-hmm.

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PETREA DICKINSON: All right. So let me just run through here. How many current employees do you have, Dan?
DAN [redacted] Okay, so employees as in like W-2 employees, because we have some independent contractors, like 1099 sale reps, so they're not considered. I'm an employee; my partner. So really just -- I mean -- I mean, you tell me how I answer this question best for the profile.
PETREA DICKINSON: Well, it sounds like two, and then how many 1099 employees do you have?
DAN [redacted] Yeah, so we have -- so if you're just looking for overall, so we have one, four -- about nine employees.
PETREA DICKINSON: All right. And it looks like -- let's see, what are you projecting in sales for 2018?
DAN [redacted] So for 2018, I believe we're projecting around half a million dollars. And you know what, give me a second, I -- I could be wrong on that. Hold on.
PETREA DICKINSON: Okay.
Yeah, keep that. Keep that, because for -- for 2020, yeah, we -- we have projections for 2019 as well. So keep it at about half a million for -- for

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this year.
PETREA DICKINSON: Half a million, okay. And it sounds like you are projected to grow. What are you projecting for 2019?
DAN [redacted] Yes. 2019, we're projecting 1.3.
PETREA DICKINSON: That's fantastic. All right. And, so, the customers that are asking you to have the DUNS number, most of the time they just want to see that, you know, you're -- you're credible, that you're --
DAN [redacted] Mm-hmm
PETREA DICKINSON: -- not (inaudible). You have seven scores and ratings behind that DUNS number. We just need to make sure that --
DAN [redacted] Okay.
PETREA DICKINSON: -- we get some financial strength into the file so that --
DAN [redacted] Okay.
PETREA DICKINSON: -- they can see that. Now --
DAN [redacted] Okay.
PETREA DICKINSON: -- with customers like Neiman Marcus, how much business are you typically doing with them, Dan?

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DAN [redacted] So, I mean, these are -- these are all opening orders to start, so, you know, we're in the range from, you know, $30,000 to $50,000 orders to start.
PETREA DICKINSON: Okay. All right, so we definitely need --
DAN [redacted] And that would be the same (inaudible) --
PETREA DICKINSON: Go ahead.
DAN [redacted] -- no, no, go ahead. I'm sorry.
PETREA DICKINSON: Well, I was just saying we definitely need to make sure that they see that, you know, they're not going to have empty shelf space or you're not going to miss an order, anything like that.
DAN [redacted] Right. So this information you're asking me, is this like -- what -- where -- are you plugging this into our profile now and then, what, companies can see this or something like that? How does this work?
PETREA DICKINSON: So we would never put anything about your customers or your vendors in the report --
DAN [redacted] Right.

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PETREA DICKINSON: -- but what we do need to do is get some payment history updated here --
DAN [redacted] Mm-hmm.
PETREA DICKINSON: -- because that's one of the main driving forces behind your scores and ratings.
DAN [redacted] Sure.
PETREA DICKINSON: (Inaudible) bills you pay and how well you pay them.
DAN [redacted] Sure.
PETREA DICKINSON: About how much would you say that you're spending in operating costs, just ball park, in a given month?
DAN [redacted] Ball park in a given month, burn rate, is -- and I have this pulled up -- we are somewhere around $20-, $25,000.
PETREA DICKINSON: Okay. So the problem right now, Dan, with your report is with business credit, those companies, they're not required by law to automatically report that information --
DAN [redacted] Mm-hmm.
PETREA DICKINSON: -- and they usually don't.
DAN [redacted] Hmm.
PETREA DICKINSON: So we don't have that

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payment history, that financial strength --
DAN [redacted] Sure.
PETREA DICKINSON: -- in your file.
DAN [redacted] Sure.
PETREA DICKINSON: So what we need to do is set you up so that you can start reporting the names of those companies, and then what we do on our part --
DAN [redacted] Okay.
PETREA DICKINSON: -- is reach out to them, contact them, confirm that payment history going back one full year if we can --
DAN [redacted] Okay, okay.
PETREA DICKINSON: -- so we can start to move the scores and ratings in a positive direction.
DAN [redacted] Okay. So I imagine -- am I going to have to create an online profile?
PETREA DICKINSON: So we're going to send you the links and logins --
DAN [redacted] Okay.
PETREA DICKINSON: -- along with your receipt. Now, about --
DAN [redacted] Okay.
PETREA DICKINSON: -- how many vendors is that 20- to 25,000 spread out between? Is it 5, 25, 105?

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DAN [redacted] No, no. Like for instance, we're in [redacted] nationwide, and they paid us, I think it was $114,000 in the last six months for our goods that we delivered to them. So, I mean, we -- we have payment history, for sure. I mean, country clubs, yacht clubs, other vendors, et cetera.
So, I mean, it's just a matter of how do I show that and how do we strengthen this, and then also, how do I get the Dun & Bradstreet -- you know, how do I get a DUNS number expedited? I guess I have to go through this entire process in order to get that done first?
PETREA DICKINSON: So you actually already have the DUNS number. It's just that it's attached to an incomplete credit file.
DAN [redacted] Okay.
PETREA DICKINSON: So what we need to do is get you set up so that you get a completed report. That's just going to mean that we confirm operations, make sure there are no lawsuits, liens, judgments --
DAN [redacted] Yep, yep.
PETREA DICKINSON: -- bankruptcies. And you don't have anything --
DAN [redacted] Mm-hmm.
PETREA DICKINSON: -- like that, right?

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DAN [redacted] No, nothing like that, nope.
PETREA DICKINSON: Okay. So and then we'll set you up so that you can add in the names of those suppliers so we can help you start to build the credit.
DAN [redacted] Okay. How soon can I get my DUNS number?
PETREA DICKINSON: So I'm going to give you your DUNS number here, and --
DAN [redacted] Okay.
PETREA DICKINSON: -- I'm also going to send you out the links and logins so that you'll --
DAN [redacted] Great.
PETREA DICKINSON: -- be able to log in to your profile, monitor all your scores.
DAN [redacted] Perfect. Awesome.
PETREA DICKINSON: You'll be able to see by industry who looks at the report. So you'll be able to control all of that moving forward.
DAN [redacted] All right, perfect. I am ready for that when you are. I'll write it down and then you can send me an email like you said. That -- that's great, too.
PETREA DICKINSON: Absolutely. So your DUNS number is going to be [redacted]

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DAN [redacted] I'm going to read that back to you. [redacted]
PETREA DICKINSON: Correct. That'll be your DUNS number for the life of the business.
DAN [redacted] Okay, very cool.
PETREA DICKINSON: And then you can just let your customers who are asking for it, just let them know that you're working with Dun & Bradstreet and we're working to get it completed and to get some financial strength into the file.
DAN [redacted] Okay.
PETREA DICKINSON: So what we'll do is we'll set you up on the entry-level service. It's only $1,499, and it's going to complete your report for the life of the business. What email address am I going to be sending your links to, Dan?
DAN [redacted] Okay, it's the one that I gave you, th[redacted]. And then that -- what did you say it was, $1,400 or $1,499?
PETREA DICKINSON: Yes, sir.
DAN [redacted] That -- what is that, that's a -- a yearly due?
PETREA DICKINSON: Correct, and it's going to complete your report for the lifetime of the business.

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DAN [redacted] Completes it for lifetime of the business. Oh, so is this really only a one-time fee?
PETREA DICKINSON: You don't have to do it every single year, but we do recommend that you do it at least every two years. After that, the information becomes outdated.
DAN [redacted] All right, so basically update every 24 months if you want to stay current. All right. Okay, yeah, send me all those links. This way I can get this all set up, and I imagine there's a payment link and all that good stuff, right?
PETREA DICKINSON: So, yeah, once we process the payment, I'll send you out the links.
DAN [redacted] Okay.
PETREA DICKINSON: And then --
DAN [redacted] Oh, so you guys got to take the payment first. I got you.
PETREA DICKINSON: Right, and we can use a Visa, MasterCard, American Express, or Discover. Usually, I just use the one that's going to give you the most points. Which one is that?
DAN [redacted] Okay, okay. Give me a second. Let me get my -- let me get my wallet. I'm going to put you on hold for a minute, okay?

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PETREA DICKINSON: Okay.
(Brief hold.)
DAN [redacted] Okay, you with me?
PETREA DICKINSON: Yes, sir.
DAN [redacted] Okay. All right, so this is going to be an American Express.
PETREA DICKINSON: And, no, I do not need that CTV code. So you're going to get some links from -- or some emails, excuse me, from us right away.
DAN [redacted] Okay.
PETREA DICKINSON: You're going to get your receipt that you're going to want to save that for tax purposes.
DAN [redacted] Yep.
PETREA DICKINSON: And your login. And, then, the service is set to automatically renew next year at the then-current price. You're also going to get about 160 free legal documents from our partners at LegalZoom that you can use for the business if you want.
DAN [redacted] Okay.
PETREA DICKINSON: There is a --
DAN [redacted] Okay.
PETREA DICKINSON: Go ahead. Did you have a question?

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DAN [redacted] No, no, go ahead. No, I'll -- I'll wait until you're done (inaudible).
PETREA DICKINSON: Okay, all right. So there's a one-time activation fee. It's $149, and then I would just need your permission to charge your American Express ending in XXXX for the CreditBuilder Plus, plus any applicable state tax.
DAN [redacted] Okay, I got you. So I'm in sales, too. I said -- shame on me, I should have asked that up front. So one, the $1,500, I know I asked you earlier, you said it completes you for the lifetime of the business, you don't have to update it, but you mentioned that it then automatically renews next year for that $1,500 price.
PETREA DICKINSON: It is set -- yeah, all the services are set to automatically renew. Did you want me to --
DAN [redacted] Okay, does that -- is that -- so if it doesn't renew, that's -- so what I'm getting at is what am I paying the $1,500 for every year if I don't have to update it every year? So what -- do you get what I'm saying?
PETREA DICKINSON: I do. So, yeah, so the -- the issue is the payment history falls off every two years --

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DAN [redacted] Mm-hmm.
PETREA DICKINSON: -- so you're going to pay for -- from now until next year --
DAN [redacted] Mm-hmm.
PETREA DICKINSON: -- to add in those vendors and suppliers, and then we're going to contact them and confirm all of that. Then --
DAN [redacted] Mm-hmm. So I can't -- so you guys don't have an option of where -- so I pay the $1,500 one time today; we go ahead and get this set up; and then it's up to me what I want to do. So technically I don't have to pay $1,500 every year, correct?
PETREA DICKINSON: Correct. So, yeah, I can go ahead and put in a ticket for you so it will not automatically renew so that they reach out to you every year to find out what you want to do.
DAN [redacted] Yeah, let's do that. Let's do that. I mean, I know it's a while away, and -- and, you know, next year, I'm sure when I talk to them, I'll say, yeah, go ahead and just auto, but -- but for now, just keep it for -- let's -- let's do this, let's get it set up.
The 149 fee, are you -- are you -- I mean, I wish I would have asked about that or it was mentioned

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as well. Do you have the capability of waiving that for first-time customers and something along those lines?
PETREA DICKINSON: No, unfortunately, I don't.
DAN [redacted] 149 setup fee. All right. And you're basically telling me there's no way -- okay, I understand how this works. So, really, technically, with the number that I have, I can just give them the number but there's no information they can pull on us. So it's to our benefit to have this filled out and get this taken care of.
PETREA DICKINSON: Absolutely.
DAN [redacted] I understand that, but I don't want it renewed every year just -- at least for the first year we'll go -- you know, we'll go -- you know, we'll take it from here and we'll see exactly how many people are looking at it, how often they use it, et cetera. So --
PETREA DICKINSON: Yep. And I'll send you over all my contact information, Dan, so you'll know -- if you have any questions, if you want to reach out to me, I'm here to help.
DAN [redacted] Okay, so 1,649. And I really -- I haven't even talked to any of my -- my

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other colleagues about this. I just figured I'd call right away and see, hey, how do I -- how do I go about getting this done.
PETREA DICKINSON: Absolutely, especially if your customers are asking for it.
DAN [redacted] Let me do this. Yeah, no, I get it, I get it.
PETREA DICKINSON: So log in with them --
DAN [redacted] Do you -- yep, yep. Okay, let me see here. All right, so it looks like you guys already charged that, okay, even though I didn't give you the verbal yes. Okay. Hmm, trying to get those sales in, huh?
PETREA DICKINSON: Oh, I'm sorry. I thought you did give me the go-ahead. I apologize.
DAN [redacted] No, no, I never gave you the verbal, and -- and if I didn't, I would have said let me talk to my partner and what's your contact information. I understand how important it is to get sales when you have them right at the fingertips. You also billed me to the wrong address as well, and I thought that was corrected. I still see the [redacted] Street here billed to.
PETREA DICKINSON: Correct. So I'm going to --

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DAN [redacted] Is that a typo?
PETREA DICKINSON: -- put in a ticket -- no, no, no. I'm going to put in a ticket --
DAN [redacted] Okay.
PETREA DICKINSON: -- so that we can get your address updated.
DAN [redacted] Uh-huh.
PETREA DICKINSON: When I send you my contact information, I'll give you a ticket number so you know --
DAN [redacted] Okay, and --
PETREA DICKINSON: -- what that --
DAN [redacted] -- okay, and also do it -- go ahead and put in a ticket for the renewal. I don't want this to be renewed unless I verbally agree to that.
PETREA DICKINSON: Absolutely, and our billing team will call you to confirm that.
DAN [redacted] All right. So, basically, what, it's 12 months from today?
PETREA DICKINSON: Correct.
DAN [redacted] Okay. Okey-doke. All right, so I just got three emails from you obviously. I got the order confirmation; I got the CreditBuilder. So the CreditBuilder is what I'm going to follow to go

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ahead and -- and add references and all this good stuff and all that, right?
PETREA DICKINSON: Exactly. And I'm going to send you my contact information in just a minute here, Dan. So if you --
DAN [redacted] Okay.
PETREA DICKINSON: -- have any questions, you'll know where to reach me. Okay?
DAN [redacted] Okey-doke. I will be on the lookout for that. And what was your name?
PETREA DICKINSON: My name is Petrea, P E T R E A.
DAN [redacted] Okay. Okey-doke. All right, I'll be on the lookout for your email. Please send me your information.
PETREA DICKINSON: Absolutely, Dan. I'll shoot it right over to you, and welcome to Dun & Bradstreet.
DAN [redacted] All right. Thank you so much. All right, thank you.
PETREA DICKINSON: Thank you.
DAN [redacted] Bye-bye.
PETREA DICKINSON: Bye-bye.
(The call was concluded.)
(The recording was concluded.)

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CERTIFICATE OF TRANSCRIPTIONIST

I, Sara J. Vance, do hereby certify that the foregoing proceedings and/or conversations were transcribed by me via CD, videotape, audiotape or digital recording, and reduced to typewriting under my supervision; that I had no role in the recording of this material; and that it has been transcribed to the best of my ability given the quality and clarity of the recording media.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

DATE: 2/12/2019 s/Sara J. Vance
SARA J. VANCE, CERT

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that, only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Dun & Bradstreet, Inc., also doing business as D&B, a Delaware corporation with its principal office or place of business at 101 John F. Kennedy Parkway, Short Hills, NJ 07078.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "**Billing Information**" means any data that enables any person to access a customer's account, such as a credit card, checking, savings, share or similar account, or debit card.

B. "**Business**" means any business or other entity, including nonprofits, cities, counties, municipalities, and other governmental entities.

C. "**Charge**," "**Charged**," or "**Charging**" means any attempt to collect money or other consideration from a consumer, including causing Billing Information to be submitted for payment, including against the consumer's credit card, debit card, bank account, telephone bill, or other account.

D. "**Clearly and Conspicuously**" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

E. "**Covered Product**" means all CreditBuilder Line Products, either sold alone or with other products or services as part of a combined or bundled package; any

product or service that includes an option to submit or add the names of or information about a Business's vendors, suppliers, or other entities to that Business's own credit report or credit file; and any product or service that Respondent markets to Businesses as being designed to allow a Business to monitor its own credit report, including CreditMonitor.

F. "**CreditBuilder 2018**" means the CreditBuilder "basic" product in the form that Respondent began offering in January 2018 and includes subscriptions with an initial purchase date (prior to any renewals) from January 1, 2018 through April 30, 2020.

G. "**CreditMonitor Substitute Product**" means a CreditBuilder Line Product to which Respondent migrated Businesses that had purchased CreditMonitor, during a period when Respondent temporarily stopped offering CreditMonitor, and any subsequent CreditBuilder Line Product to which Respondent migrated any such Business.

H. "**CreditBuilder Line Product**" means CreditBuilder, CreditBuilder Basic, CreditBuilder Plus, CreditBuilder Premium, Credit Essentials, and Credit Essentials Plus, as well as any predecessor to, successor to, or variant of any of these products; and includes CreditBuilder 2018 as defined above.

I. "**Current Customer**" includes Businesses that are customers of Respondent as of the date of the entry of this Order, and does not include a Business that first purchased a product after the date of the entry of this Order. When specifically stated in this Order, Current Customer may be further limited to exclude a Business that first purchased a product on or after May 1, 2020.

J. "**Negative Option Feature**" means, in an offer or agreement to sell or provide any product or service, a provision under which the consumer's silence or failure to take affirmative action to reject a product or service or to cancel the agreement is interpreted by the seller or provider as acceptance of the offer.

K. "***Pro Rata* Result**" means the dollar figure resulting from applying discount adjustments and term adjustments to the figure of $399 for Refund Customers who are Current Customers, and to the figure of $480 for Refund Customers who are former customers. For a Relevant Subscription Term during which a customer paid a discounted price, the discount adjustment shall be a multiplier equal to the price paid divided by the list price (e.g., if a customer paid $800 for a product listed at $1,000, the discount adjustment multiplier is .8). For a Relevant Subscription Term that is less than a one-year term, the term adjustment shall be a multiplier equal to the length of the Relevant Subscription Term divided by one year (e.g., if the Relevant Subscription Term is three months, the term adjustment multiplier is .25). The effects of the adjustment multipliers shall be cumulative (multiplied by each other) if a customer paid a discounted price for a Relevant Subscription Term of less than one year.

L. "**Relevant Subscription Term**" means the Business's current or most recent CreditBuilder Line Product subscription term.

M. "**Respondent**" means Dun & Bradstreet, Inc., a corporation, doing business as D&B ("D&B"), and its successors and assigns.

N. "**Trade Reference**" means a source, including a vendor, supplier, or other entity, that supplies Respondent (or that a Business represents could supply Respondent) with commercial payment information about a Business.

O. "**Trade Reference Acceptance Percentage**" means the aggregate calculation of the number of all Businesses' submissions of payment experiences from Trade References that have been added to Businesses' own credit reports or credit files through the operation of any CreditBuilder Line Product, divided by the number of all Businesses' attempted submissions of payment experiences from Trade References to be added to Businesses' own credit reports through any CreditBuilder Line Product, expressed as a percentage. The divisor of this calculation shall not be reduced for multiple attempted submissions by a Business of a single Trade Reference or a single payment experience, nor shall the divisor be reduced for any attempted submissions that Respondent has automatically rejected for any reason.

Provisions

I. Prohibited Misrepresentations

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of, or the Charging for, any product, must not misrepresent, expressly or by implication:

A. that using any product is likely to allow a Business to have its previously unreported commercial payment experiences added to the Business's credit report;

B. that Respondent will actively assist a Business in adding unreported commercial payment experiences to the Business's credit report;

C. that using any product is likely to help build and/or improve a Business's credit report;

D. the ease with which information or payment experiences can be added to or will be included on a Business's credit report;

E. that Respondent will accept identified vendors, suppliers, or other entities as Trade References (whether identified by the Business or by Respondent's agents or

employees), including specifically identified entities, entities comparable to specifically identified entities, or specific types or categories of entities;

F. that any product is needed for Respondent to initiate or conduct a background check on a Business, or to otherwise activate or establish the Business's credit report or credit file;

G. that any product will provide a Business with a complete credit report or credit file including a full set of scores and ratings;

H. that any product with a Negative Option Feature will be Charged at that product's list price at the time of renewal;

I. an obligation on the part of a Business to affirmatively act in order to avoid Charges, including where a Charge will be assessed pursuant to the offer unless the consumer takes affirmative steps to prevent or stop such a Charge;

J. that Respondent is collecting payment for or is renewing the same product that the Business purchased the prior term; or

K. any other material fact about the price or features of any product, or concerning a Business's ability to have, monitor, maintain, build, or improve its own credit report or credit file.

II. Prohibitions Regarding Negative Option Feature

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are prohibited from using a Negative Option Feature:

A. To renew an existing agreement with or Charge a Current Customer for (1) a CreditBuilder 2018 product or (2) a CreditMonitor Substitute Product, unless Respondent receives the express consent of the customer to renew the product, and has complied with the Notification required by Section VII below.

B. To renew an agreement with or Charge a Business for any Covered Product when Respondent has increased the list price of the product, unless Respondent first provides the Business with notice of such increase before the agreement is scheduled to renew, and gives the Business at least 30 days after such notice to cancel and avoid being Charged for the product.

1. Notice shall be provided by email. If Respondent does not have a working email for the Business, or if the emailed notice is returned as undeliverable, notice shall be provided by United States Postal Service, first class mail, postage pre-paid. If Respondent sends notice by United States Postal

Service, Respondent must give the Business at least 30 days from the date of mailing to cancel and avoid being Charged for the product. If Respondent does not have a mailing address for the Business, or if a notice sent by United States Postal Service is returned as undeliverable, Respondent must receive the express consent of the Business before renewing the product at the increased price.

2. The notice shall include the product's list price for the current term, the product's new list price, instructions on the procedure to cancel if the Business does not want to renew (as set forth in this Part B.3 below), and the deadline by which the Business must affirmatively act to avoid being Charged. The subject line of the email, and the front of the envelope for notice by United States Postal Service, shall read, without any additional language, "Price Increase Affecting Your Dun & Bradstreet [X] Product." Respondent shall insert the name of the specific Covered Product at issue where indicated by [X]. *Provided, however,* that if Respondent has increased the list price of the product but Respondent is providing the Business with a discount so that the Business will not pay any of the price increase, the notice shall also include the price that Respondent will Charge the Business, and the subject line of the email and the front of the envelope for notice by United States Postal Service shall read, without any additional language, "Price Information About Your Dun & Bradstreet [X] Product."

3. Respondent shall provide a simple mechanism that the Business can easily use to cancel the product and avoid being Charged, including a telephone number and web form. Respondent must assure that all calls to this telephone number are answered during normal business hours. Respondent shall provide the telephone number and a link to the web form in the notice, and shall post it to an easily accessible location on the Internet.

C. To renew an agreement with or Charge a Business for any Covered Product a Business purchased when Respondent has materially changed the product's feature or features in a manner that limits, reduces, or eliminates such feature or features.

D. To substitute a different product for the Covered Product a Business purchased, provided that, this Part D does not apply and Parts B and C of this Section apply instead if:

1. Respondent renames or rebrands the Covered Product that the Business purchased, or

2. Respondent eliminates and ceases to offer the Covered Product a Business purchased (the "Eliminated Product"), under the following conditions:

a. The list price of the substitute product is no higher than the list price of the Eliminated Product. For purposes of the calculation required

by this condition, Respondent may not consider any introductory or discounted pricing of the substitute product.

b. The substitute product has every material feature of the Eliminated Product, and none of those features are limited or reduced in comparison to the Eliminated Product. Respondent may not use a combination of substitute products to meet this condition.

c. Respondent (i) provides the Business with prompt notice of such product substitution, and (ii) gives the Business at least 30 days after such notice to cancel and avoid being Charged for the substitute product. The notice shall be provided in the same manner as set forth in Part B.1. of this Section. If Respondent is required to send notice by United States Postal Service and does not have a mailing address for the Business, or if a notice sent by United States Postal Service is returned as undeliverable, Respondent must receive the express consent of the Business before Charging the Business for a substitute product.

d. The required notice shall identify the Eliminated Product and its list price; shall identify the substitute product, its list price and its features; and shall disclose that the Eliminated Product is no longer being offered. The notice shall also provide instructions on the procedure to cancel if the Business does not want to renew (as set forth in Part B.3 above), and the deadline by which the Business must affirmatively act to avoid being Charged. The subject line of the email, and the front of the envelope for notice by United States Postal Service, shall read, without any additional language, "Notice of Substitution of your [name of Eliminated Product] to a Different Product."

e. If, at any time, Respondent reintroduces the Eliminated Product, Respondent shall revert the Business's subscription back to a subscription to the Eliminated Product. For the first subscription term upon such reversion, Respondent shall charge the Business no more than the lowest of (i) the amount the Business paid for its most recent term of subscription to the Eliminated Product, or (ii) the amount the Business paid for its most recent term of subscription to any Covered Product, or (iii) the list price of the reintroduced Eliminated Product. In the event of such reversion, Respondent shall provide notice to the Business of the reversion in a manner consistent with the terms of Parts D.2.c and d, above.

E. For all oral offers for Covered Products, without obtaining express oral confirmation, before obtaining a Business's Billing Information, that the Business

understands that the transaction includes a Negative Option Feature, and understands the specific affirmative steps the Business must take to prevent or stop further Charges. For such transactions, Respondent shall maintain for three (3) years from the date of each transaction an unedited voice recording of the entire transaction.

III. Required Disclosure: Aggregated Trade Reference Acceptance Percentage

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of, or the Charging for, any CreditBuilder Line Product or bundled product that includes a CreditBuilder Line Product, must disclose, Clearly and Conspicuously, before obtaining the Business's Billing Information, the aggregated Trade Reference Acceptance Percentage for the preceding calendar year. Upon the start of a new calendar year, Respondent may continue to disclose the most recently available calendar year's percentage until Respondent has calculated the updated percentage for the preceding calendar year, *provided that* Respondent must begin disclosing the percentage for the preceding calendar year no later than April 1.

IV. Required Disclosure: Respondent Does Not Identify Ineligible Trade References And Reasons For Rejection

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale of, or the Charging for, any CreditBuilder Line Product or bundled product that includes a CreditBuilder Line Product, must disclose, Clearly and Conspicuously, before obtaining the Business's Billing Information:

A. that although Respondent maintains lists of named entities that are ineligible to be added as Trade References through CreditBuilder Line Product submissions, Respondent will not disclose in advance of any Trade Reference payment experience submission whether such Trade Reference is ineligible; and

B. that if Respondent rejects a Trade Reference payment experience submission, Respondent will not identify to the Business the specific reason for rejection of that submission.

Provided that, if Respondent changes its practices described in either Part A or Part B of this Section (or both of them), this Section shall require accurate disclosure of the resulting practice or practices.

V. Unfairness Relief: Dispute Investigation and Resolution

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, shall, free of charge, provide Businesses with access to information gathered, collected or maintained by Respondent, other than Respondent's proprietary or derived scores, ratings, calculations, summaries, predictions and analyses, that Respondent reports about them, and shall, free of charge, provide such Businesses with reasonable means to dispute the accuracy of such information.

A. If a Business notifies Respondent directly (by notifying a customer service representative or using an online process provided by Respondent) that it disputes the accuracy of information that Respondent reports about the Business, Respondent shall, free of charge, either delete the information from files gathered, collected, or maintained by Respondent, or conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate. A reasonable reinvestigation must be responsive to the specific allegations, if any, in the Business's dispute.

B. In conducting a reinvestigation, Respondent shall review and consider all relevant information, including, as applicable, information in Respondent's own files, publicly available information, information Respondent receives from vendors, suppliers or other entities, and information submitted by the disputing Business with respect to such disputed information. Respondent shall have no obligation to resolve disputes among other businesses as to billing or payments.

C. If a Business notifies Respondent directly (by notifying a customer service representative or using an online process provided by Respondent) that it disputes any information that Respondent reports about the Business's basic identifying information, such as its name, address, or operating status (in business or out of business), Respondent shall complete its investigation within seven (7) business days from the date on which Respondent receives notice of the dispute from the Business. This seven-business-day period may be extended for not more than seven (7) additional business days if Respondent is unable to complete its investigation within seven business days despite reasonable efforts. For disputes about a Business's DUNS number (for instance, incorrect number reported or multiple DUNS assigned to the same Business), the time frames in this Part C shall be extended by seven (7) business days.

D. If a Business notifies Respondent directly (by notifying a customer service representative or using an online process provided by Respondent) that it disputes any information that Respondent reports based on publicly available information, such as judgments and liens, or on payment experience information:

1. For any disputed publicly available information, if requested by the Business, Respondent shall promptly identify to the disputing Business the

open source of the information, to the extent reasonably available, if not already provided to the Business;

2. For any disputed payment experience information that Respondent does not remove from the Business's record, if requested by the Business, Respondent shall, to the extent permitted by the source that reported the payment experience information, promptly provide the disputing Business with the name of such source and the date of the payment experience at issue; *provided, however*, that Respondent may include reasonable limits on the number of items that can be disputed at one time;

3. Respondent shall complete its investigation within fourteen (14) business days from the date on which Respondent receives notice of the dispute from the Business. This fourteen-business-day period may be extended for not more than fourteen (14) additional business days if Respondent is unable to complete its investigation within fourteen (14) business days despite reasonable efforts; and

4. If Respondent provides the disputing Business with additional details regarding the disputed information pursuant to this Part D, and asks the Business to confirm that it continues to dispute the information in light of the additional details, then (i) Respondent may defer any additional reinvestigation until the Business informs Respondent that it continues to dispute the information, and (ii) the time between when the additional details are provided to the Business and when the Business informs Respondent that it continues to dispute the information shall not be counted in determining the time periods and deadlines set forth in this Part D.

E. If, after any reinvestigation required by Part C or D of this Section, an item of information is found to be inaccurate, or additionally as to payment experience information, cannot be verified, Respondent shall promptly adjust its records to correct, modify, or delete that item of information to the extent that Respondent has gathered, collected, or maintained that item of information. Respondent shall maintain systems such that: (i) to the extent Respondent's products provide credit reports, scores, or ratings that contain information that updates on a daily basis, the product is designed to display the result of the correction, modification, or deletion of such information within four (4) business days after the investigation is completed; and (ii) to the extent Respondent's products provide credit reports, scores, or ratings that contain information that updates on a periodic basis, the product is designed to display the result of the correction, modification, or deletion of such information no later than Respondent's next periodic issuance of the information or an update to the information.

F. Following any deletion of payment experience information which is found to be inaccurate or the accuracy of which cannot be verified, Respondent shall furnish notification that the item has been deleted to any entity identified by the affected

Business, if (1) the identified entity obtained information from Respondent about the affected Business within a period beginning 60 days prior to notice of the dispute that resulted in deletion, and (2) the information obtained by the identified entity included or relied on the deleted information.

G. Respondent shall maintain reasonable procedures designed to prevent the reoccurrence in a Business's credit file and credit reports of errors corrected pursuant to this Section.

H. If Respondent removes any payment experience information from a Business's credit report pursuant to Part E of this Section, Respondent shall maintain reasonable procedures to prevent the reappearance of such information in the Business's file unless the source of the information confirms that the information is complete and accurate.

I. Respondent shall provide notice to a disputing Business of the results of a reinvestigation under this Section not later than five (5) business days after the completion of the reinvestigation. Such notice shall include a statement that the reinvestigation is completed and provide the Business with free access to the information as revised as a result of the reinvestigation, other than Respondent's proprietary or derived scores, ratings, calculations, summaries, predictions and analyses, that Respondent reports about them.

J. Notwithstanding anything to the contrary in this Section V, Respondent's responsibilities set forth in this Section V apply only to Respondent's own records and reports pertaining to a Business. Respondent has no obligation under this Section V to take any action to investigate, correct, modify, or delete information that is collected or maintained about a Business by Respondent's affiliates or partners, provided, however, that if a Business notifies Respondent directly (by notifying a customer service representative or using an online process provided by Respondent) that it disputes the accuracy of any such information, Respondent shall either (i) request that the affiliate or partner investigate the dispute or (ii) provide the Business with information sufficient for the Business to contact the affiliate or partner directly to dispute the accuracy of the information.

VI. Refunds to Customers

IT IS FURTHER ORDERED that Respondent shall issue refunds as follows:

A. Within sixty (60) days after entry of this Order, Respondent shall provide refunds or attempt to provide refunds to all Refund Customers, as defined in this Section, who are not Current Customers, in the manner set forth in this Section. For Current Customers who receive notice pursuant to Parts A and B of Section VII, below, Respondent shall provide refunds or attempt to provide refunds within forty-five (45) days of receiving the Current Customer's notice of cancellation.

B. Potential Refund Customers include all Current Customers and former customers of CreditBuilder Line Products who:

1. paid for at least one subscription to a CreditBuilder Line Product on or after April 27, 2015;

2. were CreditBuilder Line Product customers before May 1, 2020;

3. have not already received a full refund for the customer's Relevant Subscription Term; *and,*

4. submitted one or more Trade Reference payment experience requests in the Relevant Subscription Term and,

a. for Businesses that submitted one or two Trade Reference payment experience requests in the Relevant Subscription Term, did not have all of the experiences accepted, verified, and added to their credit report, or

b. for Businesses that submitted three or more Trade References in the Relevant Subscription Term, had fewer than three separate requested Trade Reference payment experiences accepted, verified, and added to their credit report.

c. The calculation of the number of separate Trade Reference payment experiences accepted, verified, and added shall exclude any Trade Reference that already had an agreement with Respondent to automatically report commercial payment information to Respondent on a regular basis about Businesses, regardless of whether Respondent added payment experiences between that Trade Reference and the customer to the customer's credit report.

Provided, however, that if the requirements of VI.B.1-3 are met, the following shall also be Potential Refund Customers if they submitted no Trade Reference payment experience requests in the Relevant Subscription term: (a) CreditBuilder 2018 customers, and (b) Businesses that purchased or were Charged for a CreditMonitor Substitute Product.

C. Potential Refund Customers, and their current contact information, must be identified to the extent such information is in Respondent's possession, custody or control, including from third parties. Potential Refund Customers include those identified at any time, including after Respondent's execution of the Agreement through the eligibility period, which runs for one (1) year after the issuance date of the Order.

D. Refund Customers are (i) all Potential Refund Customers who are not Current Customers and (ii) Potential Refund Customers who are Current Customers and who timely cancel their current CreditBuilder Line Product subscription pursuant to Section VII of this Order.

E. For Refund Customers who are not Current Customers and who are first identified after Respondent first emails or mails Notices pursuant to Section VII, Respondent shall issue a refund or attempt to issue a refund within forty-five (45) days of their identification.

F. For Refund Customers who are Current Customers, Respondent shall issue the amount of compensation calculated pursuant to Part G of this Section through a refund applied to the credit card or other method of payment Respondent has on file for the Refund Customer. Respondent shall provide such Current Customers, other than those who paid for a CreditBuilder 2018 product in the Relevant Subscription Term, with access to all functions of Respondent's CreditMonitor product through the end of the Current Customer's Relevant Subscription Term.

G. For Refund Customers who are not Current Customers or for whom Respondent does not have a valid credit card or other method of payment on file, Respondent shall issue the amount of compensation calculated pursuant to Part H of this Section by sending a check by United States Postal Service, in accordance with the following instructions:

1. For Refund Customers who are not Current Customers, Respondent shall include a letter in the form shown in Attachment D.

2. The envelope containing the letter must be in the form shown in Attachment E.

3. The face of each check must Clearly and Conspicuously state: "Please cash or deposit this check within 180 days or it may no longer be good." Respondent may void any checks that have not been negotiated after 187 days from the date the checks were originally mailed, subject to Part G.5. of this Section.

4. The mailing must not include any other enclosures or marketing information, and shall not in any manner offer any products.

5. The mailing must be sent by first-class mail, postage prepaid, address correction service requested with forwarding and return postage guaranteed. For any mailings returned as undeliverable, Respondent must use standard address search methodologies such as re-checking Respondent's own data and records and the Postal Service's National Change of Address database and re-mailing to the corrected address within fifteen (15) business days.

Respondent may void any re-mailed checks that have not been negotiated after 187 days from the date the checks were re-mailed.

H. The amount of compensation for each Refund Customer who paid for a CreditBuilder Line Product shall be calculated as follows:

1. For Refund Customers who paid for a CreditBuilder 2018 product in the Relevant Subscription Term, the amount of compensation is the total amount the Refund Customer paid Respondent for the Relevant Subscription Term for the CreditBuilder 2018 product.

2. For Refund Customers who are Current Customers, other than those who paid for a CreditBuilder 2018 product in the Relevant Subscription Term, the amount of compensation for each Refund Customer is the total amount the Refund Customer paid Respondent for the Relevant Subscription Term for the CreditBuilder Line Product reduced by $399, except that, as applicable, the compensation will instead be reduced by the *Pro Rata* Result.

3. For Refund Customers who are former customers, other than those who paid for a CreditBuilder 2018 product in the Relevant Subscription Term, the amount of compensation for each Refund Customer is the total amount the Refund Customer paid Respondent for the Relevant Subscription Term for the CreditBuilder Line Product reduced by $480, except that, as applicable, the compensation will instead be reduced by the *Pro Rata* Result.

4. If a Refund Customer upgraded or otherwise moved from one CreditBuilder Line Product to another CreditBuilder Line Product during the Relevant Subscription Term and had a portion of a previous payment applied to the upgraded CreditBuilder Line Product subscription, the amount of compensation shall include the amount applied to the more recent subscription.

5. If a Refund Customer already received a partial refund for its CreditBuilder Line Product in the Relevant Subscription Term, Respondent may reduce the compensation by the amount of the refund already provided. If requested by the Commission pursuant to I.2 below, Respondent must produce any refund records on which it relies to reduce compensation pursuant to this Part.

I. Respondent must report on this refund program under penalty of perjury:

1. Respondent must submit a report at the conclusion of the program: summarizing its compliance, including the total number of, and dollar amounts for, Refund Customers, refunds made, refund checks mailed, and refund checks negotiated.

2. If a representative of the Commission requests any information regarding the program, including any of the underlying customer data, Respondent must submit it within ten (10) business days of the request. Upon request by Respondent, this ten-business-day period may be extended for a reasonable number of days by the Commission's requesting representative, and such extension shall not be unreasonably withheld.

3. Failure to provide required refunds or any requested information will be treated as a continuing failure to obey this Order.

VII. Notification to Current Customers of Covered Products that Automatically Renew

IT IS FURTHER ORDERED that Respondent shall, within sixty (60) days of entry of this Order, provide adequate and timely Notice of this Order by email (if Respondent has an email address for the customer) or United States Postal Service (if Respondent does not have an email address for the customer) to each Current Customer of a Covered Product that Respondent automatically renews, who paid or agreed to pay money to Respondent or Billing Information as a means of paying Respondent.

A. For Current Customers who are Potential Refund Customers with a subscription to a CreditBuilder 2018 product, the Notice shall provide notice of this Order, information about the automatic renewal schedule or subscription end date of the product, and an opportunity to cancel their CreditBuilder 2018 subscription and receive a refund. The Notice shall be in the exact wording and format set forth in Attachment A. The subject line of the email and letter must read "**Option to cancel your CreditBuilder product and potential refund from Dun & Bradstreet.**" The Notice shall include or enclose (if by mail) only the information described in Part D of this Section, and shall not include any other message, attachment, or enclosure.

B. For all other Current Customers who are Potential Refund Customers, the Notice shall provide notice of this Order, information about the automatic renewal schedule or subscription end date of their product, and an opportunity to cancel their subscription and receive a partial refund. The Notice shall be in the exact wording and format set forth in Attachment B. The subject line of the email and letter must read "**Option to cancel your CreditBuilder or Credit Essentials product and potential partial refund from Dun & Bradstreet.**" The Notice shall include or enclose (if by mail) only the information described in Part D of this Section, and shall not include any other message, attachment, or enclosure.

C. For all other Current Customers that have a paid subscription to any Covered Product that automatically renews or would automatically renew absent the application of Section II.A of this Order, the Notice shall provide notice of this Order and information about the automatic renewal schedule or subscription end date of their Covered Product or Products. The Notice shall be in the exact wording and format set forth in Attachment C. The subject line of the email and letter must

read "**Notice of lawsuit and information about your Dun & Bradstreet product or products."** The Notice shall include or enclose (if by mail) only the information described in Part D of this Section, and shall not include any other message, attachment, or enclosure.

D. The Notice shall include or enclose (if by mail) the following:

1. a list of all paid subscriptions to Covered Products,

2. a list of all paid subscriptions to any of Respondent's other products that the customer has purchased from the same business unit responsible for Covered Products,

3. a brief description (in compliance with Section I of this Order) of each such product,

4. the price the customer paid for each product in its current term,

5. the current list price and, if different, renewal price, of each such product,

6. the date each product is scheduled to automatically renew and, for products covered by Section II. A of this Order, the end date of the product subscription term and a disclosure that such product will not automatically renew, and

7. a telephone number that the customer can call to obtain a complete list of Respondent's paid products to which the customer subscribes.

E. Respondent must use reasonable means to attempt to determine whether each Notice sent by email pursuant to this Section was opened by the recipient. If Respondent has no indication that the recipient opened the email within twenty (20) business days after the date Respondent sent it, Respondent shall, within ten (10) additional business days, send the Notice (with enclosure) by United States Postal Service. Any deadline for the recipient to respond to the Notice shall run only from the last date that Respondent sent a Notice to the recipient.

F. Notices sent by United States Postal Service pursuant to this Section shall be sent first-class mail, postage prepaid, address correction service requested with forwarding and return postage guaranteed. For Notices in the form of Attachment A or Attachment B, the front of the envelope shall read "**Option to cancel your CreditBuilder or Credit Essentials product and potential refund from Dun & Bradstreet.**" For Notices in the form of Attachment C, the front of the envelope shall read "**Notice of lawsuit and information about your Dun & Bradstreet product or products.**" For any mailings returned as undeliverable, Respondent must use standard address search methodologies such as re-checking Respondent's

own data and records and the Postal Service's National Change of Address database and re-mail to the corrected address within fifteen (15) business days.

G. Notwithstanding any other provision of this Order, Respondent shall, within thirty (30) days of a written request, provide the Commission with all records reasonably requested about each customer to whom a Notice is sent pursuant to this Section. In accordance with Section X below, Respondent shall implement systems and procedures designed to maintain all of the following records about each such customer, and in accordance with this Part G, the FTC may request any or all of them for any such customer: name; all known addresses, telephone numbers, and email addresses; whether Respondent has any indication that the customer opened the Notice email (and, if so, the form of such indication); the date or dates that Respondent sent a Notice; whether the customer canceled the CreditBuilder Line Product subscription; and copies of all communications with the customer that are made through the channels identified in the Notice and that relate to the Notice, including webform submissions, recordings of telephone calls, and recordings of voicemail messages.

VIII. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 3 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for any Covered Product subject to a Negative Option Feature, and all agents and representatives who participate in the sale of any Covered Product; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur within 10 days of when they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

IX. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (1) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (2) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (3) describe the activities of each business, including the goods and services offered and the means of advertising, marketing, and sales; (4) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (5) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. For 10 years after the issuance date of this Order, Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in: (1) any designated point of contact; or (2) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: "_____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Dun & Bradstreet, Inc., [*plus the docket number*].

X. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

A. accounting records showing the revenues from the sale of all Covered Products sold, and, to the extent such records are created and maintained in the ordinary course of business, the costs incurred in generating those revenues, and resulting net profit or loss;

B. personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. copies or records of all consumer complaints and refund requests for Covered Products made to customer service, whether received directly or indirectly, such as through a third party, and any response;

D. all records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission; and

E. a copy of each unique advertisement or other marketing material for Covered Products making a representation subject to this Order.

XI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20

years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A

[D&B letterhead]

Customer No: XXX-XX-XXX

Date

Re: **Option to cancel your CreditBuilder product and potential refund from Dun & Bradstreet**

Dear CreditBuilder Customer:

Our records show that you subscribed to our CreditBuilder product. We're writing to tell you that you can choose to cancel your CreditBuilder subscription and get a refund.

The Federal Trade Commission (FTC), the nation's consumer protection agency, recently filed a lawsuit against us. The FTC said we made misleading claims in our marketing of CreditBuilder and other products, including about your ability to add payment experiences to your credit report. We did not admit to these things, but to settle the lawsuit with the FTC, we're giving you the option to cancel your subscription and get a refund. Our records show the following CreditBuilder subscription is eligible for cancellation:

- [Description of the CreditBuilder subscription]
- You paid $xx.xx for the current subscription term
- The current list price is $xx.xx
- Your subscription ends on (Month, Day, Year)

If you want to cancel your subscription and get a refund, you must let us know within 30 days of the date on this letter by

- calling us at [toll free number],
- completing the online form at [web form URL], or
- returning the included Notice of Cancellation and Request for Refund form (Enclosure A) to us by mail at the address on the form.

If you cancel your subscription

- You'll get a refund of what you paid for your current subscription term.
- Within 45 days of the date we get your request to cancel, we'll issue a credit to the method of payment currently on file. (If the payment method we have on file is no longer valid, we will send you a check by mail.)
- You'll lose access to your CreditBuilder subscription.
- Cancelling your subscription will not affect your DUNS® number or your business's information, scores, or ratings.

If you want to keep your subscription, you don't have to do anything. If you keep your CreditBuilder subscription, we won't automatically renew it and charge you. But, we may contact you to ask if you want to renew it.

[Include the next section only if there WILL NOT be an enclosed list of paid subscriptions in addition to CreditBuilder 2018]

You may have other subscriptions with us. To get a list of products to which you subscribe, call us at [(XXX) XXX-XXXX].

[end of section]

[Include the next section only if there WILL be an enclosed list of paid subscriptions in addition to CreditBuilder 2018]

We've enclosed a list of other paid subscriptions you have, how much you paid for each, when it expires, if we'll automatically renew it, and when we'll charge you.

You may have other subscriptions not included in the list. To get a complete list of your subscriptions, call us at [(XXX) XXX-XXXX].

[end of section]

You can learn more about the FTC's lawsuit against Dun & Bradstreet at www.ftc.gov/[url].

Enclosure A to Attachment A

Notice of Cancellation and Request for Refund

TO: [Address of Company]

Re: Cancellation Request for Customer No. XXX-XX-XXX

I am writing to request cancellation of my CreditBuilder subscription. Please refund my payment by issuing a credit to the method of payment currently on file.

Enclosure B to Attachment A

Your Current Subscriptions to Other Paid Products Not Eligible for Refund*

Subscription	Amount You Paid for this Term	Current List Price	Your Renewal Price	Date of Renewal or End of Term
Product 1 **[description]**	$xx.xx	$xx.xx	$xx.xx	
Product 2 **[description]**	$xx.xx	$xx.xx	$xx.xx	

If you see a price in the Your Renewal Price column, that means we will **automatically renew** that subscription on the date listed and we will charge you at the specified renewal price. You may contact us at [(XXX) XXX-XXXX] at any point before the date the product is scheduled to renew to request that we not renew your subscription at the end of the current term.

* You may have other subscriptions not included in this list. To get a list of products to which you subscribe, call us at [(XXX) XXX-XXXX].

ATTACHMENT B

[D&B letterhead]

Customer No: XXX-XX-XXX

Date

Re: **Option to cancel your CreditBuilder or Credit Essentials product and potential partial refund from Dun & Bradstreet**

Dear CreditBuilder or Credit Essentials Customer:

Our records show that you subscribed to our CreditBuilder or Credit Essentials products. We're writing to tell you that you can choose to cancel your CreditBuilder or Credit Essentials subscription and get a partial refund.

The Federal Trade Commission (FTC), the nation's consumer protection agency, recently filed a lawsuit against us. The FTC said we made misleading claims in our marketing of these products, including about your ability to add payment experiences to your credit report. We did not admit to these things, but to settle the lawsuit with the FTC, we're giving you the option to cancel your subscription and get a partial refund. Our records show the following CreditBuilder or Credit Essentials subscription is eligible for cancellation:

- [Description of the subscription]
- You paid $xx.xx for the current subscription term
- The current list price is $xx.xx
- Your subscription renews on (Month, Day, Year) at a renewal price of $xx.xx. **[For CreditMonitor Substitute Product customers, replace this bullet with:** Your subscription ends on (Month, Day, Year)**]**

If you want to cancel your subscription and get a refund, you must let us know <u>within 30 days of the date on this letter</u> by

- calling us at [toll free number],
- completing the following form at [web form URL], or
- returning the included Notice of Cancellation and Request for Refund form (Enclosure A) to us by mail at the address on the form.

If you cancel your subscription

- You'll get a partial refund of what you paid for your current subscription term.

- Within 45 days of the date we get your request to cancel, we'll issue a credit to the method of payment currently on file. (If the payment method we have on file is no longer valid, we will send you a check by mail.)
- You'll keep your access to certain product features on our website for the remainder of your current term, including unlimited access to view your Dun & Bradstreet credit report. Learn more at [CreditMonitor product description URL].
- Cancelling your subscription will not affect your DUNS® number or your business's information, scores, or ratings.

If you want to keep your subscription, you don't have to do anything. **[Include the next sentence only for Credit Monitor Substitute Product customers:** If you keep your subscription, we won't automatically renew it and charge you. But, we may contact you to ask if you want to renew it.**]**

[Include the next section only if there WILL NOT be an enclosed list of paid subscriptions in addition to those listed above]

You may have other subscriptions with us. To get a list of products to which you subscribe, call us at [(XXX XXX-XXXX].

[end of section]

[Include the next section only if there WILL be an enclosed list of paid subscriptions in addition to those listed above]

We've enclosed a list of other paid subscriptions you have, how much you paid for each, when it expires, if we'll automatically renew it, and when we'll charge you.

You may have other subscriptions not included in the list. To get a complete list of your subscriptions, call us at [(XXX) XXX-XXXX].

[end of section]

You can learn more about the FTC's lawsuit against Dun & Bradstreet at www.ftc.gov/[url].

Enclosure A to Attachment B

Notice of Cancellation and Request for Partial Refund

TO: [Address of Company]

Re: Cancellation Request for Customer No. XXX-XX-XXX

I am writing to request cancellation of my (check the appropriate box)

☐ CreditBuilder subscription

☐ Credit Essentials subscription

Please partially refund my payment by issuing a credit to the method of payment currently on file.

Enclosure B to Attachment B

Your Current Subscriptions to Other Paid Products Not Eligible for Refund*

Subscription	Amount You Paid for this Term	Current List Price	Your Renewal Price	Date of Renewal or End of Term
Product 1 **[description]**	$xx.xx	$xx.xx	$xx.xx	
Product 2 **[description]**	$xx.xx	$xx.xx	$xx.xx	

If you see a price in the Your Renewal Price column, that means we will **automatically renew** that subscription on the date listed and we will charge you at the specified renewal price. You may contact us at [(XXX) XXX-XXXX] at any point before the date the product is scheduled to renew to request that we not renew your subscription at the end of the current term.

* You may have other subscriptions not included in this list. To get a complete list of your subscriptions, call us at [(XXX) XXX-XXXX].

ATTACHMENT C

[D&B letterhead]

Customer No: XXX-XX-XXX

Date

Re: **Notice of lawsuit and information about your Dun & Bradstreet product or products**

Dear Customer:

Our records show that you subscribed to our CreditBuilder, Credit Essentials, or CreditMonitor products. The Federal Trade Commission (FTC), the nation's consumer protection agency, recently filed a lawsuit against us. The FTC said we made misleading claims in our marketing of these products, including misleading claims about the automatic renewal of our products.

We did not admit to these things, but to settle the lawsuit with the FTC, we're giving customers information about products they currently subscribe to and information about the automatic renewal schedule of those products.

We've enclosed a list of paid subscriptions you have, how much you paid for each, when it expires, if we'll automatically renew it, and when we'll charge you.

You may have other subscriptions not included in the list. To get a complete list of your subscriptions, call us at [(XXX) XXX-XXXX].

You can learn more about the FTC's lawsuit against Dun & Bradstreet at www.ftc.gov/[url].

Enclosure to Attachment C

Your Current Paid Subscriptions*

Subscription	Amount You Paid for this Term	Current List Price	Your Renewal Price	Date of Renewal or End of Term
Product 1 **[description]**	$xx.xx	$xx.xx	$xx.xx	
Product 2 **[description]**	$xx.xx	$xx.xx	$xx.xx	

If you see a price in the Your Renewal Price column, that means we will **automatically renew** that subscription on the date listed and we will charge you at the specified renewal price. You may contact us at [(XXX) XXX-XXXX] at any point before the date the product is scheduled to renew to request that we not renew your subscription at the end of the current term.

If you see "N/A" in the Your Renewal Price column, that means we won't automatically renew that subscription when the term is scheduled to end, and we won't charge you. We may contact you about renewing the subscription before it expires.

* You may have other subscriptions not included in this list. To get a list of products to which you subscribe, call us at [(XXX) XXX-XXXX].

ATTACHMENT D

[D&B letterhead]

Customer No: XXX-XX-XXX

Date

Re: **Refund check for CreditBuilder or Credit Essentials subscription from Dun & Bradstreet**

Dear Former CreditBuilder or Credit Essentials Customer:

Our records show that you subscribed to our CreditBuilder or Credit Essentials products. The Federal Trade Commission (FTC), the nation's consumer protection agency, recently filed a lawsuit against us. The FTC said our marketing of these products included misleading claims.

We did not admit to these things, but to settle the lawsuit with the FTC, we're giving you a refund. **We've enclosed a refund check for the amount you are entitled to receive.** Please cash or deposit the enclosed check within 180 days.

If you have any questions, please call [toll free number].

You can learn more about the FTC's lawsuit against Dun & Bradstreet at www.ftc.gov/[url].

Sincerely,

Dun & Bradstreet

ATTACHMENT E –
Envelope Template

The envelope referenced at Section VI.G.2 must be in the following form, with the underlined text completed as directed:

Dun & Bradstreet, Inc.
101 John F. Kennedy Parkway
Short Hills, NJ 07078

FORWARDING AND RETURN POSTAGE GUARANTEED ADDRESS CORRECTION SERVICE REQUESTED

[name and
mailing address of consumer,
including zip code]

ABOUT YOUR PURCHASE OF CREDITBUILDER OR CREDIT ESSENTIALS AND REFUND

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a proposed consent order ("Proposed Order") from Dun & Bradstreet, Inc. ("D&B"). The Proposed Order has been placed on the public record for 30 days to receive comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's Proposed Order.

This matter involves D&B's sale of paid CreditBuilder and related products ("CreditBuilder products"). D&B typically marketed CreditBuilder products to small and mid-sized businesses (who are the consumers in this matter) as a means to improve what D&B reports about the business on its commercial credit reports. The FTC's proposed five-count complaint challenges several of D&B's CreditBuilder sales and renewal practices as deceptive, and also

alleges that certain conduct was unfair, all in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a).

The first four counts of the proposed complaint allege deceptive acts or practices in violation of the FTC Act.

- *First*, the complaint alleges that D&B's representations that a business could use CreditBuilder products to have previously unreported commercial payment experiences added to its credit report, and that D&B would actively assist CreditBuilder customers in adding payment experiences, were deceptive because, in numerous instances, customers did not get payment experiences added, and D&B did not actively assist the customer in adding payment experiences.

- *Second*, the complaint alleges that D&B made false claims that CreditBuilder products were required for D&B to conduct a background check on the business or to complete its D&B report, including providing the business with a full set of scores and ratings.

- *Third*, the complaint alleges that, in connection with collecting updated payment information for CreditBuilder products scheduled to renew, D&B sometimes misrepresented that D&B was collecting payment for and renewing the product that the business purchased the prior term, when, in fact, D&B was collecting payment information to enroll the customer in a different product from the one to which the customer previously subscribed.

- *Fourth*, the complaint alleges that when D&B collected customer credit card information for payment, it failed to adequately disclose practices that resulted in recurring and increasing charges, including automatic billing.

In addition to the alleged deceptive marketing and renewal practices, the complaint alleges in its *fifth* count that D&B engaged in an unfair practice by reporting incorrect information on businesses' credit reports while failing to provide those businesses with a reasonable means to dispute such information and have inaccurate information corrected. The proposed complaint alleges that this conduct caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoided by consumers themselves. Such practice constitutes an unfair act or practice in violation of Section 5 of the FTC Act.

The Proposed Order is designed to prevent D&B from engaging in similar acts or practices in the future. It includes injunctive relief to address these alleged violations.

- Part I prohibits future deceptive acts and practices similar to those at issue in the complaint by prohibiting D&B from misrepresenting:

    - That using D&B's product is likely to allow a business to have its previously unreported commercial payment experiences added to its credit report;

- That D&B will actively assist a business in adding its unreported commercial payment experiences to its credit report;
- That using D&B's product is likely to help a business build or improve its credit report;
- The ease with which information or payment experiences can be added to a business's credit report; and
- That D&B's product is needed when it is not, and that a product will enable a prospective customer to have a "complete" file.

- Part I also features ancillary relief relating to the challenged conduct by prohibiting misrepresentations relating to what payment experiences customers can add, as well as to D&B's renewal and charging practices.
- Part II provides additional specific relief relating to D&B's renewal and charging practices for products covered under the Proposed Order, to make sure that D&B makes clear disclosures about renewals both before a customer subscribes and during the period of the subscription.
- Parts III and IV require D&B to make certain disclosures to potential customers of CreditBuilder products, so that those potential customers can make better informed decisions about whether to purchase the products.
- Part V sets out specific requirements for D&B to follow when a business disputes information that D&B reports about it. The requirements of this Part V apply generally, and are not limited only to D&B customers.
- Part VI requires D&B to offer refunds (or partial refunds) to certain customers and former customers of CreditBuilder products. Refund or partial refund eligibility under the Proposed Order will depend on customers' specific circumstances and how they used or attempted to use their CreditBuilder products.
- Part VII requires D&B to send notices to all current customers of paid products covered under the Proposed Order that automatically renew.

Parts VIII through XII are reporting and compliance provisions. Part VIII mandates that D&B acknowledge receipt of the Proposed Order and, for three years, distribute the Proposed Order to certain employees and agents and secure acknowledgments from recipients of the Proposed Order. Part IX requires D&B to submit compliance reports to the FTC one year after the order's issuance and submit additional reports when certain events occur. Part X requires that, for 10 years, D&B creates certain records and retain them for at least 5 years. Part XI provides for the FTC's continued compliance monitoring of D&B's activity during the Proposed Order's effective dates. Part XII is a provision "sunsetting" the Proposed Order after 20 years, with certain exceptions.

Analysis to Aid Public Comment

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 complaint or Proposed Order, or to modify in any way the Proposed Order's terms.

Complaint

IN THE MATTER OF

ELECTRONIC PAYMENT SYSTEMS, LLC, ELECTRONIC PAYMENT TRANSFER, LLC, JOHN DORSEY, AND THOMAS MCCANN

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE TELEMARKETING SALES RULE

Docket No. C-4764; File No. 152 3213
Complaint, May 12, 2022 – Decision, May 12, 2022

This consent order addresses Electronic Payment Systems, LLC's activities as the independent sales organization ("ISO") for the entities involved in a deceptive telemarketing scam called Money Now Funding ("MNF"). The complaint alleges that EPS's conduct regarding the MNF fictitious companies and their merchant accounts constituted an unfair act or practice under Section 5 of the FTC Act and assistance and facilitation of illegal credit card laundering violated Section 310.3(b) of the Telemarketing Sales Rule. The consent order prohibits engaging in credit card laundering; engaging in tactics to evade fraud monitoring or risk monitoring programs; providing payment processing services to any merchant that is engaged in any act or practice that is, or is likely to be, deceptive or unfair; and providing payment processing services to, or acting as an ISO for, any merchant that is listed on the MasterCard Member Alert to Control High-Risk Merchants (MATCH) list for several enumerated reasons.

Participants

For the *Commission*: *Michelle Chua,* and *Karen S. Hobbs.*

For the *Respondents*: *Scott Krob* and *Daniel Krob, Krob Law Office, LLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Electronic Payment Systems, LLC, a limited liability company, Electronic Payment Transfer LLC, a limited liability company, and John Dorsey and Thomas McCann, individually and as officers of Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC (collectively "Respondents"), have violated the provisions of the Federal Trade Commission Act and the Telemarketing Sales Rule ("TSR"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Electronic Payment Systems, LLC, also doing business as EPS, is a Colorado limited liability company with its principal office or place of business at 6472 S. Quebec St., Englewood, Colorado 80111.

2. Respondent Electronic Payment Transfer, LLC, also doing business as EPS, is a Colorado limited liability company with its principal office or place of business at 6472 S. Quebec St., Englewood, Colorado 80111.

3. Respondent John Dorsey is an owner and officer of the Proposed Corporate Respondents, Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC.

4. Respondent Thomas McCann is an owner and officer of the Proposed Corporate Respondents, Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC.

5. Respondents Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC (collectively, "EPS" or "Corporate Respondents") have operated as a common enterprise while engaging in the unlawful acts and practices alleged below. Respondents have conducted the business practices described below through interrelated companies that have common ownership, officers, managers, and office locations. Because these Corporate Respondents have operated as a common enterprise, each of them is jointly and severally liable for the acts and practices alleged below. Respondents Dorsey and McCann have formulated, directed, controlled, or had the authority to control, or participated in the acts and practices of the common enterprise alleged in this complaint.

6. Respondent EPS is an independent sales organization ("ISO") that serves as an intermediary between merchants seeking to open credit card merchant accounts and its acquiring bank ("acquirer"), which is the bank that has access to the credit card networks.

7. 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.

Respondents' Business Activities

8. In 2013, the FTC sued a deceptive telemarketing scam called Money Now Funding ("MNF" or "MNF scam") for telemarketing worthless business opportunities to consumers and falsely promising that consumers would earn thousands of dollars in income.

9. The principals of the MNF scam went to great lengths to hide their identities behind a large number of phony "businesses." In order to charge consumers' credit cards but make it difficult to trace the money back to MNF, MNF engaged in a credit card laundering scheme whereby its principals and employees created numerous fictitious companies. Those fictitious companies, through a sales agent, submitted applications for merchant accounts to Respondents; Respondents then opened merchant accounts in the names of these fictitious companies, and victim

credit card charges were processed through those accounts, rather than through a single merchant account in the name of MNF.

10. The practice of processing credit card transactions through another company's merchant accounts is called "credit card laundering" or "factoring" in the credit card industry. It is strictly forbidden by the credit card companies and is illegal under the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310.

11. The banking system behind credit card processing involves a complex series of exchanges involving numerous entities. These entities include, on one side, the consumer and the consumer's bank and, on the other, the merchant and the merchant's bank; between them are the credit card networks (e.g., VISA) and other third parties such as "independent sales organizations" involved in processing a transaction.

12. In 2012 and 2013, EPS served as the ISO for the entities involved in the MNF scam.

13. EPS engaged in the underwriting and approval of MNF's fictitious companies, and helped set up merchant accounts with its acquirer for these fictitious companies. Using the services of two payment processors, EPS enabled more than $4.6 million in MNF transactions to be processed through these and other fraudulent merchant accounts.

14. EPS used "sales agents" to market its processing services to merchants. Three of these sales agents, Jay Wigdore, Michael Abdelmesseh, and Nikolas Mihilli, directly participated in the MNF credit card laundering scheme.[1]

15. Wigdore submitted the merchant applications for the MNF fictitious companies to EPS, and EPS opened merchant accounts for them. MNF's transactions were then processed through the fictitious company accounts.

16. The MNF scam operated through a web of interrelated companies, including "Rose Marketing." When consumer complaints about MNF's scam mounted, threatening exposure of the scam, the principals and employees behind MNF changed the scheme's name and created new companies to continue operating the scam, under different and constantly changing names.

1 The FTC brought an action in 2017 in federal court against two groups of defendants: (1) EPS, its owners, and an employee; and (2) Wigdore, his companies, and related companies and individuals. FTC v. Electronic Payment Solutions of America, Inc., et al., No. CV-17-02535-PHX-SMM (D. Ariz., July 28, 2017). The following defendants settled claims with the FTC: Michael Peterson; Michael Abdelmesseh; Nikolas Mihilli and his company, Dynasty Merchants, LLC; and Jay Wigdore and his companies, Electronic Payment Solutions of America, Inc., and Electronic Payment Services, Inc. The Court granted summary judgment for the FTC against EPS, Dorsey and McCann as to liability under the FTC Act and the Telemarketing Sales Rule, but denied summary judgment as to the availability of injunctive relief. See id., ECF No. 366 (Aug. 11, 2021). The FTC will dismiss that federal court complaint after the settlement of this administrative complaint is approved.

The Money Now Funding Litigation

17. The FTC filed an action against MNF and its related and successor companies on August 5, 2013, alleging that the deceptive and fraudulent business opportunity scam violated the FTC Act, the Business Opportunity Rule, and the Telemarketing Sales Rule. *FTC v. Money Now Funding, LLC, et al.*, CV 13-01583-PHX- ROS (D. Ariz. 2013). The complaint, which was amended on December 16, 2013, alleged, among other things, that MNF created fictitious companies supposedly owned by various MNF employees and applied for merchant accounts under these fictitious companies, and that MNF then used such merchant accounts to launder its credit card transactions.

18. In 2015, the FTC settled with many of the MNF defendants, obtaining court orders banning eighteen individual defendants from selling business or work- at-home opportunities. Also in 2015, the court granted the FTC's motion for summary judgment against certain MNF defendants, and entered default judgments against the remaining MNF defendants, resulting in the entry of permanent injunctions and monetary judgments.

19. In granting the FTC's motion for summary judgment against MNF, the court found that MNF was a multi-million-dollar scheme to defraud consumers.

20. In 2016, the Arizona Attorney General's office brought criminal charges against four individuals involved in the MNF scam. As of January 25, 2017, all four had entered guilty pleas, with the lead defendant agreeing to a five-year prison term.

Background on Credit Card Laundering

21. In order to accept credit card payments from consumers, a merchant must establish a "merchant account" with a merchant acquiring bank (as noted above, also referred to as an "acquirer"). A merchant account is a type of account that allows businesses to process consumer purchases by a credit or debit card.

22. The acquirer is the entity that has access to the credit card associations (such as Mastercard and VISA), and through which merchant accounts are established. Without a merchant account obtained through an acquirer, merchants are unable to process consumer credit or debit card sales transactions.

23. Acquirers commonly enter into contracts with ISOs, who solicit and sign up merchants for merchant accounts with the acquirer. In some cases, ISOs engage in the screening and underwriting of prospective merchants, operate the acquirer's merchant processing program (directly or through the services of third- party processors), and monitor the merchants' transactions.

24. The credit card associations ("card networks"), such as VISA and Mastercard, require all participants in their networks, including the acquirers and their registered ISOs, to comply with detailed rules governing the use of the card networks. These rules include screening and underwriting merchants to ensure that they are legitimate bona fide businesses, and to screen

out merchants engaged in potentially fraudulent or illegal practices. The rules also prohibit credit card laundering.

25. Merchants that pose a greater risk of fraud or financial loss to the ISO, acquirer, and card networks may be denied merchant accounts. For example, the ISO or acquirer may be concerned that the merchant is engaged in deceptive marketing, illegal activity or will generate excessive rates of transactions returned by consumers ("chargebacks").

26. Consumers initiate "chargebacks" when they dispute credit card charges by contacting their "issuing bank," which is the bank that issued the credit card to the consumer. When a consumer successfully disputes the charge, the consumer's issuing bank credits the consumer's credit card for the disputed amount, and then recovers the chargeback amount from the acquirer (the merchant's bank). The acquirer, in turn, collects the chargeback amount from the merchant, either directly or through its ISO or payment processor.

27. In order to detect and prevent illegal, fraudulent, or unauthorized merchant activity, the card networks operate various chargeback monitoring and fraud monitoring programs. For example, if a merchant generates excessive levels of chargebacks that trigger the thresholds set under VISA's chargeback monitoring program, the merchant is subject to additional monitoring requirements and, in some cases, penalties and termination.

28. In recent years, credit card laundering has become a common practice of fraudulent merchants who cannot meet a bank's underwriting criteria or who cannot obtain merchant accounts under their own names (whether because of excessive chargebacks, complaints, or other signs of illegal activity).

29. Even when the fraudulent merchant can qualify for a merchant account, it often engages in laundering to conceal its true identity from consumers, the acquirer, the card networks, and law enforcement agencies.

30. To conceal their identities, fraudulent merchants often create shell companies to act as fronts, and apply for merchant accounts under these shell companies. Once the merchant accounts are approved, the fraudulent merchant then launders its own transactions through the shell company's merchant accounts.

31. Fraudulent merchants often generate excessive rates of "chargebacks" from consumers who dispute the credit card charges. To avoid triggering the card networks' chargeback monitoring programs and attracting the scrutiny of the acquirer, fraudulent merchants often spread out their sales transaction volume across multiple merchant accounts—a practice commonly referred to as "load balancing."

32. Because the VISA and Mastercard chargeback monitoring programs apply only to merchants with at least 100 chargeback transactions per month, fraudulent merchants can manipulate the system and avoid chargeback monitoring by spreading their transactions across multiple merchant accounts and ensuring that no single account has more than 100 chargebacks

per month. They can also avoid triggering the monitoring programs by simply processing for short time periods, such as for a few weeks, that fall below the monitoring programs' time thresholds.

33. In addition to evading the card networks' merchant monitoring programs, fraudulent merchants sometimes spread their transactions across multiple merchant accounts in order to circumvent the underwriting requirements or monitoring programs of the ISO's acquirer. For example, if the acquirer's underwriting rules are more lenient for merchants with lower projected sales volume, fraudulent merchants can artificially lower the merchant's projected sales volume by applying for numerous low-volume merchant accounts in the names of fictitious companies, thereby obtaining the acquirer's underwriting approval that the merchant otherwise would not be able to obtain.

34. By spreading out merchant transactions across numerous and constantly changing fraudulent merchant accounts over short time periods, fraudulent merchants and unscrupulous ISOs can cause an enormous amount of economic harm to consumers, before their transactions are detected or terminated by the ISO's acquirer or the card networks.

Respondents' Acts and Practices Related to MNF Credit Card Laundering

35. The MNF scam, in which consumer-victims were persuaded to make purchases over the telephone, relied on MNF having the ability to accept victim funds via credit and debit cards without raising fraud alerts. To conceal its identity and to prevent the acquirer and card networks from scrutinizing and terminating its merchant account, MNF engaged in a scheme with Wigdore and his associates to apply for at least 43 (forty-three) fraudulent merchant accounts, each under a different fictitious name, through which MNF could launder charges to consumers' credit or debit card accounts.

36. As part of this scheme, MNF created numerous fictitious companies, each using the name of a MNF principal or employee as the straw owner or purported principal of the company. These phony companies did not engage in any actual business. Thus, for example, one fictitious company was called "D&D Marketing," the supposed owner of which was actually an MNF employee with the initials "D.D." When consumer-victims signed up for the MNF business opportunity and made a payment, their credit card statements would show a charge made by a company they had never heard of, such as "D&D Marketing," rather than Money Now Funding.

37. In 2012, Wigdore, as a sales agent, submitted phony merchant applications on behalf of 23 MNF-related fictitious companies to EPS for EPS's underwriting approval.

38. When applying for a merchant account, merchants often submit with the application a copy of a voided check drawn on their business bank account, with the understanding that credit card sales revenues will be transferred into this account.

39. For each of the 23 fraudulent merchant applications, Wigdore attached a falsified voided preprinted check that purported to reflect the existence of a business bank account in the name of that fictitious company. Each check had been doctored to reflect an account holder, i.e., the fictitious company, that was not the true account holder for that account number. The account

number printed on the bottom of each check corresponded with one of 23 different bank accounts at J.P. Morgan Chase Bank ("Chase"), each in the name of Dynasty Merchants, LLC, a company controlled by Wigdore's associate, Mihilli.

40. After receiving the fraudulent applications from Wigdore, EPS approved all 23 applications, set up merchant accounts for each fictitious company, and immediately began processing for these accounts through EPS's acquirer, Merrick Bank ("Merrick").

41. When MNF transactions were processed through the 23 fraudulent merchant accounts in the names of the fictitious companies, the sales revenues from these transactions were automatically transferred into the 23 Dynasty Chase Accounts, and subsequently transferred into a "Master Account" at the same bank, also held in the name of Dynasty.

42. From the Dynasty "Master Account," funds were divided up and eventually paid to a company owned by Wigdore, companies affiliated with the MNF scam, and individually to Abdelmesseh and Mihilli.

43. The scheme allowed MNF to obtain merchant accounts based on false information in the merchant applications. Specifically, each merchant application contained the following false information: (1) the name of the fictitious company was listed as the applicant, when the true applicant was the principal(s) of the MNF scam; (2) the name of the straw owner was listed as the owner of the business, when the true owner was the owner(s) of the MNF scam; and (3) the fictitious company was listed as the account holder of the merchant bank account, when the true account holder was Dynasty Merchants, LLC.

44. In 2013, the principals, employees and associates of MNF changed the MNF fraudulent scheme's name and continued operating the same scam through newly created companies and aliases. Wigdore and his associates submitted to EPS phony applications for these fictitious companies. In turn, EPS approved the phony applications, opened merchant accounts for the companies at Merrick, and continued processing transactions for the MNF scam through these fraudulent merchant accounts.

45. Throughout 2012 and 2013, EPS—by underwriting and approving the MNF-related businesses for processing, establishing merchant accounts for these entities with Merrick, and processing for these merchant accounts—enabled MNF to charge consumers' credit or debit card accounts for its non-existent services.

46. Without the ISO and processing services provided by EPS, the MNF scam could not have obtained the fraudulent merchant accounts established at Merrick, through which their credit card transactions were processed.

47. According to statements made by EPS in court filings in July 2016 (see Mot. To Quash (ECF No. 9), *Electronic Payment Transfer, LLC v. Federal Trade Commission and Citywide Banks*, No. CV-01653-RBJ (D. Colo. July 11, 2016)), EPS's relationship with Wigdore

dated back to approximately 2004.[2] This relationship continued while Wigdore served a 57-month sentence on a federal fraud conviction from 2006 to 2009; during this period Wigdore's wife, Sandy Wigdore, continued acting as a sales agent for EPS.

48. EPS's principal, Respondent Thomas McCann, was aware of Wigdore's criminal history, but continued using Wigdore as EPS's sales agent.

49. EPS has held itself out as a processor for "High Risk" businesses that have difficulty finding banks willing to accept their business. EPS's website has stated that it had a "98% Approval Rate" for merchants who applied for its credit card processing services, as compared to its competitors who had a "60% Approval Rate."

50. As an ISO for Merrick, EPS was required to comply with Merrick's underwriting rules for screening merchants, which included guidelines designed to verify the identity of the merchant and the legitimacy of the merchant's business, and to screen out merchants potentially engaged in fraud. Indeed, Merrick's policy required EPS to verify "that each merchant is a bona fide business and that the transactions of such merchant will reflect bona fide business between the merchant and the cardholder, and will not violate any applicable provision of law." EPS was also required to monitor its merchants' transactions, update merchant information in the merchant database, and ensure that its merchants complied with the card networks' rules and various fraud monitoring programs. As a registered ISO with VISA (through Merrick), EPS also was required to comply with VISA's rules and regulations.

51. However, rather than verify its merchants' identities, EPS opened merchant accounts in the names of numerous fictitious companies for the same underlying merchant and submitted them to Merrick. By submitting those applications, EPS also enabled MNF to evade the various card network fraud and chargeback monitoring programs that were designed to detect and prevent fraudulent activity.

52. The chronology of EPS's involvement in the MNF scam's credit card laundering shows that EPS: (a) ignored obvious warning signs of fraud, including the likely presence of credit card laundering, (b) concealed from Merrick (the acquirer) and the card networks the true identity and nature of the MNF-related fictitious companies, and (c) made every effort to continue processing for the fictitious companies, and other merchants related to Wigdore and his associates, even after Merrick noticed signs of fraud and instructed EPS to stop.

53. On May 24, 2012, Merrick informed EPS's then-Risk Manager Michael Peterson that it had declined three merchant applications because the alleged principals of these merchants all shared the same email address as the principal of the merchant KMA Merchant Services, a Wigdore-related account owned by Wigdore's associate Michael Abdelmesseh, that Merrick had previously terminated. Merrick noted that the three declined merchants "have principal email

2 Electronic Payment Transfer, LLC v. Federal Trade Commission and Citywide Banks, No. 16-cv-1653 (D. Colo. filed June 28, 2016) was an action brought by EPS to enjoin a bank from complying with a civil investigative demand that the FTC had lawfully issued to the bank during its investigation of this matter. The case was dismissed in August 2016 upon agreement of the parties.

addresses with the alias being at kmamarketingsvcs.com – KMA had chargeback issues with us in the past."

54. One week later, on May 31, 2012, Merrick declined yet another application, again informing Peterson that the merchant "also appears to be linked to KMA Marketing which has had chargeback issues with us."

55. Two weeks later, on June 14, 2012, Merrick declined four more merchant applications, this time highlighting the fact that all four applications had been referred to EPS by the same sales agent ("sales channel 2088," a sales office number that EPS had assigned to KMA, acting as its sales agent), and that the merchants were all "home-based marketing companies," a business model that Merrick had indicated was often problematic.

56. Despite these rejections and Merrick's repeatedly-stated desire not to do business with companies linked to KMA, Peterson continued to submit new merchant applications to Merrick that had been referred by EPS's "sales agent" KMA, without informing Merrick that KMA was the underlying sales agent who had referred those applications to EPS.

57. Each of the 23 MNF-related merchant applications Wigdore submitted to EPS in 2012 indicated that the sales agent was "Jay Wigdore" of sales office "2088." As noted above, this was the number EPS had assigned to its sales agent KMA, although on their face the applications did not mention KMA directly. In addition to the fact that the applications were referred by the sales agent KMA, an entity whose own business (as an EPS client merchant) Merrick had repeatedly rejected due to concerns about fraud, these applications from 23 supposedly different merchants appeared virtually identical and contained numerous suspicious red flags, as described below. EPS approved them all.

a. Almost all the merchants were located in the Phoenix, Arizona area. The "business description" provided for most of the merchants was extremely vague, almost always identical (i.e., "marketing and advertising"), and provided no specific description of the product or service being sold.

b. The 23 supposedly separate merchants attached facially suspect checks that appeared almost identical in form. Each of the attached doctored checks was drawn on Chase bank and had the same bank routing number, indicating the same bank branch. Almost all of them bore the same check number: "1001." The fact that 23 supposedly different merchants all purported to hold accounts at the same bank branch and submitted virtually identical checks (almost always bearing the same check number) was an indicator that they were likely related to each other or to the same underlying merchant. Despite these red flags, EPS did not verify the legitimacy of the 23 bank accounts at Chase.

c. During the initial underwriting stage, EPS obtained credit reports for each of the 23 fictitious companies. For most of the merchants, the credit reports indicated that the principals or owners of the businesses had low credit

scores, poor credit ratings, and owed substantial outstanding debts, raising obvious questions about the financial health of the merchants and the nature of their businesses. EPS nonetheless approved these merchants, without seeking to obtain additional information about the businesses or their financial viability.

d. Although Merrick's underwriting policy required EPS to obtain and evaluate samples of all relevant merchant marketing materials and telemarketing scripts, the 23 merchant applications did not include copies of the merchants' marketing materials.

e. Merrick's policy further required EPS to obtain screen prints of the relevant web pages of the merchant's website for "high risk" merchants such as telemarketers; however, for at least six merchant applications, the "Initial Risk Evaluation" conducted by EPS's employee specifically noted that the merchant did not have a valid merchant website.

f. For at least five merchant applications, the address listed on the credit report did not match the address listed for the merchant on the merchant application.

g. For at least five of the merchant applications, an attached Application Addendum form stated that "Jay Wigdore" was a co-owner or co-officer of the alleged merchant, in addition to another co-owner or co-officer whose name was listed on the application form.

h. For five merchants, the merchant's business bank account was listed on the application as "Comerica Bank," even though the checks attached to the applications indicated that the merchant's bank was Chase Bank, not Comerica Bank. Despite this obvious inconsistency, EPS nonetheless approved these applications.

58. Had EPS sought to verify the legitimacy of the 23 merchant bank accounts, it would have discovered that the true account holder for each of the 23 Chase bank accounts was not the company whose name was printed on the check and listed on the merchant application, but a different company: Dynasty Merchants, LLC.

59. Many of the merchant applications for the MNF-related merchants submitted by Wigdore contained clear indications that the merchants were engaged in telemarketing. For example, a section on the application form entitled "Merchant Product/Service Profile" asked "How is the Product or Service Ordered or Purchased (mail order, catalog, over the phone, in person, etc.)." The merchant applications contained the handwritten response "over the phone," indicating telemarketing.

60. Because telemarketers pose a higher risk of fraud, VISA rules require telemarketers to be classified and coded as "High Brand Risk Merchants." VISA rules further require that the

correct Merchant Classification Code (or MCC) be assigned to all merchants. The MCC numbers 5966 and 5967 are used to indicate inbound and outbound telemarketers, which are High Brand Risk Merchants.

61. VISA imposes heightened monitoring requirements for all merchants that are coded as High Brand Risk Merchants, including merchants engaged in telemarketing. These monitoring requirements are designed to detect and prevent merchants from processing fraudulent or illegal credit card transactions through VISA's network.

62. Even though the merchant applications for many of the MNF-related merchants indicated that these entities were engaged in telemarketing, EPS concealed this fact by failing to assign to these entities the correct MCC number required for telemarketers. Instead, EPS entered MCC number 7311, which simply refers to "advertising services."

63. By not coding the MNF-related merchants as telemarketers and concealing this fact, EPS was able to avoid placing these merchants under the heightened monitoring program required by VISA for High Brand Risk Merchants.

64. Also, Merrick's underwriting policy and rules prohibited EPS from processing for telemarketers (and other categories of merchants deemed by EPS to be "high risk"), prior to obtaining Merrick's approval. Even though the applications indicated that many of the MNF-related merchants were engaged in telemarketing, EPS began processing for these entities prior to obtaining Merrick's approval, in direct violation of Merrick's rules.

65. Not only did EPS begin processing for MNF's fictitious companies before these companies were approved by Merrick, but EPS also began processing for certain MNF-related fictitious companies even after Merrick already had declined the applications for these same fictitious companies.

66. Between May 2012 and June 2012, Merrick declined 11 fraudulent merchant applications approved and submitted by EPS on behalf of MNF-related fictitious companies. EPS nonetheless continued processing for these fictitious companies, in some cases for more than two months after they had been declined by Merrick.

67. By the end of June 2012, EPS had processed more than $573,000 in transactions for the 11 declined fictitious companies, for time periods ranging from just two weeks to eight weeks per merchant—short time periods (between two and eight weeks) that fall below VISA's chargeback monitoring program thresholds.

68. Although Merrick had declined 11 applications that Wigdore had referred to EPS by late June 2012, EPS nonetheless approved and forwarded to Merrick seven additional fraudulent merchant applications, also submitted by Wigdore to EPS, between July 24, 2012 and September 5, 2012.

69. These seven new applications appeared suspiciously similar to the 11 applications that Merrick had previously declined. They attached the same facially suspect checks indicating

that the merchants all banked at the same bank ("Chase") and had the same routing number. Four applications indicated that the merchant's bank was Comerica, even though they attached a Chase bank check. The credit report for one merchant indicated an extremely poor credit score and a "past due amount" of $144,904 owed by the merchant, while the credit report for another merchant showed a "past due amount" of $24,344. The address listed on the credit report for a third merchant did not match the merchant address listed on the application. For four of the merchants, the initial risk review conducted by an EPS employee specifically noted that no marketing materials or web listings for the merchant had been submitted or found. Despite these obvious red flags, EPS approved all seven applications.

70. As it had before, EPS allowed payments to be processed through these seven new accounts for short time periods, typically ranging from three to seven weeks.

71. Merrick's underwriting policy required EPS to monitor its client merchants' transactions "in order to detect unusual or unacceptable trends in such Merchant's processing activity," and to monitor its merchants' chargeback transactions and consumer inquiries relating to these chargeback transactions.

72. EPS regularly monitored its merchants' chargeback transactions. Through the processing platforms provided by two payment processors, EPS had access to its merchants' chargeback transaction data, together with the consumer complaints that accompanied chargeback requests.

73. Once EPS began processing for the 23 accounts set up for the MNF- related fictitious merchants, these accounts began generating substantial chargebacks, many of which included "chargeback reason codes" indicating that the merchant's charges either were not authorized by the consumer, were fraudulent, or that the merchant failed to provide the goods or services as promised.

74. In some cases, the chargeback requests included consumer complaints and documentation clearly indicating that the merchant involved was "Money Now Funding," and not the fictitious company whose name was on the merchant account—obvious evidence of credit card laundering.

75. As EPS's Risk Manager, Peterson oversaw EPS's Risk Department, and closely interacted with EPS' principals, Respondents Dorsey and McCann, and EPS's Chief Operating Officer ("COO").

76. Peterson regularly communicated with KMA and Abdelmesseh. On September 4, 2012, Peterson received an email from an EPS employee he supervised. The email forwarded to Peterson a consumer's chargeback dispute documentation for a "KMA Merchant Services" merchant account and stated: "all supporting documentation sent in to rebuttal dispute has 'Rose Marketing, LLC' plastered all over the paperwork." The chargeback documents clearly indicated that the transactions for a company called "Rose Marketing" had been laundered through the KMA merchant account.

77. Peterson immediately forwarded the email to "Mike Stewart" of KMA (Abdelmesseh used "Mike Stewart" as an alias), adding:

> Stewart, We cannot win pre-arb [prearbitration] with this documentation. We are going to have to let the cardholder win on this one as the argument against factoring is too great. Please review and advise.

As noted above, credit card laundering is often referred to as "factoring."

78. Peterson also directly instructed Abdelmesseh, acting in his capacity as EPS's sales agent, to spread out the transactions of KMA's client merchant across multiple merchant accounts opened in the names of the fictitious companies.

79. In a September 17, 2012 email to "Mike Stewart" of KMA, Peterson wrote:

> Stewart, Please see my notes below for the accounts that are on hold. We need to spread this out more, I am trying to cap each individual account in the $30-$40K range, so if you need to build a couple more accounts to reach your volume, please do so…"

80. The referenced merchant accounts ("the accounts that are on hold") included at least six of the MNF-related merchant accounts that EPS had opened and used to process MNF transactions.

81. With respect to one of these merchant accounts, Peterson placed an explicit note: "On Hold – Pay out Tuesday – Do not put any more volume for the month through this one!"

82. Because Merrick's underwriting rules or monitoring practices were in part based on a merchant's projected or actual sales volume, a fraudulent merchant might obtain Merrick's approval or avoid Merrick's scrutiny if it appeared to process a lower volume of transactions.

83. By knowingly processing transactions for the same underlying merchant (that is, MNF) through multiple merchant accounts opened in the names of the fictitious companies, Peterson directly engaged in credit card laundering. He knowingly concealed the true identity of the merchant (MNF). Peterson also engaged in tactics to evade Merrick's underwriting rules or monitoring practices and the card networks' chargeback monitoring programs, by spreading out the MNF transactions across multiple merchant accounts in order to artificially lower the volume of sales and chargeback transactions processed through any single merchant account.

84. In a February 21, 2013 email from KMA to an employee working in EPS's Risk Department, KMA provided EPS a list of address changes for numerous client merchants. The list clearly revealed that almost all of the MNF-related merchants, and numerous additional merchants, had changed their addresses to the same address (three post office boxes located at the same address in Phoenix, Arizona), an obvious sign that these entities were related to the same underlying merchant.

85. An EPS Risk Department employee forwarded the list of address changes to Peterson and wrote a note asking: "Why are all the addresses the same?"

86. Despite knowing that numerous allegedly different merchants referred by KMA/Wigdore shared the same business address, in addition to all the other red flags regarding fraudulent activity by Wigdore and Abdelmesseh, EPS decided to renew its sales agent relationship with them.

87. By the end of 2012, Merrick had declined most of the MNF-related merchants. Despite this fact, throughout 2013, EPS continued accepting and approving merchant applications referred by Wigdore, using "sales channel 2088." These included phony merchant applications for the MNF-related fictitious merchants.

88. Like the merchant applications from 2012, the applications for MNF- related fictitious companies in 2013 contained obvious signs that the merchants likely were not legitimate businesses and were related to the same underlying merchant. For example, at least 14 supposedly different merchants purported to have bank accounts at the same bank branch, this time at a Wells Fargo Bank branch located in Mesa, Arizona.

89. The MNF-related merchant applications submitted in 2013 included four fictitious entities controlled by Luke Rose, the principal of the MNF scam. EPS processed at least $98,300 in transactions for these four fictitious companies combined. They also included fictitious companies controlled by managers of the MNF scam. One MNF manager, Cordell Bess, created a new fictitious company (Premier Online Marketing Strategies) to replace his previous fictitious company (JJB Marketing). In 2012, EPS had processed for JJB Marketing, until Merrick instructed EPS to terminate the company. The EPS employee who reviewed the application for Bess's new company (Premier Online Marketing Strategies) specifically noted that EPS already had opened a "previous account" for the same underlying merchant. EPS nonetheless approved the applications. About $62,795 in transactions was processed for this new fictitious company.

90. A second MNF manager, Cynthia Miller, also known as "Cynthia Metcalf" and "Cynthia Wilson," controlled at least 12 of the MNF-related fictitious companies from 2013. EPS approved the applications, and $1,666,003 in transactions was processed through the 12 Cynthia Miller-related accounts combined.

91. Peterson was fully aware that the Cynthia Miller-related entities were in fact related to the same underlying merchant or individual. In a spreadsheet attached to an email dated January 30, 2014 from Abdelmesseh ("Mike Stewart") to Mike Peterson, Abdelmesseh listed the names of the 12 merchants and the name of the straw owner of each merchant; the spreadsheet also indicated that all 12 merchants in fact belonged to a "Group" associated with one individual: "Cynthia Wilson."

92. EPS continued approving and processing for new merchants submitted by KMA and Wigdore, and continued processing for merchants previously referred to EPS by KMA, through at least the end of December 2013.

93. EPS's company practice of knowingly processing for merchants whose true identities were concealed was not limited to the MNF-related fictitious merchants. The practice applied to other merchants as well.

94. For example, in a September 17, 2013 email sent from EPS employee Chonda Pearson to an employee working in Wigdore's sales office, Pearson wrote: "Unfortunately this merchant has an open bankruptcy. We will be happy to process this deal with a new signer." Pearson's statement that the merchant circumvent Merrick's rules by simply finding a "new signer," is contrary to Merrick's underwriting policy that considered "any merchant that is currently in business bankruptcy" to be an "Unacceptable Merchant" for approval.

95. Similarly, in a May 20, 2013 email exchange between EPS employee Pearson and another employee in Wigdore's office, regarding a merchant called "M2M Gold," Pearson wrote: "This is the same signer—we need a different signer on the application." Pearson again reiterated this point two hours later, in a follow- up email, stating: "I spoke to Mike Peterson … We cannot do anything with it until we have a different signer."

96. Peterson and Abdelmesseh kept close track of the various merchants whose true identities were concealed behind different company names. For example, a spreadsheet attached to the January 30, 2014 email from "Mike Stewart" to Peterson listed numerous companies that belonged to particular "Groups." Each Group was associated with a single individual. For example, six merchants were in the "Group" associated with "Ryan Helms"; five "merchants" were in the "Group" associated with "Andrew Chavez"; six "merchants" were in the "Group" associated with "Ovi"; and 17 merchants were in the "Group" associated with "Lance Himes." Lance Himes was a former associate of MNF who had participated in the MNF scam.

97. EPS's employees were aware of complaints regarding various other deceptive marketing practices, not related to the MNF scam, engaged in by Wigdore and his associates. As early as December 19, 2011, one EPS employee emailed another EPS employee regarding a complaint received, stating: "New account we lost because Jay Wigdore lied."

98. In a February 22, 2012 email exchange between EPS employees regarding the "Wigdore accounts," one EPS employee discussed two merchants: "Both of merchants have similar story, doing 'lead generating' for Jay Wigdore . . . Dorothy Ventures isn't a business. Both ladies are retired, damn near 90. I talked to Jordan in Q&A and Travis about these accounts . . . both agreed the accounts were are most likely opened fraudulently by the agent(s)."

99. In another email exchange between EPS employees, dated March 28, 2012, one employee described a consumer complaint received regarding false promises made by the Wigdore sales agent: "They are promising trips/cruises/getaways etc to merchants for signing up with EPS." In reply, the other employee stated: "Yeah it's well-known at this point."

100. In another email exchange between EPS employees regarding "Jay Wigdore Accounts," dated September 11, 2012, one employee wrote: "We've seen an increase of non-installed merchants who are being signed up under false pretenses (agent 2088)."

101. EPS required Peterson, its Risk Manager, to closely track EPS's client merchants' sales and chargeback transaction activity on a regular basis. As noted above, various emails indicate that Peterson knew a great deal about the fraudulent nature of the businesses in which KMA and MNF were engaged, and their credit card laundering activities. Peterson received emails from Merrick in 2012, discussed above, in which Merrick expressed concern about KMA's high chargeback rate "and the reason codes for them (services not provided)" and in which Merrick expressed the opinion that KMA was engaged in the unlawful practice of "load balancing." In another email, Peterson said EPS should not fight a chargeback dispute involving a charge in the name of KMA Merchant Services for a "Rose Marketing" transaction, because "the argument against factoring is too great." In another email, Peterson directly instructed Abdelmesseh, acting in his capacity as sales agent, to "spread out" KMA's client merchant's transactions across multiple merchant accounts opened in the names of several MNF-related fictitious merchants. Peterson was fully aware that many of the merchant accounts were related to the same underlying merchant or individual.

102. Similarly, EPS's principals, Respondents McCann and Dorsey, approved and oversaw the MNF-related merchant accounts, and personally met with the sales agents who referred the accounts to EPS.

103. EPS did not have a separate department responsible for underwriting and approving merchant applications. Instead, EPS's principals, McCann and Dorsey, together with EPS's COO, were directly responsible for approving almost all merchant applications submitted to EPS for underwriting approval.

104. Despite being EPS's Risk Manager, Peterson rarely had unilateral authority to approve any merchant applications. In fact, Peterson was generally required to obtain the approval of merchant applications from Respondents Dorsey or McCann, or EPS's COO.

105. McCann and Dorsey personally met and communicated directly with the sales agents Wigdore and Abdelmesseh. They each approved numerous merchant applications for the MNF-related merchants referred by Wigdore— applications that contained glaring signs that the companies were not legitimate businesses and were related to each other or to the same underlying merchant and, therefore, were likely being used to launder transactions for another merchant.

106. Dorsey personally approved numerous MNF-related merchant applications. On one, Wigdore appeared as a co-owner or co-officer of the merchant, and the merchant did not have a business website, and owed a "past due amount" of $20,225. Dorsey approved another application even though the merchant did not have a business website and owed a "past due amount" of $139,463. Dorsey approved yet another merchant who did not have a business website, owed a "past due amount" of $10,914, and whose credit report provided an address that did not match the address on the application.

107. On July 24, 2012, Dorsey approved a merchant despite the merchant's incorporation papers showing that it had different owners and a different business address than those listed on the application. Moreover, an EPS employee had specifically noted that the merchant shared the same address as another EPS client merchant (JJB Marketing). EPS had

processed for JJB Marketing just one month before, until Merrick instructed it to terminate the merchant. Despite knowing that the new merchant was related to the previous client merchant, Dorsey approved the application.

108. Similarly, McCann approved numerous MNF-related merchant applications, including eight applications submitted by Wigdore within a span of just two days (May 17, 2012 – May 18, 2012), two of which explicitly stated that Wigdore was a co-owner or co-officer of the merchant, and five of which stated that the merchant had the exact same "KMA" email address. McCann approved two applications for merchants that shared a business address, a fact highlighted by the EPS employee who conducted the "initial risk evaluation" of the merchants.

109. McCann and Dorsey closely monitored the referral of new merchants to EPS by EPS's sales agents, as evidenced in daily emails (titled "Daily Hot Sheets") sent by EPS employees to McCann and Dorsey throughout 2013. These Daily Hot Sheets provided McCann and Dorsey a daily log of all new merchants approved by EPS for processing, and identified the sales agent who referred the merchant to EPS. The Daily Hot Sheets indicated that "Agent 2088" was among EPS's top sales agents, referring the highest number of merchant applications to EPS throughout 2013.

110. In addition to receiving fees or commissions for opening the MNF- related fictitious merchants' accounts and processing transactions through them, EPS transferred a substantial amount of MNF merchant funds (derived from MNF credit card sales generated by 16 of the fraudulent merchant accounts) into EPS's own bank accounts, which were jointly owned and controlled by Dorsey and McCann.

111. More than $4.6 million in sales transactions were processed through the MNF-related merchant accounts. These amounts do not include funds returned to consumers in the form of refunds or chargebacks.

112. Many of the consumers whose credit cards were charged never obtained a refund or reversed charge for the unauthorized charges. Even those consumers who ultimately received a refund or reversed charge for the unauthorized charges were forced to expend valuable time and energy in requesting and seeking the refunds or chargebacks. In addition, these consumers' banks and the card networks also have incurred substantial economic harm as a result of expending time and energy processing requests for refunds or chargebacks.

113. Consumers who directly suffered economic harm as a result of the Respondents' actions could not reasonably have avoided such harm because (a) they were deceived by the deceptive telemarketing practices of the MNF scam, (b) they never authorized the MNF scam or Respondents to charge their credit card accounts in the names of the MNF-related fictitious merchants, and (c) they had neither knowledge of nor control over the Respondents' actions in creating the MNF-related fictitious merchants' accounts through which Respondents processed MNF charges to the consumers' credit card accounts.

114. Credit card laundering is illegal and prohibited by the rules and policies of the credit card networks. No countervailing benefits flow to consumers or the credit card industry

marketplace from the Respondents' conduct because no legitimate business purpose exists for credit card laundering.

The Telemarketing Sales Rule

115. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108. The FTC adopted the original Telemarketing Sales Rule in 1995, extensively amended it in 2003, and amended certain provisions thereafter. 16 C.F.R. Part 310.

116. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c) and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

117. Under the TSR, a "merchant" means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution. 16 C.F.R. § 310.2(u).

118. The MNF-related merchants were "merchants" who entered into "merchant agreements," as those terms are defined by the TSR, 16 C.F.R. § 310.2(u)– (v).

119. The MNF-related merchants were "seller[s]" or "telemarketer[s]" engaged in "telemarketing," as those terms are defined in the TSR, 16 C.F.R. §§ 310.2(dd), (ff), and (gg).

120. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice for:

a. a merchant to present to or deposit into, or cause another to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

b. any person to employ, solicit, or otherwise cause a merchant, or an employee, representative or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant. 16 C.F.R. §§ 310.3(c)(1)–(2).

121. The TSR prohibits any person from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in acts or practices that violate Sections 310.3(a), (c) or (d), or Section 310.4 of the TSR. 16 C.F.R. § 310.3(b).

Count I

Unfair Credit Card Laundering

122. As described in Paragraphs 35 through 114 of this Complaint, in numerous instances, Respondents Electronic Payment Systems, LLC; Electronic Payment Transfer, LLC; John Dorsey; and Thomas McCann have engaged in credit card laundering on behalf of the Money Now Funding scam by:

a. Falsely representing that the fictitious companies listed as the applicants on the merchant applications were the true merchants who were applying for merchant accounts;

b. Approving and opening merchant accounts in the names of numerous fictitious companies for the same underlying merchant, thereby concealing the true identity of the underlying merchant; and/or

c. Permitting the continued processing of transactions for the same underlying merchant through multiple merchant accounts opened in the names of numerous fictitious companies after being informed that the accounts should be shut down.

123. Respondents' actions caused or were likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. This practice is an unfair act or practice.

Violations of Section 5

124. The acts and practices of Respondents as alleged in Count I of 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.

Count II

Assisting and Facilitating Credit Card Laundering

125. In numerous instances, Respondents provided substantial assistance or support to sellers and telemarketers (the MNF-related merchants) that the Respondents knew, or consciously avoided knowing, were engaged in credit card laundering acts or practices that violate Sections 310.3(c)(1) and (2) of the TSR, as described in Paragraphs 35 through 114 above.

Violations of the Telemarketing Sales Rule

126. The acts and practices of Respondents as alleged in Count II of this complaint constitute a violation of the TSR, 16 C.F.R. § 310.3(b), and are therefore a violation of a rule promulgated under Section 18 of the FTC Act, 15 U.S.C. § 57a, and therefore constitute unfair or

deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act. *See* 15 U.S.C. § 6102(c).

THEREFORE, the Federal Trade Commission this 12th day of May, 2022, has issued this Complaint against Respondents.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violations of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

    a. Respondent Electronic Payment Systems, LLC, also doing business as EPS, a Colorado limited liability company with its principal office or place of business at 6472 S. Quebec St., Englewood, CO 80111.

b. Respondent Electronic Payment Transfer, LLC, also doing business as EPS, a Colorado limited liability company with its principal office or place of business at 6472 S. Quebec St., Englewood, CO 80111.

c. Respondent John Dorsey, an officer of the Proposed Corporate Respondents, Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC. His principal office or place of business is the same as that of Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC.

d. Respondent Thomas McCann, an officer of the Proposed Corporate Respondents, Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC. His principal office or place of business is the same as that of Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC.

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

ORDER

Definitions

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

A. "Acquirer" means a business organization, Financial Institution, or an agent of a business organization or Financial Institution that has authority from an organization that operates or licenses a credit card system (e.g. VISA, Inc., MasterCard, Inc., American Express Company, and Discover Financial Services, Inc.) to authorize Merchants to accept, transmit, or process payment by credit card through the credit card system for money, products or services, or anything else of value. The EPS Respondents are not considered to be Acquirers.

B. "Additional Review Merchant" means any Merchant that:

1. Engages in Outbound Telemarketing; or

2. Offers to sell, sells, promotes, or markets any of the following products or services by any means: debt collection, debt relief, consumer credit related services, rental housing listings, job listings or Money Making Opportunities.

C. "Chargeback" means a procedure whereby an issuing bank or other Financial Institution charges all or part of an amount of a Person's credit or debit card transaction back to the Acquirer or other Financial Institution.

D. "Chargeback Rate" means the proportion (expressed as a percentage) of Chargebacks out of the total number of attempted credit or debit card sales transactions.

E. "Credit Card Laundering" means:

1. Presenting or depositing into, or causing or allowing another to present or deposit into, the credit card system for payment, a Credit Card Sales Draft generated by a transaction that is not the result of a credit card transaction between the cardholder and the Merchant;

2. Employing, soliciting, or otherwise causing or allowing a Merchant, or an employee, representative, or agent of a Merchant, to present to or deposit into the credit card system for payment, a Credit Card Sales Draft generated by a transaction that is not the result of a credit card transaction between the cardholder and the Merchant; or

3. Obtaining access to the credit card system through the use of a business relationship or an affiliation with a Merchant, when such access is not authorized by the Merchant Account agreement or the applicable credit card system.

F. "Credit Card Sales Draft" means any record or evidence of a credit card transaction.

G. "EPS Merchant" means any Person:

1. Who obtains, directly or indirectly, from any EPS Respondent a Merchant Account; or

2. To whom any EPS Respondent provides, directly or indirectly, Payment Processing services.

H. "Financial Institution" means any institution engaged in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1843(k)). An institution that is significantly engaged in financial activities is a Financial Institution.

I. "Fraud Monitoring" or "Risk Monitoring Program" means any program established to monitor or detect potentially fraudulent, illegal, or unauthorized Merchant transactions and activity by a credit card association (e.g., VISA, MasterCard, American Express, Discover), Acquirer, Financial Institution, or operator of a payment system. Such programs include any program established to monitor Chargebacks (including VISA's Merchant Chargeback Monitoring Program) or Chargeback Rates, reasons provided for Chargeback transactions (e.g., VISA's Merchant Chargeback Monitoring Program), fraudulent or unauthorized transactions (e.g., MasterCard's "GMAP Program," VISA's Risk Identification

Service program), and Merchants classified or defined by VISA as high risk Merchants (however titled), including VISA's "High Brand Risk Merchant" program, as periodically revised or updated from time to time.

J. "Independent Sales Organization" or "ISO" means any Person that:

1. Enters into an agreement or contract with a Payment Processor, Acquirer or Financial Institution to sell or market Payment Processing services to a Merchant;

2. Matches or refers Merchants to a Payment Processor or Acquirer for Payment Processing services, or that matches or refers a Payment Processor or Acquirer to Merchants for Payment Processing services; or

3. Is registered as an ISO or merchant service provider ("MSP") with VISA, MasterCard, or any credit card association.

K. "Merchant" means any Person engaged in the sale or marketing of any products or services or a charitable contribution, including any Person who applies for Payment Processing services.

L. "Merchant Account" means any account with an Acquirer or other Financial Institution, service provider, Payment Processor, ISO, or other entity that enables an individual, a business, or other organization to accept credit card, debit card, or check payments of any kind.

M. "Money Making Opportunity" means a business model in which a Merchant offers to sell, sells, promotes, or markets any product or service represented to enable consumers or to assist consumers in:

1. Earning income through a work-from-home business opportunity;

2. Obtaining training or education on how to establish a business or earn money or other consideration through a business;

3. Obtaining employment for an upfront fee; or

4. Obtaining government grants or other government income, benefits, or scholarships.

The term "Money Making Opportunity" does not include services provided by a school or program of instruction that has been evaluated and found to meet established criteria by an accrediting agency or association recognized for such purposes by the U.S. Department of Education.

N. "Outbound Telemarketing" means any plan, program, or campaign that is conducted to induce the purchase of products or services by use of one or more telephones, and which involves a telephone call initiated by a Person other than the consumer.

O. "Payment Processing" means transmitting sales transaction data on behalf of a Merchant or providing a Person, directly or indirectly, with the means used to charge or debit accounts through the use of any payment method or mechanism, including credit cards, debit cards, prepaid cards, and stored value cards. Whether accomplished through the use of software or otherwise, Payment Processing includes, among other things:

1. Reviewing and approving Merchant applications for payment processing services;

2. Transmitting sales transaction data or providing the means to transmit sales transaction data from Merchants to Acquirers, Payment Processors, ISOs, or other Financial Institutions;

3. Clearing, settling, or distributing proceeds of sales transactions from Acquirers or Financial Institutions to Merchants; or

4. Processing Chargebacks.

P. "Payment Processor" means any Person providing Payment Processing services in connection with another Person's sale of products or services, or in connection with any charitable donation.

Q. "Person" means any natural person, or any entity, corporation, partnership, or association of Persons.

R. "Respondents" means all of the Corporate Respondents and the Individual Respondents, individually, collectively, or in any combination.

1. "Corporate Respondents" means Electronic Payment Systems, LLC and Electronic Payment Transfer, LLC, both also doing business as EPS, and their successors and assigns.

2. "Individual Respondents" means John Dorsey and Thomas McCann.

S. "Sales Agent" means a Person that:

1. Enters into an agreement or contract with an ISO to sell or market Payment Processing services to a Merchant; or

2. Matches or refers Merchants to an ISO for Payment Processing services, or that matches or refers an ISO to Merchants for Payment Processing Services.

As such, a Sales Agent may be involved in recommending a particular ISO to a Merchant, forwarding to the ISO a Merchant's application, or negotiating rates and fees charged by an ISO.

Provisions

I.

Prohibitions Against Deceptive or Unfair Payment Processing Acts or Practices

IT IS ORDERED that Respondents, and Respondents' officers, agents, and employees, and those other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with offering Payment Processing services, must not:

A. Engage in Credit Card Laundering;

B. Engage in tactics to evade any Fraud Monitoring or Risk Monitoring Program, including:

1. Making, or assisting others in making any false or misleading statement, or providing any false document, in order to obtain a Merchant Account or Payment Processing services;

2. Opening multiple Merchant Accounts in the names of other companies for the same underlying Merchant, in order to conceal the Merchant's true identity;

3. Processing a Merchant's credit card transactions through multiple Merchant Accounts opened in the names of other companies, in order to artificially alter the true volume of transactions processed through any single Merchant Account;

4. Misrepresenting whether a Merchant is engaged in Outbound Telemarketing; and

5. Using or providing a bank account set up for the purpose of receiving only the returned transactions of any payment instrument (including checks and credit card transactions), in order to conceal Chargeback levels of Merchant transactions deposited into a different bank account;

C. Provide Payment Processing services to any Merchant that is engaged in any act or practice that is, or is likely to be, deceptive or unfair, including:

1. The unauthorized charging of consumer credit card accounts or the unauthorized debiting of consumer bank accounts;

2. The misrepresentation, directly or by implication, of the total costs to purchase, receive, or use any product or service; any material aspect of the performance, efficacy, nature, or central characteristics of the product or service; and any material aspect of the nature of the Merchant's refund, cancellation, exchange, or repurchase policies;

3. The failure to disclose, clearly and conspicuously, the total cost to purchase, receive or use any product or service;

4. Any tactics to conceal the true identity of the Merchant, including the use of shell companies or fictitious company names to conduct business, in order to gain access to a payment network, apply for Payment Processing services, or apply for Merchant Accounts;

5. Any tactics to evade any Fraud Monitoring or Risk Monitoring Program, including: distributing sales transaction volume among multiple Merchant Accounts or splitting a single sales transaction into multiple smaller transactions, in order to conceal a Merchant's identity or to artificially alter the true volume of transactions processed through any single Merchant Account;

6. Making any false or misleading statement, or providing any false document, in order to obtain a Merchant Account or Payment Processing services; and

7. Misrepresenting the type of business engaged in by the Merchant, or the means of advertising, marketing, and sales used by the Merchant (i.e., whether the Merchant is engaged in Outbound Telemarketing); and

D. Provide Payment Processing services or acting as an ISO or Sales Agent for any Merchant that is listed on the MasterCard Member Alert to Control High-Risk Merchants (MATCH) list for any of the following reasons:

1. Excessive chargebacks,

2. Fraud,

3. Identification as a Questionable Merchant per the MasterCard Questionable Merchant Audit Program,

4. Merchant collusion,

5. Illegal transactions,

6. Credit Card Laundering, or

7. Identity theft.

II.

Screening of Additional Review Merchants

IT IS FURTHER ORDERED that Respondent, and Respondents' officers, agents, and employees, and those other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with offering Payment Processing services, must engage in reasonable screening of Additional Review Merchants to confirm each Additional Review Merchant's identity, and to determine whether each Additional Review Merchant's business practices are, or are likely to be, deceptive or unfair.

Such reasonable screening must include:

A. Establishing and maintaining policies and procedures designed to identify Merchants that qualify as Additional Review Merchants;

B. Obtaining from each Additional Review Merchant:

1. A description of the nature of the Additional Review Merchant's business, including the nature of the products and services for which the Additional Review Merchant seeks Payment Processing services, and a description of the means of advertising, marketing, and sales used (i.e., Outbound Telemarketing, Internet sales);

2. The name(s) of the principal(s) and controlling Person(s) of the entity, and of Person(s) with a twenty-five percent (25%) or greater ownership interest in the entity;

3. A list of all business names, trade names, aliases or fictitious names, DBAs, websites, and identification numbers (such as taxpayer ID numbers) under or through which the Additional Review Merchant is marketing or intends to market the products and services for which the Additional Review Merchant seeks Payment Processing services;

4. Each physical address at which the Additional Review Merchant conducts business or will conduct the business(es) identified pursuant to subsection (1) of this Section II.B;

5. A list of all postal addresses, email addresses, telephone numbers, and Internet addresses the Additional Review Merchant uses or will use to conduct the business(es) identified pursuant to subsection (1) of this Section II.B;

6. For each product or service for which the Additional Review Merchant seeks Payment Processing services, the bank account number and name of the account holder(s) for each depository bank account currently held by the Additional Review Merchant and into which the Additional Review Merchant's sales revenues are to be deposited, and the name of the bank(s) at which each such depository bank account is maintained;

7. The percentage of the Additional Review Merchant's sales transactions, for which the Additional Review Merchant seeks Payment Processing services, that qualify as "Card Not Present Transactions," and a detailed breakdown of the Additional Review Merchant's different types of "Card Not Present Transactions" (i.e., Internet or ecommerce sales, Outbound Telemarketing);

8. Representative samples of all types of current marketing materials, including, but not limited to screen prints of relevant web pages and public social media pages, for the products or services for which the Additional Review Merchant seeks Payment Processing services;

9. Copies of all fulfillment agreements, if the Additional Review Merchant utilizes third party fulfillment providers;

10. Information regarding whether the Additional Review Merchant, including the principal(s) and controlling Person(s) of the Additional Review Merchant entity, any Person(s) who has a twenty-five percent (25%) or greater ownership interest in the entity, and any corporate name, trade name, fictitious name or aliases under which such Person(s) conduct or has conducted business, has ever been:

    a. Placed in any Fraud Monitoring or Risk Monitoring Program;

    b. Listed on the MasterCard Member Alert to Control High-Risk Merchants ("MATCH") list;

    c. Placed in a payment card association's chargeback monitoring program; or

    d. The subject of legal action taken by the Commission or any other state or federal law enforcement agency;

11. Copies of monthly or periodic Payment Processing statements issued by each bank, Acquirer, Payment Processor, ISO, or Sales Agent used by the

Additional Review Merchant during the preceding three (3) months, to the extent the Additional Review Merchant used Payment Processing services in the preceding three (3) months; and

12. The Additional Review Merchant's past Chargeback Rates for the preceding three (3) months, to the extent the Additional Review Merchant used Payment Processing services in the preceding three (3) months;

C. Taking reasonable steps to assess the accuracy of the information provided pursuant to Section II.B of this Order, and to confirm the identity of the Additional Review Merchant, including:

1. Subject to any limitations put in place by the Financial Institution that carries the account, confirming the Additional Review Merchant's depository bank account(s), including requesting and reviewing bank reference or bank verification letters;

2. Cross-referencing the following information relating to the Additional Review Merchant with similar information associated with other Merchants in Respondent Electronic Payment Systems' current Merchant portfolio, in order to determine whether the Additional Review Merchant has concealed or attempted to conceal its true identity, or is related to or associated with any other Merchant in Electronic Payment Systems' current Merchant portfolio or any other Merchant previously approved by Electronic Payment Systems that was referred by the same Sales Agent:

   a. The Additional Review Merchant's business names, trade names, aliases or fictitious names, DBAs, and identification numbers (such as taxpayer identification numbers);

   b. The Additional Review Merchant's physical addresses, postal addresses, email addresses, Internet addresses, websites, telephone numbers, and bank accounts; and

   c. The names of the principal(s) and controlling Person(s) of the Additional Review Merchant, and of Person(s) with a twenty-five percent (25%) or greater ownership interest in the Additional Review Merchant;

3. Reviewing copies of monthly or periodic Payment Processing statements issued by any bank, Acquirer, Payment Processor, ISO, or Sales Agent used by the Additional Review Merchant during the preceding three (3) months;

4. Reviewing representative samples of all current marketing materials, including, but not limited to screen prints of relevant web pages and public social media pages, and all fulfillment agreements provided by the

Additional Review Merchant, for the products or services for which the Additional Review Merchant seeks Payment Processing services;

5. Reviewing credit reports of the Additional Review Merchant and Person(s) with a twenty-five percent (25%) or greater ownership interest in the entity; and

6. Reviewing background information regarding the Additional Review Merchant, its principal(s) and controlling Person(s) of the entity, and of Person(s) with a twenty-five percent (25%) or greater ownership interest in the entity.

D. The purpose of the reasonable screening process described in Section II.A through C is to:

1. Confirm that the Additional Review Merchant is engaged in offering the products and services, and using the means of advertising, marketing, and sales, that are described in its application for Payment Processing services;

2. Determine whether the Additional Review Merchant has attempted to conceal its true identity, and is likely engaged in Credit Card Laundering;

3. Determine whether the Additional Review Merchant's past transactions exhibit any unusual or suspicious transaction patterns, trends, values, and volume, including processing for time periods of less than three months or processing only during alternating months, for no apparent legitimate business reason or lawful purpose;

4. Determine whether the Additional Review Merchant has likely engaged in tactics to evade any Fraud Monitoring or Risk Monitoring Program, including opening and processing through multiple Merchant Accounts in order to artificially alter its true total volume of sales transactions or Chargebacks processed through any one single Merchant Account, or for no apparent legitimate business reason or lawful purpose;

5. Determine whether the Additional Review Merchant is engaged in any of the following unfair or deceptive acts or practices:

a. Failing to clearly and conspicuously disclose the total cost to purchase, receive, or use, any products or services;

b. Misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of products or services;

c. Failing to clearly and conspicuously disclose all material terms and conditions of an offer;

d. Misrepresenting, expressly or by implication, any material aspect of the Additional Review Merchant's refund, cancellation, exchange, or repurchase policies; and

e. Causing billing information to be submitted for payment without the customer's express authorization.

III.

Monitoring of Additional Review Merchants

IT IS FURTHER ORDERED that Respondent, and Respondent's officers, agents, and employees, and those other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with offering Payment Processing services, must:

A. Monitor the sales activity of all current EPS Merchants to identify EPS Merchants that should be designated as Additional Review Merchants requiring additional screening pursuant to Section II of this Order, and for those EPS Merchants that become designated as Additional Review Merchants, complete the additional screening process described in Section II of this Order within 10 days of the date the EPS Merchant is determined to be an Additional Review Merchant;

B. Monitor each Additional Review Merchant's marketing practices and sales transactions to determine whether the Additional Review Merchant is engaged in practices that are deceptive or unfair in violation of Section 5 of the FTC Act. Such monitoring must include reviewing Additional Review Merchants' websites; reviewing each Additional Review Merchant's Chargeback Rates and reasons provided for these rates, as well as examining any unusual or suspect transaction patterns, values, and volume; reviewing each Additional Review Merchant's consumer complaints related to requests for Chargebacks and complaints found on publicly available complaint mediums (i.e., online consumer complaint boards), or received from any third party, including Financial Institutions, credit card associations, Better Business Bureaus, and operators of payment systems;

C. Monitor each Additional Review Merchant's accounts to detect indicia that the Additional Review Merchant is engaged in Credit Card Laundering, tactics to conceal its true identity, or tactics to evade any Fraud Monitoring or Risk Monitoring Program. Such indicia include:

1. Unusual or suspicious transactions, patterns, trends, values, and volume;

2. Opening and closing multiple Merchant Accounts for the same underlying Merchant under different business names, for no apparent legitimate business or lawful purpose;

3. Payment Processing of transactions through Merchant Accounts for time periods of less than three months, or during only alternating months, for no apparent legitimate business or lawful purpose;

4. Distributing sales transaction volume across multiple Merchant Accounts of any payment system; and

5. Using an incorrect Merchant Category Code;

D. Calculate and update the Chargeback Rate at least on a monthly basis for each Additional Review Merchant. The Chargeback Rate must be calculated separately for each payment mechanism processed, including credit and debit card transactions. For any Additional Review Merchant with multiple Merchant Accounts, the calculation of the Chargeback Rate must be made for each of the Additional Review Merchant's individual accounts, and in the aggregate for each Additional Review Merchant;

E. Immediately conduct a reasonable investigation of the cause of Chargeback Rates for any Additional Review Merchant whose monthly Chargeback Rate exceeds one percent (1%) and whose total number of Chargebacks exceeds fifty- five (55) per month in any two of the past six months, as follows:

1. Updating the information gathered in compliance with Section II of this Order, as applicable, and any other advertising of the Additional Review Merchant, and confirming the accuracy thereof;

2. Confirming that the Additional Review Merchant has obtained required consumer authorizations for the transactions;

3. Reviewing the consumer complaints and reasons provided for all Chargeback transactions;

4. If contact information is available, contacting consumers, Financial Institutions, and Better Business Bureaus to gather detailed information, including complaints and other relevant information, regarding the Additional Review Merchant;

5. Reviewing websites used by the Additional Review Merchant to market its products and services;

6. Searching publicly available sources for consumer complaints against the Additional Review Merchant alleging fraud (including online consumer complaint boards), and for legal actions against the Additional Review Merchant undertaken by the Commission or other state or federal law enforcement agencies;

7. Conducting "test" shopping to determine the Additional Review Merchant's sales practices, where possible; and

8. Stopping the processing of sales transactions and closing all processing accounts for any Additional Review Merchant investigated pursuant to this Subsection III.E within 30 days of commencing the investigation, unless the EPS Respondents draft a written report establishing facts that demonstrate that the Additional Review Merchant's business practices are not deceptive or unfair in violation of Section 5 of the FTC Act and are not in violation of the Telemarketing Sales Rule.

F. Immediately stop processing sales transactions and close all Merchant Accounts for any Additional Review Merchant that the EPS Respondents know or should know is engaged in Credit Card Laundering, tactics to conceal its true identity, or tactics to evade any Fraud Monitoring or Risk Monitoring Program, including balancing or distributing sales transaction volume or sales transaction activity among multiple Merchant Accounts or merchant billing descriptors; splitting a single sales transaction into multiple transactions, or using shell companies to apply for additional Merchant Accounts.

Nothing in this Section III should be read to insulate the EPS Respondents from liability for a violation of Section 5 of the FTC Act, the TSR, or any provision of this Order.

IV.

Monitoring of Sales Agents and Termination of Sales Agents Engaged in Certain Practices

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, and employees, and those other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with offering Payment Processing services, in connection with offering or providing Payment Processing services, must:

A. Monitor each Sales Agent's past referral of Merchants and existing Merchant portfolio to determine whether any Merchant referred by the Sales Agent has engaged in tactics to conceal its true identity or is related to or associated with any other Merchant previously referred to any EPS Respondent by the same Sales Agent;

B. Immediately terminate the EPS Respondents' relationship with any Sales Agent as soon as practicable and in no more than 3 days, for any Sales Agent that any EPS Respondent knows or should know:

1. Has provided false information or false documents to apply for Payment Processing services or a Merchant Account for any Merchant, that the Sales Agent knew or should have known was false;

2. Has referred Merchants to any EPS Respondent that the Sales Agent knew or should have known were concealing their true identities, or are engaged in or have been engaged in deceptive or unfair sales practices;

3. Has engaged in Credit Card Laundering or any tactics to evade any Fraud Monitoring or Risk Monitoring Program; or

4. Is or has been engaged in deceptive or unfair sales practices.

V.

Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after the issuance date of this Order, each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is the majority owner or controls directly or indirectly, unless such business cannot violate the Order, and each Corporate Respondent, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

VI.

Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of that Respondent's businesses that could violate the Order by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the products and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondents must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, each Individual Respondent must: (a) identify all his telephone numbers and all his physical, postal, email and Internet addresses, including addresses used for any business; (b) identify all his business activities, including any business for which such Respondent performs services whether as an employee or otherwise and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 10 years after the issuance date of this Order, each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, each Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which Respondents have direct or indirect

control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *In re Electronic Payment Systems, LLC*, matter number 1523213.

VII.

Recordkeeping

IT IS FURTHER ORDERED that Respondents must create or receive, as applicable, certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Corporate Respondents in connection with offering or providing Payment Processing services, and each Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all products or services sold that are related to the subject matter of the Order;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all EPS Merchant files and transactions, including Merchant Applications, underwriting documents, screening and monitoring records, investigation records and reports, bank verification records, processed transactions, and Chargeback transactions;

D. Records of all consumer complaints concerning the subject matter of the Order, including Chargeback requests, Chargeback dispute documentation, and refund requests with respect to EPS Merchants, whether received directly or indirectly, such as through a third party, and any response; and

E. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

VIII.

Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 14 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Respondents, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

IX.

Order Effective Dates

IT IS FURTHER ORDERED that that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the

Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Electronic Payment Systems, LLC, also d/b/a EPS, Electronic Payment Transfer, LLC, also d/b/a EPS, John Dorsey, and Thomas McCann ("EPS").

The Commission has placed the proposed Order on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the 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.

Respondent Electronic Payment Systems, LLC is an independent sales organization ("ISO") that serves as an intermediary between merchants seeking to open credit card merchant accounts and its acquiring bank, which is the bank that has access to the credit card networks. John Dorsey and Thomas McCann are officers and the owners of EPS.

The Commission's proposed Complaint alleges that, in 2012 and 2013, EPS served as the ISO for the entities involved in a deceptive telemarketing scam called Money Now Funding ("MNF" or "MNF scam"). The FTC sued MNF in 2013 for telemarketing worthless business

opportunities to consumers and falsely promising that consumers would earn thousands of dollars in income. The principals of the MNF scam went to great lengths to hide their identities behind many phony businesses. In order to charge consumers' credit cards but make it difficult to trace the money back to MNF, MNF engaged in a credit card laundering scheme whereby its principals and employees created numerous fictitious companies. Those fictitious companies, through a sales agent, submitted applications for merchant accounts to EPS. With knowledge of the misconduct, EPS then opened merchant accounts in the names of these fictitious companies, and victim credit card charges were processed through those accounts, rather than through a single merchant account in the name of MNF. With similar knowledge, EPS engaged in the underwriting and approval of MNF's fictitious companies and submitted merchant account applications for these fictitious companies to its acquirer. Using the services of two payment processors, EPS enabled more than $4.6 million in MNF transactions to be processed through these and other fraudulent merchant accounts.

The Commission's proposed Complaint alleges that EPS's conduct regarding the MNF fictitious companies and their merchant accounts constituted an unfair act or practice under Section 5 of the FTC Act and assistance and facilitation of illegal credit card laundering under Section 310.3(b) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(b); *see also* § 310.3(c) (banning credit card laundering).

The proposed Order contains provisions designed to prevent EPS from engaging in the same or similar acts or practices in the future.

Section I of the proposed Order contains prohibitions against engaging in credit card laundering; engaging in tactics to evade fraud monitoring or risk monitoring programs; providing payment processing services to any merchant that is engaged in any act or practice that is, or is likely to be, deceptive or unfair; and providing payment processing services to, or acting as an ISO for, any merchant that is listed on the MasterCard Member Alert to Control High-Risk Merchants (MATCH) list for several enumerated reasons.

Section II imposes screening requirements that EPS must implement when it screens applications from prospective merchants that fall under the definition of "Additional Review Merchants." The definition of Additional Review Merchant includes categories of EPS merchants that have been the subject of FTC cases: merchants who engage in outbound telemarketing and merchants selling specific services (debt collection, debt relief, credit-related services, rental housing listings, job listings, or "Money Making Opportunities," as defined in the order). Heightened screening of Additional Review Merchants includes obtaining detailed information about the merchant's business, as laid out in the order. EPS would also be required to take reasonable steps to verify the accuracy of the due diligence information it obtains.

Section III requires increased monitoring of Additional Review Merchants. The order requires EPS to investigate merchants whose chargeback rate exceeds 1% and whose total number of chargebacks exceeds 55 per month in two of the preceding six months.

Section IV requires monitoring of sales agents and termination of sales agents who are engaged in tactics to conceal credit card laundering.

Sections V through IX are reporting and compliance provisions that allow the Commission to better monitor EPS's ongoing compliance with the Order. Under Section IX, the Order will expire in twenty years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed Order. It is not intended to constitute an official interpretation of the Complaint or proposed Order, or to modify in any way the proposed Order's terms.

Complaint

IN THE MATTER OF

AMERICAN SECURITIES PARTNERS VII, L.P., PRINCE INTERNATIONAL CORPORATION AND FERRO CORPORATION

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

Docket No. C-4762; File No. 211 0131
Complaint, April 20, 2022 – Decision, June 10, 2022

This consent order addresses the $2.1 billion acquisition by Prince International Corporation of certain assets of Ferro Corporation. The complaint alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the markets for (1) porcelain enamel frit; (2) glass enamel; and (3) forehearth colorants. The consent order requires Respondents to divest all of Prince's rights and assets related to: (1) the porcelain enamel and forehearth colorants plant located in Leesburg, Alabama; (2) the porcelain enamel and forehearth colorants plant located in Bruges, Belgium; and (3) the glass enamel plant located in Cambiago, Italy.

Participants

For the *Commission*: *Eric Elmore, Janet Kim,* and *Steven Wilensky.*

For the *Respondents*: *Chuck Boyars* and *Matthew Reilly, Kirkland & Ellis LLP; Jamie Logie, Simpson Thacher & Bartlett LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Prince International Corporation ("Prince"), a corporation subject to the jurisdiction of the Commission, whose ultimate parent entity is Respondent American Securities Partners VII, L.P. ("American Securities"), a limited partnership subject to the jurisdiction of the Commission, has agreed to acquire Ferro Corporation ("Ferro"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such 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, 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 Prince International Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive

offices and principal place of business located at 15311 Vantage Parkway West, Suite 350, Houston, TX 77032.

2. Respondent American Securities Partners VII, L.P., is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 590 Madison Avenue, 38th Floor, New York, New York, 10022.

3. Respondent Ferro Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its executive offices and principal place of business located at 6060 Parkland Boulevard, Mayfield Heights, Ohio, 44124.

4. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and engages in business that is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

5. Pursuant to an agreement and plan of merger dated May **11,** 2021, Respondent Prince proposes to acquire all of the outstanding and issued voting securities of Respondent Ferro in a transaction valued at approximately $2.1 billion (the "Acquisition"). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKETS

6. The relevant lines of commerce in which to analyze the effects of the Acquisition are the manufacture and sale of the following products:

a. porcelain enamel frit;

b. glass enamel; and

c. forehearth colorants.

7. Porcelain enamel frit is a glass-based product used to create heat-tolerant, scratch and corrosion resistant coatings (porcelain enamel) for appliances, water heaters, cookware, and other applications. Porcelain enamel frit is necessary to make porcelain enamel. There are no good substitutes for porcelain enamel in the various applications in which it is used.

8. Glass enamel is a liquid paste or powder that is added to glass surfaces, such as appliance doors, architectural panels, and glass bottles, for aesthetic purposes, such as adding color or decoration; and to automotive windshields, for functional purposes, such as blocking UV light. There are no good substitutes for glass enamel in the various applications in which it is used.

9. Forehearth colorants are glass-based products added to the forehearths of certain glass furnaces during the manufacture of glass bottles to impart a specific color to the bottles. There is no good substitute for forehearth colorants.

10. North America is the relevant geographic area in which to assess the competitive effects of the Acquisition in porcelain enamel frit. Prince supplies its U.S. customers from a plant in Leesburg, Alabama, while Ferro suppliers its U.S. customers from a plant in Villagran, Mexico.

11. The world is the relevant geographic area in which to assess the competitive effects of the Acquisition in glass enamel and forehearth colorants. Prince supplies its U.S. glass enamel customers from a plant in Cambiago, Italy, while Ferro supplies its U.S. customers from a plant in Villagran, Mexico. Prince supplies its U.S. forehearth colorant customers with products made at a plant in Bruges, Belgium that are further processed in Leesburg, Alabama, while Ferro supplies its U.S. customers with products made at a plant in Villagran, Mexico that are further processed in Orrville, Ohio.

IV. THE STRUCTURE OF THE MARKETS

12. The North American market for porcelain enamel frit is highly concentrated. Respondents have a combined share of about [redacted] of sales of the overall North American market for porcelain enamel frit and about [redacted] of the sales of the non- captive, merchant North American market for porcelain enamel frit.

13. The world market for glass enamel is highly concentrated, with the two leading producers, Ferro and Fenzi Holdings SPY S.p.A., having a combined market share of about [redacted]. Prince, the third largest competitor, has about a [redacted] market share.

14. The world market for forehearth colorant is highly concentrated. Ferro and Prince are the two largest producers of forehearth colorant in the world, with a combined market share of about [redacted].

V. ENTRY CONDITIONS

15. Entry into the relevant markets described in Paragraphs 12-14 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. *De nova* entry would not take place in a timely manner because the time and cost required to construct a new plant, and the time required to obtain approvals at customer accounts. In addition, no other entry is likely to occur such that it would be timely and sufficient to deter or counteract the competitive harm likely to result from the Acquisition.

VI. THE EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, may be to substantially lessen competition 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:

a. increasing the likelihood that Prince would unilaterally exercise market power in the relevant markets; and

b. increasing the likelihood of collusive or coordinated interaction between any remaining competitors in the relevant markets.

17. The parties' documents show that they regard each other as the leading, and perhaps only other practical competitor, in porcelain enamel in North America. In an email to a major porcelain enamel user, Prince states:

[redacted]

A Ferro strategic document states: [redacted] and its [redacted]

18. The parties' documents also show that price competition between the two parties is intense in porcelain enamel. A Prince strategic review states that [redacted] A Prince management review states [redacted]

19. The parties' documents show that Prince may be in a position to rapidly increase its market share in the glass enamel market, particularly in the automotive segment. Prince currently produces a glass enamel paste for the traditional silk screen application process and estimates that it has [redacted] However, Prince is developing an innovative technology, referred to as digital ink, which could lead to Prince becoming a major supplier in this segment. Digital ink, which contains glass enamel paste, may have significant productivity savings over the traditional method of application, screen printing. A Prince strategic document states [redacted]

VII. VIOLATIONS CHARGED

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

21. The Acquisition described in Paragraph 5, 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 twentieth day of April, 2022 issues its Complaint against said Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent American Securities Partners VII, L.P., the ultimate parent entity of Respondent Prince International Corporation, of all the voting securities of Respondent Ferro Corporation (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent American Securities Partners VII, L.P. is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 590 Madison Avenue, 38th Floor, New York, New York, 10022.

2. Respondent Prince International Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 15311 Vantage Parkway West, Suite 350, Houston, Texas 77032.

3. Respondent Ferro Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its executive offices and principal place of business located at 6060 Parkland Boulevard, Mayfield Heights, Ohio, 44124.

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

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

A. "Decision and Order" means the proposed Decision and Order contained in the Consent Agreement or the Decision and Order issued in this matter.

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

II. Asset Maintenance

IT IS FURTHER ORDERED that, pending divestiture of the Prince Assets, Respondents shall operate the Prince Assets in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Prince Assets, to minimize any risk of loss of competitive potential of the Prince Assets, to operate the Prince Assets in the regular and ordinary course of business and in accordance with past practice and in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Prince Assets (including regular repair and maintenance effort), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Prince Assets (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Prince Assets;

B. Conduct or cause to be conducted the Prince Business in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Prince Business, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Prince Business; and

C. Respondents must warrant to Acquirer of the Prince Assets that (1) the Prince Assets will be operational and without material defect on the date of their transfer to Acquirer of the Prince Assets; (2) there are no material defects in the environmental, zoning, or other permits relating to the operation of the Prince Assets; and (3) Respondents have disclosed all encumbrances on any part of the Prince Assets, including on intangible property. Following the sale of the Prince Assets, Respondents must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits relating to the operation of the Prince Assets.

Provided, however, that Respondents shall not be in violation of this Section II if Respondents take actions (i) as explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Prince Assets and consistent with the purposes of the Orders.

III. Transitional Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information to the Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to Business Information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the Business Information.

B. At the option of the Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the Prince Assets to the Acquirer and (2) allow the Acquirer to operate the acquired Prince Assets in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall provide Transitional Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, for up to 12 months after the Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a written request to extend the 12 month time period for providing Transitional Assistance in order to achieve the purposes of the Orders.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transitional Assistance at any time upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of any agreement relating to Transitional Assistance.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until 180 days after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer to evaluate independently and offer employment to any Prince Employee.

B. Until Respondents have fulfilled their obligation to provide Transition Assistance pursuant to Paragraph IV.C, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide the Acquirer a list of all Prince Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to privately interview any of the Prince Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Prince Employees;

3. Remove and not enter into any impediments within the control of Respondents that may deter Prince Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Prince Employee who receives an offer of employment from the Acquirer; *provided, however,* that nothing in the Orders shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Prince Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Prince Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Prince Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Prince Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Prince Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Section IV.

D. Respondents Prince and Ferro shall not enforce any noncompete provision or noncompete agreement against any Person seeking employment from or otherwise doing business with the Prince Business.

V. Confidential Information

IT IS FURTHER ORDERED that:

A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Information received or maintained by Respondents, *provided, however*, that Respondents may disclose or use such Confidential Information in the course of:

1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting, or defending legal claims, investigations, or enforcing actions threatened or brought against the Prince Assets or Prince Business, or as required by law, rule, or regulation.

B. Respondents shall only disclose Confidential Information to an employee or any other Person if disclosure is permitted in Paragraph V.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of the Orders.

C. Respondents shall enforce the terms of this Section V and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Smith & Williamson to serve as Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of this Section VI or Section VIII in the Decision and Order ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule as determined by Commission staff, and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of the Decision and Order, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose ofreviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same

terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

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

VII. Divestiture Trustee

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 the Prince Assets as required by the Decision and Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of the Decision and Order. 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 these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Section VII 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 the Respondents to comply with the Decision and Order.

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

C. Not later than 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 relevant divestitures required by the Decision and Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of the Decision and Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Section VII, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by the Decision and Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one-year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 the Decision and 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under this Section VII 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by the Decision and Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the

divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 the Decision and 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Prince Assets required to be divested by the Decision and Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

F. 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 Section VII.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by the Decision and Order.

VIII. Prior Notice or Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any business that manufactures and sells Forehearth Colorants or Glass Enamel anywhere in the world, or manufactures and sells Porcelain Enamel Frit in North America.

IX. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent ASP shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents ASP and Prince shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents ASP and Prince shall submit interim compliance reports 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until this Order to Maintain Assets terminates, and additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently

whether Respondents ASP and Prince are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents ASP and Prince shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents ASP and Prince have implemented or plan to implement to ensure that they have complied or will comply with each section of the Orders; and

3. For a period of 5 years after filing a compliance report, Respondents ASP and Prince shall retain all material written communications with each party identified in each compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling their obligations under the Orders during the period covered by such compliance report. Respondents ASP and Prince shall provide copies of these documents to Commission staff upon request; and

C. Respondents ASP and Prince shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents ASP and Prince shall file their compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents ASP and Prince shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

X. Change in Respondents

IT IS FURTHER ORDERED that Respondents ASP and Prince shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of American Securities Partners VII, L.P. or Prince International Corporation;

B. Any proposed acquisition, merger, or consolidation of American Securities Partners VII, L.P. or Prince International Corporation; or

C. Any other change in Respondent ASP or Prince, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of the Orders.

XI. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with the Orders, and subject to any legally recognized privilege, upon written request and 5 days'

notice to the relevant Respondent, made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.71(a)(l) and (2), 16 C.F.R. § 2.71(a)(l) and (2), in the possession or under the control of the Respondent related to compliance with the Orders, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; or

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

XII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Prince Business through its full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Prince Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Prince Assets except for ordinary wear and tear.

XIII. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

Order to Maintain Assets

Monitor Agreement

Monitor Agreement

This Monitor Agreement is entered into this 1st day of April 2022, by and between Smith & Williamson LLP, acting through Nasoul Gopal, Partner & Head of Monitoring Trustee Services ("Monitor") and Prince International Corp. (together with its affiliates, "Respondent Prince"). Monitor and Respondent are each referred to herein as a "Party" and collectively as the "Parties."

WHEREAS, on May 11, 2021, Respondent Prince entered into an Agreement and Plan of Merger with Ferro Corporation (the "Proposed Transaction");

WHEREAS, it is expected that the United States Federal Trade Commission (the "Commission") and Respondent will enter into an Agreement Containing Consent Orders, which includes a proposed Decision and Order and an Order to Maintain Assets (collectively the "Orders") pursuant to which Respondent and Ferro may consummate the Proposed Transaction;

WHEREAS, it is expected that the Orders will provide for the appointment of a Monitor to ensure that Respondent Prince complies with all of its obligations and performs all of its responsibilities required by the Orders;

WHEREAS, the Monitor wishes to accept such appointment upon the terms and conditions stated herein;

WHEREAS, it is expected that the Orders will further provide that Respondent Prince shall execute an agreement, subject to prior approval of the Commission, conferring all the rights, powers, and authority necessary to permit the Monitor to perform its duties and responsibilities pursuant to the Order; and

WHEREAS, this Monitor Agreement, although executed by the Monitor and Respondent Prince, is not effective for any purpose until this Monitor Agreement has been approved by the Commission.

NOW, THEREFORE, the Parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Orders.

2. The Monitor shall have all of the powers, authority, and responsibilities Respondent Prince is required to confer upon the Monitor by the Orders, including, without limitation, the responsibility, consistent with the Orders, for monitoring Respondent Prince's compliance with its obligations under the Orders. The Monitor shall have the authority, in its sole discretion, to consult with third parties in the exercise of its duties under the Orders and this Monitor Agreement; provided, that the Monitor shall not have the authority to execute any documents or enter into any agreements on behalf of Respondent Prince or any of its affiliates.

3. In the performance of its functions and duties under this Monitor Agreement, the Monitor will perform its obligations hereunder in good faith, using its best efforts to perform these services in accordance with generally accepted industry standards.

4. If the Monitor becomes aware during the term of this Monitor Agreement that it has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of its duties under this Monitor Agreement, the Monitor shall promptly inform Respondent Prince and the Commission of any such conflict.

5. The Monitor shall have reasonable access, subject to any legally recognized privilege of Respondent Prince, to Respondent Prince's personnel, books, records, documents, facilities and technical information to the extent relating to Respondent Prince's compliance with its obligations under the Orders, including its obligations related to the Prince Assets, as the Monitor may reasonably require to perform the services set forth herein, subject to the limitations contained in the Orders. Such access shall include, inter alia, access to all relevant information related to the Prince Assets. Respondent Prince shall cooperate with any reasonable request of the Monitor, including but not limited to complying with Monitor's requests for onsite visits and interviews with employees of Respondent Prince. Respondent Prince shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Prince's compliance with the Orders.

6. Respondent shall designate a senior employee of Respondent Prince to be a primary contact for the Monitor and notify the Monitor regarding any changes to Respondent Prince's points of contact. Respondent Prince shall keep the Monitor informed of critical events relating to the Prince Assets, the Orders, or the Agreements.

7. Respondent Prince shall provide and the Monitor shall evaluate the reports submitted by Respondent Prince pursuant to the Orders.

8. The Monitor shall report to the Commission pursuant to the terms of the Orders and as otherwise requested by the Commission Staff.

9. The Monitor shall be compensated by Respondent Prince for its services under this Monitor Agreement, including all work in connection with the negotiation and preparation of this Monitor Agreement, pursuant to the fee schedule attached as Confidential Exhibit A for time spent in connection with the discharge of its duties under this Monitor Agreement and the Order. In addition, Respondent Prince will pay all documented reasonable out-of-pocket expenses incurred by the Monitor in the performance of the Monitor's duties, including all reasonable fees and disbursements incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities hereunder. Payments under this Paragraph 9 shall be made on a monthly basis until the Monitor ceases its activities under this Monitor Agreement. The Monitor shall provide Respondent Prince with monthly invoices for time and expenses that include details and an explanation of all matters for which the Monitor submits an invoice to Respondent Prince. Respondent Prince shall pay such invoices within 30 days of receipt. The Monitor and Respondent shall submit any disputes about invoices to the Commission's Compliance Division for assistance in resolving such disputes.

10. Respondent Prince hereby confirms its obligation to indemnify the Monitor (and all Persons retained by the Monitor) and hold the Monitor harmless against any liabilities arising out of the performance of the Monitor's duties, except to the extent that such

liabilities result from the willful default, recklessness, gross negligence, or bad faith of the Monitor, its employees, agents or advisors.

11. In the event of a disagreement or dispute between Respondent Prince and the Monitor, and in the event that such disagreement or dispute cannot be resolved by the Parties, either Party may seek the assistance of the Assistant Director of the Commission's Compliance Division, to resolve the issue. In the event that such disagreement or dispute cannot be resolved by the Parties, the Parties shall submit the matter to the non-exclusive jurisdiction of the courts of England and Wales. Litigation between the Parties shall not be used to resolve any disagreement or dispute concerning Respondent Prince's obligations pursuant to any Order entered by the Commission.

12. The term of this Monitor Agreement shall continue until the latter of (i) the completion of all divestitures required by the Orders, and (ii) the end of any Transition Services Agreement in effect with any Commission-Approved Acquirer; provided further, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order. In the event that the Monitor is no longer able to perform the duties described in this Monitor Agreement, the Monitor may terminate this Monitor Agreement by providing Respondent Prince 30 days written notice. In the event of such termination, the Monitor shall cooperate with Respondent Prince pursuant to Paragraph 14.

13. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondent Prince provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondent Prince to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff does not object, shall comply with Respondent Prince's request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information that was obtained while acting as a Monitor.

14. Should the Commission appoint a substitute monitor or should the Monitor terminate this Monitor Agreement pursuant to Paragraph 12, the Monitor shall cooperate with Respondent and the substitute monitor in order to effect a prompt transition to the substitute monitor. Such cooperation shall include, but shall not be limited to, (i) the prompt return to Respondent Prince of all confidential materials as required by the preceding Paragraph of this Monitor Agreement, and (ii) the provision of access to the Monitor and any personnel hired by the Monitor for interviews by Respondent Prince and/or the substitute monitor for purposes of gathering relevant information relating to the Monitor's performance of its duties.

15. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail or e-mail to the applicable Party at its address below (or to such other address as to which such Party shall hereafter notify the other party):

If to the Monitor, to:

Nasoul Gopal
Partner & Head of Monitoring Trustee Services
Smith & Williamson LLP
25 Moorgate
London EC2R 6AY
nasoul.gopal@smithandwilliamson.com

If to Respondent Prince, to:

Mark Whitney
Senior Vice President & General Counsel
Prince International Corp.
15311 Vantage Parkway West, Suite 350
Houston, TX 77032
mwhitney@princecorp.com

With a copy to:

Chuck Boyars
Partner
Kirkland & Ellis LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
chuck.boyars@kirkland.com

16. The Monitor Agreement may not be assigned by Respondent Prince or the Monitor without the prior written consent of the other Party and the Commission.

17. It is understood and agreed that the Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of Respondent Prince or the Commission in the undertaking of this Monitor Agreement and the Monitor shall exercise control over and employ its own means and methods of accomplishing the projects and tasks in performing services hereunder.

18. This Monitor Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

19. This Monitor Agreement contains the entire agreement between the Parties relating to the subject matter hereof and supersedes all previous negotiations, agreements, undertakings and representations, documents, minutes of meetings, letters or notices (whether oral or written) between the Parties and/or their respective affiliates with respect to the subject matter.

20. This Monitor Agreement shall not become binding until it has been approved by the Commission and the Orders have been accepted for public comment. The Orders shall govern this Monitor Agreement and any provisions herein that conflict or are inconsistent with such Orders may be declared void by the Commission and any provision not in conflict shall survive and remain a part of this Monitor Agreement.

21. This Monitor Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of England and Wales.

(Signature Page Follows)

Order to Maintain Assets

IN WITNESS WHEREOF, the Parties have executed this Monitor Agreement as of the date first above written.

Respondent:

Mark Whitney
Senior Vice President and General Counsel
Prince International Corp.

Monitor:

Nasoul Gopal
Partner & Head of Monitoring Trustee Services
Smith & Williamson LLP

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent American Securities Partners VII, L.P., the ultimate parent entity of Respondent Prince International Corporation, of all the voting securities of Respondent Ferro Corporation (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (**1)** an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent American Securities Partners VII, L.P. is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 590 Madison Avenue, 38th Floor, New York, New York, 10022.

2. Respondent Prince International Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 15311 Vantage Parkway West, Suite 350, Houston, Texas 77032.

3. Respondent Ferro Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its executive offices and principal place of business located at 6060 Parkland Boulevard, Mayfield Heights, Ohio, 44124.

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

ORDER

I. Definitions

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

A. "ASP" means American Securities Partners VII, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by American Securities Partners VII, L.P., including Prince International Corporation, PMHC II, Inc, and PMHC Fortune Merger Sub, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Prince" means Prince International Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Prince International Corporation, PMHC II, Inc., and PMHC Fortune Merger Sub, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Ferro" means Ferro Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Ferro Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "KPS" means KPS Capital Partners, LP, a 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 Vanderbilt Avenue, 52nd Floor, New York, New York 10017.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means

1. KPS; or

2. Any other Person that the Commission approves to acquire the Prince Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the agreement titled "Agreement and Plan of Merger among Ferro Corporation, PMHC II, Inc. and PMHC Fortune Merger Sub, Inc., dated as of May 11, 2021."

H. "Acquisition Date" means the date Respondents consummate the Acquisition.

I. "Bruges Facility" means the Prince facility located at Pathoekeweg 116-118, 8000 Brugge, in Bruges, Belgium.

J. "Business Information" means books, records, data, and information, wherever located and however stored, used in the Prince Business, including documents, written information, graphic materials, and data and information in electronic format, along with the unwritten knowledge of employees, contractors, and representatives. Business Information includes records and information relating to research and development, manufacturing, process technology, engineering, production, sales, marketing, logistics, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, and all other aspects of the Prince Business. For clarity, Business Information includes Respondents' rights and control over information and material provided to any other person.

K. "Cambiago Facility" means the facility leased by Prince located at Via S. Botticeli, 6-16, 20040 Cambiago (MI) in Cambiago, Italy.

L. "Confidential Information" means all Business Information not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

M. "Consent" means an approval, consent, ratification, waivers, or other authorization.

N. "Contract" means an agreement, contract, lease, license agreement, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), whether or not legally binding with third parties.

O. "Direct Cost" means the cost of labor, materials, travel, and other expenditures directly incurred. The cost of any labor included in Direct Cost shall not exceed the hours of labor provided times the then-current average hourly wage rate, including benefits, for the employee providing such labor.

P. "Divestiture Agreement" means:

1. The Securities and Asset Purchase Agreement By and Between PMHC II., Inc. and Smalto Holdings Alberta, LP, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Nonpublic Appendix A; or

2. Any other agreement between Respondents (or a Divestiture Trustee appointed pursuant to Section IX of this Order) and an Acquirer for the purchase of any of the Prince Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

Q. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee) close on the divestiture of the Prince Assets as required by Section II (or Section IV) of this Order.

R. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

S. "Employee Information" means, to the extent permitted by law, the following information summarizing the employment history of each Prince Employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status *(i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

T. "Fenton Facility Forehearth Colorants Line" means all assets related to the manufacture and sale of Forehearth Colorants at the Prince facility located at Duke Street, Fenton, Stoke-on-Trent, Staffordshire, ST43NR in Fenton, United Kingdom.

U. "Forehearth Colorant" means a glass-based product that is added to the forehearth of certain glass furnaces during the manufacture of glass bottles to impart a specific color to the bottles.

V. "Forehearth Colorant Business" means the research, development, manufacture, commercialization, distribution, marketing, exportation, advertisement, and sale of Forehearth Colorants worldwide by Respondent ASP.

W. "Ferro Proceeding" means the proceeding filed by Ferro against Prince International Corporation, Prince Minerals Limited, Prince Belgium BVBA, and

Jonathan Cork (collectively, the "Defendants") on June 28, 2019 in the High Court of Justice- Business and Property Courts of England and Wales (Docket#: IL-2019-00076) alleging trade secret misappropriation and any other claims or proceedings related thereto, that are pending prior to the Divestiture Date.

X. "Glass Enamel" means a liquid paste produced by combining glass frit in a furnace with oxides of chrome, cobalt, nickel, and other metals and materials, milling the mixture, and making it into a thick paste that is added to glass surfaces for aesthetic purposes, such as adding color or decoration, or functional purposes, such as blocking UV light.

Y. "Glass Enamel Business" means the research, development, manufacture, commercialization, distribution, marketing, exportation, advertisement, and sale of Glass Enamel worldwide by Respondent ASP.

Z. "Governmental Authorization" means any license, registration, or permit issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.

AA. "Intellectual Property" means intellectual property of any kind, including patents, patent applications, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, product recipes, process technology, engineering technology, product technology, product rights, trade secrets, and proprietary information.

BB. "Leesburg Facility" means the Prince facility located at 100 Pemco Drive, Leesburg, Alabama, 35983 and the nearby distribution center located at 201 5th Avenue North, Piedmont, Alabama, 36272.

CC. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

DD. "Orders" means this Order and the Order to Maintain Assets entered in this action.

EE. "Porcelain Enamel" means a glass-based coating applied to metal substrates that is made from ground frit combined with metals such as cobalt, lithium, titanium and nickel, and other additives.

FF. "Porcelain Enamel Business" means the research, development, manufacture, commercialization, distribution, marketing, exportation, advertisement, and sale of Porcelain Enamel worldwide by Respondent ASP.

Provided, however, the "Porcelain Enamel Business" does not include any business conducted out of Brazil and Argentina, including by Prince Minerais Ltda. and Prince Argentina SA or their subsidiaries.

GG. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity, or a governmental body.

HH. "Prince Assets" means all of Respondents' right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, used in, or relating to the Prince Business (including assets removed and not replaced after the announcement of the Acquisition), including:

1. The Bruges Facility;

2. The Cambiago Facility;

3. The Leesburg Facility;

4. The Fenton Facility Forehearth Colorants Line;

5. Prince Minerals Italy S.r.l;

6. Prince Belgium B.V;

7. All inventories;

8. All accounts receivable;

9. All Business Information;

10. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

11. All Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;

12. Real property interests owned, leased, or otherwise held, including easements and appurtenances, together with buildings, facilities and other structures, and improvements thereto;

13. Intangible rights and property, including Intellectual Property, owned, used, or licensed (as licensor or licensee) by Respondent, going concern value, goodwill, and telephone listings, internet sites and social media accounts;

14. Prince Trademarks;

15. Tangible personal property (other than inventories or accounts receivable), whether owned or leased, including machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles,

together with all express or implied warranties by manufacturers, sellers or lessors and all maintenance records and operating manuals; and

16. Contracts, and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

Provided, however, that the Prince Assets do not include the Retained Leesburg Facility Assets or the Retained Assets.

II. "Prince Business" means the Forehearth Colorant Business, the Glass Enamel Business, and the Porcelain Enamel Business.

JJ. "Prince Employee" means any full-time, part-time, or contract individual employed by Prince at any Prince Business or whose job duties in whole or part include supporting any Prince Business, as of May 11, 2021.

KK. "Prince Trademarks" means any trademark used by the Prince Business, including, but not limited to the Ecomail™, PACE™, PEMCO®, POESTA™, Vitroinx™, VitroLite®, Vitromail®, and VitroMax® trademarks.

LL. "Retained Assets" means the list of assets identified in Nonpublic Appendix B.

MM. "Retained Leesburg Facility Assets" means the equipment used solely to produce brick engobes, ladle sands, and water treatment products, or to transload manganese nodules, at the Leesburg Facility and identified in Nonpublic Appendix C.

NN. "Transition Assistance" means services, assistance, cooperation, training and access to personnel regarding the transfer and operation of the Prince Business, including, but not limited to, accounting and finance, human resources (employee benefits, payroll, etc.) information technology and systems, logistics (purchasing, distribution, warehousing, supply chain management, etc.), manufacturing (technology, technology transfer, operating permits and licenses, regulatory compliance, quality control, manufacturing processes and troubleshooting, etc.), supply of inputs, research and development, and sales and marketing (including customer service, supply chain management, and customer transfer logistics, etc.).

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Prince Assets, as an ongoing business, absolutely and in good faith, to KPS;

Provided, however, that, if within 12 months after issuing this Order, the Commission determines, in consultation with the Acquirer and the Monitor, the Acquirer needs one or more Retained Assets or Retained Leesburg Facility Assets

to operate the Prince Assets in a manner that achieves the purposes of this Order, Respondents shall divest, absolutely and in good faith, such needed Retained Assets or Retained Leesburg Facility Assets to the Acquirer;

Provided, further, however, that if Business Information includes information (i) that also relates to other retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Prince Assets or (ii) where Respondents have a legal obligation to retain the original copies, then Respondents shall provide only copies of the materials containing such information with appropriate redactions to the Acquirer and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes.

B. If Respondents have divested the Prince Assets to an Acquirer 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:

1. An Acquirer is not acceptable as the acquirer of the Prince Assets, then Respondents shall rescind the divestiture to that Acquirer within 5 days of notification, and shall divest the Prince Assets no later than 180 days from the date this Order is issued, as on-going businesses, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture to an Acquirer was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to modify the manner of divestiture of the Prince Assets as the Commission may determine is necessary to satisfy the requirements of this Order.

C. Respondents shall deliver the Business Information to the Acquirer as soon as practicable after the Divestiture Date in a manner that ensures their completeness, accuracy and usefulness and meets the reasonable requirements of the Acquirer.

D. No later than the Divestiture Date, Respondents shall, at their sole expense, obtain each Consent required to transfer the Prince Assets, including Contracts and Governmental Authorizations; *provided however,* that Respondents shall assist the Acquirer in obtaining the Contracts or Governmental Authorizations which Respondents have no legal right to assign, transfer or sublicense (even by obtaining relevant Consents).

E. Respondents shall cooperate and assist the Acquirer (or any other person with whom Respondents engage in negotiations to acquire the Prince Assets) with a due diligence investigation of the Prince Assets and the Prince Business, including by

providing sufficient and timely access to all information and employees customarily provided as part of a due diligence process.

F. Respondent Ferro will seek a dismissal with prejudice of the Ferro Proceeding no later than 10 days after the Divestiture Date and provide a copy of the motion for dismissal and the court dismissal to the Commission.

G. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against an Acquirer related to any Intellectual Property acquired pursuant to this Order if such suit would limit or impair the Acquirer's ability to research, develop, manufacture distribute, market, or sell, anywhere in the world, any product acquired pursuant to this Order.

III. Divestiture Agreement

IT IS FURTHER ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order; *provided, however,* that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in this Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.4l(f)(5).

IV. Transitional Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information to the Acquirer, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to Business Information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the Business Information.

B. At the option of the Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the Prince Assets to the Acquirer and (2) allow the Acquirer to operate the acquired Prince Assets in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Acquisition.

C. Respondents shall provide Transitional Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, for up to 12 months after the Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a written request to extend the 12 month time period for providing Transitional Assistance in order to achieve the purposes of this Order.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transitional Assistance at any time upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondent's breach of any agreement relating to Transitional Assistance.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 180 days after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer to evaluate independently and offer employment to any Prince Employee.

B. Until Respondents have fulfilled their obligation to provide Transition Assistance pursuant to Paragraph IV.C, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide the Acquirer a list of all Prince Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to privately interview any of the Prince Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Prince Employees;

3. Remove and not enter into any impediments within the control of Respondents that may deter Prince Employees from accepting employment with the Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Prince Employee who receives an offer of employment from the Acquirer; *provided, however,* that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Prince Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Prince Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Prince Employees by an Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Prince Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Prince Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by the Acquirer to terminate his or her employment with the Acquirer; *provided, however,* Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

D. Respondents Prince and Ferro shall not enforce any noncompete provision or noncompete agreement against any Person seeking employment from or otherwise doing business with the Prince Business.

VI. Asset Maintenance

IT IS FURTHER ORDERED that, pending divestiture of the Prince Assets, Respondents shall operate the Prince Assets in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Prince Assets, to minimize any risk of loss of competitive potential of the Prince Assets, to operate the Prince Assets in the regular and ordinary course of business and in accordance with past practice and in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Prince Assets (including regular repair and maintenance effort), except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, terminate the operations of, or otherwise impair the Prince Assets (other than in the manner prescribed **in** this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Prince Assets;

B. Conduct or cause to be conducted the Prince Business in the regular and ordinary course of business and in accordance with past practice and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Prince Business, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, creditors, agents, and others having business relationships with the Prince Business; and

C. Respondents must warrant to Acquirer of the Prince Assets that (1) the Prince Assets will be operational and without material defect on the date of their transfer to Acquirer of the Prince Assets; (2) there are no material defects in the environmental, zoning, or other permits relating to the operation of the Prince Assets; and (3) Respondents have disclosed all encumbrances on any part of the Prince Assets, including on intangible property. Following the sale of the Prince Assets, Respondents must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits relating to the operation of the Prince Assets.

Provided, however, that Respondents shall not be in violation of this Section VI if Respondents take actions (i) as explicitly permitted or required by any Divestiture Agreement, or (ii) that have been requested or agreed-to by an Acquirer, in writing, and approved in advance by the Monitor (in consultation with Commission staff), in all cases to facilitate the Acquirer's acquisition of the Prince Assets and consistent with the purposes of the Order.

VII. Confidential Information

IT IS FURTHER ORDERED that:

A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting, or defending legal claims, investigations, or enforcing actions threatened or brought against the Prince Assets or Prince Business, or as required by law, rule, or regulation.

B. Respondents shall only disclose Confidential Information to an employee or any other Person if disclosure is permitted in Paragraph VII.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.

C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Smith & Williamson to serve as Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of this Section VIII or Section VI of the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of this Order in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in this Order, Respondents and the Monitor shall comply with this Order.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in this Order;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with this Order on a schedule as determined by Commission staff, and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of this Order, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose ofreviewing Respondents' compliance with their obligations under this Order, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to this Order;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under this Order, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to this Order; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under this Order, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with this Order.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

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

IX. Divestiture Trustee

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 the Prince Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to§ *5([)* 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 these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § *5(l)* of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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

C. Not later than 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 relevant divestitures required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one-year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price.

The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Prince Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

F. 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 Section IX.

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

X. Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any business that manufactures and sells Forehearth Colorants or Glass Enamel anywhere in the world, or manufactures and sells Porcelain Enamel Frit in North America.

XI. Prior Approval for Acquirer

IT IS FURTHER ORDERED that:

A. For a period of 3 years after the Divestiture Date, KPS or any other Acquirer shall not sell, or otherwise convey, through subsidiaries or otherwise, without the prior approval of the Commission, the Prince Business that was divested pursuant to Section II, to any Person; and

B. For a period of 7 years after the term of Paragraph XI.A ends, KPS or any other Acquirer shall not sell, or convey, through subsidiaries or otherwise, without the prior approval of the Commission:

1. the Forehearth Colorant Business to any Person who owns, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership

interest, or other interest, in whole or in part, in any business that manufactures and sells Forehearth Colorant anywhere in the world;

2. the Glass Enamel Business to any Person who owns, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or other interest, in whole or in part, in any business that manufactures and sells Glass Enamel anywhere in the world; or

3. the Porcelain Enamel Business to any Person who owns, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or other interest, in whole or in part, in any business that manufactures and sells Porcelain Enamel in North America,

Provided, however, KPS is not required to obtain prior approval of the Commission under this Paragraph XI.B for a change of control, merger, reorganization, or sale of all or substantially all of KPS's business.

XII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondent ASP shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents ASP and Prince shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents ASP and Prince shall submit interim compliance reports 30 days after this Order is issued, and every 30 days thereafter until Respondents ASP and Prince have fully complied with the provisions of Sections II, IV, and VI of this Order;

2. Respondents ASP and Prince shall submit annual compliance reports one year after the date this Order is issued, and annually thereafter for the next nine years on the anniversary of that date; and

3. Respondents ASP and Prince shall submit additional compliance reports as the Commission or its staff may request;

4. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents ASP and Prince are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents ASP and Prince shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents ASP and Prince have implemented or plan to implement to ensure that they have complied or will comply with each section of the Order; and

5. For a period of 5 years after filing a compliance report, Respondents ASP and Prince shall retain all material written communications with each party identified in each compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling their obligations under this Order during the period covered by such compliance report. Respondents ASP and Prince shall provide copies of these documents to Commission staff upon request; and

C. Respondents ASP and Prince shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents ASP and Prince shall file their compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents ASP and Prince shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XIII. Change in Respondents

IT IS FURTHER ORDERED that Respondents ASP and Prince shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of American Securities Partners VII, L.P. or Prince International Corporation;

B. Any proposed acquisition, merger, or consolidation of American Securities Partners VII, L.P. or Prince International Corporation; or

C. Any other change in Respondent ASP or Prince, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIV. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.71(a)(l) and (2), 16 C.F.R. § 2.71(a)(l) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; or

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

XV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the Prince Business and Prince Assets in a manner at least equivalent in all material respects to the manner in which they were operated prior to the Acquisition.

XVI. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

Nonpublic Appendix A Divestiture Agreement

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

Nonpublic Appendix B Retained Assets

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

Nonpublic Appendix C Retained Leesburg Facility Assets

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

ANALYSIS OF 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 American Securities Partners VII, L.P. ("American Securities"), Prince International Corporation ("Prince"), and Ferro Corporation ("Ferro") that is designed to remedy the anticompetitive effects resulting from Prince's acquisition of Ferro. Pursuant to an agreement dated May 11, 2021, American Securities proposes to acquire Ferro in a transaction valued at approximately $2.1 billion (the "Proposed Acquisition"). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the following the markets: (1) porcelain enamel frit; (2) glass enamel; and (3) forehearth colorants. The Consent Agreement will remedy the alleged violations by preserving the competition that otherwise would be eliminated by the Proposed Acquisition.

Under the terms of the proposed Decision and Order ("Order"), Respondents are required to divest all of Prince's rights and assets related to the following three plants: (1) the porcelain enamel and forehearth colorants plant located in Leesburg, Alabama; (2) the porcelain enamel and forehearth colorants plant located in Bruges, Belgium; and (3) the glass enamel plant located in Cambiago, Italy. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture plant in the normal course of business until the products are ultimately divested. The Commission also issued the Order to Maintain Assets.

The Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the Consent Agreement, along

with the comments received, to make a final decision as to whether it should withdraw from the Consent Agreement, modify it, or make final the proposed Order.

I. The Respondents

Respondent American Securities Partners VII, L.P. ("American Securities") is a private equity firm headquartered in New York, New York.

Respondent Prince International Corporation ("Prince") is a wholly owned subsidiary of American Securities. Prince manufactures a variety of chemicals, minerals, and industrial additives, including porcelain enamel frit, glass enamel, and forehearth colorant. Prince is headquartered in Houston, Texas.

Respondent Ferro Corporation ("Ferro") manufactures a variety of functional coatings and color solutions, including porcelain enamel frit, glass enamel, and forehearth colorant. Ferro is headquartered in Mayfield, Ohio.

II. The Products and Structure of the Markets

Porcelain enamel frit is a glass-based product used to create heat resistant, scratch and corrosion resistant coatings (porcelain enamel) for appliances, water heaters, cookware, and other applications. Porcelain enamel frit is necessary to make porcelain enamel coating. There are no good substitutes for porcelain enamel coating in the various applications in which it is used. Prince supplies its U.S. customers from a plant in Leesburg, Alabama while Ferro suppliers its U.S. customers from a plant in Villagran, Mexico. North America is the relevant geographic area in which to assess the competitive effects of the Proposed Acquisition in porcelain enamel frit. The North American market for porcelain enamel frit is highly concentrated. Respondents have a dominant combined share of sales of the overall North American market for porcelain enamel frit and an even higher share of the sales of the non- captive, merchant North American market for porcelain enamel frit. Almost all of the porcelain enamel frit production capacity in North America outside of that owned by Respondents is possessed by competitors who use it internally and consequently little if any is sold to merchant customers.

Glass enamel is a liquid paste or powder that is added to glass surfaces, such as appliance doors, architectural panels, and glass bottles, for aesthetic purposes, such as adding color or decoration; and to automotive windshields, for functional purposes, such as blocking UV light. There are no good substitutes for glass enamel in the various applications in which it is used. Prince supplies its U.S. customers from a plant in Cambiago, Italy while Ferro suppliers its U.S. customers from a plant in Villagran, Mexico. The world is the relevant geographic area in which to assess the competitive effects of the Proposed Acquisition in glass enamel. The world market for glass enamel is highly concentrated, with the two leading producers, Ferro and Fenzi Holdings SPV S.p.A ("Fenzi"), having a dominant combined market share. Prince is the third largest competitor.

Forehearth colorants are glass-based powders added to the forehearths of glass furnaces during the manufacture of glass bottles to impart a specific color to bottles. There is no good

substitute for forehearth colorants. Prince supplies its U.S. forehearth colorants customers from a plant in Bruges, Belgium and further processes the product at Leesburg, Alabama, while Ferro supplies its U.S. customers from a plant in Villagran, Mexico and further processes the product at Orrville, Ohio. The world is the relevant geographic area in which to assess the competitive effects of the Proposed Acquisition in forehearth colorants. The world market for forehearth colorants is highly concentrated. Ferro and Prince are the two largest producers of forehearth colorants in the world, with a dominant combined market share.

III. Entry

Entry into the three markets at issue would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. Constructing a new plant and acquiring approvals at customer accounts is costly and lengthy.

IV. Competitive Effects

The Proposed Acquisition will eliminate competition between Prince and Ferro and likely allow the merged firm to unilaterally increase the price in the North American market for porcelain enamel frit and in the world market for forehearth colorants. The Proposed

Acquisition will eliminate Prince as an independent competitor in the world market for glass enamel. By removing Prince, the third large competitor in the world and the firm most likely to expand market share in the United States, the Proposed Acquisition decreases the likelihood of future price competition and increases the likelihood of coordination between the merged firm and its largest competitor, Fenzi.

V. The Proposed Order and the Order To Maintain Assets

The proposed Order and the Order to Maintain Assets effectively remedy the competitive concerns raised by the Proposed Acquisition for the three relevant products at issue. Pursuant to the proposed Order, the parties are required to divest Prince's rights and assets related to the three relevant products to KPS Capital Partners, L.P. ("KPS"). The parties must accomplish these divestitures no later than 10 days after Prince consummates the Proposed Acquisition. The proposed Order further allows the Commission to appoint a trustee in the event the parties fail to divest the products.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the Proposed Acquisition. KPS is a capable purchaser with management and employees who have experience acquiring and improving industrial assets resulting from corporate carve-outs, including those resulting from U.S. Department of Justice and Federal Trade Commission consent decrees. It will be able to replicate the competition otherwise lost from the Proposed Acquisition.

The proposed Order contains several provisions to help ensure that the divestitures are successful. The proposed Order requires Prince to provide transitional services to KPS to assist it in establishing its back-office capabilities.

Under the proposed Order, the Commission also will appoint a Monitor to ensure that Prince complies with its obligations under the proposed Order and Order to Maintain Assets. The Commission has appointed Smith & Williamson as the Monitor. Smith & Williamson is a leading UK accountancy firm with over 1800 UK employees and has 17 years of experience acting as a monitor trustee. Smith & Williamson has prior monitoring experience in divestitures ordered by both the Commission and the European Commission ("EC"). The EC also has approved Smith & Williamson as the Monitor in this matter.

In addition to requiring plant divestitures, the proposed Order requires Respondent American Securities to obtain prior approval from the Commission before acquiring assets for the manufacture and sale of products in any of the three relevant markets for ten years. The prior approval provision is necessary because an acquisition of assets for the manufacture and sale of products in any of the three relevant markets likely would raise the same competitive concerns as the Acquisition. The proposed Order further requires KPS to obtain prior approval from the Commission for a period of 3 years before transferring any of the divested assets to any buyer, and for a period of 7 additional years to any buyer with an interest in assets for the manufacture and sale of products in any of the three relevant markets.

* * *

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.

Complaint

IN THE MATTER OF

RESIDENT HOME LLC,
AND
RAN RESKE

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

Docket No. C-4647; File No. 202 3179
Complaint, June 21, 2022 – Decision, June 21, 2022

This consent order addresses Resident Home LLC's advertising of DreamCloud mattresses as of U.S. origin. The complaint alleges that, although Respondents represented that DreamCloud mattresses were "proudly made with 100% USA-made premium quality materials," in numerous instances, DreamCloud mattresses are wholly imported or incorporate significant imported materials and, in all instances, DreamCloud mattresses are finished overseas. The consent order prohibits Respondents from making U.S.-origin claims for their products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial. The order also imposes a judgment of $753,300.

Participants

For the *Commission*: *Julia Solomon Ensor.*

For the *Respondents*: *Tyler Newby, Fenwick & West LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Resident Home LLC, a limited liability company also d/b/a Nectar Sleep, DreamCloud Sleep, Awara Sleep, Level Sleep, Bundle Living, 1771 Living, Cloverlane, Wovenly Rugs, Sleep Authority, and Home Well Designed; and Ran Reske, individually and as an officer of Resident Home LLC, (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 Resident Home LLC ("Resident") is a Delaware limited liability company with its principal office or principal place of business at 340 South Lemon Avenue #9599, Walnut, CA 91789.

2. Resident advertises, labels, offers for sale, and distributes home products to consumers, including, but not limited to, bed-in-a-box-type mattresses sold under a variety of brand names including Nectar Sleep, DreamCloud Sleep, Awara Sleep, Level Sleep, and others. Although Resident maintains storefronts for Nectar Sleep and other brands, Resident primarily

advertises products on its network of websites, including: www.nectarsleep.com; www.dreamcloudsleep.com; www.awarasleep.com; www.levelsleep.com; www.bundleliving.com; www.1771living.com; www.cloverlane.com; www.wovenlyrugs.com; www.sleepauthority.com; www.homewelldesigned.com; and www.residenthome.com.

3. Resident offers for sale, sells, and distributes its products directly to the public throughout the United States.

4. Respondent Ran Reske ("Reske") is a Chief Executive Officer of Resident. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Resident, including the acts and practices alleged in this complaint. Since at least 2019, he has communicated with the Federal Trade Commission on Resident's behalf regarding the acts and practices alleged in this Complaint. In August 2019, he personally signed the Report described *infra* ¶¶13-17, in which he expressly assumed liability for Nectar Brand LLC's compliance with the 2018 Order described *infra* ¶¶ 7-12. His principal office or place of business is the same as that of Resident.

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.

2018 Action and Order

6. On August 28, 2018, the Federal Trade Commission ("FTC") issued a complaint against Resident subsidiary Nectar Brand LLC, also d/b/a Nectar Sleep, DreamCloud, LLC, and DreamCloud Brand, LLC. The complaint, attached as **Exhibit A**, alleged that, in numerous instances, Nectar Brand LLC falsely advertised its mattresses as "assembled in the United States." These claims were false, the complaint alleged, because Nectar Brand LLC wholly imported mattresses from China, and performed no assembly operations in the United States. *See* Exh. A, ¶¶ 5-8.

7. Also on August 28, following a 30-day public comment period on the underlying consent agreement, the Commission entered the final Decision and Order attached as **Exhibit B** (the "Nectar Order"), resolving all matters then in dispute between the 2018 Respondent and the FTC.

8. The Nectar Order, which bound Nectar Sleep LLC and its successors and assigns (the "2018 Respondent"), includes the following provisions:

9. Section I of the Nectar Order enjoins the 2018 Respondent from representing, expressly or by implication, that a product or service is of U.S. origin unless: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States,

the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

10. Section II of the Nectar Order enjoins the 2018 Respondent from making any representation, expressly or by implication, regarding the country of origin of any product or service unless the representation is true, not misleading, and at the time it is made, 2018 Respondent possesses and relies upon a reasonable basis for the representation.

11. Section III.A. of the Nectar Order requires the 2018 Respondent to submit a compliance report one year after entry of the Order.

12. Section V.A. of the Nectar Order requires the 2018 Respondent to submit additional compliance reports or other information requested by a representative of the Commission within 10 days of receipt of a written request.

2019 Compliance Report

13. On August 28, 2019, the 2018 Respondent submitted the required one-year compliance report (the "2019 Report").

14. The 2019 Report explains that since entry of the Nectar Order, the 2018 Respondent underwent several changes to its corporate structure: "DreamCloud, LLC formally changed its name to Nectar Brand LLC on June 19, 2018. Nectar Brand LLC and DreamCloud Brand LLC's sole member, DreamCloud Holdings LLC, formally changed its name . . . to Resident Home LLC on Monday, August 19, 2019. Resident Home LLC is the sole member of Nectar Brand LLC and DreamCloud Brand LLC . . . [and] also sells home furnishings under different brand names." 2019 Report, p.2.

15. In addition, the 2019 Report describes the 2018 Respondent's efforts to comply with each provision of the Nectar Order.

16 The 2019 Report asserts: "DreamCloud has never made US [sic] origin claims about its mattresses and does not make claims that any of the products on its site are made or assembled in the United States." *Id.* at p. 5.

17. The 2019 Report further states: "Nectar and DreamCloud have not created advertisements, marketing materials[,] or representations that their products are of a U.S. origin." *Id.* at 8.

18. Reske signed the 2019 Report in his capacity as Member of DreamCloud Holdings, LLC, Nectar Brand LLC's and DreamCloud Brand LLC's sole member, affirming under penalty of perjury that the 2019 Report was "true and correct." *Id.* at 9.

U.S.-Origin Claims for DreamCloud Mattresses

19. Despite Reske's statements described in Paragraphs 16 and 17, over at least two periods after entry of the Nectar Order, Resident actively advertised DreamCloud mattresses as "proudly made with 100% USA-made premium quality materials" in materials comparing DreamCloud mattresses with Tempur-Pedic mattresses. *See* attached **Exhibit C**.

20. Between December 9, 2018 and June 26, 2020, the "proudly made with 100% USA-made premium quality materials" claim was viewable by any consumer that directly accessed https://www.dreamcloudsleep.com/p/compare/tempurpedic/.

21. Between December 9, 2018 and January 29, 2019, the hyperlink to this content was live on DreamCloud's homepage. On January 29, 2019, Resident removed the hyperlink from the homepage, making the page viewable only to consumers that possessed and directly accessed the URL.

22. On May 6, 2020, Resident reinstated the hyperlink to the "proudly made with 100% USA-made premium quality materials" claim on the DreamCloud homepage. This hyperlink remained live until Commission staff requested a Compliance Report pursuant to Section V.A. of the Nectar Order, demanding Resident's substantiation for the claim. Resident permanently removed the "proudly made with 100% USA-made premium quality materials" claim on June 26, 2020, after receiving our request.

23. On July 6, 2020, Resident confirmed that some DreamCloud mattresses are wholly imported. Other DreamCloud mattresses may contain some U.S. content, but undergo substantial transformation and finishing overseas.

24. Therefore, Resident's claim that DreamCloud mattresses are "proudly made with 100% USA-made premium quality materials" is false.

25. Despite knowing or consciously avoiding knowing that Resident made "proudly made with 100% USA-made premium quality materials" claims for wholly or partially imported DreamCloud mattresses, Reske nonetheless affirmed under penalty of perjury that DreamCloud "has never made US [sic] origin claims about its mattresses and does not make claims that any of the products on its site are made or assembled in the United States . . . [and has] not created advertisements, marketing materials[,] or representations that [its] products are of a U.S. origin."

26. Therefore, this action is in the public interest.

COUNT I

False or Misleading Representation

27. In connection with the advertising, promotion, offering for sale, or sale of DreamCloud mattresses, Respondents have represented, directly or indirectly, expressly or by

implication, that such mattresses are "proudly made with 100% USA-made premium quality materials."

28. In fact, in numerous instances, Respondents' DreamCloud mattresses are wholly imported or incorporate significant imported materials. In all instances, DreamCloud mattresses are finished overseas. Therefore, the representation set forth in Paragraph 27 is false or misleading.

VIOLATION OF SECTION 5

29. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this 21st day of June, 2022, has issued this Complaint against Respondents.

By the Commission, Commissioners Phillips and Wilson dissenting.

Complaint

Exhibit A

1823038

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Maureen K. Ohlhausen
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter

In the Matter of **NECTAR BRAND LLC, a limited liability company, also d/b/a NECTAR SLEEP; DREAMCLOUD, LLC; and DREAMCLOUD BRAND LLC.**	**DOCKET NO. C-4656**

COMPLAINT

The Federal Trade Commission, having reason to believe that Nectar Brand LLC, a limited liability company, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC ("Respondent") is a California limited liability company with its principal office or place of business at 2000 University Drive, Palo Alto, California 94303.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to consumers, including but not limited to mattresses. Respondent advertises these products online, including, but not limited to, on its website, nectarsleep.com.

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

4. Respondent has disseminated or caused to be disseminated advertisements, packaging, and promotional materials for its products, including but not necessarily limited to the attached Exhibit A. This exhibit contains the following statement: "Designed and Assembled in the USA."

5. In numerous instances, including, but not limited to, the promotional materials shown in Exhibit A, Respondent has represented, expressly or by implication, that its mattresses are assembled in the United States.

6. In fact, Respondent's mattresses are wholly imported from China, and Respondent performs no assembly operations in the United States.

7. Therefore, Respondent's express or implied representations that its mattresses are assembled in the United States are false.

COUNT I
(False or Unsubstantiated Representation – Assembled in USA)

8. In connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of its products, Respondent has represented, directly or indirectly, expressly or by implication, that its products, including, but not limited to, mattresses, are assembled in the United States.

9. In fact, certain of Respondent's products are wholly imported. Therefore, the representation set forth in Paragraph 8 is false or misleading, or was not substantiated at the time the representation was made.

Violations of Section 5

10. 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 twenty-eighth day of August, 2018, has issued this Complaint against Respondent.

By the Commission, Commissioner Chopra dissenting.

Donald S. Clark
Secretary

SEAL:

Complaint

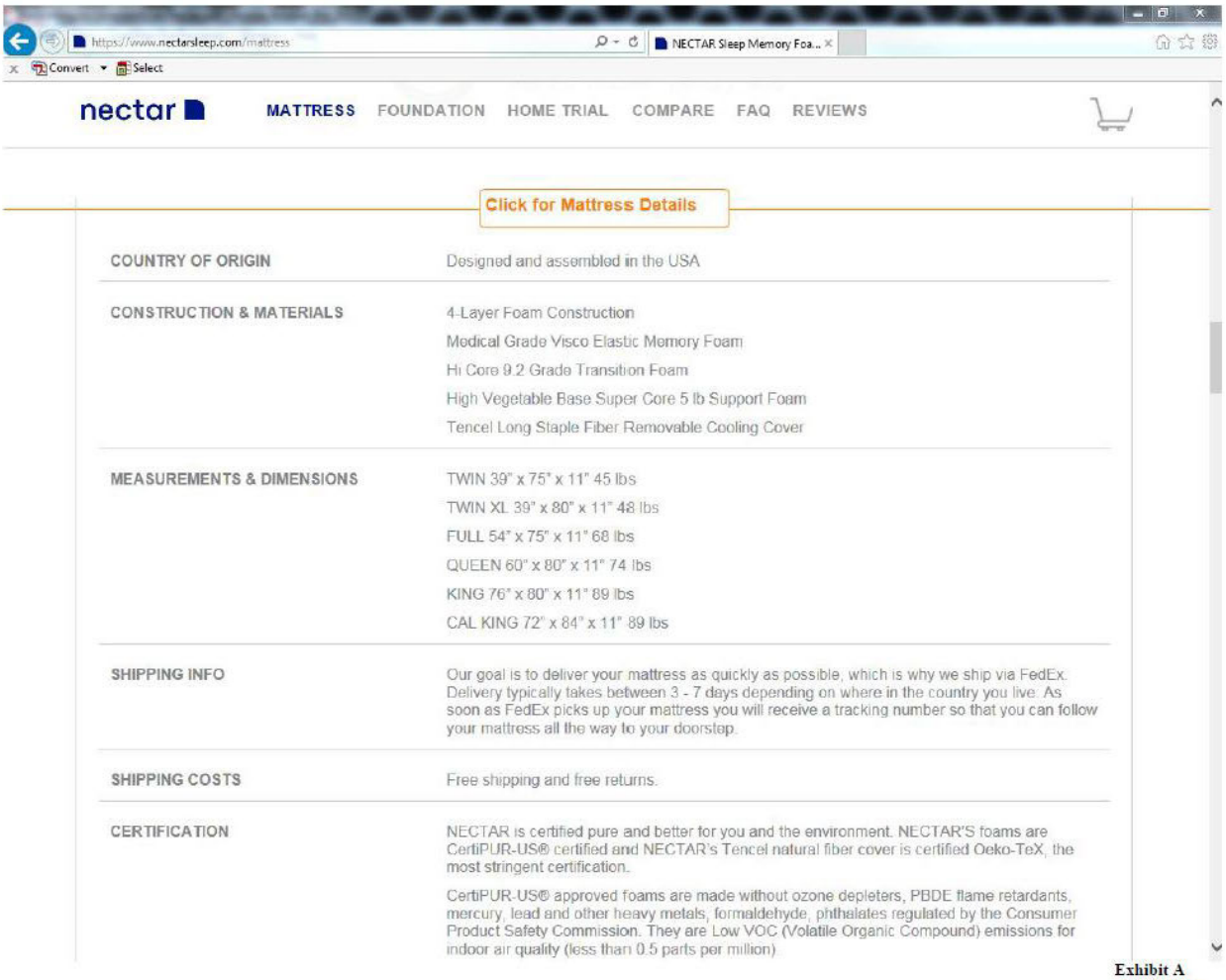

Exhibit A
Exhibit A
p. 3 of 3

Complaint

Exhibit B

1823038

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Maureen K. Ohlhausen
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter

In the Matter of **NECTAR BRAND LLC, a limited liability company, also d/b/a NECTAR SLEEP; DREAMCLOUD, LLC; and DREAMCLOUD BRAND LLC.**	**DECISION AND ORDER** **DOCKET NO. C-4656**

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Complaint

Findings

1. The Respondent is Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand LLC, a California limited liability company, with its principal office or place of business at 2000 University Dr., Palo Alto, CA 94303.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Clear(ly) and conspicuous(ly)" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

   1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

   2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

   3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

   4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

   5. On a product label, the disclosure must be presented on the principal display panel.

   6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

   7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "Made in the United States" means any representation, express or implied, that a product or service, or a component thereof, is of U.S.-origin, including, but not limited to, a representation that such product or service is "made," "manufactured," "built," or "produced" in the United States, or any other U.S.-origin claim.

C. "Respondent" means Nectar Brand LLC, also doing business as Nectar Sleep; DreamCloud, LLC; and DreamCloud Brand, LLC, and its successors and assigns.

Provisions

I.
PROHIBITED MISREPRESENTATIONS REGARDING U.S. ORIGIN CLAIMS

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any mattress, mattress foundation, or any other product or service, must not make any representation, expressly or by implication, that a product or service is Made in the United States unless:

A. The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or

B. A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or

C. For a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

II.
SUBSTANTIATION

IT IS FURTHER ORDERED that Respondent, Respondent's officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection

with promoting or offering for sale any product or service, shall not make any representation, in any manner, expressly or by implication, regarding the country of origin of any product or service unless the representation is true, not misleading, and at the time it is made, Respondent possesses and relies upon a reasonable basis for the representation.

III.
COMPLIANCE REPORTS AND NOTICES

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; and (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of any Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Nectar Brand LLC.

IV.
RECORDKEEPING

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

E. A copy of each unique advertisement or other marketing material making a representation subject to this Order;

F. For 5 years from the date of the last dissemination of any representation covered by this Order:

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

2. All evidence in Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls 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.

V.
COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

VI.
ORDER EFFECTIVE DATES

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate on August 28, 2038, or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 20 years; and

B. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Chopra dissenting.

Donald S. Clark
Secretary

SEAL:
ISSUED: August 28, 2018

Exhibit C

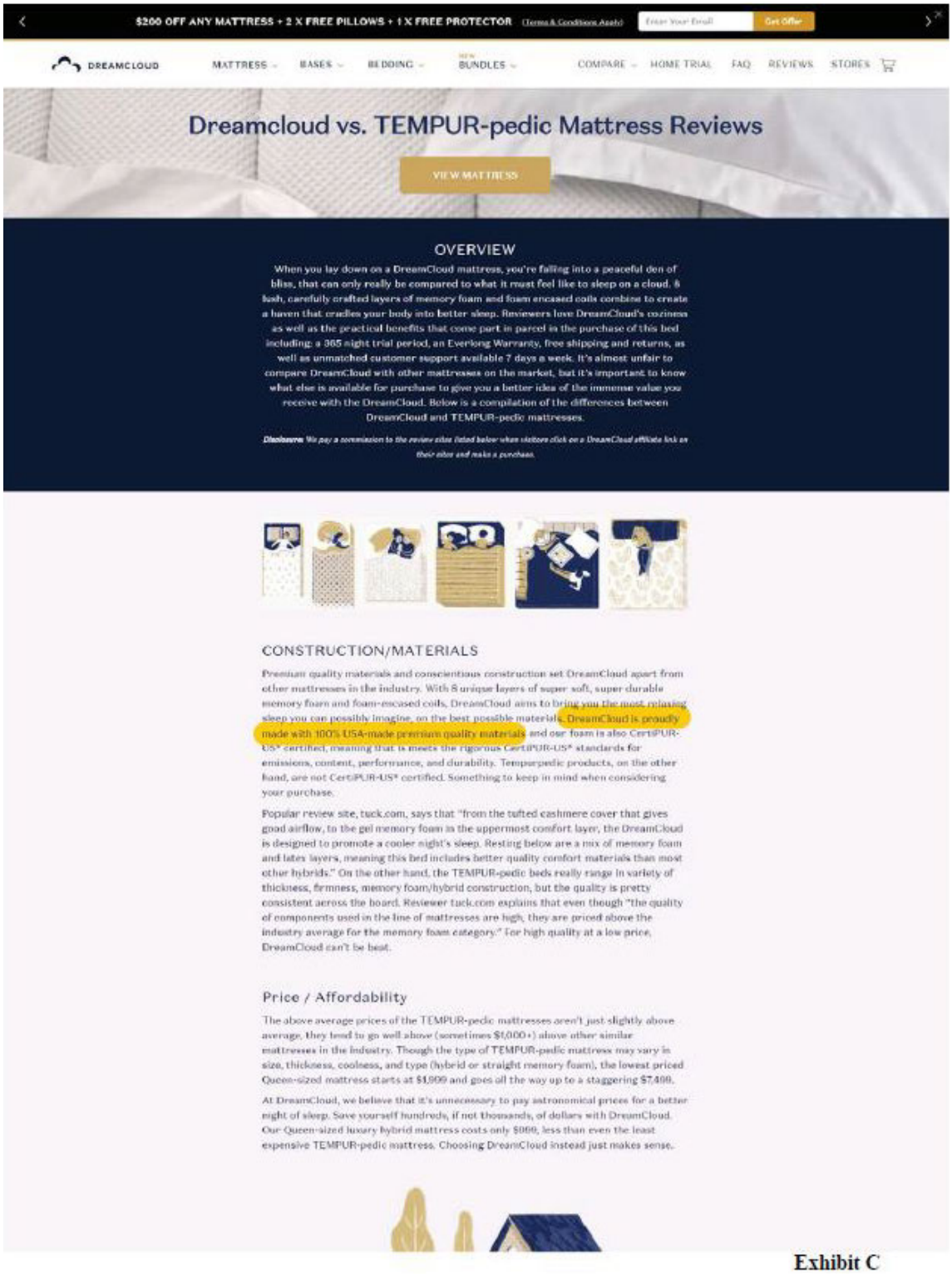

Exhibit C

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondents a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondents with violations of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes includes: 1) statements by Respondents that they neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, they admit the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondents are:

    a. Respondent Resident Home LLC, a Delaware limited liability company with its principal office or principal place of business at 340 South Lemon Avenue #9599; Walnut, CA 91789.

    b. Respondent Ran Reske, an officer of the Proposed Corporate Respondent, Resident Home LLC. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of Resident Home LLC. His principal office or place of business is the same as that of Resident Home LLC.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "**Clear(ly) and conspicuous(ly)**" means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure ("triggering representation") is made through only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. On a product label, the disclosure must be presented on the principal display panel.

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

B. "**Made in the United States**" means any representation, express or implied, that a product or service, or a specified component thereof, is of U.S.-origin, including, but not limited to, a representation that such product or service is "made," "manufactured," "built," "produced," or "crafted" in the United States or in America, or any other U.S.-origin claim.

C. "**Respondents**" means the Corporate Respondent and the Individual Respondent, individually, collectively, or in any combination.

1. "Corporate Respondent" means Resident Home LLC, its successors and assigns, and any joint ventures, subsidiaries, divisions, groups, and affiliates it controls, directly or indirectly.

2. "Individual Respondent" means Ran Reske.

Provisions

I.

Prohibited Misrepresentations Regarding U.S.-Origin Claims

IT IS ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any mattress, or any other product or service, must not make any representation, expressly or by implication, that a product is Made in the United States unless:

A. The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; or

B. A Clear and Conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or

C. For a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

II.

Prohibited Misleading and Unsubstantiated Country-of-Origin Representations

IT IS FURTHER ORDERED that Respondents, and Respondents' officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any mattress, or any other product or service, must not make any representation, expressly or by implication, regarding the country of origin of any product or service unless the representation is non-misleading, including that, at the time such representation is made, Respondents possess and rely upon a reasonable basis for the representation.

III.

Monetary Relief

IT IS FURTHER ORDERED that:

A. Respondents must pay to the Commission $753,300, which Respondents stipulate their undersigned counsel holds in escrow for no purpose other than payment to the Commission.

B. Such payment must be made within 8 days of the effective date of this Order by electronic fund transfer in accordance with instructions provided by a representative of the Commission.

IV.

Additional Monetary Provisions

IT IS FURTHER ORDERED that:

A. Respondents relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission to enforce its rights to any payment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by or on behalf of the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other relief (including consumer information remedies) as it determines to be reasonably related to Respondents' practices alleged in the Complaint. Any money not used is to be deposited to the U.S. Treasury. Respondents have no right to challenge any activities pursuant to this Provision.

E. In the event of default on any obligation to make payment under this Order, interest, computed as if pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for 10 days beyond the date that payment is due, the entire amount will immediately become due and payable.

F. Each day of nonpayment is a violation through continuing failure to obey or neglect to obey a final order of the Commission and thus will be deemed a separate offense and violation for which a civil penalty shall accrue.

G. Respondents acknowledge that their Taxpayer Identification Numbers (Social Security or Employer Identification Numbers) may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

V.

Customer Information

IT IS FURTHER ORDERED that Respondents must directly or indirectly provide sufficient customer information, including sufficient identification of all resellers, to enable the Commission to efficiently administer consumer redress. If a representative of the Commission requests in writing any information related to redress, Respondents must provide it, in the form prescribed by the Commission representative, within 14 days.

VI.

Notice to Customers

IT IS FURTHER ORDERED that Respondents must notify customers as follows:

A. Respondents must identify all consumers who purchased DreamCloud mattresses through the www.dreamcloudsleep.com website between: (1) December 9, 2018 and January 29, 2019; or (2) May 6, 2020 and June 26, 2020 (collectively, "Affected Customers").

1. Such Affected Customers, and their contact information, must be identified to the extent such information is in Respondents' possession, custody, or control;

2. Affected Customers include those identified at any time, including after Respondents' execution of the Agreement through the eligibility period, which runs for 1 year after the issuance date of the Order.

B. Respondents must notify all identified Affected Customers by mailing or emailing each a notice in the form shown in Attachment A. The communication containing the notification letter may contain a copy of this Order, but no other document or enclosure.

C. Respondents must notify all Affected Customers within 30 days after the issuance date of this Order and any Affected Customers identified thereafter within 30 days of their identification.

D. Respondents must report on their notification program under penalty of perjury:

1. Respondents must submit a report within 60 days of entry of this Order and at the conclusion of the program summarizing its compliance to date.

2. If a representative of the Commission requests any information regarding the program, including any of the underlying customer data, Respondents must submit it within 10 days of the request.

3. Failure to provide required notices or any requested information will be treated as a continuing failure to obey this Order.

VII.

Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. Individual Respondent, for any business that such Respondent, individually or collectively with Corporate Respondent, is the majority owner or controls directly or indirectly, and Corporate Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives who participate in conduct

related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

VIII.

Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondent must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Respondent must: (a) identify all his telephone numbers and all his physical, postal, email and Internet addresses, including all residences; (b) identify all his business activities, including any business for which such Respondent performs services, whether as an employee or otherwise, and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. Each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services, whether as an employee or otherwise, and (ii) any entity in which such Respondent has any ownership interest and over which Respondents have direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Resident Home LLC, 2023179.

IX.

Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records and retain each such record for 5 years. Specifically, Corporate Respondent and Individual Respondent, for any business that such Respondent, individually or collectively with Corporate Respondent, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records of all customer complaints and refund requests concerning the subject matter of this Order, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

E. A copy of each unique advertisement, label, or other marketing material making a representation subject to this Order; and

F. For 5 years from the date of the last dissemination of any representation covered by this Order, all materials that were relied upon in making the representation.

X.

Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Respondent, pursuant to Section 604(2) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

XI.

Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioners Phillips and Wilson dissenting.

ATTACHMENT A: NOTICE TO CUSTOMERS

The notification email or letter must be in the following form, from an authorized Resident Home LLC address or email address, appearing on Resident Home LLC's letterhead if in letter form, and containing a Resident Home LLC signature line with the sender's full contact information:

Subject: Settlement of FTC deceptive advertising case

Dear <Name of customer>:

Our records show that you bought a mattress from www.dreamcloudsleep.com between either (1) December 9, 2018 and January 29, 2019, or (2) May 6, 2020 and June 26, 2020. During those times, our website linked to a previously-deleted webpage comparing the DreamCloud mattress to a competitor's mattress. That page described the DreamCloud mattress as "proudly made with 100% USA-made premium quality materials." We're writing to tell you that the Federal Trade Commission, the nation's consumer protection agency, has sued us for deceptive or false advertising concerning that statement. According to the FTC, our claim that DreamCloud mattresses were "proudly made with 100% USA-made premium quality materials" was misleading.

To settle the FTC's lawsuit, we agreed to contact our customers who bought a DreamCloud mattress during that time to tell them that our DreamCloud mattresses actually contain significant imported materials and, in many cases, are wholly imported.

If you have questions about this lawsuit, visit [get short URL]. For more information about "Made in USA" advertising, visit [get short URL].

Sincerely,

[signature]

[Resident LLC signature block]

STATEMENT OF THE COMMISSION

October 8, 2021

The parties named in this matter are no strangers to the Commission. In 2018, the FTC finalized a settlement with Nectar Brand LLC (also doing business as DreamCloud, LLC, and DreamCloud Brand LLC) ("Nectar") related to false "Assembled in USA" claims about the company's wholly imported mattresses. Shortly after that settlement, CEO Ran Reske and Nectar's other officers reorganized the company and its subsidiaries under a new ultimate parent entity, Resident Home LLC ("Resident").

Despite the reorganization and being under active compliance monitoring as part of the 2018 Nectar order, old habits die hard. Misleading made in USA ("MUSA") claims continued to appear on the website of DreamCloud Brand LLC in 2019 and 2020, contrary to Reske's statements made under penalty of perjury as part of required compliance reports.

Today's action sends an unambiguous message about the importance of complying with prior Commission orders. In addition to injunctive provisions, the proposed settlement contains monetary relief of $753,300 and requires Resident to notify consumers of the FTC's action. Together with the Commission's recent MUSA rule[1], these remedies signal to businesses that MUSA abuses—which harm both consumers and honest competitors—will not be tolerated by the FTC.

Our dissenting colleagues suggest that the proposed settlement is not authorized by statute. This is incorrect. The settlement is squarely within the Commission's statutory authority.

The dissent contends that the monetary relief in this settlement goes beyond what is permitted by Section 19 of the FTC Act. In fact, Section 19 expressly authorizes payment of redress and damages. The dissent attempts to sidestep this clear statutory authority by narrowly equating "damages" with restoration of money to particular consumers. However, such an interpretation runs contrary to the standard legal meaning of the term.[2] Furthermore, MUSA fraud can result in significant consequential damages, both to consumers and, especially, to honest businesses that lose out on sales. Against this backdrop, the proposed monetary relief, far from being a penalty of the sort prohibited by Section 19, is reasonable and well within the Commission's legal authority.

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1 See Press Release, Fed Trade Comm'n, FTC Issues Rule to Deter Rampant Made in USA Fraud (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud.

2 See Rohit Chopra and Samuel Levine, The Case for Resurrecting the FTC Act's Penalty Offense Authority, U. PA. L. REV. (forthcoming), footnote 37, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256 ("Black's Law Dictionary defines consequential damages as '[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.' DAMAGES, Black's Law Dictionary (11th ed. 2019). We have been unable to identify a Section 19 matter where the FTC pursued damages, which is traditionally understood to be a legal remedy rather than an equitable remedy. Unlike equitable relief, damages can conceivably capture a broad range of harms, including indirect consequences of deception. As the FTC faces threats to its authority to seek equitable relief, the agency should consider pursuing this alternative form of relief in more cases.").

The dissent also presents a highly restrictive reading of the types of relief "explicitly authorized" by Section 19. But despite admonishing the Commission "that the words of a statute matter", the dissent misses the statute's language expressly stating that the relief available is not limited to the types explicitly enumerated ("Such relief may include, but shall not be limited to…"). Thus, even if the dissent were not mistaken about what is covered under "damages", the relief obtained here still would not be foreclosed by the statutory language.

Finally, even if the dissent were not incorrect about the extent of the relief the Commission could obtain under Section 19 at trial, it would still be wrong about the lawfulness of the relief obtained in this *settlement*. Supreme Court precedent makes clear that federal courts may approve settlements that include relief beyond what could have been awarded at trial.[3]

We agree with our dissenting colleagues that Congress should act swiftly to restore our Section 13(b) authority, and like them we have directly urged Congress to do so.[4] But, as we have also consistently emphasized, the FTC needs to use all its tools to protect consumers and competition within the bounds of our existing authority.[5] While Congress works to deliver a

3 Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) ("a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial").

4 See Press Release, Fed Trade Comm'n, FTC Asks Congress to Pass Legislation Reviving the Agency's Authority to Return Money to Consumers Harmed by Law Violations and Keep Illegal Conduct from Reoccurring (Apr. 27, 2021), https://www.ftc.gov/news-events/press-releases/2021/04/ftc-asks-congress-pass-legislation-reviving-agencys-authority. See also Hearing on "Strengthening the Federal Trade Commission's Authority to Protect Consumers": Before the U.S. Senate Committee on Commerce, Science, and Transportation, Prepared Oral Statement of FTC Commissioner Noah Joshua Phillips, Fed. Trade Comm'n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589176/formatted_prepared_statement_0420_senate_hearing_42021_final.pdf; Hearing on "Strengthening the Federal Trade Commission's Authority to Protect Consumers": Before the U.S. Senate Committee on Commerce, Science, and Transportation, Oral Statement of Commissioner Christine S. Wilson, Fed. Trade Comm'n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf; Hearing on "Strengthening the Federal Trade Commission's Authority to Protect Consumers": Before the U.S. Senate Committee on Commerce, Science, and Transportation, Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter, Fed. Trade Comm'n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589184/opening_statement_april_20_senate_oversight_hearing_420_final.pdf; Hearing on "Strengthening the Federal Trade Commission's Authority to Protect Consumers": Before the U.S. Senate Committee on Commerce, Science, and Transportation, Prepared Opening Statement of Commissioner Rohit Chopra, Fed. Trade Comm'n (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589172/final_chopra_opening_statement_for_senate_commerce_committee_20210420.pdf.

5 See, e.g., Joint Statement of Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter Concurring in Part, Dissenting in Part, In the Matter of Flo Health, Inc., Fed. Trade Comm'n (Jan. 13, 2021), https://www.ftc.gov/system/files/documents/public_statements/1586018/20210112_final_joint_rcrks_statement_on_flo.pdf; Remarks of Commissioner Rebecca Kelly Slaughter, FTC Data Privacy Enforcement: A Time of Change, Cybersecurity and Data Privacy Conference, New York University School of Law (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf.

Section 13(b) fix, Section 19 and other extant statutory tools[6] will be crucial in allowing the FTC to obtain monetary redress in consumer protection cases.

6 For instance, violators of administrative orders are subject to penalties and various forms of relief under Section 5(l) of the FTC Act. See Statement of Rohit Chopra In the Matter of Resident Home LLC Commission File No. 2023179, Oct. 7, 2021.

Concurring Statement

STATEMENT OF COMMISSIONER ROHIT CHOPRA

October 7, 2021

Wow, that was fast. Soon after the Federal Trade Commission "punished" Nectar Sleep through a no-money, no-fault order, the company and its affiliates clearly realized the FTC wasn't serious about Made in USA fraud, so here we are again.

FTC orders are not suggestions, but many bad actors view them as such.[1] And when companies do not adhere to agency orders, it is often a sign of more serious problems.[2] Violations of FTC orders are punishable with civil penalties and a broad range of other relief.

The Commission is proposing to settle the matter by ordering Resident Home, Nectar Sleep's new parent company, to pay $753,300. The Commission's complaint also charges Resident's CEO, Ran Reske, with serious wrongdoing. Reske signed a report, under penalty of perjury, stating that Resident Home had removed all covered Made in USA claims from its subsidiaries' websites and that Resident had never made Made in USA claims about its DreamCloud mattress. This was false.

The proposed settlement binds Nectar Sleep, as well as its new parent company, ensuring that any corporate musical chairs will not allow the company to dodge the FTC's order. The proposed order also requires the companies to provide notice to consumers who purchased a mattress while the false claims appeared.

Commissioner Slaughter has rightfully noted that the Commission must use all of its tools to protect the marketplace and make victims whole. This case is no exception. The settlement is reasonable and squarely within the Commission's legal authority.

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1 This follows a slew of other repeat offenders when it comes to Made in USA requirements, a clear demonstration of the need for the policy shift the FTC is now making. See Rohit Chopra, Commissioner, Fed. Trade Comm'n., Statement of Commissioner Rohit Chopra Regarding the Notice of Proposed Rulemaking on Made in USA (June 22, 2020), https://www ftc.gov/system/files/documents/public_statements/1577107/p074204musachoprastatementrev.pdf. See e.g., In the Matter of Williams-Sonoma, Inc., No. C-4724 (July 2020), https://www.ftc.gov/system/files/documents/cases/2023025c4724williamssonomaorder.pdf. The Commission opened an investigation but, after some behavior alterations by Williams-Sonoma, the 2018 investigation was closed, only to be renewed in 2020 when Williams-Sonoma was at it again. See also U.S. v. iSpring Water Systems, LLC, et al., No. 1:16-cv-1620-AT (N.D. Ga. 2019). After making false claims that its water filtration systems were made in the United States and entering into an administrative order with the FTC in 2017, iSpring went back to making false claims only a year later, triggering the violation of the 2017 order.

2 Rohit Chopra, Comm'r, Fed. Trade Comm'n. Repeat Offenders Memo (May 14, 2018), https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

I. Disguised Opposition

My dissenting colleagues purport that this proposed action – which was agreed to by Resident Home and Reske – is not authorized by statute. Their arguments fail on policy and legal grounds.

Commissioners Phillips and Wilson have consistently supported no-money, no-fault settlements, even in cases of egregious Made in USA fraud.[3] I understand that, as a matter of policy, they do not support serious consequences for Made in USA fraud and have expressed support for the longstanding permissive policy of the past.[4] However, their dissenting statement disguises this *policy* opposition as an argument about the Commission's *legal* authority. There are several pieces of evidence to suggest that Commissioners Phillips and Wilson's resistance is based on policy grounds, not on legal grounds.

First, Commissioners Phillips and Wilson argue they must have express statutory authorization to accept monetary remedies in settlements. However, less than two months after the Supreme Court ruled that the FTC cannot obtain monetary relief in certain federal court actions, both Commissioners Phillips and Wilson voted for an $18 million order to settle a complaint brought under Section 13(b) of the FTC Act – the exact authority the Supreme Court explicitly ruled against the FTC on.[5] This not the only example where Commissioners Phillips and Wilson have agreed to settle complaints with remedies that are not specifically enumerated by statute.

To further disguise the nature of their opposition, Commissioners Phillips and Wilson assert that the Commission is accepting monetary remedies in an administrative settlement not permitted by Section 19 of the Federal Trade Commission Act. In reality, Section 19 of the FTC Act expressly authorizes the payment of redress and damages. Consequential damages in Made in USA fraud can be considerable, particularly when it comes to harms to law-abiding businesses whose sales were siphoned. In settlements, parties can save time and resources by making the best estimates – adjusted for risk – on the right resolution. It would have been costly to specifically identify each harmed consumer and business, but it is clear the proposed monetary relief is reasonable, given our legal authority.

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3 See Press Release, Fed Trade Comm'n, FTC Approves Final Consents Settling Charges that Hockey Puck Seller, Companies Selling Recreational and Outdoor Equipment Made False 'Made in USA' Claims (Apr. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-approves-final-consents-settling-charges-hockey-puck-seller; In the Matter of Sandpiper Gear of California, Inc. et al., No. 182-3095, https://www ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter; In the Matter of Underground Sports d/b/a Patriot Puck, et al., No. 182-3113 (Apr. 2019), https://www ftc.gov/enforcement/cases-proceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al.

4 Id.

5 See Press Release, Fed Trade Comm'n, LendingClub Agrees to Pay $18 Million to Settle FTC Charges (July 14, 2021), https://www ftc.gov/news-events/press-releases/2021/07/lendingclub-agrees-pay-18-million-settle-ftc-charges. Given the alternative paths the Commission could have pursued to address the conduct at hand, I believe the settlement was appropriate even in spite of the Supreme Court's ruling. Indeed, the Commission's proposed stipulated judgment was entered by the court.

In addition, Commissioners Phillips and Wilson imply that to obtain the proposed remedies, the Commission must file multiple complaints in our administrative tribunal and in federal court.

However, Commissioner Phillips and Wilson know that the Commission does not regularly prosecute the same conduct in multiple fora. Commissioners need not concurrently charge an entity for the same consumer protection violation of law in its administrative tribunal and in federal court, even when it may be authorized, like in civil penalty actions under Section 5(l).

The facts and evidence clearly show that DreamCloud violated an administrative order, triggering penalties and a broad range of relief under Section 5(l) of the FTC Act. Even if Section 19 of the FTC Act did not authorize damages, it is perfectly appropriate for the Commission to settle all of these claims at once, rather than pursue an additional action for civil penalties.

It is obvious that today's proposed action is legally sound. If Commissioners Phillips and Wilson are voting against the proposed settlement because of their preference for no-consequences settlements in Made in USA fraud matters, then they should be upfront with the public and state so plainly.

II. Conclusion

The FTC has a troubling history of strong-arming small and independent business owners – including church organists[6] and skating teachers[7] – into settlements, while allowing those who repeatedly break the law to escape unscathed,[8] often with the help of high-priced FTC alumni.

In this matter, the Commission is proposing a settlement to hold accountable a repeat offender represented by a sophisticated law firm. I am pleased that the agency's abusive and inappropriate double standard is starting to fade away.

Finally, for decades, there was a bipartisan consensus among FTC Commissioners that Made in USA fraud should not be penalized. In 1994, Congress granted the FTC strong tools to combat Made in USA fraud, but Commissioners essentially ignored them. Fortunately, that era is also over.

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6 In the Matter of American Guild of Organists, Fed. Trade Comm'n, https://www ftc.gov/enforcement/cases-proceedings/151-0159/american-guild-organists.

7 In the Matter of Professional Skaters Association, Inc., Fed. Trade Comm'n, https://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter.

8 See e.g. Devin Coldewey, 9 reasons the Facebook FTC settlement is a joke, TECHCRUNCH (July 24, 2019), https://techcrunch.com/2019/07/24/9-reasons-the-facebook-ftc-settlement-is-a-joke/.

Dissenting Statement

Effective August 13, 2021, individuals and companies engaging in Made in USA fraud, including first-time offenders, will be subject to stricter sanctions under the FTC's Made in USA Labeling Rule. I hope my colleagues will fully support enforcement actions to hold bad actors accountable under this rule. The families and honest businesses – long ignored by past Commissioners – are counting on us to live up to the law.

DISSENTING STATEMENT OF COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON

October 7, 2021

That didn't take long. Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act[1]— remedies that, in fairness to the agency, were blessed by appellate courts for decades[2]— the Commission now votes to accept monetary remedies not permitted by Section 19.

We commend staff for their diligent work on this case, and remain committed to continued Made in the U.S.A. enforcement.[3] But we believe that the monetary redress in this case exceeds our authority, and so we respectfully dissent.

In 2018, the Commission entered an administrative order against Nectar Brand LLC, also d/b/a Nectar Sleep, DreamCloud LLC, and DreamCloud Brand LLC ("Nectar Order") and its successors and assigns for making "Assembled in USA" claims for wholly-imported mattresses. Despite being under order, over at least two periods between December 2018 and June 2020, the Complaint alleges that Nectar deceptively advertised DreamCloud mattresses as "proudly made with 100% USA-made premium quality materials".

Since entry of the Nectar Order, the 2018 Respondent underwent several changes to its corporate structure. In 2019, Resident Home LLC was created as the parent company of Nectar

1 AMG Capital Management, LLC v. FTC, 141 S. Ct. 1341 (2021).

2 See, e.g., FTC v. H.N. Singer, Inc.,668 F.2d 1107, 1112-1113 (9th Cir. 1982); FTC v. Rare Coin & Bullion Corp., 931 F.2d 1312, 1314-1315 (8th Cir. 1991); FTC v. Bronson Partners, LLC, 654 F.3d 359, 365 (2d Cir. 2011).

3 See, In the matter of Chemence, Inc., File No. X1600321 (Feb. 2021), https://www ftc.gov/enforcement/cases-proceedings/X160032/chemence-inc; In the matter of Gennex Media, File No. 2023122 (Apr. 2021), https://www.ftc.gov/enforcement/cases-proceedings/2023122/gennex-media-matter; In the matter of Williams-Sonoma, Inc., File No. 2023025 (July 2020), https://www ftc.gov/enforcement/cases-proceedings/202-3025/williams-sonoma-inc-matter. Unlike Commissioners Chopra and Slaughter, we have supported every Made in U.S.A. enforcement action brought during our tenure.

Brand LLC and DreamCloud Brand LLC. We do not have reason to believe that Resident Home LLC is a successor or assign of Nectar Brand LLC and is covered by the Nectar Order.

This state of play left the Commission with at least two choices. It could choose to pursue an order enforcement action in federal court and seek civil penalties.[4] Alternatively, or in addition to taking action against Nectar Brand, LLC, it could choose to pursue a *de novo* administrative action and seek a new order that would cover the company, its corporate parent Resident Home LLC, and Resident Home's CEO Ran Reske, while ensuring that any future violations would result in a civil penalty. While valid justifications support any of these approaches, the Commission ultimately determined that seeking a new, broader order would best protect consumers.

In choosing to proceed only administratively, the Commission gave up its ability to obtain civil penalties; but it can still seek redress on behalf of injured consumers pursuant to Section 19 of the FTC Act. While the process is somewhat convoluted, Section 19 permits the Commission to secure certain monetary relief, including, *inter alia*, "the refund of money" and "the payment of damages".[5] As the legislative history underscores, the purpose of this relief is to allow the Commission to act "to make specific consumers whole…".[6] Section 19 allows the Commission to obtain refunds for specific, identified injured consumers.[7] It expressly precludes "the imposition of any exemplary or punitive damages".[8] Under Section 19, the FTC does not have authority to obtain disgorgement of ill-gotten gains, another (more penal[9]) form of equitable monetary relief.

Despite these clear limitations, the Commission's proposed order includes monetary redress of $753,300, with any remainder not used for redress to be disgorged to the Treasury. The complaint does not include details that would help the public understand how the Commission arrived at this amount, and we are not at liberty to reveal non-public information. But our view of the facts is that the figure obtained far exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages. The majority points to language in Section 19 that also authorizes redress of injury to "other persons" (besides consumers) resulting from the unlawful practices alleged.[10] We have seen

4 The Commission statement and Commissioner Chopra's separate statement assert that evidence clearly showed that DreamCloud violated an administrative order. Despite the majority's paean to the value of vindicating Commission orders, we do not plead an order violation in the complaint. We support the FTC's longstanding view that order obligations should reflect pleadings.

5 15 U.S.C. 57b(b).

6 S. Rept. 93-151, 93d Cong., 2d Sess., at 27-28 (May 14, 1973).

7 See FTC v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993).

8 15 U.S.C. 57b(b).

9 See Liu v. Securities and Exchange Commission, 140 S. Ct. 1936 (2020).

10 15 U.S.C. 57b(b) ("The court…shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or

no evidence of such harm in this matter. No one quibbles that the amount of money here exceeds any reasonable estimate of injury. It might plausibly be consistent with a penalty or with the disgorgement of ill-gotten gains, but we have no authority to obtain such relief under Section 19.[11] The Commission makes clear in its statement that the purpose of the monetary relief in question is to penalize, not to make consumers whole.[12]

The Supreme Court handed down its decision in *AMG Capital Management, LLC v. FTC* in April,[13] and made clear that the words of a statute matter. Those words trump the policy preferences of commissioners. That decision should have been a wake-up call, a reminder to the Commission that, no matter how egregious the conduct or righteous our cause, the Commission is not entitled to go beyond the bounds of what the law permits. If we continue to flout the limits of our authority, the Commission should fully expect additional rebukes from the courts.

The *AMG* decision has significantly impacted the ability of the FTC to pursue wrongdoers and remediate law violations through the imposition of monetary relief. So we reiterate our call to Congress to pass legislation to restore the ability of the FTC to seek monetary remedies under Section 13(b) of the FTC Act in appropriate circumstances. But the law says what it says, and we do not support using the cloak of a settlement to overstep the authority we have.[14]

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deceptive act or practice, as the case may be."); see also Joint Statement of Commissioner Slaughter, Chair Khan, and Commissioner Chopra In the Matter of Resident Home, 2, FN4 Commission File No. 202317.

11 The majority is correct that Section 19 permits "damages". The majority, though, is not entitled to its own facts. The facts are that only a small number of consumers saw DreamCloud's deceptive statements over a two-year period, and only a miniscule number of those consumers actually purchased mattresses. The evidence presented comes nowhere near demonstrating the extent to which deceptive MUSA claims distorted consumers' decisions to purchase the mattresses. Although we cannot share the underlying analysis with the reader, the monetary remedy far exceeds any reasonable estimate of Section 19 damages. As the majority makes clear in the Commission statement, it is assessing a penalty under cover of Section 19.

12 In his separate statement, Commissioner Chopra also claims that we do not support consequences for Made in the U.S.A. fraud. By that logic, Commissioner Chopra's votes against privacy enforcement in cases like Facebook and Google/YouTube show his enthusiasm for their business models and distaste for enforcement against large technology platforms. The issue here is the Commission trying to eat its Section 19 cake and have its civil penalties too. We cannot do both, however we feel about policy. See Statement of Rohit Chopra In the Matter of Resident Home LLC, Commission File No. 202317. See also, Dissenting Statement of Commissioner Rohit Chopra In re: Facebook, Inc., Commission File No. 1823109 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_facebook_7-24-19.pdf; Dissenting Statement of Commissioner Rohit Chopra In the Matter of Google LLC and YouTube, LLC, Commission File No. 1723083 (Sep. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf.

13 AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

14 The majority is correct that, as a practical matter, the government has the ability to extort that to which it is not entitled under law. As we have said on other occasions, though, just because we can does not mean that we should. Joint Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, U.S. v. iSpring Water Systems, LLC, Commission File No. C4611 (Apr. 12, 2019),

Dissenting Statement

If the goal in this case were to maximize money paid by the Respondents as punishment and to deter others from engaging in similar conduct, the Commission was free to enforce the original Nectar Order and seek civil penalties. That was the road not taken. In choosing this road, with a new and broader order, the Commission is obligated to limit monetary relief to the amount necessary to redress injury, as explicitly authorized by Section 19. Because this settlement exceeds those clearly delineated bounds, we must respectfully dissent.

https://www.ftc.gov/system/files/documents/public_statements/1513499/ispring_water_systems_llc_c4611_modified_joint_statement_of_commissioners_phillips_and_wilson_4-12.pdf.

Concurring Statement

JOINT STATEMENT OF CHAIR LINA M. KHAN, COMMISSIONER REBECCA KELLY SLAUGHTER, AND COMMISSIONER ALVARO M. BEDOYA

June 21, 2022

Today, the Commission votes to enter the settlement order with Resident Home for false made in the USA claims, in violation of Section 5. A majority of Commissioners voted for this initial settlement in October and published a statement in support.[1] We now vote to enter into this final settlement.

Resident Home is the parent company of Nectar Sleep, a repeat offender already under order for false made in the USA claims.[2] Because Resident Home is a newly-created corporate parent of Nectar Sleep, an action for order violation directly against Resident Home would have been fraught with legal uncertainty. Instead, Commission staff pursued a *de novo* settlement against Resident Home, which now covers Resident Home and all of its subsidiaries, prohibits them from making unsubstantiated claims, and requires them to pay $753,000 in monetary relief pursuant to a Section 19 damages theory.

Commissioners Phillips and Wilson vote against a settlement because they believe that staff could not prove that Resident Home consumers suffered $753,000 in damages, and so the settlement illegally requires the monetary relief beyond the Commission's statutory authority. We disagree. For the reasons stated in the previous majority statement, Section 19 is the correct vehicle to require monetary relief in this matter and the quantity of monetary relief agreed on by the parties is appropriate to "redress injury."[3] In any case, our dissenting colleagues dispute neither that the Commission was entitled to monetary relief (which they would have sought as civil penalties through an order enforcement action[4]) nor injunctive relief for Resident Home (which they agree can be done through an administrative action[5]).

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1 Joint Statement of Chair Lina Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter In the Matter of Resident Home LLC (hereinafter "Original Joint Statement") (Oct. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597282/2023179khanslaughterchopraresidenthomestatement.pdf.

2 Fed. Trade Comm'n, In the Matter of Nectar Brand LLC (Sept. 12, 2018), https://www ftc.gov/legal-library/browse/cases-proceedings/182-3038-nectar-brand-llc-matter.

3 15 U.S.C. § 57b(b). See also Original Joint Statement at 2; Statement of Commissioner Rohit Chopra at 3 (Oct. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597266/chopra_statement_on_resident_home.pdf.

4 Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson In the Matter of Resident Home LLC (observing that the Commission "could choose to pursue an order enforcement action in federal court and seek civil penalties"), https://www.ftc.gov/system/files/documents/public_statements/1597270/resident_home_dissenting_statement_wilson_and_phillips_final_0.pdf.

5 Id. (observing that the Commission "could choose to pursue a de novo administrative action and seek a new order").

Concurring Statement

We support staff's proposed resolution of this matter. In light of the dramatically changing legal landscape, including the Supreme Court's decision in *AMG*[6] and recent appellate decisions,[7] staff is operating under extraordinarily demanding conditions. We believe the result in this matter reflects Commission staff at its best, and we gladly vote to enter the settlement in this matter.

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6 AMG Capital Mgmt. v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021).

7 See, e.g., Jarkesy v. Sec. & Exch. Comm'n., 34 F.4th 446 (5th Cir. 2022).

DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON AND COMMISSIONER NOAH JOSHUA PHILLIPS

June 21, 2022

Readers should refer to our prior dissent in Resident Home. <Link>

In October 2021, the Commission voted to seek comment on a proposed consent with Resident Home LLC, the parent company of Nectar Brand LLC and DreamCloud Brand LLC, and its CEO Ran Reske. The order proposed to resolve allegations that Nectar deceptively advertised DreamCloud mattresses as "proudly made with 100% USA-made premium quality materials." The proposed order included monetary redress of $753,300, pursuant to Section 19 of the FTC Act. The Commission votes today to enter the proposed order unchanged.

As we explained in our joint dissent in October, we believe this settlement exceeds the clearly delineated bounds of Section 19.[1] This Section permits the Commission to secure certain monetary relief, including, *inter alia*, "the refund of money" and "the payment of damages" but expressly precludes "the imposition of any exemplary or punitive damages."[2] The FTC does not have authority, under Section 19, to obtain disgorgement of ill-gotten gains, another (more penal[3]) form of equitable monetary relief. The statement further explained that, in our view, the monetary redress in this settlement far exceeds any injury suffered by those consumers who saw the deceptive statement and purchased a DreamCloud mattress or any reasonable estimate of damages.[4] This fact is not disputed.

The one comment received in response to this matter supports our view. We note that we support the staff's active enforcement of deceptive Made in USA claims and the injunctive relief contained in this order. Our disagreement with the terms of this settlement relates exclusively to the monetary relief. For the reasons stated in our prior dissent, which contains a complete distillation of our views, we respectfully dissent from the entry of this final order.

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1 Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, In the Matter of Resident Home LLC., No. 2023179 (Oct. 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson-matter-resident-home-llc.

2 15 U.S.C. 57b(b).

3 See Liu v. Securities and Exchange Commission, 140 S. Ct. 1936 (2020).

4 The statement in the Secretary's letter to the effect that the amount in question represents the Commission and the defendants' assessment of "damages" is not supported.

ANALYSIS OF 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 Resident Home LLC, also d/b/a Nectar Sleep, DreamCloud Sleep, Awara Sleep, Level Sleep, Bundle Living, 1771 Living, Cloverlane, Wovenly Rugs, Sleep Authority, and Home Well Designed, and Ran Reske ("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 Respondents' advertising of DreamCloud mattresses as of U.S. origin. According to the FTC's complaint, Respondents represented that DreamCloud mattresses were "proudly made with 100% USA-made premium quality materials." However, the complaint alleges that, in numerous instances, DreamCloud mattresses are wholly imported or incorporate significant imported materials. In all instances, DreamCloud mattresses are finished overseas. Based on the foregoing, the complaint alleges that Respondents engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S.-Origin Claims, Part I prohibits Respondents from making U.S.-origin claims for their products unless either: (1) the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits Respondents from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and Respondents have a reasonable basis substantiating the representation.

Parts III through V are monetary provisions. Part III imposes a judgment of $753,300. Part IV includes additional monetary provisions relating to collections. Part V requires Respondents to provide sufficient customer information to enable the Commission to administer consumer redress, if appropriate.

Part VI is a notice provision requiring Respondents to identify and notify certain DreamCloud mattress purchasers of the FTC's action within 30 days after the issuance of the order, or within 30 days of the customer's identification, if identified later. Respondents are also required to submit reports regarding their notification program

Parts VII through IX are reporting and compliance provisions. Part VII requires Respondents to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part VIII requires Respondents to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Part IX requires Respondents to maintain certain records, including records necessary to demonstrate compliance with the order. Part X requires Respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview Respondents' personnel.

Finally, Part XI is a "sunset" provision, terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

HCA HEALTHCARE, INC., STEWARD HEALTH CARE SYSTEM, LLC, AND RALPH DE LA TORRE, M.D.

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9410; File No. 221 0003
Complaint, June 2, 2022 – Decision, June 22, 2022

This case addresses the $850 million acquisition by HCA Healthcare, Inc. of certain assets of Steward Health Care System LLC. The complaint alleges that the transaction, if consummated, will violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for general acute care hospital services in the Wasatch Front region of Utah, which includes Salt Lake City. On June 16, 2022, Complaint Counsel and Respondents HCA Healthcare, Inc. ("HCA"), Steward Health Care System LLC, and Ralph de la Torre, M.D. jointly move to dismiss the complaint as moot following Respondent HCA's withdrawal of its Hart-Scott-Rodino Notification and Report Form filed for the proposed acquisition. The order dismisses the Complaint.

Participants

For the *Commission*: *Guia Dixon, Elizabeth Arens, Stephanie Cummings, Matthew Frank, Christopher Megaw, Jeanne Nichols, Anthony Saunders, Anusha Sunkara,* and *Jonathan Wright.*

For the *Respondents*: *Sara Y. Razi, Simpson Thacher & Bartlett LLP; Karen Kazmerzak, Sidley Austin LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondent HCA Healthcare, Inc. ("HCA") has agreed to acquire the Utah-based assets of Respondent Steward Health Care System, LLC ("Steward"), a limited liability company controlled by Respondent Ralph de la Torre, M.D., in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. HCA, already owner of six hospitals along Utah's Wasatch Front, seeks to acquire Steward's five hospitals and other assets in the same region (the "Proposed Transaction"). Respondents' transaction violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined because it is likely to lead to higher prices and lower quality. This is not a new story: in 1995, HCA agreed to divest three of the five hospitals it now wants to acquire to avoid an antitrust challenge from the FTC.

2. HCA and Steward are large multi-hospital systems and two of only four large healthcare systems along the Wasatch Front. HCA currently operates eight hospitals in Utah. Six of those hospitals are located in the area running north to south from Weber County to Utah County. Steward currently operates five hospitals in Utah, all of which are located in the same area. HCA's and Steward's geographic footprints significantly overlap. Each of Steward's five Utah hospitals is within an approximately twelve-mile drive of an HCA hospital.

3. HCA and Steward identify each other as close competitors. For example, an HCA executive wanted to [redacted] and HCA's Vice President of Strategy and Business Development for the region stated, [redacted] Competition between HCA and Steward has spurred them to reduce the rates they charge insurers, upgrade their facilities, and improve their service offerings.

4. The Proposed Transaction is likely to substantially lessen competition in a relevant service market defined as adult inpatient general acute care ("GAC") hospital services sold and provided to commercial insurers and their members ("inpatient GAC hospital services"). Respondents' inpatient GAC hospitals provide overlapping medical, surgical, and diagnostic services that require an overnight hospital stay. Three relevant geographic markets for evaluating the Proposed Transaction's likely effects on competition are: (1) an area comprising Weber County and northern Davis County (the "Northern Market"); (2) an area comprising Salt Lake County and southern Davis County (the "Central Market"); and (3) an area comprising Utah County (the "Southern Market").

5. The relevant markets are already highly concentrated. There are only four healthcare systems along the Wasatch Front that provide inpatient GAC hospital services: HCA, Steward, Intermountain Healthcare ("Intermountain"), and University of Utah Health. In the Northern and Southern Markets, the Proposed Transaction will reduce the number of healthcare systems offering inpatient GAC hospital services from three to two. In the Central Market, the Proposed Transaction will reduce the number of healthcare systems offering inpatient GAC hospital services from four to three. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), the Proposed Transaction is

presumptively unlawful in each of these relevant markets.[1] According to the Merger Guidelines, an acquisition yielding a post-acquisition market concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points establishes a presumption of illegality. Based on inpatient admissions, the Proposed Transaction will significantly increase market concentration levels for inpatient GAC hospital services sold and provided to commercial insurers and their members in each of the relevant geographic markets, in excess of the threshold for presumptive illegality. Even in a broader market comprising Weber, Davis, Salt Lake, and Utah Counties taken together (the "Four County Market"), the Proposed Transaction will reduce the number of healthcare systems offering inpatient GAC hospital services in that market from four to three, and the resulting market concentration still renders the Proposed Transaction presumptively unlawful.

6. Evidence of direct competition between HCA and Steward corroborates the market concentration evidence and further demonstrates the likely anticompetitive effects of the Proposed Transaction. HCA and Steward compete to be included in commercial insurers' health plan networks. HCA demands and receives significantly higher reimbursement rates than Steward because it currently has substantial bargaining leverage during negotiations with health insurers that offer health plans to employers and individuals. By contrast, Steward offers low- cost healthcare services and innovative contract terms and benefit designs. Competition with HCA has motivated Steward to offer such arrangements. The Proposed Transaction will eliminate Steward as a low-cost provider. As a result, HCA will have greater bargaining leverage, which will allow it to command even higher reimbursement rates. Commercial insurers would pass on at least a portion of those higher healthcare costs to employers and health plan members in the form of increased premiums, deductibles, co-pays, and other out-of-pocket expenses.

7. HCA and Steward also directly compete to provide inpatient GAC hospital services to patients. They routinely track each other's market shares, quality, and other competitive metrics. HCA and Steward compete on non-price dimensions such as facility improvements and patient experience, and the Proposed Transaction will eliminate this beneficial non-price competition between them.

II.

JURISDICTION

8. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

9. The Proposed Transaction constitutes a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

1 The Merger Guidelines outline the principal analytical techniques, practices, and enforcement policy of the Department of Justice and the FTC with respect to mergers (like the Proposed Transaction) involving competitors.

III.

RESPONDENTS

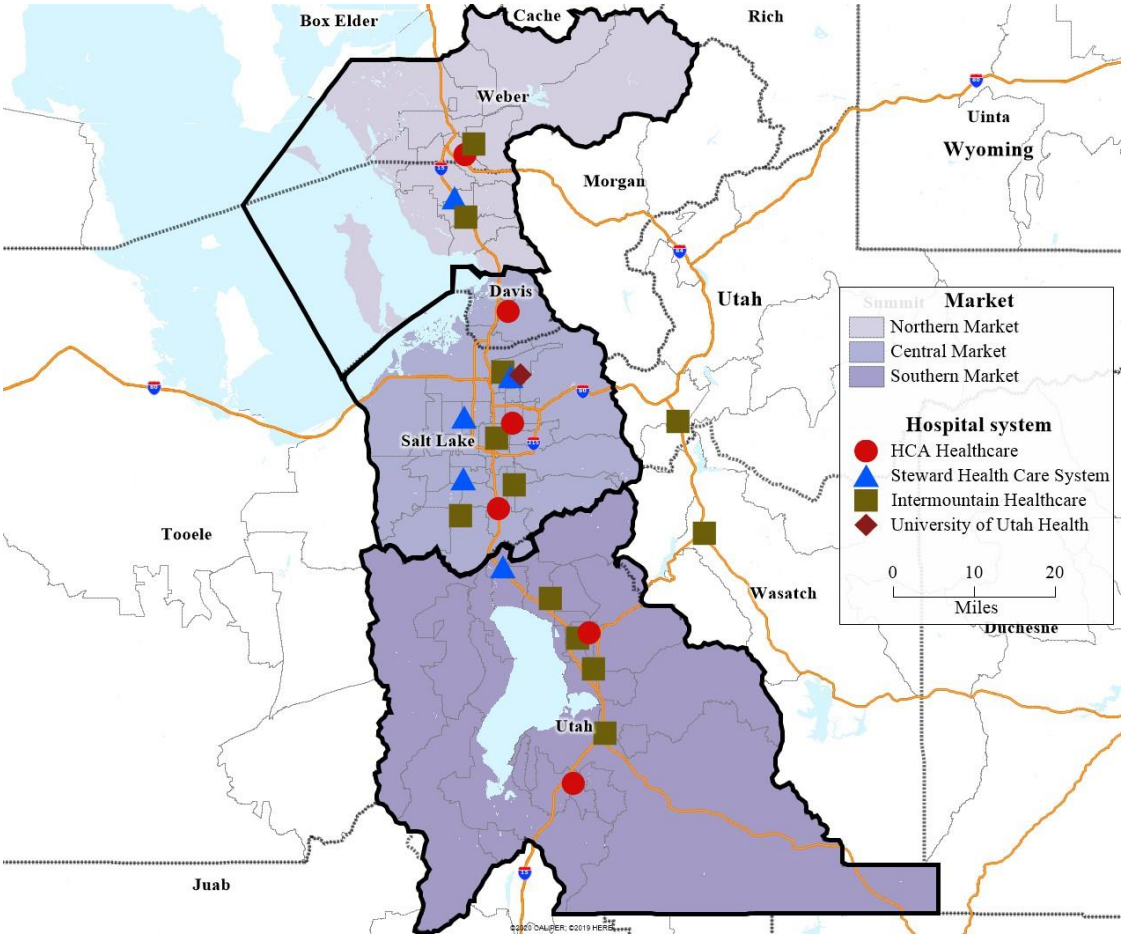
10. Respondent HCA is a for-profit company incorporated under the laws of Delaware, with its principal place of business located at One Park Plaza, Nashville, Tennessee 37203. HCA operates 182 hospitals in the United States and abroad, with revenues totaling approximately $58.8 billion in fiscal year 2021.

11. HCA is the second largest provider of inpatient GAC hospital services along the Wasatch Front. HCA operates eight inpatient GAC hospitals in Utah under its MountainStar Healthcare division. Six of those hospitals are located in the relevant geographic markets. Ogden Regional Medical Center (located in Weber County) is situated in the Northern Market. St. Mark's Hospital and Lone Peak Hospital (both located in Salt Lake County) and Lakeview Hospital (located in Davis County) are situated in the Central Market. Timpanogos Regional Hospital and Mountain View Hospital (both located in Utah County) are situated in the Southern Market. Combined, HCA's inpatient GAC hospitals in the relevant markets operate approximately 947 beds. In addition to its inpatient GAC hospitals, HCA operates ambulatory surgery centers, outpatient medical imaging centers, free-standing emergency departments, and urgent care centers. HCA employs approximately 104 physicians in the relevant geographic markets.

12. Respondent Steward is a for-profit limited liability company organized under the laws of Delaware, with its principal place of business located at 1900 N Pearl St. #2400, Dallas, Texas 75201. Steward operates forty-one hospitals in the United States and abroad, and its 2020 revenues totaled approximately $5.4 billion.

13. Steward is the fourth largest provider of inpatient GAC hospital services along the Wasatch Front. Steward operates five hospitals in Utah, all of which are located in the relevant geographic markets. Davis Hospital and Medical Center (located in Davis County) is situated in the Northern Market. Salt Lake Regional Medical Center, Jordan Valley Medical Center, and Jordan Valley Medical Center West Valley Campus (all located in Salt Lake County) are situated in the Central Market. Mountain Point Medical Center (located in Utah County) is situated in the Southern Market. Steward's inpatient GAC hospitals in the relevant markets operate a total of approximately 693 beds. Steward owns one free-standing emergency department and two outpatient medical imaging centers and employs approximately 105 physicians in the relevant geographic markets.

14. The map below shows the three relevant geographic markets for assessing the competitive effects of the Proposed Transaction and the inpatient GAC hospitals located therein.



15. Steward acquired its assets in Utah, including its five inpatient GAC hospitals, from IASIS Healthcare LLC ("IASIS") in 2017. Three of these hospitals were previously owned by HCA, but were divested to avoid an antitrust challenge. Specifically, in 1995, HCA (then Columbia/HCA Healthcare Corporation) acquired Healthtrust, Inc. – The Hospital Company ("Healthtrust"), whose hospitals included Jordan Valley Medical Center, Jordan Valley Medical Center West Valley Campus (then Pioneer Valley Hospital), Ogden Regional Medical Center, and Lakeview Hospital. In the face of a Commission challenge, HCA agreed to divest Jordan Valley Medical Center and Jordan Valley Medical Center West Valley Campus, along with then- HCA-operated Davis Hospital and Medical Center. Since the Healthtrust transaction, HCA has increased its presence in the relevant markets, including by opening two new hospitals, Timpanogos Regional Hospital in 1998 and Lone Peak Hospital in 2013.

16. Respondent Ralph de la Torre, M.D. is the CEO and majority shareholder of Respondent Steward. Ralph de la Torre, M.D. ultimately controls Steward. His offices are located at 1900 N Pearl St. #2400, Dallas, Texas 75201.

IV.

THE PROPOSED TRANSACTION

17. Pursuant to an Asset Purchase Agreement dated September 15, 2021, HCA will acquire from Ralph de la Torre, M.D., Steward's Utah-based facilities, including hospitals, physician clinic operations, and outpatient facilities.

V.

RELEVANT SERVICE MARKET

18. Inpatient GAC hospital services sold and provided to commercial insurers and their members constitute a relevant service market in which to evaluate the effects of the Proposed Transaction. Inpatient GAC hospital services include a broad cluster of hospital services (including medical, surgical, and diagnostic services) requiring an overnight hospital stay for which competitive conditions are substantially similar. The relevant inpatient GAC hospital services market includes overlapping services that both HCA and Steward sell and provide to commercial insurers and their members through their hospitals in the relevant geographic markets. Non-overlapping services are not included in the relevant service market.

19. Although the Proposed Transaction's likely effect on competition could be analyzed separately for each individual inpatient GAC hospital service, it is appropriate to evaluate the Proposed Transaction's likely effects across the cluster of inpatient GAC hospital services because these services are offered to patients under similar competitive conditions. Thus, grouping the hundreds of individual overlapping inpatient GAC hospital services into a cluster for analytical convenience enables the efficient evaluation of competitive effects without forfeiting the accuracy of the overall analysis.

20. Outpatient services are not included in the inpatient GAC hospital services market because commercial insurers and patients cannot substitute outpatient services for inpatient services in response to a price increase for inpatient GAC hospital services. Additionally, outpatient services are offered by a different set of competitors under different competitive conditions from inpatient GAC hospital services.

21. The inpatient GAC hospital services market does not include services related to psychiatric care, substance abuse, rehabilitation services, or pediatric services (i.e., services provided to patients under the age of eighteen). These services are offered by a different set of competitors under different competitive conditions from—and are not substitutes for—inpatient GAC hospital services.

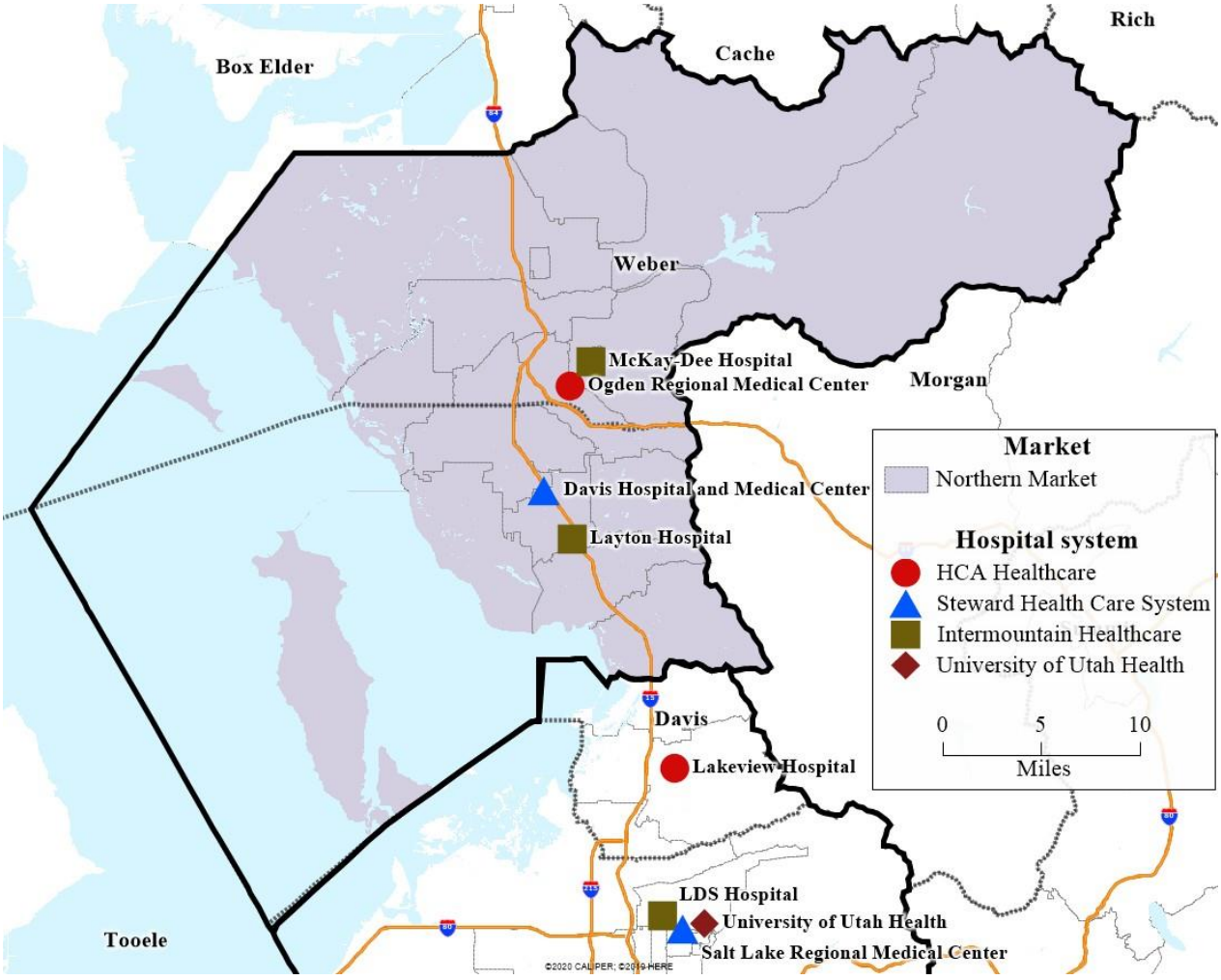
22. The Proposed Transaction is likely to substantially lessen competition in the market for inpatient GAC hospital services.

VI.

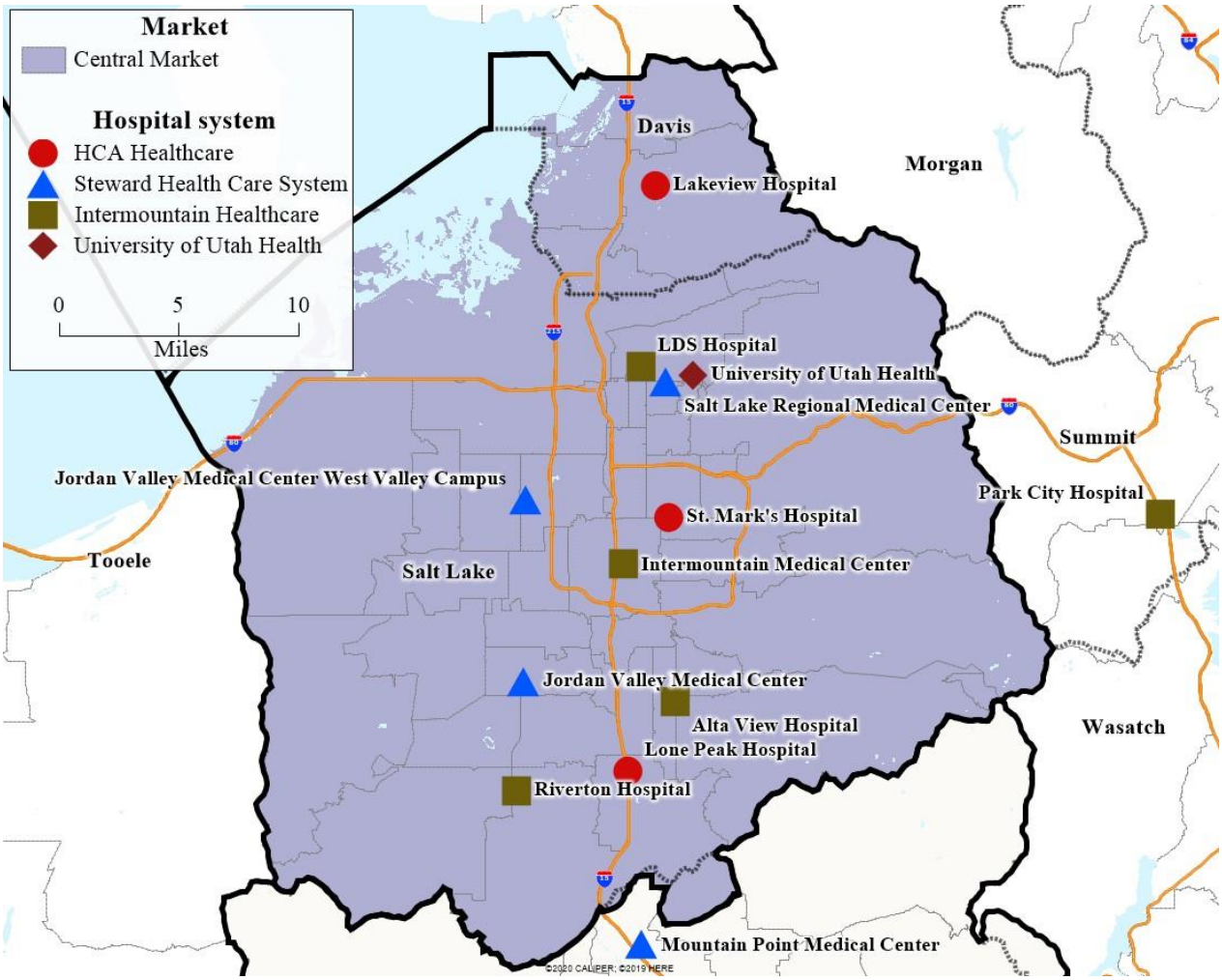
RELEVANT GEOGRAPHIC MARKETS

23. The Northern Market, the Central Market, and the Southern Market are relevant geographic markets in which to analyze the Proposed Transaction's effects on competition. HCA and Steward each divide the broader Wasatch Front into distinct regions to evaluate competition. The Wasatch Front is growing in population and approximately eighty percent of Utah's citizens reside there today.

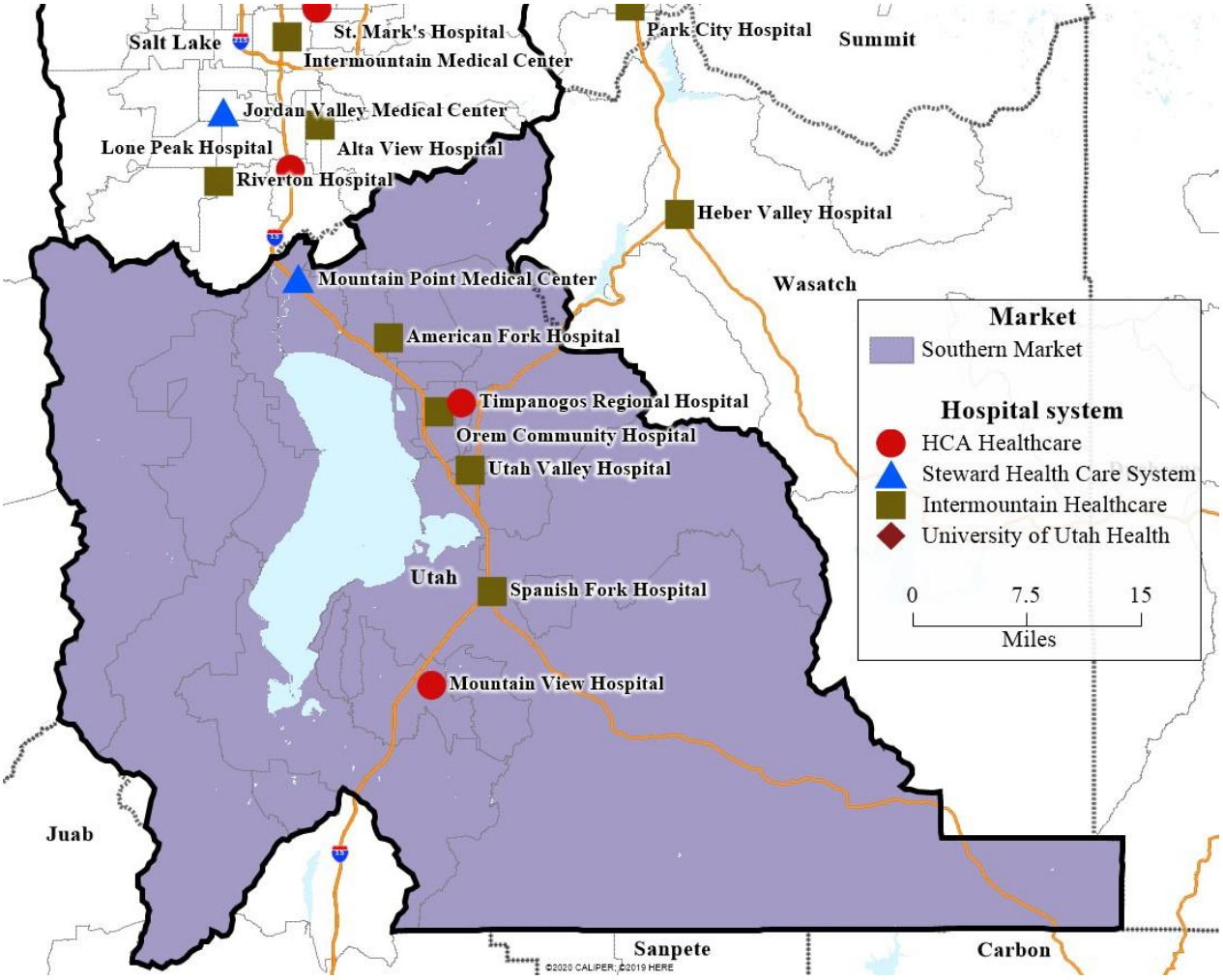
24. The Northern Market comprises Weber County and northern Davis County approximately as far south as Farmington, Utah. HCA's Ogden Regional Medical Center and Steward's Davis Hospital and Medical Center are located in the Northern Market. The map below depicts the Northern Market.



25. The Central Market comprises Salt Lake County and southern Davis County approximately as far north as Centerville, Utah. HCA's Lakeview Hospital, St. Mark's Hospital, and Lone Peak Hospital and Steward's Salt Lake Regional Medical Center, Jordan Valley Medical Center, and Jordan Valley Medical Center West Valley Campus are located in the Central Market. The map below depicts the Central Market.



26. The Southern Market comprises Utah County. HCA's Timpanogos Regional Hospital and Mountain View Hospital and Steward's Mountain Point Medical Center are located in the Southern Market. The map below depicts the Southern Market.



27. An appropriate geographic market for analyzing the Proposed Transaction exists where a hypothetical monopolist of the relevant services could profitably impose a small but significant and non-transitory increase in price ("SSNIP") on the relevant services. If a hypothetical monopolist of the relevant services could profitably impose a SSNIP in a candidate area, that area constitutes a relevant geographic market.

28. Patients who receive inpatient GAC hospital services in the relevant geographic areas strongly prefer to obtain inpatient GAC hospital services close to where they live. As a result, an insurer would face significant difficulty marketing a plan in each area that does not include in its provider network any inpatient GAC hospitals located in that area.

29. A hypothetical monopolist of inpatient GAC hospital services in each relevant geographic area could profitably impose a SSNIP on commercial insurers that sell health plans in that area. Thus, the Northern, Central, and Southern Markets each separately pass the hypothetical monopolist test, and each is a relevant geographic market in which to assess the Proposed Transaction's effects on competition.

30. In the alternative—although less illuminative of the competitive effects of the Proposed Transaction—the Four County Market also passes the hypothetical monopolist test and constitutes a relevant geographic market in which to analyze the Proposed Transaction's effects on competition. A hypothetical monopolist of inpatient GAC hospital services in the entire Four County Market could profitably impose a SSNIP on commercial insurers that sell health plans in the Four County Market.

VII.

MARKET STRUCTURE AND THE PROPOSED TRANSACTION'S PRESUMPTIVE ILLEGALITY

31. The Proposed Transaction is presumed likely to enhance market power in each of the relevant markets because it significantly increases concentration and results in highly concentrated relevant markets. This showing of high market concentration suffices to establish a prima facie case that the Proposed Transaction is unlawful.

32. HHI is a commonly accepted metric for calculating market concentration. The HHI is calculated by summing the squares of individual firms' market shares. HHI ranges from 10,000 (in the case of a pure monopoly of one firm with 100% market share) to a number approaching zero (in the case of an atomistic market). Under the Merger Guidelines, if a proposed acquisition would result in a post-acquisition market concentration level in a relevant market above 2,500, as measured by HHI, and an increase in market concentration of more than 200, then the acquisition is presumed to enhance market power and is, therefore, presumptively unlawful.

33. As measured by inpatient adult GAC admissions, the Proposed Transaction will result in market concentration levels well above 2,500 points and increases in market concentration greater than 200 points in each of the relevant markets. In the Northern Market, the Proposed Transaction will increase HHIs by more than 750 points to a post-merger HHI of over 4,500 points. In the Central Market, the Proposed Transaction will increase HHIs by more than 300 points to a post-merger HHI of over 3,900 points. In the Southern Market, the Proposed Transaction will increase HHIs by more than 250 points to a post-merger HHI of over 5,800 points.

34. Under the Merger Guidelines and the relevant case law, the Proposed Transaction substantially increases market concentration and is presumed likely to create or enhance market power—and is thus presumptively illegal—in each of these relevant markets.

35. The Northern, Central, and Southern Markets are already highly concentrated. In the Northern and Southern Markets, the Proposed Transaction will reduce the number of healthcare systems offering inpatient GAC hospital services from three to two. In the Central Market, the Proposed Transaction will reduce that number from four to three.

36. Even in a relevant geographic market consisting of the entire Four County Market, the Proposed Transaction also will result in market concentration levels and increases in market concentration significantly above those presumed likely to create or enhance market power. Like the Northern, Central, and Southern Markets, the Four County Market is already highly

concentrated. In the Four County Market, the Proposed Transaction will increase HHIs by more than 400 points to a post-merger HHI of over 4,400 points. The Proposed Transaction, therefore, is presumptively unlawful even in the Four County Market.

37. Although University of Utah Health currently plans to open a 187-bed hospital in Salt Lake County, that hospital is not expected to open until 2026. Further, once open, the hospital will not significantly impact market concentration levels in the relevant markets.

VIII.

ANTICOMPETITIVE EFFECTS

A.

Competition Between Hospitals Benefits Patients

38. Competition between hospitals occurs in two separate but related stages. First, hospitals compete for inclusion in commercial insurers' health plan provider networks. Second, in-network hospitals compete to attract patients, including commercial insurers' health plan members.

39. In the first stage of hospital competition, hospitals compete to be included in commercial insurers' provider networks. To become an "in-network" provider, a hospital negotiates and enters into a contract with an insurer if the negotiating parties agree on terms. The financial terms under which a hospital is reimbursed for services rendered to a health plan's members are a central component of those negotiations. This is true regardless of whether reimbursements are tied to fee-for-service contracts, value-based contracts, or other types of contracts.

40. Commercial insurers attempt to contract with (and thus bring "in-network") local hospitals (and other healthcare providers) whose services the insurer's current and prospective members demand. An in-network hospital is typically more attractive to the insurer's members because a member usually incurs substantially lower out-of-pocket costs by accessing an in-network, versus an out-of-network, hospital. Hospitals are motivated to offer competitive reimbursement rates to induce the insurer to include the hospital in its network because a hospital will attract more of an insurer's members when it is in-network.

41. Having hospitals in-network is also beneficial to commercial insurers. Insurers strive to create a health plan provider network that will appeal to current and prospective members—typically local employers and their employees—in a given geographic area.

42. A hospital has significant bargaining leverage during negotiations with an insurer if its absence would make the insurer's health plan network substantially less attractive (and therefore less marketable) to its current and prospective members. The attractiveness of a hospital to an insurer depends in significant part on whether nearby hospitals—or a combination of hospitals—could serve as alternatives to the negotiating hospital. The presence of alternative

competitors that an insurer can turn to limits the bargaining leverage of a hospital in negotiations with the insurer. Where there are fewer meaningful alternatives, a hospital will have greater bargaining leverage to negotiate higher reimbursement rates and other more favorable reimbursement terms.

43. These bargaining dynamics apply to both "broad"- and "narrow"-network health plan negotiations. Narrow-network health plans do not include all area hospitals and are usually marketed at lower prices than health plans that include all area hospitals (i.e., broad-network health plans). Insurers can contain costs using a narrow-network plan because in-network hospitals agree to lower rates or less favorable terms with the expectation that they will obtain a greater portion of patient volume than they otherwise would in a broad-network plan. Hospitals will often give rate and other concessions to insurers to exclude a competing hospital—or hospitals—from the insurer's narrow-network health plan.

44. A merger between hospitals that are substitutes for some or all services in the eyes of insurers and their members increases the combined entity's bargaining leverage. Such mergers can lead to higher reimbursement rates and poorer quality by eliminating an available alternative for commercial insurers. Reimbursement rate increases negatively impact insurers' health plan members. When hospital rates increase, commercial insurers generally pass on a significant portion of those increased rates to their customers—employers, their employees, and individuals—in the form of higher premiums, co-pays, and deductibles.

45. In the second stage of hospital competition, hospitals compete to attract patients. Because patients' out-of-pocket costs are generally the same for all in-network hospitals, these hospitals seek to attract patients by competing on non-price factors such as patient experience, location, convenience, and quality of care. Hospitals compete on non-price dimensions to attract all patients, regardless of whether they are covered by commercial insurance, have Medicare or Medicaid, or lack any insurance, and thus this competition benefits all patients, not just the commercially insured. A merger of competing hospitals eliminates non-price competition between the hospitals.

B.

The Proposed Transaction Would Eliminate Beneficial Head-to-Head Competition Between HCA and Steward

46. HCA and Steward are close competitors. HCA and Steward internal documents demonstrate this head-to-head competition. HCA identifies each of Steward's Utah hospitals as a competitor to at least one HCA hospital. An email from HCA's Vice President of Physician and Provider Relations for the region states that [redacted] Steward's internal documents likewise show close competition with HCA. For instance, an email from a Steward Senior Vice President [redacted] HCA and Steward closely track each other's market shares, quality scores, and strategic initiatives. Today, this close head-to-head competition between HCA and

Steward incentivizes them to keep prices lower and quality of care higher than they would without this competition.

47. The geographic proximity of the HCA and Steward hospitals results in significant head-to-head competition between them throughout the Wasatch Front. Each of Steward's five Utah hospitals is within an approximately twelve-mile drive of an HCA hospital—and most are much closer. Steward's Salt Lake Regional Medical Center and Jordan Valley Medical Center West Valley Campus are each approximately seven miles by car from HCA's St. Mark's Hospital. Steward's Jordan Valley Medical Center is approximately eight miles by car from HCA's Lone Peak Hospital. Steward's Mountain Point Medical Center is approximately nine miles by car from HCA's Lone Peak Hospital. Steward's Davis Hospital and Medical Center is approximately eleven miles by car from HCA's Ogden Regional Medical Center. Many of HCA's and Steward's hospitals compete with one another because they are geographically proximate and offer many of the same services.

C.

The Proposed Transaction Would Increase HCA's Bargaining Leverage in Negotiations with Insurers

48. The reduction in competition caused by the Proposed Transaction will increase HCA's bargaining leverage in contract negotiations with commercial insurers. This increase in bargaining leverage will apply to contract negotiations for both narrow- and broad-network health plans. Greater bargaining leverage will allow HCA to command higher reimbursement rates at HCA and Steward hospitals, along with other more favorable reimbursement terms, regardless of whether reimbursement is based on fee-for-service contracts, value-based contracts, or another payment mechanism.

49. Competition between HCA and Steward to be in-network providers and to exclude each other from commercial insurance networks directly drives down reimbursement rates in the relevant geographic markets today. HCA and Steward each have provided price concessions to insurers to exclude one another from narrow-network health plans because each system gains inpatient volume when the other is excluded. One email from an HCA executive underscores this direct price competition between HCA and Steward: [redacted] The Proposed Transaction will eliminate HCA's and Steward's incentives to provide discounts to gain inpatient volume at the other's expense.

50. The Proposed Transaction also will eliminate much of the price constraint placed on Steward today that makes it a low-cost provider of inpatient GAC hospital services. As the fourth largest health system in the region, Steward has been motivated to offer insurers low rates and innovative reimbursement terms to be included in-network. Post-transaction, the combined entity would have little incentive to continue to offer low rates or innovative reimbursement terms for these hospitals.

D.

The Proposed Transaction Would Eliminate Vital Quality and Service Competition

51. HCA and Steward compete with one another to attract patients. Competition between HCA and Steward has led them to improve their facilities and services to gain patient volume at the other's expense, as well as to prevent the other from taking patient volume.

52. This competition is particularly fierce with respect to members of the narrow-network health plans in which HCA and Steward participate. Intermountain (the largest healthcare system along the Wasatch Front) typically is excluded from these narrow-network plans. As a result, HCA and Steward often compete more closely with each other than they do with Intermountain for commercial patients. One HCA capital project approval memorandum explains:

[redacted]

53. HCA and Steward also compete by recruiting physicians from one another. By aligning physicians around their respective systems, HCA and Steward are better able to steer inpatient volume away from one another and towards their own hospitals. Steward's President of the Western Region put it succinctly: "[p]atients follow physicians." For example, after HCA successfully recruited OB/GYN physicians and orthopedists aligned with Steward, HCA embarked on an approximately $70 million expansion of its Lone Peak Hospital, expanding Lone Peak's women's services and surgery departments [redacted].

54. Patients benefit from this direct non-price competition between HCA and Steward. The Proposed Transaction will eliminate HCA's and Steward's incentives to compete to attract patients from one another. As a result, the combined entity will have less incentive to improve quality of care, access to care, technology, patient experience, and service offerings to the detriment of all patients who use these hospitals, including commercially insured, Medicare, Medicaid, and uninsured patients.

IX.

LACK OF COUNTERVAILING FACTORS

A.

Entry Barriers

55. Building a new hospital is a multi-million dollar and multi-year effort. Entry by new competitors into the relevant markets will not be timely, likely, or sufficient to counteract the anticompetitive effects of the Proposed Transaction. Expansion by current market participants also is unlikely to deter or counteract the Proposed Transaction's likely harm to competition for inpatient GAC hospital services.

B.

Efficiencies

56. Respondents have not substantiated merger-specific, verifiable, and cognizable efficiencies that likely would be sufficient to reverse the Proposed Transaction's potential to harm customers in the markets for inpatient GAC hospital services.

X.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

57. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth.

58. The Proposed Transaction constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

59. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth.

60. The Proposed Transaction, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the 13th day of December 2022, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary 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 and the Clayton 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 you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. 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 3.2l(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.3l(b) obligates counsel for each party, within five days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Proposed Transaction challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. A prohibition against any transaction between Respondents that combines their businesses, except as may be approved by the Commission.

2. If the Proposed Transaction is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as HCA and Steward were offering and planning to offer prior to the Proposed Transaction.

3. A requirement that, for a period of time, HCA, Steward, and Ralph de la Torre, M.D. provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Requiring that Respondents' compliance with the order may be monitored at Respondents' expense by an independent monitor, for a term to be determined by the Commission.

6. Any other relief appropriate to correct or remedy the anticompetitive effects of the Proposed Transaction or to restore Steward as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this second day of June, 2022.

By the Commission.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel's and Respondents' Joint Motion to Dismiss the Complaint. Having considered the motion, it is hereby ORDERED:

The Joint Motion to Dismiss the Complaint, dated June 16, 2022, is GRANTED; and the complaint is DISMISSED without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

RWJ BARNABAS HEALTH,
AND
SAINT PETER'S HEALTHCARE SYSTEM

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9409; File No. 201 0145
Complaint, June 2, 2022 – Decision, June 23, 2022

This case addresses the $435 million acquisition by Robert Wood Johnson Barnabas Health, Inc. of certain assets of Saint Peter's Healthcare System, Inc. The complaint alleges that the acquisition, if consummated, will significantly reduce competition in the market for general acute care inpatient hospital services in Middlesex County, New Jersey. Complaint Counsel and Respondents RWJ Barnabas Health, Inc. and Saint Peter's Healthcare System, Inc. jointly moved to dismiss the complaint as moot after Respondents terminated their Member Substitution and Merger Agreement. The Order dismissed the Complaint.

Participants

For the *Commission*: *Ryan Andrews, Emily Blackburn, Alex Bryson, Cory Gordon, Karen Hunt, Ryan Maddock,* and *Adam Pergament.*

For the *Respondents*: *Mark Botti, Baker Botts LLP; Bruce Sokler, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondents RWJ Barnabas Health, Inc. ("RWJ") and Saint Peter's Healthcare System, Inc. ("Saint Peter's Healthcare") have executed a definitive agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. RWJ, one of the largest healthcare systems in New Jersey, seeks to acquire Saint Peter's Healthcare (the "Acquisition"). Saint Peter's Healthcare operates an independent hospital located in Middlesex County, Saint Peter's University Hospital ("Saint Peter's" or "SPUH"). RWJ's flagship general acute care ("GAC") hospital, RWJ University Hospital New Brunswick

("RWJ-NB"), and Saint Peter's are located less than one mile apart in New Brunswick, one of the largest cities in Middlesex County. RWJ-NB and Saint Peter's are two of the three largest hospitals in Middlesex County and the only two hospitals in New Brunswick.

2. The Acquisition would enhance RWJ's dominant position in Middlesex County. Post-merger, RWJ would control approximately 50% of the relevant market for inpatient GAC services sold to commercial insurers and their members in Middlesex County. If the Acquisition is completed, only two other competitors would operate hospitals in Middlesex County: Hackensack Meridian Health ("Hackensack") and Penn Medicine Princeton Medical Center ("Penn-Princeton"), both of which would have significantly smaller market shares than the merged RWJ-Saint Peter's.

3. The Acquisition would eliminate substantial head-to-head competition between Saint Peter's and RWJ-NB. [redacted]. The Acquisition would eliminate this competition, leading to higher healthcare prices and diminished incentives to compete on improving quality, offering new services and technology, and increasing patient satisfaction.

4. RWJ and Saint Peter's currently compete to be included in insurer health plan networks. [redacted] RWJ-NB and Saint Peter's compete with each other for inclusion in health insurance plans. This competition, and insurers' ability to substitute between Respondents' hospitals when building health plan networks, allows insurers to negotiate for lower prices and other favorable terms, which, in turn, benefit consumers.

5. If RWJ acquires Saint Peter's, this competition would disappear and insurers would have fewer alternatives for inpatient GAC services in Middlesex County. RWJ would be able to demand higher rates from insurers for the combined entity's services, which, in turn, will likely lead to higher insurance premiums, co-pays, deductibles, or other out-of-pocket costs and/or reduced benefits for plan members.

6. RWJ and Saint Peter's also compete directly for patients by improving quality, service offerings, and facilities. This non-price competition currently benefits Respondents' patients regardless of whether they are commercially insured, use a government payment program such as Medicaid or Medicare, or are uninsured. [redacted]

[redacted]

7. [redacted]

II.

JURISDICTION

8. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

9. The Acquisition constitutes a transaction subject to Section 7 of the Clayton Act, 15 U.S.C § 18.

III.

RESPONDENTS

10. Respondent RWJ is a New Jersey non-profit corporation that operates one of the largest healthcare systems in New Jersey. It is headquartered in West Orange, New Jersey. In 2021, RWJ reported approximately $6.6 billion in revenue.

11. RWJ has become one of the largest healthcare systems in New Jersey through a series of acquisitions. In 2016, Barnabas Health and Robert Wood Johnson Health System merged to create RWJ, which then controlled eleven GAC hospitals across central New Jersey. On January 1, 2022, RWJ closed its acquisition of Trinitas Regional Medical Center in Union County. RWJ now operates 12 GAC hospitals, several ambulatory surgical centers, a pediatric rehabilitation hospital, and a freestanding behavioral health center.

12. In Middlesex County, RWJ operates RWJ-NB, its flagship hospital. RWJ-NB has 614 licensed beds and provides inpatient GAC services. RWJ also operates the Bristol Myers Squib Children's Hospital, which is a state-designated children's hospital that operates as a hospital-within-a-hospital on the RWJ-NB campus.

13. RWJ also operates RWJ University Hospital Somerset ("RWJ-Somerset"), located in Somerset County, adjacent to Middlesex County, approximately eleven miles from RWJ-NB. RWJ-Somerset is a community hospital that provides many inpatient GAC services, but generally refers patients to RWJ-NB for more complex services.

14. Respondent Saint Peter's Healthcare is a New Jersey non-profit corporation and healthcare system that operates an independent hospital, Saint Peter's, in Middlesex County. Saint Peter's Healthcare is headquartered in New Brunswick, New Jersey. Saint Peter's Healthcare is composed of Saint Peter's, employed physicians, and other healthcare-related subsidiaries and joint ventures. In 2021, Saint Peter's Healthcare reported approximately $579 million in revenue.

15. Saint Peter's is located in Middlesex County. Saint Peter's has 478 licensed beds and provides inpatient GAC services. The Children's Hospital at Saint Peter's University Hospital is a state-designated children's hospital that operates as a hospital-within-a-hospital on the Saint Peter's campus. Saint Peter's is less than one mile away from RWJ-NB.

IV.

THE ACQUISITION

16. In 2015, Saint Peter's Healthcare began considering whether to partner with a larger health system. In February 2018, Saint Peter's Healthcare decided to proceed further and, by November 2018, had issued a Request for Indicative Proposal to 40 entities. Four entities responded to the request, including RWJ. Saint Peter's Healthcare narrowed its potential merger partners down to RWJ and one other entity before ultimately selecting RWJ.

17. On September 10, 2020, RWJ and Saint Peter's Healthcare entered into a Member Substitution and Merger Agreement setting forth the terms of the Acquisition.

18. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, and a modified timing agreement entered into between Respondents and Commission staff, absent this Court's action, Respondents would be free under federal law to close the Acquisition after 11:59 p.m. EST on June 9, 2022.

V.

RELEVANT MARKET

19. Inpatient GAC services sold to commercial insurers and their members in Middlesex County is a relevant market in which to assess the Acquisition's effect on competition.

Relevant Product Market

20. Inpatient GAC services sold to commercial insurers and their members is a relevant product market in which to assess the Acquisition's effect on competition. Inpatient GAC services include a broad cluster of hospital services—medical, surgical, and diagnostic services requiring

an overnight hospital stay—for which competitive conditions are substantially similar. Here, inpatient GAC services cover all such overlapping services that both RWJ and Saint Peter's sell to commercial insurers and provide to their members. Non-overlapping services are not included in the relevant product market, as the Acquisition is not likely to affect competition for those services.

21. Although the Acquisition's likely effects could be analyzed separately for each of the hundreds of individual inpatient GAC services Respondents offer, it is appropriate to assess competitive effects and calculate market concentration for inpatient GAC services as a cluster of services because these services are offered in Middlesex County under substantially similar competitive conditions. Grouping the hundreds of individual inpatient GAC services into a cluster for analytical convenience enables the efficient evaluation of competitive effects and reflects commercial and competitive realities.

22. Outpatient services (i.e., services that do not require an overnight hospital stay) are not included in the inpatient GAC services market because commercial insurers and their members cannot substitute outpatient services for inpatient services in response to a price increase on inpatient GAC services. This is because the decision to administer services on an inpatient or outpatient basis is a medical determination based on each patient's specific clinical need. Additionally, outpatient services are offered by a different set of competitors under different competitive conditions in Middlesex County.

23. The relevant product market does not include other services that are neither substitutes for, nor offered under similar competitive conditions as, inpatient GAC services. For example, the relevant product market does not include services related to psychiatric care, substance abuse, and rehabilitation services.

24. A hypothetical monopolist of all inpatient GAC services could profitably impose a small but significant and non-transitory increase in the price of those services.

B.

Relevant Geographic Market

25. Middlesex County, New Jersey, is a relevant geographic market in which to evaluate the Acquisition's effect on competition.

26. Middlesex County is the third-most populous county in New Jersey, with a population of more than 863,000 residents.

27. Middlesex County is an area in that is economically significant to commercial insurers.

28. Patients typically prefer to have access to inpatient GAC services close to where they live. For this reason, an insurer would be unable to sell a health plan successfully in Middlesex County that did not include in its network any Middlesex County GAC hospitals.

29. Middlesex County is the main area of competition between RWJ and Saint Peter's, and that competition occurs primarily between RWJ-NB and Saint Peter's. RWJ and Saint Peter's each analyze competition for inpatient GAC services within Middlesex County.

30. Insurers offering fully insured commercial plans must meet regulatory requirements that mandate a certain level of geographic access. Insurers could not meet geographic access requirements for marketing commercial plans in Middlesex County if those insurers did not include any Middlesex County hospitals as in-network hospitals in their commercial insurance plans.

31. A hypothetical monopolist of all inpatient GAC services sold to commercial insurers and their members in Middlesex County could profitably impose a small but significant and non-transitory increase in price of those services.

VI.

MARKET CONCENTRATION AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

32. The Acquisition is presumed to be likely to enhance market power because it significantly increases concentration and results in a highly concentrated relevant market. This showing of high market concentration suffices to establish a prima facie case that the Acquisition is unlawful.

33. Market concentration within a properly defined antitrust market is a useful indicator of the competitive effects of a merger. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines") measure market concentration using the Herfindahl–Hirschman Index ("HHI"). The Merger Guidelines outline the analytical techniques, practices, and enforcement policy of the FTC and Department of Justice with respect to mergers involving competitors. Though the Merger Guidelines are not binding on the courts, courts frequently cite the Merger Guidelines as persuasive authority.

34. The HHI for a given market is calculated by summing the squares of the individual firms' market shares. HHIs range from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). A market HHI above 2,500 is classified as highly concentrated. A merger resulting in a highly concentrated market that increases the HHI by more than 200 points is presumed to enhance market power and is, therefore, presumptively unlawful.

35. The Acquisition will significantly increase market concentration for inpatient GAC services sold to commercial insurers and their members in Middlesex County and is presumed likely to create or enhance market power—and is thus presumptively illegal.

36. The Acquisition will increase HHI levels in the relevant market by more than 900 points to a post-merger HHI of over 3,000 points. The Acquisition will result in a highly concentrated market and is presumed likely to create or enhance market power. As a result, the

Acquisition, therefore, also is presumptively unlawful under Section 7 of the Clayton Act, 15 U.S.C. § 18.

37. After the Acquisition, RWJ's market share would increase to approximately 50% of the inpatient GAC services sold to commercial insurers and their members in Middlesex County. RWJ's two remaining competitors operating hospitals in the county (Hackensack and Penn-Princeton) would have substantially smaller market shares than the merged firm. The Acquisition would combine two of the three largest hospitals in Middlesex County and reduce the number of GAC hospital competitors in Middlesex County from four to three.

VII.

DIRECT EVIDENCE OF LIKELY ANTICOMPETITIVE EFFECTS

38. In addition to the presumption of harm resulting from the increase in market concentration caused by the Acquisition, there is also direct evidence that the Acquisition is likely to substantially lessen competition in the relevant market. Today, RWJ and Saint Peter's are important competitors to each other. That competition benefits commercial insurers and patients. The Acquisition would eliminate this important head-to-head competition, resulting in likely anticompetitive effects.

39. A merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition, including what courts and the Merger Guidelines refer to as "unilateral" anticompetitive effects. A merger is likely to have unilateral anticompetitive effects when it gives the merged firm the incentive to raise price or reduce quality independent of competitive responses from other firms. As described in the Merger Guidelines, unilateral anticompetitive effects are likely when a significant fraction, though not necessarily a majority, of customers of one merging firm consider products or services sold by the other merging firm to be their second choice. A merger of such close substitutes gives the merged entity the incentive and ability to raise the price of (or reduce the quality of) products or services previously sold by one merging firm, because now it will recapture a significant portion of lost business via sales diverted to products or services previously sold by the other merging firm, boosting the profits on the latter products or services.

A.

Competition Among Hospitals Benefits Consumers

40. Hospital competition for commercially insured patients occurs in two distinct but related stages. First, hospitals compete for inclusion in commercial insurers' networks. Second, in-network hospitals compete to attract patients.

41. In the first stage of hospital competition, hospitals compete to be included in commercial insurers' health plan networks. To become an in-network provider in a health plan, a hospital negotiates with an insurer and enters into a contract if it can agree with the insurer on terms. The hospital's reimbursement terms for services rendered to a health plan's members are a

central component of those negotiations. This is true regardless of whether reimbursements are tied to fee-for-service contracts, value-based contracts, or other types of contracts.

42. Insurers attempt to contract with local hospitals (and other healthcare providers) that offer services that current or prospective members of the health plan want. In-network hospitals are typically significantly less expensive for health plan members to seek care from than a hospital that is not included in the health plan's network (an "out-of-network provider"). A hospital likely will attract more of a health plan's members when it is in-network. Hospitals, therefore, have an incentive to offer competitive terms and reimbursement rates to induce the insurer to include the hospital in its health plan network.

43. From the insurer's perspective, having hospitals in-network is beneficial because it enables the insurer to create a health plan provider network in a particular geographic area that is attractive to current and prospective members, typically employers and their employees.

44. A hospital has significant bargaining leverage if its absence would make the insurer's health plan network substantially less attractive (and therefore less marketable) to its current and prospective members. This relative attractiveness to the insurer depends largely on whether other nearby hospitals could serve as viable in-network substitutes in the eyes of the plan's members. The presence of alternative, conveniently located, high-quality hospitals is important competition that constrains the ability of hospitals to raise prices and seek other terms adverse to consumers in negotiations with insurers. Where there are fewer meaningful alternatives (i.e., less competition), a hospital will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more onerous contract terms.

45. A merger involving hospitals that are good substitutes for patients increases the combined hospital's bargaining leverage with insurers. Such a merger can lead to higher prices because the merger eliminates an available alternative that an insurer could otherwise offer (or threaten to offer) its health plan members. Increases in reimbursement rates significantly impact insurers' health plan members, such as through higher cost-sharing payments and/or fewer benefits. For fully-insured employers, increased healthcare costs would come in the form of higher premiums. Self-insured employers would fully bear those increased healthcare costs because they pay for claims directly. Individual consumers also could feel the burden of increased costs in the form of higher insurance premiums, co-pays, deductibles, or other out-of-pocket costs.

46. In the second stage of competition, hospitals compete to attract patients to their facilities by offering convenient, high-quality healthcare services. Once patients select a health plan, they generally do not face different out-of-pocket costs to access hospitals included in their commercial health plan network. As a result, in-network hospitals often compete on non-price features, such as location, quality of care, access to services and technology, reputation, physicians and faculty members, amenities, conveniences, and patient satisfaction.

47. Non-price competition to attract patients benefits all patients at the competing hospitals, regardless of whether those patients are covered by commercial insurance, Medicare and Medicaid, or are patients without any insurance. A merger of competing hospitals eliminates these forms of non-price competition between these hospitals.

B.

The Acquisition Would Eliminate Head-to-Head Competition Between RWJ and Saint Peter's that Currently Benefits Patients and Insurers

48. Respondents are direct competitors. [redacted].

49. In Middlesex County, RWJ-NB and Saint Peter's are close competitors to each other because they sell many of the same services in essentially the same place. RWJ-NB and Saint Peter's are located closer to each other than either is to any other hospital. [redacted] RWJ-NB and Saint Peter's also are very close substitutes for patients and insurers in terms of service offerings. RWJ-NB offers virtually every inpatient service that Saint Peter's offers.

50. Respondents engage in substantial head-to-head competition for patient volume and insurers' business. [redacted].

51. RWJ-NB and Saint Peter's currently serve as important alternatives to one another for insurers constructing networks that include Middlesex County. RWJ-NB and Saint Peter's are two of the three largest hospitals in Middlesex County. RWJ-NB and Saint Peter's are the only hospitals in New Brunswick, one of the largest cities within Middlesex County, and are located less than a mile apart. RWJ-NB and Saint Peter's provide many of the same services.

52. Today, close head-to-head competition between Respondents incentivizes them to keep prices lower and quality of care higher than they would absent this competition. [redacted]

53. Quantitative analysis provides direct evidence of the closeness of the competition between RWJ and Saint Peter's. Diversion analysis, an economic tool that measures substitution using data on where patients receive hospital services, shows that if Saint Peter's was to become unavailable to patients for inpatient GAC services, a significant number of those patients would seek care at an RWJ hospital. Likewise, if RWJ-NB was to become unavailable to patients for

inpatient GAC services, a significant fraction of RWJ-NB's patients would seek care at Saint Peter's.

54. Post-merger, insurers will have fewer, less attractive alternatives to Respondents' hospitals than exist today. Aside from Respondents' GAC hospitals, the only other GAC hospitals in Middlesex County are Penn-Princeton and three hospitals owned by Hackensack. Neither Penn-Princeton nor any of Hackensack's hospitals is located in New Brunswick—all are between 10 and 15 miles outside of the city. This distance makes the Hackensack and Penn-Princeton hospitals less convenient alternatives for many patients and less effective substitutes for insurers than RWJ-NB and Saint Peter's are for each other. As a result, should RWJ acquire Saint Peter's, the merged firm will likely be able to demand higher reimbursement rates and/or more onerous contractual terms than Respondents do separately today, which will harm consumers.

55. RWJ and Saint Peter's also compete with one another to attract patients to utilize their inpatient GAC services, regardless of a patient's insurer. This competition incentivizes RWJ and Saint Peter's to improve quality, technology, amenities, equipment, access to care, and service offerings.

56. [redacted]

57. Respondents have invested in their healthcare systems and facilities to compete to attract patients to their Middlesex County hospitals. For example, RWJ and Saint Peter's have each expanded their facilities, hired new specialists, and offered new services to attract patients to their hospitals over their competitors. RWJ is in the process of building a new $750 million cancer center at RWJ-NB that will add 96 beds to the hospital. In response to each other, Respondents have also made improvements to their facilities and service offerings.

58. All of RWJ-NB's and Saint Peter's patients benefit from this non-price competition. The Acquisition will diminish the combined firm's incentive to compete on these non-price dimensions, including improved and expanded facilities, enhanced quality of care, and improved service offerings—to the detriment of all patients who use these hospitals. [redacted]

59. Through the Acquisition, RWJ is attempting to prevent Saint Peter's from competing against RWJ—either as an independent competitor or as a competitor partnered with a different healthcare system. [redacted]

[redacted]

VIII.

LACK OF COUNTERVAILING FACTORS

A.

Entry Barriers

60. *De novo* entry into inpatient GAC services in Middlesex County will not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. Expansion by current market participants also is unlikely to deter or counteract the Acquisition's likely harm to competition for inpatient GAC services in Middlesex County.

61. Construction of a new hospital involves high costs and significant financial risks, including the time and resources it would take to develop plans, acquire land or repurpose a facility, garner community support, obtain regulatory approvals, and build and open a facility.

62. In New Jersey, state law requires obtaining a "Certificate of Need" before building a new hospital or expanding an existing hospital. The process of obtaining a Certificate of Need is expensive and time-consuming, and a denial of a Certificate of Need would foreclose a potential competitor's entry or expansion.

B.

Efficiencies

Respondents have not substantiated merger-specific, verifiable, and cognizable efficiencies that likely would be sufficient to reverse the Acquisition's potential to harm customers in the market for inpatient GAC services.

IX.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

1. The allegations of Paragraphs 1 through 63 above are incorporated by reference as though fully set forth.

2. The Acquisition constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

3. The allegations of Paragraphs 1 through 63 above are incorporated by reference as though fully set forth.

4. The Acquisition, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the twenty-ninth day of November, 2022, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary 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 and the Clayton 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 you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. 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

pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. A prohibition against any transaction between RWJ and Saint Peter's Healthcare that combines their businesses, except as may be approved by the Commission.

2. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as RWJ and Saint Peter's Healthcare were offering and planning to offer prior to the Acquisition.

3. A requirement that, for a period of time, RWJ and Saint Peter's Healthcare provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

5. Requiring that Respondents' compliance with the order may be monitored at Respondents' expense by an independent monitor, for a term to be determined by the Commission.

6. Any other relief appropriate to correct or remedy the anticompetitive effects of the Acquisition or to restore Saint Peter's Healthcare as a viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D.C., this second day of June, 2022.

By the Commission.

ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Complaint Counsel and Respondents' Joint Motion to Dismiss Complaint. The Joint Motion states that Respondents have terminated their Member Substitution and Merger Agreement and that Respondent RWJ Barnabas Health, Inc. has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed acquisition. Having considered the Joint Motion, we have determined that it should be granted. Accordingly,

IT IS HEREBY ORDERED that the Joint Motion to Dismiss Complaint, dated June 15, 2022, is **GRANTED**, and the Complaint in this proceeding is dismissed without prejudice.

By the Commission.

Complaint

IN THE MATTER OF

RESIDUAL PUMPKIN ENTITY, LLC,
AND
PLANETART, LLC

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

Docket No. C-4768; File No. 192 3209
Complaint, June 23, 2022 – Decision, June 23, 2022

This consent order addresses Residual Pumpkin Entity, LLC's data security and privacy practices. The complaint alleges that Respondents violated Section 5(a) of the FTC Act by: (1) misrepresenting the measures CafePress took to protect Personal Information; (2) misrepresenting the steps CafePress took to secure consumer accounts following security incidents; (3) failing to employ reasonable data security practices; (4) misrepresenting how CafePress would use email addresses; (5) misrepresenting CafePress' adherence to the Privacy Shield frameworks; (6) misrepresenting whether CafePress would honor deletion requests; and (7) unfairly withholding commissions payable to shopkeepers. The consent order prohibits Residual Pumpkin from misrepresenting: (1) privacy and security measures it takes to prevent unauthorized access to Personal Information; (2) the extent to which Residual Pumpkin is a member of any privacy or security program sponsored by a government, self-regulatory, or standard-setting organization; (3) privacy and security measures to honor users' privacy choices; (4) information deletion and retention practices; and (5) the extent to which it maintains and protects the privacy, security, availability, confidentiality, or integrity of Personal Information. The order also requires Residual Pumpkin to establish and implement, and thereafter maintain, a comprehensive information security program that protects the privacy, security, confidentiality, and integrity of Personal Information.

Participants

For the *Commission*: *M. Hasan Aijaz* and *Matthew Wilshire.*

For the *Respondent*: *Jennifer Everett* and *Kerianne Tobitsch, Jones Day.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Residual Pumpkin Entity, LLC, a limited liability company, and PlanetArt, LLC, a limited liability company (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 Residual Pumpkin Entity, LLC ("Residual Pumpkin"), also formerly doing business as CafePress, is a Delaware limited liability company with its principal office or place of business at 11909 Shelbyville Road, Louisville, Kentucky 40243.

2. Respondent PlanetArt, LLC ("PlanetArt"), also doing business as CafePress, is a Delaware limited liability company with its principal office or place of business at 23801 Calabasas Road, Suite 2005, Calabasas, California 91302.

3. Residual Pumpkin developed and operated a platform that allows consumers to purchase customized merchandise such as t-shirts and coffee mugs from other consumers or "shopkeepers" on the platform at www.cafepress.com. On September 1, 2020, PlanetArt purchased substantially all of CafePress's assets, including the use of the trade name CafePress, and began operating the website www.cafepress.com. As part of the September 1, 2020 transaction, CafePress changed its name to Residual Pumpkin Entity. This complaint uses the name Residual Pumpkin to refer to activity conducted by that entity before its September 1, 2020 name change.

4. PlanetArt has run the website from the same building, with the same servers, using many of the same vendor accounts, in the same line of business, with many of the same personnel as its predecessor, Residual Pumpkin.

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, 15 U.S.C. § 44.

Data Security

6. Respondents have hosted a platform at the website www.cafepress.com, through which consumers nationwide and internationally can purchase customized merchandise.

7. In selling and promoting products through www.cafepress.com, Respondents routinely have collected information from consumers and shopkeepers—including names, email addresses, telephone numbers, birth dates, gender, photos, social media handles, security questions and answers, passwords, PayPal addresses, the last four digits and expiration dates of credit cards, and Social Security or tax identification numbers of shopkeepers (collectively "Personal Information")—through Respondents' website. Residual Pumpkin stored this Personal Information on their network in clear text, except for passwords, which were encrypted.

Residual Pumpkin's Deceptive Data Security Representations

8. Since at least June 2018 until in or around February 2020, Residual Pumpkin disseminated or caused to be disseminated a privacy policy on the www.cafepress.com website, attached as Exhibit A. This privacy policy contained the following statements regarding the security of the Personal Information it has collected:

> CafePress values the trust you place in us when you use CafePress.com and our affiliated websites, applications or tools (collectively, our "Websites"). Your privacy and trust are important to us and who we are as a company.
>
> * * *
>
> We do our best to provide you with a safe and convenient shopping experience. Our Websites incorporate physical, technical, and administrative safeguards to protect the confidentiality of the information we collect through the Websites, including

the use of encryption, firewalls, limited access and other controls where appropriate. **While we use these precautions to safeguard your personal information, we cannot guarantee the security of the networks, systems, servers, devices, and databases we operate or that are operated on our behalf. 100% complete security does not presently exist anywhere online or offline.**

(Emphasis in original.)

9. Since at least 2018 through the date of the breach described below, Respondents have also disseminated or caused to be disseminated the following statements to consumers regarding the security of the Personal Information it collects:

- In standardized email responses to commonly asked questions, Residual Pumpkin claimed: "CafePress.com also pledges to use the best and most accepted methods and technologies to insure [sic] your personal information is safe and secure."

- On Residual Pumpkin's and PlanetArt's checkout pages: "Safe and Secure Shopping. Guaranteed."

10. Since at least August 2018 through the date of the February 2019 breach described below, Residual Pumpkin has disseminated or caused to be disseminated standardized email responses to commonly asked questions from shopkeepers containing the following statements regarding the security of the Personal Information it collects:

- Please keep in mind, your Social Security ID # is sensitive information and it is sent form [sic] an unsecured email. If you have an EIN number, you can use that number in place of the SSN.

  If you do not have an Employer/Employee Identification Number you can file for a EIN. Below is a link to this form. Please note our servers are secure.

- If you do not wish to use your social security number to receive your commission checks, you can file for an EIN. Below is a link to this form.

  http://www.irs.gov/pub/irs-pdf/fss4.pdf

  Please note our servers are secure and your personal information is stored safely in our system.

- To receive your full commission amount, you must provide your tax information. Information collected here will be used solely to fulfill IRS requirements, and will not be used in any other manner. Additionally your information will be secure. The following is a link for more information on our Secure Server….

Respondents' Data Security Practices

11. Since at least January 2018, Respondents have been responsible for a number of practices that failed to provide reasonable security for the Personal Information stored on its network. Among other things:

a. Respondents failed to implement readily-available protections, including many low-cost protections, against well-known and reasonably foreseeable vulnerabilities, such as "Structured Query Language" ("SQL") injection, Cascading Style Sheets ("CSS") and HTML injection, cross-site scripting ("XSS"), and cross-site request forgery ("CSRF") attacks, that could be exploited to gain unauthorized access to Personal Information on its network;

b. Residual Pumpkin stored Personal Information such as Social Security numbers and security questions and answers in clear, readable text;

c. Residual Pumpkin failed to implement reasonable measures to protect passwords, such as using the SHA-1 hashing algorithm, deprecated by the National Institute of Standards and Technology in 2011, instead of more secure algorithms, and failing to use a "salt"—random data that makes attacks (*e.g.*, brute force, rainbow tables) against cryptographically protected passwords harder;

d. Residual Pumpkin failed to implement a process for receiving and addressing security vulnerability reports from third-party researchers, academics, or other members of the public, thereby delaying its opportunity to correct discovered vulnerabilities or respond to reported incidents;

e. Residual Pumpkin failed to implement patch management policies and procedures to ensure the timely remediation of critical security vulnerabilities and used obsolete versions of database and web server software that no longer received patches;

f. Residual Pumpkin failed to establish or enforce rules sufficient to make user credentials (such as user name and password) hard to guess. For example, employees and consumers, including shopkeepers, were not required to use complex passwords. Accordingly, they could select the same word, including common dictionary words, as both the password and user ID, or a close variant of the user ID as the password;

g. Residual Pumpkin created unnecessary risks to Personal Information by storing it indefinitely on its network without a business need;

h. Residual Pumpkin failed to implement reasonable procedures to prevent, detect, or investigate an intrusion. For example, Residual Pumpkin failed to:

i. log sufficient information to adequately assess cybersecurity events;

ii. properly configure vulnerability testing and scope penetration testing of the network and web application;

iii. comply with its own written security policies; and

i. Residual Pumpkin failed to reasonably respond to security incidents. For example, Residual Pumpkin failed to:

i. timely disclose security incidents to relevant parties, preventing them from taking readily available low-cost measures to avoid or mitigate reasonably foreseeable harm;

ii. adequately assess the extent of and remediate malware infections after learning that devices on its network were infected with malware; and

iii. take adequate measures to prevent account takeovers through password resets using data known to have been obtained by hackers.

February 2019 Breach of Consumer Data

12. In or around February 2019, a hacker exploited the failures set forth in Paragraph 11. The hacker found Personal Information stored on Residual Pumpkin's network, including: more than twenty million unencrypted email addresses and encrypted passwords; millions of unencrypted names, physical addresses, and security questions and answers; more than 180,000 unencrypted Social Security numbers; and, for tens of thousands of payment cards, the unencrypted last four digits of the card together with the unencrypted expiration dates. The hacker exported this information over the Internet to outside computers.

13. On March 11, 2019, Residual Pumpkin received notice of a security incident involving an intrusion into its network. An individual stated that he "believe[s] hackers have access to your customer [database]. The data is currently for sale in certain circles." The individual demonstrated the existence of a SQL injection vulnerability that allowed direct access to Residual Pumpkin's database containing consumer information.

14. On March 12, 2019, Residual Pumpkin confirmed that the individual had identified a legitimate vulnerability. On March 13, 2019, Residual Pumpkin issued a patch to remediate the vulnerability.

15. On March 26, 2019, Residual Pumpkin investigated a recent spike in suspected fraudulent orders and concluded the orders were caused by someone "testing ou[t] stolen credit cards."

16. The breach of Respondents' consumers' credentials increased the risk that its website would be used by fraudsters in possession of credit card numbers, individuals sometimes known as "carders." "Carders" are known to target certain websites to place fraudulent orders using stolen credit card numbers.

17. "Carders" often share lists of "cardable" websites, those on which stolen credit cards can easily be used because, for example, Respondents did not use an address verification service to validate the billing addresses of credit cards used for payments. Since at least 2015, carders have listed CafePress on publicly available forums as a cardable website.

18. On April 10, 2019, Residual Pumpkin received an email from a foreign government with an attached letter stating that a hacker had illegally obtained access to CafePress user account information from January 2014 to January 2019. The email included an attachment with CafePress account logins and passwords and said the hacker had sold the information to a large number of "carders." The letter requested that Residual Pumpkin notify users of compromised accounts to "prevent[] further compromise of accounts owned by users."

19. On April 15, 2019, Residual Pumpkin required all users who logged into the service to reset their passwords, telling consumers only that the company had updated its password policy.

20. Publicly available internet posts began appearing on July 13, 2019, stating that consumer data in Residual Pumpkin's custody had been obtained by hackers. These posts appeared on Twitter.com, Reddit.com, and other discussion boards. By July 19, 2019, posters began to request assistance with decrypting the passwords, and by August 3, 2019, posts appeared purporting to show recovered passwords from the breach.

21. On July 26, 2019, Residual Pumpkin became aware of a post on Facebook stating that the poster had received notice from a monitoring service that her information had been breached from Residual Pumpkin's network.

22. From July 26, 2019, through August 5, 2019, Residual Pumpkin received additional reports from consumers stating that they received third-party notifications that their data had been hacked. On August 5, 2019, a post on the haveibeenpwned.com website indicated that the cafepress.com website had been breached. The next day, Residual Pumpkin internally confirmed that its customer records were available for sale on the dark web.

23. After third parties publicized the breach, Residual Pumpkin reviewed the data it had received in the April 10, 2019 email and confirmed that it appeared to contain CafePress account names and passwords.

24. In September 2019, Residual Pumpkin sent breach notification letters and emails to government agencies and affected consumers and posted a notice of the breach via a banner at

the top of the CafePress website from September 5, 2019 to October 12, 2019. Residual Pumpkin offered two years of free identity theft insurance and credit monitoring services to consumers whose Social Security numbers or tax identification numbers were exposed.

25. Residual Pumpkin told individuals, law enforcement, and regulators that the April 15, 2019 password reset effectively blocked the passwords from subsequent unauthorized use. However, until at least November 19, 2019, Residual Pumpkin continued to allow passwords to be reset through Residual Pumpkin's website simply by answering a security question associated with an email address—information that was stolen in the breach—without confirming that the individual attempting to change the password controlled that email address. Thus, until November 2019, anyone with access to the breached data could take over another user's account.

26. Even though the passwords were encrypted, as noted above, Residual Pumpkin used a deprecated encryption algorithm and failed to use a salt. Scammers were thus able to recover the passwords and use them in extortion attempts. Scammers sent emails to consumers claiming they had obtained damaging Personal Information by hacking into the consumer's computer and would release it unless paid in bitcoin. To provide credibility to their claims, scammers included the consumer's recovered password to Respondents' website in the extortion message.

27. Residual Pumpkin withheld up to $25 in otherwise payable commissions owed to shopkeepers who closed their account after the breach.

Other Security Breaches

28. The February 2019 breach was not the only incident that Residual Pumpkin experienced as a result of these security failures. Shopkeepers' accounts have been hacked and visitors to those shopkeepers' sites redirected to websites controlled by hackers. Moreover, through at least January 2018, and when Residual Pumpkin identified shopkeeper accounts that it determined had been hacked, Residual Pumpkin not only closed those accounts, but also assessed the shopkeepers a $25 account closure fee.

29. Residual Pumpkin also experienced a number of malware infections. In May 2018, Residual Pumpkin determined that a number of its servers were infected with malware but failed to investigate the cause of infection and instead merely fixed the affected servers.

30. In August 2018, Residual Pumpkin became aware that an employee had been targeted by multiple phishing attempts. A scan showed the employee's computer was infected with malware, including a backdoor bot, a "Trojan" downloader, and a password stealer. Additionally, the employee's email account had been configured for months to forward all incoming email to unknown third-party email addresses.

31. In response to this security incident, Residual Pumpkin replaced the particular computer that was infected, but failed to take reasonable steps to detect, remediate, and prevent similar infections on other devices on its network.

32. Because of Residual Pumpkin's failure to implement reasonable safeguards in response to the discovery of malware-based phishing attacks, other devices on Residual Pumpkin's network remained vulnerable to malware. In fact, the same type of malware that had been found in August 2018 was found on the payroll administrator's computer in February 2019.

33. In April, May, and September 2019, an identity thief or thieves used Personal Information belonging to three Residual Pumpkin employees to try to change the employees' payroll direct deposit information. Only after the third incident did Residual Pumpkin at last begin an investigation.

Injury to Consumers

34. Consumers have likely suffered actual injury as a result of Respondents' data security failures. Breached Personal Information, such as that stored in Respondents' system, is often used to commit identity theft and fraud. For example, as noted above, Personal Information exfiltrated from Respondents' system, including login credentials and Social Security numbers, was known to be in the hands of criminals on the dark web including credit card fraudsters and scammers who, among other things, used recovered passwords in extortion attempts of Respondents' consumers.

35. Residual Pumpkin's failure to respond adequately to multiple reports of a security breach led to an unreasonable delay in notifying consumers that their information was exposed and increased the likelihood that those consumers would become victims of identity theft and fraud. Residual Pumpkin's insecure password reset procedure further exacerbated the risks to consumers' Personal Information, as those with access to the breached information could take over users' accounts even after Residual Pumpkin had reset their passwords.

36. Consumers had no way of independently knowing about Respondents' security failures and could not reasonably have avoided possible harms from such failures.

Privacy

37. Until in or around February 2020, Residual Pumpkin disseminated or caused to be disseminated a privacy policy (Exhibit A). This privacy policy included the following statements:

> **How we use your information**
>
> . . . .
>
> In accordance with your choices when you registered with us, we may use information you give us or information we collect about you to:
>
> - Provide, maintain, and improve the Websites for internal or other business purposes;
>
> - Fulfill requests for information;

***

Emails, Newsletters, and other Communications:

When you create an account through our Websites, you are required to provide us with an accurate e-mail address through which we may contact you. The choices you make during the registration through our Websites or apps constitute your express acknowledgment of whether CafePress may use your e-mail address to communicate with you about product offerings from CafePress, its affiliates, selected third parties, and/or partners.

***

Users in the European Union (EEA) and Switzerland

If you are a resident of the EEA [European Economic Area] or Switzerland, the following information applies.

Purposes of processing and legal basis for processing: As explained above, we process personal data in various ways depending upon your use of our Websites. We process personal data on the following legal bases: (1) with your consent; (2) as necessary to perform our agreement to provide Services; and (3) as necessary for our legitimate interests in providing the Websites where those interests do not override your fundamental rights and freedom related to data privacy.

***

Individual Rights: If you are a resident of the EEA or Switzerland, you are entitled to the following rights.

. . . .

The right to request data erasure: You have the right to have your data erased from our Websites if the data is no longer necessary for the purpose for which it was collected, you withdraw consent and no other legal basis for processing exists, or you believe your fundamental rights to data privacy and protection outweigh our legitimate interest in continuing the processing.

***

Privacy Shield Frameworks

CafePress Inc. complies with the EU-US Privacy Shield Framework and the Swiss-US Privacy Shield Framework as set forth by the US Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries and Switzerland transferred to the United States pursuant

> to Privacy Shield. CafePress has certified that it adheres to the Privacy Shield Principles with respect to such data. If there is any conflict between the policies in this privacy policy and data subject rights under the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification page, please visit https://www.privacyshield.gov/.
>
> . . . .
>
> EU and Swiss individuals have the right to obtain our confirmation of whether we maintain personal information relating to you. Upon request, we will provide you with access to the personal information that we hold about you. You also may correct, amend, or delete the personal information we hold about you. An individual who seeks access, or who seeks to correct, amend, or delete inaccurate data, should direct their query to GDPR@cafepress.com. If requested to remove data, we will respond within a reasonable timeframe.
>
> . . . .
>
> We will provide an individual opt-out or opt-in choice before we share your data with third parties other than our agents, or before we use it for a purpose other than which it was originally collected or subsequently authorized.
>
> To limit the use and disclosure of your personal information, please submit a written request to GDPR@cafepress.com.

38. The Department of Commerce ("Commerce") and the European Commission negotiated the Privacy Shield to provide a mechanism for companies to transfer personal data from the European Union to the United States in a manner consistent with the requirements of European Union law on data protection. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework.

39. Privacy Shield expressly provides that, while decisions by organizations to "enter the Privacy Shield are entirely voluntary, effective compliance is compulsory: organizations that self-certify to the Department and publicly declare their commitment to adhere to the Principles must comply fully with the Principles."

40. To join the EU-U.S. and/or Swiss-U.S. Privacy Shield framework, a company must certify to Commerce that it complies with the Privacy Shield Principles. Participating companies must annually re-certify their compliance.

41. Companies under the jurisdiction of the FTC are eligible to join the EU-U.S. and/or Swiss-U.S. Privacy Shield framework. Both frameworks warn companies that claim to have self-certified to the Privacy Shield Principles that failure to comply or otherwise to "fully implement" the Privacy Shield Principles "is enforceable under Section 5 of the Federal Trade Commission Act."

42. Residual Pumpkin obtained Privacy Shield certification in June 2018 and has had an active certification since then, except from June 12, 2019 through July 23, 2019.

43. The Privacy Shield Principles include the following:

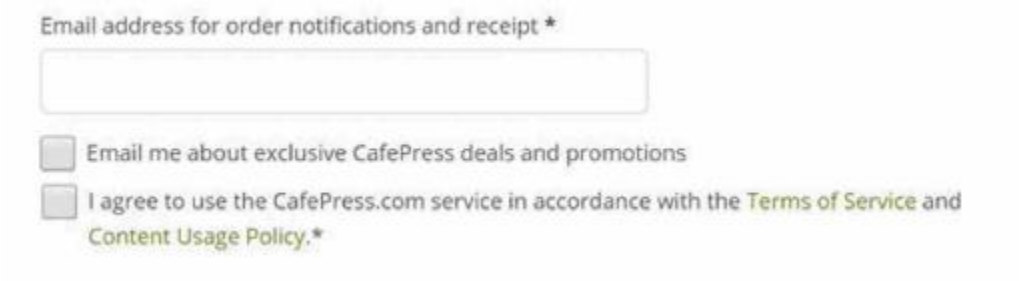
> CHOICE [Principle 2]: (a) An organization must offer individuals the opportunity to choose (opt out) whether their personal information is (i) to be disclosed to a third party or (ii) to be used for a purpose that is materially different from the purpose(s) for which it was originally collected or subsequently authorized by the individuals. Individuals must be provided with clear, conspicuous, and readily available mechanisms to exercise choice.
>
> SECURITY [Principle 4]: (a) Organizations creating, maintaining, using or disseminating personal information must take reasonable and appropriate measures to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction, taking into due account the risks involved in the processing and the nature of the personal data.
>
> ACCESS [Principle 6]: (a) Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, or has been processed in violation of the Principles, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

44. Although the European Court of Justice determined on July 16, 2020 that the EU-U.S. Privacy Shield framework was not adequate for allowing the lawful transfer of personal data from the European Union and the Swiss Data Protection and Information Commissioner determined on September 8, 2020 that the Swiss-U.S. Privacy Shield framework was similarly inadequate, those decisions do not change the fact that Residual Pumpkin represented to consumers that it was certified under both Privacy Shield frameworks, and as such, would fully comply with the Principles, including Principles 2, 4, and 6.

Privacy Practices

45. When consumers completed online orders, Respondents have required them to submit their email address as a mandatory input field. Respondents have provided a notice above the field stating, "Email address for order notifications and receipt."

46. In certain markets, Residual Pumpkin included an additional checkbox to obtain consumer consent to receive marketing emails.



47. However, users would receive marketing emails when they provided their email during checkout, even though the input box only explained that Residual Pumpkin would use the email address "for order notifications and receipt." Similarly, where Residual Pumpkin provided an additional checkbox to seek consumers' opt-in consent to receive marketing emails, as shown in Paragraph 46 above, consumers would receive marketing emails even if they left the checkbox unchecked. Residual Pumpkin was aware that its practices were inconsistent with its stated practices since at least August 2018.

48. Residual Pumpkin has also failed to honor its commitments related to deleting information. Since June 19, 2018, Residual Pumpkin claimed it would delete information upon request from residents of the EEA and Switzerland. In fact, until November 2019 Residual Pumpkin only deactivated user accounts when it received such requests but did not delete the associated account information. Because of this failure to honor deletion requests, information from many consumers who had requested before the February 2019 breach that Residual Pumpkin delete their information was exposed in the breach.

49. The acts and practices of Respondents alleged in this complaint involve material conduct occurring within the United States.

Count I

Data Security Misrepresentations

50. As described in Paragraphs 8-10, Respondents have represented, directly or indirectly, expressly or by implication, that they implemented reasonable measures to protect Personal Information against unauthorized access.

51. In fact, as set forth in Paragraph 11, Respondents did not implement reasonable measures to protect Personal Information against unauthorized access. Therefore, the representation set forth in Paragraph 50 is false or misleading.

Count II

Response to Data Security Incident Misrepresentations

52. As described in Paragraphs 19 and 24-25, Respondents have represented, directly or indirectly, expressly or by implication, that they took appropriate steps to secure consumer account information following security incidents.

53. In fact, as set forth in Paragraph 25, Respondents had not taken appropriate steps to secure access to consumer accounts following security incidents. Consumer accounts remained at risk even after the passwords had been reset. Therefore, the representation set forth in Paragraph 52 is false or misleading.

Count III

Unfair Data Security Practices

54. As described in Paragraph 11, Respondents' failure to employ reasonable data security measures to protect Personal Information caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. This practice is an unfair act or practice.

Count IV

Data Collection and Use Misrepresentation

55. As described in Paragraphs 37, 45, and 46, Respondents have represented, directly or indirectly, expressly or by implication, that they would use email addresses only for order notification and receipt.

56. In fact, as described in Paragraph 47, Respondents did not use email addresses only for order notification and receipt. Respondents sent marketing emails to consumers irrespective of whether they consented to receive such emails. Therefore, the representation set forth in Paragraph 55 is false or misleading.

Count V

Misrepresentation Relating to Privacy Shield Frameworks

57. As described in Paragraph 37, Respondents have represented, directly or indirectly, expressly or by implication, that they adhered to the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks, including the principles of Choice, Security, and Access.

58. In fact, as described in Paragraphs 11 and 43-49, Respondents did not adhere to the Privacy Shield Principles of Choice, Security, and Access. Therefore, the representation set forth in Paragraph 57 is false or misleading.

Count VI

Misrepresentation Relating to Deletion of Consumer Data

59. As described in Paragraph 37, Respondents have represented, directly or indirectly, expressly or by implication, that they honored requests from residents of the EEA and Switzerland to erase data and restrict the use of personal data for direct marketing.

60. In fact, as described in Paragraph 48, Respondents did not honor requests from residents of the EEA and Switzerland to erase data and restrict the use of personal data for direct marketing. Therefore, the representation set forth in Paragraph 59 is false or misleading.

Count VII

Unfair Withholding of Payable Commissions After Security Breach

61. As described in Paragraphs 27 and 28, Respondents withheld payable commissions owed to shopkeepers whose accounts were closed after a security breach.

62. Withholding payable commissions owed to shopkeepers whose accounts were closed after a security breach is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. This practice is an unfair act or practice.

Violations of Section 5

63. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this 23rd day of June, 2022, has issued this complaint against Respondents.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent Residual Pumpkin Entity, LLC, named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its

consideration. If issued by the Commission, the draft Complaint would charge Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Residual Pumpkin Entity, LLC, also formerly doing business as CafePress, a Delaware limited liability company with its principal office or place of business at 11909 Shelbyville Road, Louisville, Kentucky 40243.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "**Covered Incident**" means any instance in which any United States federal, state, or local law or regulation requires Respondent to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondent from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

B. "**Personal Information**" means individually identifiable information from or about an individual consumer, including: (1) a first and last name; (2) a physical address; (3) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (4) a telephone number; (5) date of birth; (6) a Social Security number; (7) driver's license or other government issued identification number; (8) financial institution account number; (9) credit or debit card information; (10) a persistent identifier, such as a customer number held in a

"cookie," a static Internet Protocol ("IP") address, a mobile device ID, or processor serial number; and (11) authentication credentials such as a user ID, password, and security questions and answers. For purposes of this definition, "consumer" includes any individual who is, or seeks to become, an employee, officer, or independent contractor of Respondent.

C. "**Respondent**" means Residual Pumpkin Entity, LLC, a limited liability company, formerly doing business as CafePress and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Privacy and Security

IT IS ORDERED that Respondent, Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them who receive actual notice of this Order, whether acting directly or indirectly, in connection with any product or service, must not misrepresent in any manner, expressly or by implication:

A. Respondent's privacy and security measures to prevent unauthorized access to Personal Information;

B. The extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization;

C. Respondent's privacy and security measures to honor the privacy choices exercised by users;

D. Respondent's information deletion and retention practices; and

E. The extent to which Respondent otherwise protects the privacy, security, availability, confidentiality, or integrity of Personal Information.

II. Mandated Information Security Program

IT IS FURTHER ORDERED that Respondent, and any business that Respondent controls directly, or indirectly, in connection with the collection, maintenance, use, or disclosure of, or provision of access to, Personal Information, must, within sixty (60) days of issuance of this order, establish and implement, and thereafter maintain, a comprehensive information security program ("Information Security Program") that protects the privacy, security, confidentiality, and integrity of such Personal Information. To satisfy this requirement, Respondent must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Information Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to Respondent's board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer of Respondent responsible for Respondent's Information Security Program at least once every twelve (12) months and promptly (not to exceed thirty (30) days) after a Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Information Security Program;

D. Assess and document, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, internal and external risks to the privacy, security, confidentiality, or integrity of Personal Information that could result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Personal Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards that control for the internal and external risks Respondent identifies to the privacy, security, confidentiality, or integrity of Personal Information identified in response to sub-Provision II.D. Each safeguard must be based on the volume and sensitivity of the Personal Information that is at risk, and the likelihood that the risk could be realized and result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Personal Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information. Such safeguards must also include:

1. Technical measures to monitor all of Respondent's networks and all systems and assets within those networks to identify data security events, including unauthorized attempts to exfiltrate Personal Information from those networks;

2. Policies and procedures to ensure that all code for web applications is reviewed for the existence of common vulnerabilities;

3. Policies and procedures to minimize data collection, storage, and retention, including data deletion or retention policies and procedures;

4. Encryption of all Social Security numbers on Respondent's computer networks;

5. Data access controls for all databases storing Personal Information, including by, at a minimum, (a) restricting inbound connections to approved IP addresses, (b) requiring authentication to access them, and (c) limiting employee access to what is needed to perform that employee's job function;

6. Policies and procedures to ensure that all devices on Respondent's network with access to Personal Information are securely installed and inventoried

at least once every twelve (12) months, including policies and procedures to timely remediate critical and high-risk security vulnerabilities and apply up-to-date security patches;

7. Replacing authentication measures based on the use of security questions and answers to access accounts with multi-factor authentication methods that use a secure authentication protocol, such as cryptographic software or devices, mobile authenticator applications, or allowing the use of security keys; and

8. Training of all of Respondent's employees, at least once every twelve (12) months, on how to safeguard Personal Information;

F. Assess, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, the sufficiency of any safeguards in place to address the internal and external risks to the privacy, security, confidentiality, or integrity of Personal Information, and modify the Information Security Program based on the results;

G. Test and monitor the effectiveness of the safeguards at least once every twelve (12) months and promptly (not to exceed 30 days) following a Covered Incident, and modify the Information Security Program based on the results. Such testing and monitoring must include vulnerability testing of Respondent's network(s) once every four months and promptly (not to exceed 30 days) after a Covered Incident, and penetration testing of Respondent's network(s) at least once every twelve (12) months and promptly (not to exceed 30 days) after a Covered Incident;

H. Select and retain service providers capable of safeguarding Personal Information they access through or receive from Respondent, and contractually require service providers to implement and maintain safeguards sufficient to address the internal and external risks to the privacy, security, confidentiality, or integrity of Personal Information;

I. Consult with, and seek appropriate guidance from, independent, third-party experts on data protection and privacy in the course of establishing, implementing, maintaining, and updating the Information Security Program; and

J. Evaluate and adjust the Information Security Program in light of any changes to Respondent's operations or business arrangements, a Covered Incident, new or more efficient technological or operational methods to control for the risks identified in Provision II.D of this Order, or any other circumstances that Respondent knows or has reason to know may have an impact on the effectiveness of the Information Security Program or any of its individual safeguards. At a minimum, Respondent must evaluate the Information Security Program at least once every twelve (12) months and modify the Information Security Program based on the results.

III. Independent Program Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with compliance with Provision II of this Order titled Mandated Information Security Program, Respondent and any business that Respondent controls directly, or indirectly, in connection with the collection, maintenance, use, or disclosure of, or provision of access to, Personal Information must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from one or more qualified, objective, independent third-party professionals ("Assessors"), who: (1) use procedures and standards generally accepted in the profession; (2) conduct an independent review of the Information Security Program; (3) retain all documents relevant to each Assessment for five (5) years after completion of such Assessment, and (4) will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents may be withheld on the basis of a claim of confidentiality, proprietary or trade secrets, work product protection, attorney-client privilege, statutory exemption, or any similar claim. Respondent may obtain separate assessments for (1) privacy and (2) information security from multiple Assessors, so long as each of the Assessors meet the qualifications set forth above.

B. For each Assessment, Respondent must provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name, affiliation, and qualifications of the proposed Assessor, whom the Associate Director shall have the authority to approve in her or his sole discretion.

C. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment; and (2) each 2-year period thereafter for twenty (20) years after issuance of the Order for the biennial Assessments.

D. Each Assessment must, for the entire assessment period: (1) determine whether Respondent has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program; (2) assess the effectiveness of Respondent's implementation and maintenance of sub-Provisions II.A-J; (3) identify any gaps or weaknesses in, or instances of material noncompliance with, the Information Security Program; (4) address the status of gaps or weaknesses in, or instances of material non-compliance with, the Information Security Program that were identified in any prior Assessment required by this Order; and (5) identify specific evidence (including documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is (a) appropriate for assessing an enterprise of Respondent's size, complexity, and risk profile; and (b)

sufficient to justify the Assessor's findings. No finding of any Assessment shall rely primarily on assertions or attestations by Respondent's management. The Assessment must be signed by the Assessor, state that the Assessor conducted an independent review of the Information Security Program and did not rely primarily on assertions or attestations by Respondent's management, and state the number of hours that each member of the assessment team worked on the Assessment. To the extent that Respondent revises, updates, or adds one or more safeguards required under Provision II of this Order during an Assessment period, the Assessment must assess the effectiveness of the revised, updated, or added safeguard(s) for the time period in which it was in effect, and provide a separate statement detailing the basis for each revised, updated, or additional safeguard.

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondent must submit an unredacted copy of the initial Assessment and a proposed redacted copy suitable for public disclosure of the initial Assessment to the Commission within ten (10) days after the Assessment has been completed via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, FTC File No. 1923209." Respondent must retain an unredacted copy of each subsequent biennial Assessment as well as a proposed redacted copy of each subsequent biennial Assessment suitable for public disclosure until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

IV. Cooperation with Third Party Information Security Assessor

IT IS FURTHER ORDERED that Respondent, whether acting directly or indirectly, in connection with any Assessment required by Provision III of this Order titled Independent Program Assessments by a Third Party, must:

A. Provide or otherwise make available to the Assessor all information and material in its possession, custody, or control that is relevant to the Assessment for which there is no reasonable claim of privilege.

B. Provide or otherwise make available to the Assessor information about Respondent's network(s) and all of Respondent's IT assets so that the Assessor can determine the scope of the Assessment, and visibility to those portions of the network(s) and IT assets deemed in scope; and

C. Disclose all material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether Respondent has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program; (2) assessment of the effectiveness of the implementation and

maintenance of sub-Provisions II.A-J; or (3) identification of any gaps or weaknesses in, or instances of material noncompliance with, the Information Security Program.

V. Annual Certification

IT IS FURTHER ORDERED that Respondent must:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of Respondent responsible for Respondent's Information Security Program that: (1) Respondent has established, implemented, and maintained the requirements of this Order; (2) Respondent is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of all Covered Incidents during the certified period. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, FTC File No. 1923209."

VI. Covered Incident Reports

IT IS FURTHER ORDERED that Respondent, within thirty (30) days after Respondent's discovery of a Covered Incident, must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes of the Covered Incident, if known;

C. A description of each type of information that triggered any notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information triggered any notification obligation to the U.S. federal, state, or local government entity;

E. The acts that Respondent has taken to date to remediate the Covered Incident and protect Personal Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of any materially different notice sent by Respondent to consumers or to any U.S. federal, state, or local government entity.

Unless otherwise directed by a Commission representative in writing, all Covered Incident reports to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, FTC File No. 1923209."

VII. Monetary Relief

IT IS FURTHER ORDERED that:

A. Respondent must pay to the Commission $500,000 which Respondent stipulates their undersigned counsel holds in escrow for no purpose other than payment to the Commission.

B. Such payment must be made within 8 days of the effective date of this Order by electronic fund transfer in accordance with instructions provided by a representative of the Commission.

VIII. Additional Monetary Provisions

IT IS FURTHER ORDERED that:

A. Respondent relinquishes dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission to enforce its rights to any payment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by or on behalf of the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for relief, including

consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other relief (including consumer information remedies) as it determines to be reasonably related to Respondent's practices alleged in the Complaint. Any money not used is to be deposited to the U.S. Treasury. Respondent has no right to challenge any activities pursuant to this Provision.

E. In the event of default on any obligation to make payment under this Order, interest, computed as if pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for 10 days beyond the date that payment is due, the entire amount will immediately become due and payable.

F. Each day of nonpayment is a violation through continuing failure to obey or neglect to obey a final order of the Commission and thus will be deemed a separate offense and violation for which a civil penalty shall accrue.

G. Respondent acknowledges that its Taxpayer Identification Numbers, which Respondent has previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

IX. Customer Information

IT IS FURTHER ORDERED that Respondent must directly or indirectly provide sufficient customer information to enable the Commission to efficiently administer consumer redress to shopkeepers who did not receive payable commissions because they closed their account. If a representative of the Commission requests in writing any information related to redress, Respondent must provide it, in the form prescribed by the Commission representative, within 14 days.

X. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 10 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives with managerial

or professional responsibilities for conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

XI. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the

United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, LLC, FTC File No. 1923209."

XII. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent, in connection with any conduct related to the subject matter of the Order, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;

E. A copy of each widely disseminated representation by Respondent that describes the extent to which Respondent maintains or protects the privacy, security and confidentiality of any Personal Information, including any representation concerning a change in any website or other service controlled by Respondent that relates to the privacy, security, and confidentiality of Personal Information.

F. For 5 years after the date of preparation of each Assessment required by this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment.

G. For 5 years from the date received, copies of all subpoenas and other communications with law enforcement, if such subpoena or other communication relate to Respondent's compliance with this Order.

H. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondent, that demonstrate non-compliance or tend to show any lack of compliance by Respondent with this Order.

I. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

XIII. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XIV. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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

By the Commission.

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, agreements containing consent orders from Residual Pumpkin Entity, LLC ("Residual Pumpkin") and PlanetArt, LLC ("PlanetArt") (collectively, "Respondents").

The proposed consent orders ("Proposed Orders") have 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 agreements and the comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the Proposed Orders.

This matter involves Respondents' data security and privacy practices. Respondent Residual Pumpkin owned CafePress until September 2020, when Residual Pumpkin sold CafePress to Respondent PlanetArt. The CafePress website allows users, known as shopkeepers, to earn commissions from sales of merchandise offered to consumers. CafePress collected information such as names, email addresses, telephone numbers and—from shopkeepers—Social Security numbers ("Personal Information"). CafePress claimed to keep this information safe, but in fact failed to provide reasonable security. For example, CafePress failed to: guard against well-known and reasonably foreseeable threats, such as SQL injection and cross-site scripting attacks; encrypt Social Security numbers; and implement a process for receiving and addressing third-party security vulnerability reports. CafePress also claimed to adhere to principles set forth in the EU-U.S. and Swiss U.S. Privacy Shield frameworks, specifically that it would honor user requests to delete data and user choices about how email addresses would be used. Instead, CafePress failed to delete Personal Information when it was requested to do so and sent marketing emails to nearly

all its consumers, even those who had not opted in to receive such messages. As a result of CafePress' data security practices, consumers' Personal Information was stolen and sold on the dark web. CafePress learned of the breach but failed to notify affected consumers. After some shopkeepers learned of the breach and closed their accounts, CafePress withheld up to $25 in payable commissions from each of those shopkeepers.

The complaint alleges that Respondents violated Section 5(a) of the FTC Act by: (1) misrepresenting the measures CafePress took to protect Personal Information; (2) misrepresenting the steps CafePress took to secure consumer accounts following security incidents; (3) failing to employ reasonable data security practices; (4) misrepresenting how CafePress would use email addresses; (5) misrepresenting CafePress' adherence to the Privacy Shield frameworks; (6) misrepresenting whether CafePress would honor deletion requests; and (7) unfairly withholding commissions payable to shopkeepers.

The Proposed Orders contain provisions designed to prevent Respondents from engaging in the same or similar acts or practices in the future.

Summary of Proposed Order with Residual Pumpkin

Part I prohibits Residual Pumpkin from misrepresenting: (1) privacy and security measures it takes to prevent unauthorized access to Personal Information; (2) the extent to which Residual Pumpkin is a member of any privacy or security program sponsored by a government, self-regulatory, or standard-setting organization; (3) privacy and security measures to honor users' privacy choices; (4) information deletion and retention practices; and (5) the extent to which it maintains and protects the privacy, security, availability, confidentiality, or integrity of Personal Information.

Part II requires Residual Pumpkin to establish and implement, and thereafter maintain, a comprehensive information security program ("Security Program") that protects the privacy, security, confidentiality, and integrity of Personal Information.

Part III requires Residual Pumpkin to obtain initial and biennial data security assessments for 20 years.

Part IV requires Residual Pumpkin to disclose all material facts to the assessor and prohibits Residual Pumpkin from misrepresenting any fact material to the assessment required by Part II.

Part V requires Residual Pumpkin to submit an annual certification from a senior corporate manager (or senior officer responsible for its Security Program) that Residual Pumpkin has implemented the requirements of the order and is not aware of any material noncompliance that has not been corrected or disclosed to the Commission.

Part VI requires Residual Pumpkin to notify the Commission of a "Covered Incident" within thirty days of discovering such incident.

Analysis to Aid Public Comment

Parts VII and **VIII** require Residual Pumpkin to pay to the Commission $500,000 and describe the procedures and legal rights related to that payment.

Part IX requires Residual Pumpkin to provide customer information to enable the Commission to administer consumer redress.

Part X requires Residual Pumpkin to submit an acknowledgement of receipt of the order, including all officers or directors and employees having managerial responsibilities for conduct related to the subject matter of the order, and to obtain acknowledgements from each individual or entity to which a Residual Pumpkin has delivered a copy of the order.

Part XI requires Residual Pumpkin to file compliance reports with the Commission and to notify the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations.

Part XII contains recordkeeping requirements for accounting records, personnel records, consumer correspondence, advertising and marketing materials, and claim substantiation, as well as all records necessary to demonstrate compliance with the order.

Part XIII contains other requirements related to the Commission's monitoring of Respondent's order compliance.

Part XIV provides the effective dates of the order, including that, with exceptions, the order will terminate in twenty (20) years.

The purpose of this analysis is to facilitate public comment on the Proposed Orders, and it is not intended to constitute an official interpretation of the complaint or Proposed Orders, or to modify the Proposed Orders' terms in any way.

Complaint

IN THE MATTER OF

RESIDUAL PUMPKIN ENTITY, LLC,
AND
PLANETART, LLC

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

Docket No. C-4769; File No. 192 3209
Complaint, June 23, 2022 – Decision, June 23, 2022

This consent order addresses PlanetArt, LLC's data security and privacy practices. The complaint alleges that Respondents violated Section 5(a) of the FTC Act by: (1) misrepresenting the measures CafePress took to protect Personal Information; (2) misrepresenting the steps CafePress took to secure consumer accounts following security incidents; (3) failing to employ reasonable data security practices; (4) misrepresenting how CafePress would use email addresses; (5) misrepresenting CafePress' adherence to the Privacy Shield frameworks; (6) misrepresenting whether CafePress would honor deletion requests; and (7) unfairly withholding commissions payable to shopkeepers. The consent order prohibits PlanetArt from misrepresenting: (1) privacy and security measures it takes to prevent unauthorized access to Personal Information; (2) the extent to which PlanetArt is a member of any privacy or security program sponsored by a government, self-regulatory, or standard-setting organization; (3) privacy and security measures to honor users' privacy choices; (4) information deletion and retention practices; and (5) the extent to which it maintains and protects the privacy, security, availability, confidentiality, or integrity of Personal Information. The order also requires PlanetArt to obtain initial and biennial data security assessments for 20 years.

Participants

For the *Commission*: *M. Hasan Aijaz* and *Matthew Wilshire.*

For the *Respondents*: *Josh James* and *Jim Dudukovich, Bryan Cave Leighton Paisner.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Residual Pumpkin Entity, LLC, a limited liability company, and PlanetArt, LLC, a limited liability company (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 Residual Pumpkin Entity, LLC ("Residual Pumpkin"), also formerly doing business as CafePress, is a Delaware limited liability company with its principal office or place of business at 11909 Shelbyville Road, Louisville, Kentucky 40243.

2. Respondent PlanetArt, LLC ("PlanetArt"), also doing business as CafePress, is a Delaware limited liability company with its principal office or place of business at 23801 Calabasas Road, Suite 2005, Calabasas, California 91302.

3. Residual Pumpkin developed and operated a platform that allows consumers to purchase customized merchandise such as t-shirts and coffee mugs from other consumers or

"shopkeepers" on the platform at www.cafepress.com. On September 1, 2020, PlanetArt purchased substantially all of CafePress's assets, including the use of the trade name CafePress, and began operating the website www.cafepress.com. As part of the September 1, 2020 transaction, CafePress changed its name to Residual Pumpkin Entity. This complaint uses the name Residual Pumpkin to refer to activity conducted by that entity before its September 1, 2020 name change.

4. PlanetArt has run the website from the same building, with the same servers, using many of the same vendor accounts, in the same line of business, with many of the same personnel as its predecessor, Residual Pumpkin.

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, 15 U.S.C. § 44.

Data Security

6. Respondents have hosted a platform at the website www.cafepress.com, through which consumers nationwide and internationally can purchase customized merchandise.

7. In selling and promoting products through www.cafepress.com, Respondents routinely have collected information from consumers and shopkeepers—including names, email addresses, telephone numbers, birth dates, gender, photos, social media handles, security questions and answers, passwords, PayPal addresses, the last four digits and expiration dates of credit cards, and Social Security or tax identification numbers of shopkeepers (collectively "Personal Information")—through Respondents' website. Residual Pumpkin stored this Personal Information on their network in clear text, except for passwords, which were encrypted.

Residual Pumpkin's Deceptive Data Security Representations

8. Since at least June 2018 until in or around February 2020, Residual Pumpkin disseminated or caused to be disseminated a privacy policy on the www.cafepress.com website, attached as Exhibit A. This privacy policy contained the following statements regarding the security of the Personal Information it has collected:

> CafePress values the trust you place in us when you use CafePress.com and our affiliated websites, applications or tools (collectively, our "Websites"). Your privacy and trust are important to us and who we are as a company.
>
> * * *
>
> We do our best to provide you with a safe and convenient shopping experience. Our Websites incorporate physical, technical, and administrative safeguards to protect the confidentiality of the information we collect through the Websites, including the use of encryption, firewalls, limited access and other controls where appropriate. **While we use these precautions to safeguard your personal**

information, we cannot guarantee the security of the networks, systems, servers, devices, and databases we operate or that are operated on our behalf. 100% complete security does not presently exist anywhere online or offline.

(Emphasis in original.)

9. Since at least 2018 through the date of the breach described below, Respondents have also disseminated or caused to be disseminated the following statements to consumers regarding the security of the Personal Information it collects:

- In standardized email responses to commonly asked questions, Residual Pumpkin claimed: "CafePress.com also pledges to use the best and most accepted methods and technologies to insure [sic] your personal information is safe and secure."

- On Residual Pumpkin's and PlanetArt's checkout pages: "Safe and Secure Shopping. Guaranteed."

10. Since at least August 2018 through the date of the February 2019 breach described below, Residual Pumpkin has disseminated or caused to be disseminated standardized email responses to commonly asked questions from shopkeepers containing the following statements regarding the security of the Personal Information it collects:

- Please keep in mind, your Social Security ID # is sensitive information and it is sent form [sic] an unsecured email. If you have an EIN number, you can use that number in place of the SSN.

  If you do not have an Employer/Employee Identification Number you can file for a EIN. Below is a link to this form. Please note our servers are secure.

- If you do not wish to use your social security number to receive your commission checks, you can file for an EIN. Below is a link to this form.

  http://www.irs.gov/pub/irs-pdf/fss4.pdf

  Please note our servers are secure and your personal information is stored safely in our system.

- To receive your full commission amount, you must provide your tax information. Information collected here will be used solely to fulfill IRS requirements, and will not be used in any other manner. Additionally your information will be secure. The following is a link for more information on our Secure Server….

Respondents' Data Security Practices

11. Since at least January 2018, Respondents have been responsible for a number of practices that failed to provide reasonable security for the Personal Information stored on its network. Among other things:

a. Respondents failed to implement readily-available protections, including many low-cost protections, against well-known and reasonably foreseeable vulnerabilities, such as "Structured Query Language" ("SQL") injection, Cascading Style Sheets ("CSS") and HTML injection, cross-site scripting ("XSS"), and cross-site request forgery ("CSRF") attacks, that could be exploited to gain unauthorized access to Personal Information on its network;

b. Residual Pumpkin stored Personal Information such as Social Security numbers and security questions and answers in clear, readable text;

c. Residual Pumpkin failed to implement reasonable measures to protect passwords, such as using the SHA-1 hashing algorithm, deprecated by the National Institute of Standards and Technology in 2011, instead of more secure algorithms, and failing to use a "salt"—random data that makes attacks (*e.g.*, brute force, rainbow tables) against cryptographically protected passwords harder;

d. Residual Pumpkin failed to implement a process for receiving and addressing security vulnerability reports from third-party researchers, academics, or other members of the public, thereby delaying its opportunity to correct discovered vulnerabilities or respond to reported incidents;

e. Residual Pumpkin failed to implement patch management policies and procedures to ensure the timely remediation of critical security vulnerabilities and used obsolete versions of database and web server software that no longer received patches;

f. Residual Pumpkin failed to establish or enforce rules sufficient to make user credentials (such as user name and password) hard to guess. For example, employees and consumers, including shopkeepers, were not required to use complex passwords. Accordingly, they could select the same word, including common dictionary words, as both the password and user ID, or a close variant of the user ID as the password;

g. Residual Pumpkin created unnecessary risks to Personal Information by storing it indefinitely on its network without a business need;

h. Residual Pumpkin failed to implement reasonable procedures to prevent, detect, or investigate an intrusion. For example, Residual Pumpkin failed to:

i. log sufficient information to adequately assess cybersecurity events;

ii. properly configure vulnerability testing and scope penetration testing of the network and web application;

iii. comply with its own written security policies; and

i. Residual Pumpkin failed to reasonably respond to security incidents. For example, Residual Pumpkin failed to:

i. timely disclose security incidents to relevant parties, preventing them from taking readily available low-cost measures to avoid or mitigate reasonably foreseeable harm;

ii. adequately assess the extent of and remediate malware infections after learning that devices on its network were infected with malware; and

iii. take adequate measures to prevent account takeovers through password resets using data known to have been obtained by hackers.

February 2019 Breach of Consumer Data

12. In or around February 2019, a hacker exploited the failures set forth in Paragraph 11. The hacker found Personal Information stored on Residual Pumpkin's network, including: more than twenty million unencrypted email addresses and encrypted passwords; millions of unencrypted names, physical addresses, and security questions and answers; more than 180,000 unencrypted Social Security numbers; and, for tens of thousands of payment cards, the unencrypted last four digits of the card together with the unencrypted expiration dates. The hacker exported this information over the Internet to outside computers.

13. On March 11, 2019, Residual Pumpkin received notice of a security incident involving an intrusion into its network. An individual stated that he "believe[s] hackers have access to your customer [database]. The data is currently for sale in certain circles." The individual demonstrated the existence of a SQL injection vulnerability that allowed direct access to Residual Pumpkin's database containing consumer information.

14. On March 12, 2019, Residual Pumpkin confirmed that the individual had identified a legitimate vulnerability. On March 13, 2019, Residual Pumpkin issued a patch to remediate the vulnerability.

15. On March 26, 2019, Residual Pumpkin investigated a recent spike in suspected fraudulent orders and concluded the orders were caused by someone "testing ou[t] stolen credit cards."

16. The breach of Respondents' consumers' credentials increased the risk that its website would be used by fraudsters in possession of credit card numbers, individuals sometimes known as "carders." "Carders" are known to target certain websites to place fraudulent orders using stolen credit card numbers.

17. "Carders" often share lists of "cardable" websites, those on which stolen credit cards can easily be used because, for example, Respondents did not use an address verification service to validate the billing addresses of credit cards used for payments. Since at least 2015, carders have listed CafePress on publicly available forums as a cardable website.

18. On April 10, 2019, Residual Pumpkin received an email from a foreign government with an attached letter stating that a hacker had illegally obtained access to CafePress user account information from January 2014 to January 2019. The email included an attachment with CafePress account logins and passwords and said the hacker had sold the information to a large number of "carders." The letter requested that Residual Pumpkin notify users of compromised accounts to "prevent[] further compromise of accounts owned by users."

19. On April 15, 2019, Residual Pumpkin required all users who logged into the service to reset their passwords, telling consumers only that the company had updated its password policy.

20. Publicly available internet posts began appearing on July 13, 2019, stating that consumer data in Residual Pumpkin's custody had been obtained by hackers. These posts appeared on Twitter.com, Reddit.com, and other discussion boards. By July 19, 2019, posters began to request assistance with decrypting the passwords, and by August 3, 2019, posts appeared purporting to show recovered passwords from the breach.

21. On July 26, 2019, Residual Pumpkin became aware of a post on Facebook stating that the poster had received notice from a monitoring service that her information had been breached from Residual Pumpkin's network.

22. From July 26, 2019, through August 5, 2019, Residual Pumpkin received additional reports from consumers stating that they received third-party notifications that their data had been hacked. On August 5, 2019, a post on the haveibeenpwned.com website indicated that the cafepress.com website had been breached. The next day, Residual Pumpkin internally confirmed that its customer records were available for sale on the dark web.

23. After third parties publicized the breach, Residual Pumpkin reviewed the data it had received in the April 10, 2019 email and confirmed that it appeared to contain CafePress account names and passwords.

24. In September 2019, Residual Pumpkin sent breach notification letters and emails to government agencies and affected consumers and posted a notice of the breach via a banner at

the top of the CafePress website from September 5, 2019 to October 12, 2019. Residual Pumpkin offered two years of free identity theft insurance and credit monitoring services to consumers whose Social Security numbers or tax identification numbers were exposed.

25. Residual Pumpkin told individuals, law enforcement, and regulators that the April 15, 2019 password reset effectively blocked the passwords from subsequent unauthorized use. However, until at least November 19, 2019, Residual Pumpkin continued to allow passwords to be reset through Residual Pumpkin's website simply by answering a security question associated with an email address—information that was stolen in the breach—without confirming that the individual attempting to change the password controlled that email address. Thus, until November 2019, anyone with access to the breached data could take over another user's account.

26. Even though the passwords were encrypted, as noted above, Residual Pumpkin used a deprecated encryption algorithm and failed to use a salt. Scammers were thus able to recover the passwords and use them in extortion attempts. Scammers sent emails to consumers claiming they had obtained damaging Personal Information by hacking into the consumer's computer and would release it unless paid in bitcoin. To provide credibility to their claims, scammers included the consumer's recovered password to Respondents' website in the extortion message.

27. Residual Pumpkin withheld up to $25 in otherwise payable commissions owed to shopkeepers who closed their account after the breach.

Other Security Breaches

28. The February 2019 breach was not the only incident that Residual Pumpkin experienced as a result of these security failures. Shopkeepers' accounts have been hacked and visitors to those shopkeepers' sites redirected to websites controlled by hackers. Moreover, through at least January 2018, and when Residual Pumpkin identified shopkeeper accounts that it determined had been hacked, Residual Pumpkin not only closed those accounts, but also assessed the shopkeepers a $25 account closure fee.

29. Residual Pumpkin also experienced a number of malware infections. In May 2018, Residual Pumpkin determined that a number of its servers were infected with malware but failed to investigate the cause of infection and instead merely fixed the affected servers.

30. In August 2018, Residual Pumpkin became aware that an employee had been targeted by multiple phishing attempts. A scan showed the employee's computer was infected with malware, including a backdoor bot, a "Trojan" downloader, and a password stealer. Additionally, the employee's email account had been configured for months to forward all incoming email to unknown third-party email addresses.

31. In response to this security incident, Residual Pumpkin replaced the particular computer that was infected, but failed to take reasonable steps to detect, remediate, and prevent similar infections on other devices on its network.

32. Because of Residual Pumpkin's failure to implement reasonable safeguards in response to the discovery of malware-based phishing attacks, other devices on Residual Pumpkin's network remained vulnerable to malware. In fact, the same type of malware that had been found in August 2018 was found on the payroll administrator's computer in February 2019.

33. In April, May, and September 2019, an identity thief or thieves used Personal Information belonging to three Residual Pumpkin employees to try to change the employees' payroll direct deposit information. Only after the third incident did Residual Pumpkin at last begin an investigation.

Injury to Consumers

34. Consumers have likely suffered actual injury as a result of Respondents' data security failures. Breached Personal Information, such as that stored in Respondents' system, is often used to commit identity theft and fraud. For example, as noted above, Personal Information exfiltrated from Respondents' system, including login credentials and Social Security numbers, was known to be in the hands of criminals on the dark web including credit card fraudsters and scammers who, among other things, used recovered passwords in extortion attempts of Respondents' consumers.

35. Residual Pumpkin's failure to respond adequately to multiple reports of a security breach led to an unreasonable delay in notifying consumers that their information was exposed and increased the likelihood that those consumers would become victims of identity theft and fraud. Residual Pumpkin's insecure password reset procedure further exacerbated the risks to consumers' Personal Information, as those with access to the breached information could take over users' accounts even after Residual Pumpkin had reset their passwords.

36. Consumers had no way of independently knowing about Respondents' security failures and could not reasonably have avoided possible harms from such failures.

Privacy

37. Until in or around February 2020, Residual Pumpkin disseminated or caused to be disseminated a privacy policy (Exhibit A). This privacy policy included the following statements:

> **How we use your information**
>
> . . . .
>
> In accordance with your choices when you registered with us, we may use information you give us or information we collect about you to:
>
> - Provide, maintain, and improve the Websites for internal or other business purposes;
>
> - Fulfill requests for information;

***

Emails, Newsletters, and other Communications:

When you create an account through our Websites, you are required to provide us with an accurate e-mail address through which we may contact you. The choices you make during the registration through our Websites or apps constitute your express acknowledgment of whether CafePress may use your e-mail address to communicate with you about product offerings from CafePress, its affiliates, selected third parties, and/or partners.

***

Users in the European Union (EEA) and Switzerland

If you are a resident of the EEA [European Economic Area] or Switzerland, the following information applies.

Purposes of processing and legal basis for processing: As explained above, we process personal data in various ways depending upon your use of our Websites. We process personal data on the following legal bases: (1) with your consent; (2) as necessary to perform our agreement to provide Services; and (3) as necessary for our legitimate interests in providing the Websites where those interests do not override your fundamental rights and freedom related to data privacy.

***

Individual Rights: If you are a resident of the EEA or Switzerland, you are entitled to the following rights.

. . . .

The right to request data erasure: You have the right to have your data erased from our Websites if the data is no longer necessary for the purpose for which it was collected, you withdraw consent and no other legal basis for processing exists, or you believe your fundamental rights to data privacy and protection outweigh our legitimate interest in continuing the processing.

***

Privacy Shield Frameworks

CafePress Inc. complies with the EU-US Privacy Shield Framework and the Swiss-US Privacy Shield Framework as set forth by the US Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries and Switzerland transferred to the United States pursuant to Privacy Shield. CafePress has certified that it adheres to the Privacy Shield

> Principles with respect to such data. If there is any conflict between the policies in this privacy policy and data subject rights under the Privacy Shield Principles, the Privacy Shield Principles shall govern. To learn more about the Privacy Shield program, and to view our certification page, please visit https://www.privacyshield.gov/.
>
> . . . .
>
> EU and Swiss individuals have the right to obtain our confirmation of whether we maintain personal information relating to you. Upon request, we will provide you with access to the personal information that we hold about you. You also may correct, amend, or delete the personal information we hold about you. An individual who seeks access, or who seeks to correct, amend, or delete inaccurate data, should direct their query to GDPR@cafepress.com. If requested to remove data, we will respond within a reasonable timeframe.
>
> . . . .
>
> We will provide an individual opt-out or opt-in choice before we share your data with third parties other than our agents, or before we use it for a purpose other than which it was originally collected or subsequently authorized.
>
> To limit the use and disclosure of your personal information, please submit a written request to GDPR@cafepress.com.

38. The Department of Commerce ("Commerce") and the European Commission negotiated the Privacy Shield to provide a mechanism for companies to transfer personal data from the European Union to the United States in a manner consistent with the requirements of European Union law on data protection. The Swiss-U.S. Privacy Shield framework is identical to the EU-U.S. Privacy Shield framework.

39. Privacy Shield expressly provides that, while decisions by organizations to "enter the Privacy Shield are entirely voluntary, effective compliance is compulsory: organizations that self-certify to the Department and publicly declare their commitment to adhere to the Principles must comply fully with the Principles."

40. To join the EU-U.S. and/or Swiss-U.S. Privacy Shield framework, a company must certify to Commerce that it complies with the Privacy Shield Principles. Participating companies must annually re-certify their compliance.

41. Companies under the jurisdiction of the FTC are eligible to join the EU-U.S. and/or Swiss-U.S. Privacy Shield framework. Both frameworks warn companies that claim to have self-certified to the Privacy Shield Principles that failure to comply or otherwise to "fully implement" the Privacy Shield Principles "is enforceable under Section 5 of the Federal Trade Commission Act."

42. Residual Pumpkin obtained Privacy Shield certification in June 2018 and has had an active certification since then, except from June 12, 2019 through July 23, 2019.

43. The Privacy Shield Principles include the following:

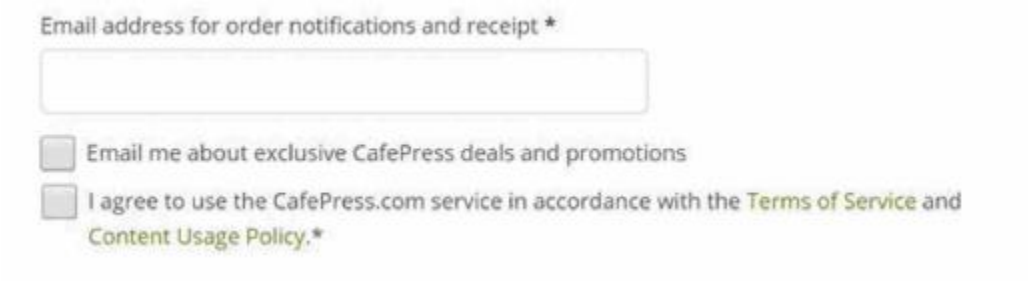
> CHOICE [Principle 2]: (a) An organization must offer individuals the opportunity to choose (opt out) whether their personal information is (i) to be disclosed to a third party or (ii) to be used for a purpose that is materially different from the purpose(s) for which it was originally collected or subsequently authorized by the individuals. Individuals must be provided with clear, conspicuous, and readily available mechanisms to exercise choice.
>
> SECURITY [Principle 4]: (a) Organizations creating, maintaining, using or disseminating personal information must take reasonable and appropriate measures to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction, taking into due account the risks involved in the processing and the nature of the personal data.
>
> ACCESS [Principle 6]: (a) Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, or has been processed in violation of the Principles, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

44. Although the European Court of Justice determined on July 16, 2020 that the EU-U.S. Privacy Shield framework was not adequate for allowing the lawful transfer of personal data from the European Union and the Swiss Data Protection and Information Commissioner determined on September 8, 2020 that the Swiss-U.S. Privacy Shield framework was similarly inadequate, those decisions do not change the fact that Residual Pumpkin represented to consumers that it was certified under both Privacy Shield frameworks, and as such, would fully comply with the Principles, including Principles 2, 4, and 6.

Privacy Practices

45. When consumers completed online orders, Respondents have required them to submit their email address as a mandatory input field. Respondents have provided a notice above the field stating, "Email address for order notifications and receipt."

46. In certain markets, Residual Pumpkin included an additional checkbox to obtain consumer consent to receive marketing emails.



47. However, users would receive marketing emails when they provided their email during checkout, even though the input box only explained that Residual Pumpkin would use the email address "for order notifications and receipt." Similarly, where Residual Pumpkin provided an additional checkbox to seek consumers' opt-in consent to receive marketing emails, as shown in Paragraph 46 above, consumers would receive marketing emails even if they left the checkbox unchecked. Residual Pumpkin was aware that its practices were inconsistent with its stated practices since at least August 2018.

48. Residual Pumpkin has also failed to honor its commitments related to deleting information. Since June 19, 2018, Residual Pumpkin claimed it would delete information upon request from residents of the EEA and Switzerland. In fact, until November 2019 Residual Pumpkin only deactivated user accounts when it received such requests but did not delete the associated account information. Because of this failure to honor deletion requests, information from many consumers who had requested before the February 2019 breach that Residual Pumpkin delete their information was exposed in the breach.

49. The acts and practices of Respondents alleged in this complaint involve material conduct occurring within the United States.

Count I

Data Security Misrepresentations

50. As described in Paragraphs 8-10, Respondents have represented, directly or indirectly, expressly or by implication, that they implemented reasonable measures to protect Personal Information against unauthorized access.

51. In fact, as set forth in Paragraph 11, Respondents did not implement reasonable measures to protect Personal Information against unauthorized access. Therefore, the representation set forth in Paragraph 50 is false or misleading.

Count II

Response to Data Security Incident Misrepresentations

52. As described in Paragraphs 19 and 24-25, Respondents have represented, directly or indirectly, expressly or by implication, that they took appropriate steps to secure consumer account information following security incidents.

53. In fact, as set forth in Paragraph 25, Respondents had not taken appropriate steps to secure access to consumer accounts following security incidents. Consumer accounts remained at risk even after the passwords had been reset. Therefore, the representation set forth in Paragraph 52 is false or misleading.

Count III

Unfair Data Security Practices

54. As described in Paragraph 11, Respondents' failure to employ reasonable data security measures to protect Personal Information caused or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. This practice is an unfair act or practice.

Count IV

Data Collection and Use Misrepresentation

55. As described in Paragraphs 37, 45, and 46, Respondents have represented, directly or indirectly, expressly or by implication, that they would use email addresses only for order notification and receipt.

56. In fact, as described in Paragraph 47, Respondents did not use email addresses only for order notification and receipt. Respondents sent marketing emails to consumers irrespective of whether they consented to receive such emails. Therefore, the representation set forth in Paragraph 55 is false or misleading.

Count V

Misrepresentation Relating to Privacy Shield Frameworks

57. As described in Paragraph 37, Respondents have represented, directly or indirectly, expressly or by implication, that they adhered to the EU-U.S. and the Swiss-U.S. Privacy Shield frameworks, including the principles of Choice, Security, and Access.

58. In fact, as described in Paragraphs 11 and 43-49, Respondents did not adhere to the Privacy Shield Principles of Choice, Security, and Access. Therefore, the representation set forth in Paragraph 57 is false or misleading.

Count VI

Misrepresentation Relating to Deletion of Consumer Data

59. As described in Paragraph 37, Respondents have represented, directly or indirectly, expressly or by implication, that they honored requests from residents of the EEA and Switzerland to erase data and restrict the use of personal data for direct marketing.

60. In fact, as described in Paragraph 48, Respondents did not honor requests from residents of the EEA and Switzerland to erase data and restrict the use of personal data for direct marketing. Therefore, the representation set forth in Paragraph 59 is false or misleading.

Count VII

Unfair Withholding of Payable Commissions After Security Breach

61. As described in Paragraphs 27 and 28, Respondents withheld payable commissions owed to shopkeepers whose accounts were closed after a security breach.

62. Withholding payable commissions owed to shopkeepers whose accounts were closed after a security breach is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers themselves. This practice is an unfair act or practice.

Violations of Section 5

63. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this 23rd day of June, 2022, has issued this complaint against Respondents.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of Respondent PlanetArt, LLC, named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the

Commission, the draft Complaint would charge Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is PlanetArt, LLC, also doing business as CafePress, a Delaware company with its principal office or place of business at 23801 Calabasas Road, Suite 2005, Calabasas California 91302.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "**Covered Incident**" means any instance in which any United States federal, state, or local law or regulation requires Respondent to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondent from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization.

B. "**Personal Information**" means individually identifiable information from or about an individual consumer, including: (1) a first and last name; (2) a physical address; (3) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (4) a telephone number; (5) date of birth; (6) a Social Security number; (7) driver's license or other government issued identification number; (8) financial institution account number; (9) credit or debit card information; (10) a persistent identifier, such as a customer number held in a

"cookie," a static Internet Protocol ("IP") address, a mobile device ID, or processor serial number; and (11) authentication credentials such as a user ID, password, and security questions and answers. For purposes of this definition, "consumer" includes any individual who is, or seeks to become, an employee, officer, or independent contractor of Respondent.

C. "**Respondent**" means PlanetArt, LLC, also doing business as CafePress and its successors and assigns.

Provisions

I. Prohibition against Misrepresentations about Privacy and Security

IT IS ORDERED that Respondent, Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them who receive actual notice of this Order, whether acting directly or indirectly, in connection with any product or service, must not misrepresent in any manner, expressly or by implication:

A. Respondent's privacy and security measures to prevent unauthorized access to Personal Information;

B. The extent to which Respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by a government or any self-regulatory or standard-setting organization;

C. Respondent's privacy and security measures to honor the privacy choices exercised by users;

D. Respondent's information deletion and retention practices; and

E. The extent to which Respondent otherwise protects the privacy, security, availability, confidentiality, or integrity of Personal Information.

II. Mandated Information Security Program

IT IS FURTHER ORDERED that Respondent, and any business that Respondent controls directly, or indirectly, in connection with the collection, maintenance, use, or disclosure of, or provision of access to, Personal Information, must, within sixty (60) days of issuance of this order, establish and implement, and thereafter maintain, a comprehensive information security program ("Information Security Program") that protects the privacy, security, confidentiality, and integrity of such Personal Information. To satisfy this requirement, Respondent must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Information Security Program;

B. Provide the written program and any evaluations thereof or updates thereto to Respondent's board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer of Respondent responsible for Respondent's Information Security Program at least once every twelve (12) months and promptly (not to exceed thirty (30) days) after a Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Information Security Program;

D. Assess and document, at least once every twelve (12) months and promptly (not to exceed forty-five (45) days) following a Covered Incident, internal and external risks to the privacy, security, confidentiality, or integrity of Personal Information that could result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Personal Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards that control for the internal and external risks Respondent identifies to the privacy, security, confidentiality, or integrity of Personal Information identified in response to sub-Provision II.D. Each safeguard must be based on the volume and sensitivity of the Personal Information that is at risk, and the likelihood that the risk could be realized and result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Personal Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information. Such safeguards must also include:

1. Technical measures to monitor all of Respondent's networks and all systems and assets within those networks to identify data security events, including unauthorized attempts to exfiltrate Personal Information from those networks;

2. Policies and procedures to ensure that all code for web applications is reviewed for the existence of common vulnerabilities;

3. Policies and procedures to minimize data collection, storage, and retention, including data deletion or retention policies and procedures;

4. Encryption of all Social Security numbers on Respondent's computer networks;

5. Data access controls for all databases storing Personal Information, including by, at a minimum, (a) restricting inbound connections to approved IP addresses, (b) requiring authentication to access them, and (c) limiting employee access to what is needed to perform that employee's job function;

6. Policies and procedures to ensure that all devices on Respondent's network with access to Personal Information are securely installed and inventoried

at least once every twelve (12) months, including policies and procedures to timely remediate critical and high-risk security vulnerabilities and apply up-to-date security patches;

7. Replacing, and not adopting in the future, authentication measures based on the use of security questions and answers to access accounts with multi-factor authentication methods that use a secure authentication protocol, such as cryptographic software or devices or mobile authenticator applications; and

8. Training of all of Respondent's employees, at least once every twelve (12) months, on how to safeguard Personal Information.

F. Assess, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, the sufficiency of any safeguards in place to address the internal and external risks to the privacy, security, confidentiality, or integrity of Personal Information, and modify the Information Security Program based on the results;

G. Test and monitor the effectiveness of the safeguards at least once every twelve (12) months and promptly (not to exceed 30 days) following a Covered Incident, and modify the Information Security Program based on the results. Such testing and monitoring must include vulnerability testing of Respondent's network(s) once every four months and promptly (not to exceed 30 days) after a Covered Incident, and penetration testing of Respondent's network(s) at least once every twelve (12) months and promptly (not to exceed 30 days) after a Covered Incident;

H. Select and retain service providers capable of safeguarding Personal Information they access through or receive from Respondent, and contractually require service providers to implement and maintain safeguards sufficient to address the internal and external risks to the privacy, security, confidentiality, or integrity of Personal Information;

I. Consult with, and seek appropriate guidance from, independent, third-party experts on data protection and privacy in the course of establishing, implementing, maintaining, and updating the Information Security Program; and

J. Evaluate and adjust the Information Security Program in light of any changes to Respondent's operations or business arrangements, a Covered Incident, new or more efficient technological or operational methods to control for the risks identified in Provision II.D of this Order, or any other circumstances that Respondent knows or has reason to know may have an impact on the effectiveness of the Information Security Program or any of its individual safeguards. At a minimum, Respondent must evaluate the Information Security Program at least once every twelve (12) months and modify the Information Security Program based on the results.

III. Independent Program Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with compliance with Provision II of this Order titled Mandated Information Security Program, Respondent and any business that Respondent controls directly, or indirectly, in connection with the collection, maintenance, use, or disclosure of, or provision of access to, Personal Information must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from one or more qualified, objective, independent third-party professionals ("Assessors"), who: (1) use procedures and standards generally accepted in the profession; (2) conduct an independent review of the Information Security Program; (3) retain all documents relevant to each Assessment for five (5) years after completion of such Assessment, and (4) will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents relating to the Respondent's compliance with the Order may be withheld from the Commission by the Assessor on the basis of a claim of confidentiality, proprietary or trade secrets, work product protection, attorney-client privilege, statutory exemption, or any similar claim. Respondent may obtain separate assessments for (1) privacy and (2) information security from multiple Assessors, so long as each of the Assessors meet the qualifications set forth above.

B. For each Assessment, Respondent must provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name, affiliation, and qualifications of the proposed Assessor, whom the Associate Director shall have the authority to approve in her or his sole discretion.

C. The reporting period for the Assessments must cover: (1) the first 180 days after the issuance date of the Order for the initial Assessment; and (2) each 2-year period thereafter for twenty (20) years after issuance of the Order for the biennial Assessments.

D. Each Assessment must, for the entire assessment period: (1) determine whether Respondent has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program; (2) assess the effectiveness of Respondent's implementation and maintenance of sub-Provisions II.A-J; (3) identify any gaps or weaknesses in, or instances of material noncompliance with, the Information Security Program; (4) address the status of gaps or weaknesses in, or instances of material non-compliance with, the Information Security Program that were identified in any prior Assessment required by this Order; and (5) identify specific evidence (including documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is (a) appropriate for assessing an enterprise of Respondent's size, complexity, and risk profile; and (b)

sufficient to justify the Assessor's findings. No finding of any Assessment shall rely primarily on assertions or attestations by Respondent's management. The Assessment must be signed by the Assessor, state that the Assessor conducted an independent review of the Information Security Program and did not rely primarily on assertions or attestations by Respondent's management, and state the number of hours that each member of the assessment team worked on the Assessment. To the extent that Respondent revises, updates, or adds one or more safeguards required under Provision II of this Order during an Assessment period, the Assessment must assess the effectiveness of the revised, updated, or added safeguard(s) for the time period in which it was in effect, and provide a separate statement detailing the basis for each revised, updated, or additional safeguard.

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondent must submit an unredacted copy of the initial Assessment and a proposed redacted copy suitable for public disclosure of the initial Assessment to the Commission within ten (10) days after the Assessment has been completed via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, FTC File No. 1923209." Respondent must retain an unredacted copy of each subsequent biennial Assessment as well as a proposed redacted copy of each subsequent biennial Assessment suitable for public disclosure until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

IV. Cooperation with Third Party Information Security Assessor

IT IS FURTHER ORDERED that Respondent, whether acting directly or indirectly, in connection with any Assessment required by Provision III of this Order titled Independent Program Assessments by a Third Party, must:

A. Provide or otherwise make available to the Assessor all information and material in its possession, custody, or control that is relevant to the Assessment for which there is no reasonable claim of privilege.

B. Provide or otherwise make available to the Assessor information about Respondent's network(s) and all of Respondent's IT assets so that the Assessor can determine the scope of the Assessment, and visibility to those portions of the network(s) and IT assets deemed in scope; and

C. Disclose all material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether Respondent has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program; (2) assessment of the effectiveness of the implementation and

maintenance of sub-Provisions II.A-J; or (3) identification of any gaps or weaknesses in, or instances of material noncompliance with, the Information Security Program.

V. Annual Certification

IT IS FURTHER ORDERED that Respondent must:

A. One year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of Respondent responsible for Respondent's Information Security Program that: (1) Respondent has established, implemented, and maintained the requirements of this Order; (2) Respondent is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission; and (3) includes a brief description of all Covered Incidents during the certified period. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, FTC File No. 1923209."

VI. Covered Incident Reports

IT IS FURTHER ORDERED that Respondent, within thirty (30) days after Respondent's discovery of a Covered Incident, must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes of the Covered Incident, if known;

C. A description of each type of information that triggered any notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information triggered any notification obligation to the U.S. federal, state, or local government entity;

E. The acts that Respondent has taken to date to remediate the Covered Incident and protect Personal Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of any materially different notice sent by Respondent to consumers or to any U.S. federal, state, or local government entity.

Unless otherwise directed by a Commission representative in writing, all Covered Incident reports to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, FTC File No. 1923209."

VII. Notice to Users

IT IS FURTHER ORDERED that, on or before fourteen (14) days after the date of the filing of this Order, Respondent must email an exact copy of the notice attached hereto as Exhibit A ("Notice") to all consumers whose Personal Information was in the data breached from the website wwww.cafepress.com in 2019. Respondent shall not include with the Notice any other information, documents, or attachments.

VIII. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 10 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order and all agents and representatives with managerial or professional responsibilities for conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within 10 days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

IX. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes Respondent made to comply with the Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in: (a) any designated point of contact; or (b) the structure of Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal

Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re CafePress, LLC, FTC File No. 1923209."

X. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondent, in connection with any conduct related to the subject matter of the Order, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints and refund requests that relate to the privacy, security, and confidentiality of any Personal Information, whether received directly or indirectly, such as through a third party, and any response;

D. A copy of each unique advertisement or other marketing material making a representation subject to this Order;

E. A copy of each widely disseminated representation by Respondent that describes the extent to which Respondent maintains or protects the privacy, security and confidentiality of any Personal Information, including any representation concerning a change in any website or other service controlled by Respondent that relates to the privacy, security, and confidentiality of Personal Information.

F. For 5 years after the date of preparation of each Assessment required by this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment.

G. For 5 years from the date received, copies of all subpoenas and other communications with law enforcement, if such subpoena or other communication relate to Respondent's compliance with this Order.

H. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondent, that demonstrate non-compliance OR tend to show any lack of compliance by Respondent with this Order.

I. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

XI. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XII. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had

never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Attachment A

Subject line: Notice of FTC Settlement, 2019 Data Breach

Dear [Customer]:

We are contacting you about the 2019 breach of your information collected by the prior owners of CafePress. This notice is about that breach, which you may have already been notified of. We recently reached a settlement with the Federal Trade Commission, the nation's consumer protection agency, to resolve issues related to the 2019 data breach, and to make sure CafePress keeps your information safe.

What happened?

Before November 2019, CafePress didn't have reasonable practices to keep your information safe. When the company had a security breach, the following information about you may have been stolen: your email address, password, name, address, phone number, [Social Security number or Tax Identification number], answers to your security questions, and the expiration date and last four digits of your credit card.

What you can do to protect yourself

Here are some steps to reduce the risk of identity theft and protect your information online:

1. **Use different passwords for different accounts.** That way, if one account is hacked or has a data breach, your other accounts will be safer. And if you've reused your CafePress password or security questions on other websites, be sure to change them right away.

2. **Consider a password manager.** These are apps that store and manage strong, unique passwords and security questions for all the sites you use. Search independent review sites to find a free or paid password manager that works for you.

3. **Use multi-factor authentication** when it's an option. Multi-factor authentication can help secure your account by requiring two or more ways to verify it's you before granting access

to your account. This security feature makes it much harder for people to take advantage of stolen passwords or answers to security questions.

4. **Learn more** from the Federal Trade Commission at https://www.ftc.gov/data-breach-resources or at https://www.IdentityTheft.gov.

If you have any questions or concerns, please contact us at support@CafePress.com, at 1.844.988.0030 or reply to this email. Learn more about the settlement at [insert link].

Sincerely,

[Name of actual person]

[Title]

ANALYSIS OF CONSENT ORDERS TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, agreements containing consent orders from Residual Pumpkin Entity, LLC ("Residual Pumpkin") and PlanetArt, LLC ("PlanetArt") (collectively, "Respondents").

The proposed consent orders ("Proposed Orders") have 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 agreements and the comments received and will decide whether it should withdraw from the agreements and take appropriate action or make final the Proposed Orders.

This matter involves Respondents' data security and privacy practices. Respondent Residual Pumpkin owned CafePress until September 2020, when Residual Pumpkin sold CafePress to Respondent PlanetArt. The CafePress website allows users, known as shopkeepers, to earn commissions from sales of merchandise offered to consumers. CafePress collected information such as names, email addresses, telephone numbers and—from shopkeepers—Social Security numbers ("Personal Information"). CafePress claimed to keep this information safe, but in fact failed to provide reasonable security. For example, CafePress failed to: guard against well-known and reasonably foreseeable threats, such as SQL injection and cross-site scripting attacks; encrypt Social Security numbers; and implement a process for receiving and addressing third-party security vulnerability reports. CafePress also claimed to adhere to principles set forth in the EU-U.S. and Swiss U.S. Privacy Shield frameworks, specifically that it would honor user requests to delete data and user choices about how email addresses would be used. Instead, CafePress failed to delete Personal Information when it was requested to do so and sent marketing emails to nearly all its consumers, even those who had not opted in to receive such messages. As a result of

CafePress' data security practices, consumers' Personal Information was stolen and sold on the dark web. CafePress learned of the breach but failed to notify affected consumers. After some shopkeepers learned of the breach and closed their accounts, CafePress withheld up to $25 in payable commissions from each of those shopkeepers.

The complaint alleges that Respondents violated Section 5(a) of the FTC Act by: (1) misrepresenting the measures CafePress took to protect Personal Information; (2) misrepresenting the steps CafePress took to secure consumer accounts following security incidents; (3) failing to employ reasonable data security practices; (4) misrepresenting how CafePress would use email addresses; (5) misrepresenting CafePress' adherence to the Privacy Shield frameworks; (6) misrepresenting whether CafePress would honor deletion requests; and (7) unfairly withholding commissions payable to shopkeepers.

The Proposed Orders contain provisions designed to prevent Respondents from engaging in the same or similar acts or practices in the future.

Summary of Proposed Order with PlanetArt

Part I prohibits PlanetArt from misrepresenting: (1) privacy and security measures it takes to prevent unauthorized access to Personal Information; (2) the extent to which PlanetArt is a member of any privacy or security program sponsored by a government, self-regulatory, or standard-setting organization; (3) privacy and security measures to honor users' privacy choices; (4) information deletion and retention practices; and (5) the extent to which it maintains and protects the privacy, security, availability, confidentiality, or integrity of Personal Information.

Part II requires PlanetArt to establish and implement, and thereafter maintain, a comprehensive information security program that protects the privacy, security, confidentiality, and integrity of Personal Information.

Part III requires PlanetArt to obtain initial and biennial data security assessments for 20 years.

Part IV requires PlanetArt to disclose all material facts to the assessor and prohibits PlanetArt from misrepresenting any fact material to the assessment required by Part II.

Part V requires PlanetArt to submit an annual certification from a senior corporate manager (or senior officer responsible for its Security Program) that PlanetArt has implemented the requirements of the order and is not aware of any material noncompliance that has not been corrected or disclosed to the Commission.

Part VI requires PlanetArt to notify the Commission of a "Covered Incident" within thirty days of discovering such incident.

Parts VII requires PlanetArt to provide notice to consumers to inform them of the breach and the settlement with the FTC.

Part VIII requires PlanetArt to submit an acknowledgement of receipt of the order, including all officers or directors and employees having managerial responsibilities for conduct related to the subject matter of the order, and to obtain acknowledgements from each individual or entity to which a PlanetArt has delivered a copy of the order.

Part IX requires PlanetArt to file compliance reports with the Commission and to notify the Commission of bankruptcy filings or changes in corporate structure that might affect compliance obligations.

Part X contains recordkeeping requirements for accounting records, personnel records, consumer correspondence, advertising and marketing materials, and claim substantiation, as well as all records necessary to demonstrate compliance with the order.

Part XI contains other requirements related to the Commission's monitoring of PlanetArt's order compliance.

Part XII provides the effective dates of the order, including that, with exceptions, the order will terminate in 20 years.

The purpose of this analysis is to facilitate public comment on the Proposed Orders, and it is not intended to constitute an official interpretation of the complaint or Proposed Orders, or to modify the Proposed Orders' terms in any way.

Complaint

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC, WHOLE BODY SUPPLEMENTS, LLC, AND KRAMER DUHON

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

Docket No. 9397; File No. X180007
Complaint, November 13, 2020 – Decision, June 24, 2022

This consent order addresses Health Research Laboratories, LLC and Whole Body Supplements, LLC's advertising for Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic. The complaint alleges that Respondents violated Sections 5(a) and 12 of the FTC Act by disseminating false and unsubstantiated advertisements claiming that: (1) Black Garlic Botanicals, BG18, and The Ultimate Heart Formula will prevent, reduce the risk of, cure, mitigate, or treat cardiovascular disease, atherosclerosis, and/or hypertension; and (2) Neupathic will cure, treat, or mitigate diabetic neuropathy. The consent order bans Respondents from advertising, marketing, promoting, or offering for sale any dietary supplements and from making any disease prevention, reduction of risk, cure, mitigation, or treatment claim when advertising, marketing, promoting, or offering for sale any product.

Participants

For the *Commission*: *Elizabeth J. Averill* and *Philip Z. Brown.*

For the *Respondents*: *Joel W. Reese* and *Joshua Russ, Reese Marketos LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Health Research Laboratories ("HRL"), a limited liability company, Whole Body Supplements ("WBS"), a limited liability company, and Kramer Duhon, individually and as an owner and officer of HRL and WBS (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 HRL is a Nevada limited liability company with its principal office or place of business at 16250 Knoll Trail Drive, Dallas, TX 75248.

2. Respondent WBS is a Nevada limited liability company with its principal office or place of business at 16250 Knoll Trail Drive, Dallas, TX 75248.

3. Respondent Kramer Duhon is the Chief Operating Officer and managing member of HRL and the Chief Operating Officer and managing member of WBS. Individually or in concert with others, he controlled or had the authority to control the acts and practices of HRL and WBS, including the acts and practices alleged in this complaint. His principal office or place of business is 16250 Knoll Trail Drive, Dallas, TX 75248.

4. Respondents have advertised, labeled, offered for sale, sold, and distributed, or caused to be distributed a number of dietary supplement products to consumers. HRL sold, among other products, Black Garlic Botanicals, The Ultimate Heart Formula, and Neupathic. WBS sold BG18, among other products. Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic are "food" and/or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission 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.

Black Garlic Botanicals

6. HRL began selling Black Garlic Botanicals in November 2016. Each capsule contains 600 mg of the active ingredient black garlic, and the recommended dosage is two capsules a day. HRL sells a one-month supply of Black Garlic Botanicals for $39.95, plus shipping and handling.

7. HRL has disseminated or has caused to be disseminated advertising and promotional materials for Black Garlic Botanicals in multi-page mailers sent to consumer residences and on company websites. The Black Garlic Botanicals mailer attached as Exhibit A opens with the following representations and depictions:

Exhibit A (Black Garlic Botanicals mailer)

This front-page content is followed by additional descriptions of the dangers of cardiovascular disease. For example, the second and third pages display a banner across the top, which states, "Cardiovascular Disease: #1 cause of Death in the world, especially the U.S.!" A banner at the bottom states, "There's a miraculous natural solution that can help – find out what it is!!"

The mailer continues with the following statements about the efficacy of black garlic in reducing arterial plaque, blood pressure, and cholesterol:

- BLACK GARLIC WORKS WITH YOUR BODY
  - Cholesterol: Black Garlic helps maintain healthy cholesterol levels.
  - Clotting: Black Garlic supports healthy platelet aggregation, which can help to keep blood circulating and works against clotting.
  - Supports and helps maintain healthy blood pressure levels to combat risks.

- Healthy Arteries
  Plaque build-up in arteries can lead to unhealthy heart conditions. Black Garlic helps keep blood vessels barrier-free to create smooth flow, which could address symptoms of fatigue. It may also inhibit calcium binding, which is responsible for arterial plaque formation.

- Want Healthy Blood Pressure & Cholesterol? Black Garlic helps maintain healthy blood pressure, cholesterol and triglyceride levels.

- BLACK GARLIC
  A BREAKTHROUGH FOR
  - ✓ Cholesterol
  - ✓ Blood Sugar
  - ✓ Blood Pressure
  - ✓ The Heart
  - ✓ The Brain

- "I made the switch to Black Garlic Botanicals and within the span of 3 months my LDL levels have reduced from 300 to 150. This product works!" ~ Gerald W.

- "I now have my blood pressure under control with Black Garlic Botanicals. This is a quality product!" ~ Rolf M.

BG18

8. WBS began selling BG18 in August 2017. The product has identical ingredients to Black Garlic Botanicals. Each capsule contains 600 mg of the active ingredient black garlic, and the recommended dosage is two capsules a day. WBS sells a one-month supply of BG18 for $44.95, plus shipping and handling.

9. WBS has disseminated or has caused to be disseminated advertising and promotional materials for BG18, including multi-page mailers and content on company websites. An example of a mailer for BG18 is attached as Exhibit B.

The front page of the attached BG18 mailer features an image of a caduceus and, a photograph of a doctor in a white coat, and states "Black Garlic has shown an amazing power to improve heart and cardiovascular health, maintain normal cholesterol levels, boost your immune system. And MUCH MORE!" The mailer continues with the following representations:

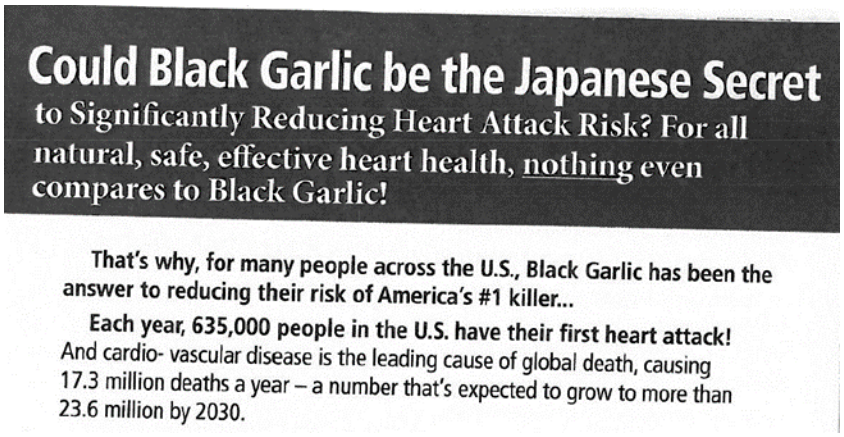
- Black Garlic is a proven miracle for . . . Cholesterol . . . Hypertension . . . Your Heart.

- [Black Garlic] can help reverse plaque build-up in arteries – not just slow it down. Black Garlic keeps blood vessels barrier-free to create a smooth blood flow and alleviates symptoms of fatigue. It also strongly inhibits calcium binding, which is responsible for plaque build-up.

- Reduces Blood Pressure and Cholesterol. . . Black Garlic helps reduce high blood pressure and lowers high levels of bad cholesterol and triglycerides.

- "My blood pressure has also been lowered. I recommend this product because IT WORKS!" ~ Lorraine T.

- On the following page, the brochure poses this question and answer:


Could Black Garlic be the Japanese Secret to Significantly Reducing Heart Attack Risk? For all natural, safe, effective heart health, nothing even compares to Black Garlic!

That's why, for many people across the U.S., Black Garlic has been the answer to reducing their risk of America's #1 killer...

Each year, 635,000 people in the U.S. have their first heart attack! And cardio- vascular disease is the leading cause of global death, causing 17.3 million deaths a year – a number that's expected to grow to more than 23.6 million by 2030.

Exhibit B (BG18 mailer).

- Yes, Black Garlic is a true miracle for cardiovascular health! Just 1 capsule knocks down cholesterol and high blood pressure within days. It can also unblock, clean, and strengthen your arteries.

- The cardio-protective effect of black garlic. . . Black garlic can also improve your lipid profile, an important factor in protecting against cardiovascular problems.

Complaint

The Ultimate Heart Formula

10. HRL has been selling The Ultimate Heart Formula ("UHF") since November 2008. UHF contains Vitamins C, E, and B12 as well as garlic extract (25 mg), Tetrasodium EDTA (40 mg), Ubiquinol (CoEnzyme Q-10) (5 mg), and Nattokinase (10 mg). HRL sold a one-month's supply of UHF for $39.95, plus shipping and handling. The recommended dosage is 20 drops or 1ml, twice per day.

11. HRL disseminated or caused to be disseminated advertisements for UHF, including multipage mailers and company websites. An example of a mailer is attached as Exhibit C, which contains the following statements and depictions on its first and second pages:

Exhibit C (The Ultimate Heart Formula mailer).

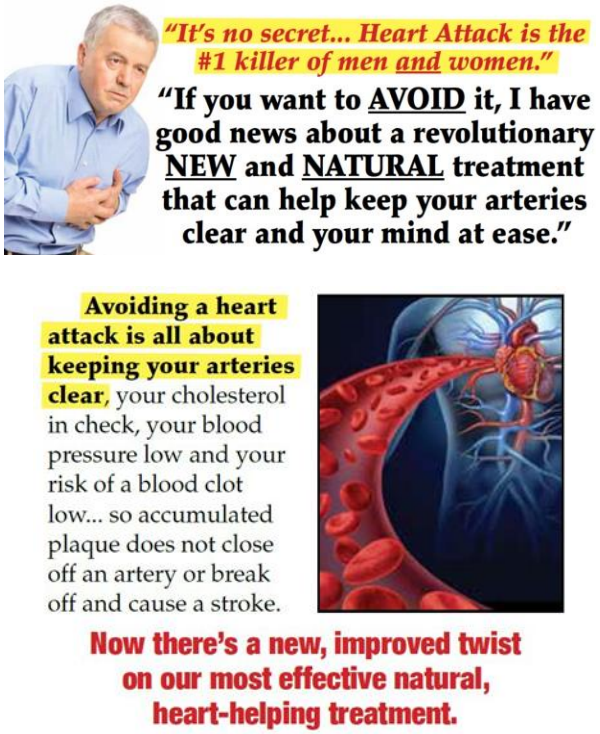


Exhibit C (The Ultimate Heart Formula mailer, p.2)

These depictions and representations are followed by a number of additional claims, including:

- Instead, right before you is a simple, safe, inexpensive, non-painful and preventative option that could help you say goodbye to your heart surgeon and avoid an angioplasty.

- Our Ultimate Heart Formula can help support a healthy heart, healthy cholesterol and healthy blood pressure. As blockages in your veins and arteries become clear, you can experience better blood circulation – resulting in more energy, better sleep, sharper mental clarity and better health.

- The Ultimate Heart Formula also contains a powerful, clot-busting agent!

- The Ultimate Heart Formula is an all-natural combination of 19 powerful herbs and essential nutrients that counter the causes of poor cardio health. The Ultimate Heart Formula's unique "Senior Formula" is made with ingredients specifically shown to help improve the effects of a weakened heart, clogged arteries, high blood pressure and high cholesterol for older people!

- With our Ultimate Heart Formula ...You get it ALL ... Amazing heart and artery protection ... without side effects!

- Yes, with the Ultimate Heart Formula, a lifetime of plaque build up could disappear before you know it! The artery-flushing power of this formula does not even require a doctor's visit or stay in the hospital!

Neupathic

12. Beginning in August 2016, HRL also sold a dietary supplement called Neupathic. Neupathic contains the following active ingredients: Vitamins E (30 IU), B1 (33.3 mg), B6 (33.3 mg), B12 (16.7 mcg), and folate (266.7 mcg), and Evening Primrose Oil (666.7 mg). HRL sold a one-month's supply of Neupathic for $39.95, plus shipping and handling. The recommended dosage is two capsules per day.

13. HRL has disseminated or caused to be disseminated advertising and promotional materials for Neupathic, including multi-page mailers and content on company websites. An example of a mailer is attached as Exhibit D, which contains the following depictions and statements on the first page:

Exhibit D (Neupathic mailer).

The mailer continues inside with additional claims:

- If you have diabetic nerve pain, you could suffer with <u>any</u> or <u>all</u> of the symptoms below.
  - ✓ Shooting pain
  - ✓ Burning
  - ✓ Pins and needles
  - ✓ Electric shock-like pain
  - ✓ Extra sensitivity
  - ✓ Numbness
  - ✓ Throbbing
  - ✓ Tingling
  - ✓ Stinging
  - ✓ Stabbing
  - ✓ Radiating

  Neupathic was specifically formulated with 6 distinct nutrients to help address ALL these issues and more.

- A "perfect" nerve pain supplement that was formulated from the ground up to improve your circulation and ease the numbness, tingling, itching, burning and swelling from excess fluid trapped in your legs.

- Take this easy step towards normal, pain free legs and feet again! Non- drug ... proven ingredients.

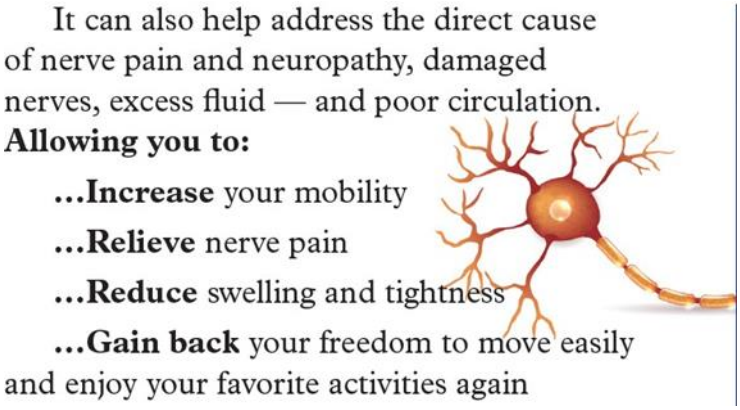


Exhibit D (Neupathic mailer, p. 11).

- Respond now if your nerve pain is driving you crazy! You'll get completely natural, real relief from your discomfort. All natural Neupathic is 100% effective and safe to use every day! Remember, it has [*sic*] shown to help reverse damaged nerves to help you feel great all day and all night.

- "Great reduction of pain. No more nerve pain in my feet. I also hardly notice any leg cramps. This product is great!" — Ruth J.

- "Neupathic is a great 'miracle-like product' which starts working the very first day you use it. Then it continues to control your pain every day. My feet have began [*sic*] to feel normal. Neupathic has improved my life. My nerve pain is gone and I will continue to take Neupathic until my numbness is gone too!" — Gloria R. *Id.*

Count I
Respondents' Unsubstantiated Claims Related to Black Garlic Botanicals
(HRL and Duhon)

14. In connection with the advertising, promotion, offering for sale, or sale of Black Garlic Botanicals, HRL and Kramer Duhon have represented, directly or indirectly, expressly or by implication, that Black Garlic Botanicals:

a. Prevents or reduces the risk of cardiovascular disease including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque;

b. Treats cardiovascular disease including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque;

c. Prevents or reduces the risk of atherosclerosis including by reducing cholesterol or decreasing arterial plaque;

d. Treats atherosclerosis including by reducing cholesterol or decreasing arterial plaque; and

e. Cures, treats, or mitigates hypertension including by decreasing arterial plaque or lowering blood pressure.

15. The representations set forth in Paragraph 14 were not substantiated at the time the representations were made.

Count II
Respondents' Unsubstantiated Claims Related to BG18
(WBS and Duhon)

16. In connection with the advertising, promotion, offering for sale, or sale of BG18, WBS and Kramer Duhon have represented, directly or indirectly, expressly or by implication, that BG18:

a. Prevents or reduces the risk of cardiovascular disease including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque;

b. Treats cardiovascular disease including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque.

c. Prevents or reduces the risk of atherosclerosis including by reducing cholesterol or decreasing arterial plaque;

d. Treats atherosclerosis including by reducing cholesterol or decreasing arterial plaque; and

e. Cures, treats, or mitigates hypertension including by decreasing arterial plaque or lowering blood pressure.

17. The representations set forth in Paragraph 16 were not substantiated at the time the representations were made.

Count III
Respondents' Unsubstantiated Claims Related to UHF
(HRL and Duhon)

18. In connection with the advertising, promotion, offering for sale, or sale of UHF, HRL and Kramer Duhon have represented, directly or indirectly, expressly or by implication, that UHF

a. Prevents or reduces the risk of cardiovascular disease including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque;

b. Treats cardiovascular disease including by lowering blood pressure, improving blood flow, reducing cholesterol, or decreasing arterial plaque.

c. Prevents or reduces the risk of atherosclerosis including by reducing cholesterol or decreasing arterial plaque;

d. Treats atherosclerosis including by reducing cholesterol or decreasing arterial plaque; and

e. Cures, treats, or mitigates hypertension including by decreasing arterial plaque or lowering blood pressure.

19. The representations set forth in Paragraph 18 were not substantiated at the time the representations were made.

Count IV
Respondents' Unsubstantiated Claims Related to Neupathic
(HRL and Duhon)

20. In connection with the advertising, promotion, offering for sale, or sale of Neupathic, HRL and Kramer Duhon have represented, directly or indirectly, expressly or by implication, that Neupathic:

a. Cures, treats, or mitigates diabetic neuropathy including by improving blood circulation, or eliminating or alleviating diabetic nerve pain and discomfort.

21. The representations set forth in Paragraph 20 were not substantiated at the time the representations were made.

Violations of Sections 5 and 12

22. The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

NOTICE

You are notified that on July 13, 2021, at 10:00 a.m., at the Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Room 532-H, Washington, DC 20580, an Administrative Law Judge of the Federal Trade Commission will hold a hearing on the charges set forth in this Complaint. At that 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 you are afforded the opportunity to file with the Federal Trade Commission ("Commission") an answer to this Complaint on or before the 14th day after service of the Complaint upon you. An answer in which the allegations of the Complaint are contested must 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 will be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer should consist of a statement that you admit all of the material facts 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 Commission may issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under FTC Rule § 3.46.

Failure to answer timely will be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint. It will also authorize the Commission, without further notice to you, to find the facts to be as alleged in the Complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will hold an initial prehearing scheduling conference not later than 10 days after the answer is filed by the last answering 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, NW, Room 532-H, Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than 5 days after the answer is filed by the last answering Respondent. 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.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the Complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers. Such relief could be in the form of restitution for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

a. NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including but not limited to:

1. A prohibition on any representation that Respondents' products cure, treat, mitigate, prevent, or reduce the risk of any disease.

2. A prohibition on representations about the health benefits, safety, efficacy, or the performance of Respondents' products unless those representations are supported by competent and reliable scientific evidence.

3. A prohibition on misrepresentations regarding tests, studies, or other research.

4. A requirement that Respondents preserve records relating to competent and reliable clinical tests or studies.

5. A requirement that Respondents send appropriate notification of the order to all affected customers.

6. A requirement that Respondents cancel any automatically recurring orders for Black Garlic Botanicals, BG18, UHF, or Neupathic for any existing customer who was first charged before the issuance of the Complaint.

7. A requirement that Respondents will not use, sell, rent, lease, or transfer any identifying information related to any customer who paid money to any Respondent for Black Garlic Botanicals, BG18, UHF, or Neupathic prior to the issuance of the Complaint.

8. A requirement that, for a period of time, Respondents send acknowledgments of the order to the Commission.

9. A requirement that, for a period of time, Respondents create and preserve certain records demonstrating compliance with the order.

10. A requirement that, for a period of time, Respondents provide notice of all new business activity to the Commission.

11. A requirement that Respondents file periodic compliance reports with the Commission.

12. A requirement that Respondents' compliance with the order be monitored for a term to be determined by the Commission.

13. Any other relief appropriate to correct or remedy the effects of Respondents' deceptive practices or of any or all of the conduct alleged in the complaint.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, DC, this 13th day of November 2020.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") issued a Complaint challenging certain acts and practices of the Respondents named in the caption. The Commission's Bureau of Consumer Protection ("BCP") filed the Complaint, which charged the Respondents with violating Sections 5(a) and 12 of the Federal Trade Commission Act.

Respondents and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) a statement by Respondents that only for purposes of this action, they admit the facts necessary to establish jurisdiction, and 2) waivers and other provisions as required by the Commission's Rules.

This matter was subsequently withdrawn from adjudication in accordance with Section 3.25 of the Commission's Rules, 16 C.F.R. § 3.25.

The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The

Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 3.25(f), the Commission makes the following Findings and issues the following Order:

FINDINGS

1. The Respondents are:

    a. Respondent Health Research Laboratories, LLC, a Nevada limited liability company with its principal office or place of business at 16250 Knoll Trail Drive, Dallas, TX 75248.

    b. Respondent Whole Body Supplements, LLC, a Nevada limited liability company with its principal office or place of business at 16250 Knoll Trail Drive, Dallas, TX 75248.

    c. Respondent Kramer Duhon, an officer and managing member of Health Research Laboratories, LLC, and an officer and managing member of Whole Body Supplements, LLC. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Health Research Laboratories, LLC and Whole Body Supplements, LLC. His principal office or place of business is the same as that of Health Research Laboratories, LLC and Whole Body Supplements, LLC.

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

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "Covered Product" means any Food or Drug.

B. "Corporate Respondent" means Health Research Laboratories, LLC, and Whole Body Supplements, LLC.

C. "Dietary Supplement" means:

    1. any product labeled as a dietary supplement or otherwise represented as a dietary supplement; or

    2. any pill, tablet, capsule, powder, softgel, gelcap, liquid, or other similar form containing one or more ingredients that are a vitamin, mineral, herb or other botanical, amino acid, probiotic, or other dietary substance for use by humans to supplement the diet by increasing the total dietary intake, or a

concentrate, metabolite, constituent, extract, or combination of any ingredient described above, that is intended to be ingested, and is not represented to be used as a conventional food or as a sole item of a meal or the diet.

D. "Drug" means: (a) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (b) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals; (c) articles (other than food) intended to affect the structure or any function of the body of humans or other animals; and (d) articles intended for use as a component of any article specified in (a), (b), or (c); but does not include devices or their components, parts, or accessories.

E. "Essentially Equivalent Product" means a product that contains the identical ingredients, except for inactive ingredients (e.g., inactive binders, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the Covered Product; *provided that* the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field indicates that the amount and combination of additional ingredients are unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.

F. "Food" means: (a) any article used for food or drink for humans or other animals; (b) chewing gum; and (c) any article used for components of any such article.

G. "Individual Respondent" means Kramer Duhon.

H. "Negative Option Feature" means, in an offer or agreement to sell any good of service, a provision under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the seller or provider as acceptance or continuing acceptance of the offer.

I. "Respondents" means Health Research Laboratories, LLC, Whole Body Supplements, LLC, and Kramer Duhon, individually, collectively, or in any combination.

Provisions

I.

IT IS ORDERED that Respondents must not advertise, market, promote, or offer for sale any Dietary Supplement or assist others in the advertising, marketing, promoting, or offering for sale of any Dietary Supplement.

II.

IT IS FURTHER ORDERED that Respondents, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, or offering for sale of any product, must not make any representation, expressly or by implication, that a product cures, treats, mitigates, prevents, or reduces the risk of any disease.

III.

IT IS FURTHER ORDERED that subject to the prohibitions in Parts I and II of this Order, Respondents, Respondents' officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, must not make any representation expressly or by implication, about the health benefits, safety, performance, or efficacy of any Covered Product, unless the representation is non-misleading, and, at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant condition or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

For purposes of this Provision, "competent and reliable scientific evidence" means tests, analyses, research, or studies that (1) have been conducted and evaluated in an objective manner by experts in the relevant condition or function to which the representation relates; (2) that are generally accepted by such experts to yield accurate and reliable results; and (3) that are randomized, double-blind, and placebo-controlled human clinical testing of the Covered Product or of an Essentially Equivalent Product, when such experts would generally require such human clinical testing to substantiate that the representation is true. In addition, when such tests or studies are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as set forth in Part V of this Order must be available for inspection and production to the Commission. Respondents have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

IV.

IT IS FURTHER ORDERED that subject to the prohibitions in Parts I and II of this Order, Respondents, Respondents' officers, agents, employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with advertising, marketing, promoting, offering for sale, sale, or distribution of any Covered Product must not make any misrepresentations expressly or by implication:

A. That the performance or benefits of any Covered Product are scientifically or clinically proven or otherwise established; or

B. About the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research.

V.

IT IS FURTHER ORDERED that, with regard to any human clinical test or study ("test") upon which Respondents rely to substantiate any claim not banned by Parts I or II, but covered by Part III, Respondents must secure and preserve all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of the test, including:

A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the test sponsor or any other person not employed by the research entity;

B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;

C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;

D. All documents referring or relating to any statistical analysis of any test data, including any pretest analysis, intent-to-treat analysis, or between-group analysis performed on any test data; and

E. All documents referring or relating to the sponsorship of the test, including all communications and contracts between any sponsor and the test's researchers.

Provided, however, the preceding preservation requirement does not apply to a reliably reported test, unless the test was conducted, controlled, or sponsored, in whole or in part by: (1) any Respondent; (2) any Respondent's officers, agents, representatives, or employees; (3) any other person or entity in active concert or participation with any Respondent; (4) any person or entity affiliated with or acting on behalf of any Respondent; (5) any supplier of any ingredient contained in the product at issue to any of the foregoing or to the product's manufacturer; or (6) the supplier or manufacturer of such product.

For purposes of this Provision, "reliably reported test" means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient information about the test for experts in the relevant field to assess the reliability of the results.

For any test conducted, controlled, or sponsored, in whole or in part, by Respondents, Respondents must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures must be documented in writing and must contain administrative, technical, and physical safeguards

appropriate to Corporate Respondents' size and complexity, the nature and scope of Respondents' activities, and the sensitivity of the personal information collected from or about the participants.

VI.

IT IS FURTHER ORDERED that Respondents must notify customers as follows:

A. Respondents must identify all consumers who purchased Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic on or after January 17, 2018 ("Eligible Customers").

1. Such Eligible Customers, and their contact information, must be identified to the extent such information is in Respondents' possession, custody or control;

2. Eligible Customers include those identified at any time through the eligibility period, which runs for 1 year after the issuance date of the Order.

B. Respondents must mail all Eligible Customers the letter in the form shown in Attachment A. Each such mailing must comply with the following:

1. The envelope containing the letter must be in the form shown in Attachment B.

2. The mailing of the notification letter must not include any other enclosures other than a copy of this Order.

3. The mailing must be sent by first-class mail, postage prepaid, address correction service requested with forwarding and return postage guaranteed. For any mailings returned as undeliverable, Respondents must use standard address search methodologies such as re-checking Respondents' records and the Postal Service's National Change of Address database and re-mailing to the corrected address within 8 days.

4. Each such notice must be mailed within 120 days after the effective date of this Order.

C. Respondents must report on their notification program under penalty of perjury as follows:

1. Respondents must submit a report at the conclusion of the program, but in no event later than 180 days after the effective date of this Order, detailing its compliance with this Provision.

2. If a representative of the Commission requests any information regarding the program, including any of the underlying customer data, Respondents must submit the requested information within 10 days of the request.

3. Failure to provide required notices or any requested information will be treated as a continuing failure to obey this Order.

VII.

IT IS FURTHER ORDERED that Respondents and their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, must not disclose, use, or receive any benefit from customer information including the name, address, telephone number, e-mail address, social security number, or other identifying information or any data that enables access to a customer's account (including a credit card, bank account or other financial account) that any Respondent obtained prior to the issuance of this Order in connection with sales of Black Garlic Botanicals, BG18, The Ultimate Heart Formula, or Neupathic. Respondents must also preserve such identifying information together with records of the product(s) individual customers purchased and the date and amount of payments made to Respondents until receipt of written notice from Commission staff to destroy the information. Once Commission staff notify Respondents to destroy such customer information, Respondents will have five days to comply.

Provided, however, that Respondents may disclose such customer information to the FTC or any law enforcement agency, or as required by any law, regulation, or court order.

VIII.

IT IS FURTHER ORDERED that, consistent with Part VII, Respondents must immediately cancel any subscription plan with a Negative Option Feature related to Black Garlic Botanicals, BG18, The Ultimate Heart Formula, or Neupathic.

IX.

IT IS FURTHER ORDERED that Respondents obtain acknowledgments of receipt of this Order:

A. Each Respondent, within 10 days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 20 years after the issuance date of this Order, the Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondent, is the majority owner or controls directly or indirectly, and each Corporate Respondent, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for the manufacturing, labeling, advertising, marketing, distribution, or sale of any Covered Product, and all agents and representatives who participate in manufacturing, labeling, advertising, marketing, distribution, or sale of any Covered Product; and (3) any business entity resulting from any change in structure as set forth in Part X. Delivery must occur within 10 days after the

effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

X.

IT IS FURTHER ORDERED that Respondents make timely submissions to the Commission:

A. One year after the issuance date of this Order, each Respondent must submit a compliance report, sworn under penalty of perjury, in which:

1. Each Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Respondent (which Individual Respondent must describe if they know or should know due to their own involvement); (d) describe in detail whether and how that Respondent is in compliance with each Part of this Order, including a discussion of all of the changes the Respondent made to comply with the Order; and (e) provide a copy of each acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, the Individual Respondent must: (a) identify all his telephone numbers and all his physical, postal, email, and Internet addresses, including all residences; (b) identify all his business activities, including any business for which such Respondent performs services whether as an employee or otherwise and any entity in which such Respondent has any ownership interest; and (c) describe in detail such Respondent's involvement in each such business activity, including title, role, responsibilities, participation, authority, control, and any ownership.

B. Each Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Respondent must submit notice of any change in: (a) any designated point of contact; or (b) the structure of any Corporate Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order,

including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, the Individual Respondent must submit notice of any change in: (a) name, including alias or fictitious name, or residence address; or (b) title or role in any business activity, including (i) any business for which such Respondent performs services whether as an employee or otherwise and (ii) any entity in which such Respondent has any ownership interest and over which Respondents have direct or indirect control. For each such business activity, also identify its name, physical address, and any Internet address.

C. Each Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re Health Research Laboratories, Dkt. 9397.

XI.

IT IS FURTHER ORDERED that Respondents must create certain records for 20 years after the issuance date of the Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, the Corporate Respondents and Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;

B. Personnel records showing, for each person providing services in relation to any aspect of the Order, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies or records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission; and

E. A copy of each unique advertisement or other marketing material making a representation subject to this Order.

F. For 5 years from the date of the last dissemination of any representation covered by this Order:

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

2. All tests, studies, analysis, other research or other such evidence in Respondents' possession, custody, or control that contradicts, qualifies, or otherwise calls 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.

G. For 5 years from the date created or received, all records, whether prepared by or on behalf of Respondents, that tend to show any lack of compliance by Respondents with this Order.

XII.

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondents' compliance with this Order:

A. Within 10 days of receipt of a written request from a representative of the Commission, each Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce documents for inspection and copying. Respondents will answer interrogatories and sit for investigational hearings within 30 days of a written request from Commission staff.

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with each Respondent. Respondents must permit representatives of the Commission to interview anyone affiliated with any Respondent who has agreed to such an interview. The interviewee may have counsel present.

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondents or any individual or entity affiliated with Respondents, without the necessity of identification or prior notice. Nothing in this Order limits the

Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XIII.

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (www.ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than 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 Provision.

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 Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A

[To be printed on Health Research Laboratories, LLC or Whole Body Supplements, LLC letterhead and sent via First Class mail]

[Date]

Subject: [Black Garlic Botanicals, BG18, The Ultimate Heart Formula, or Neupathic] [Name of customer]

[Mailing address of customer Including zip code]

Dear [Name of customer]:

Our records show that you bought [Black Garlic Botanicals, The Ultimate Heart Formula, or Neupathic from Health Research Laboratories] [BG18 from Whole Body Supplements].

The Federal Trade Commission sued us for making misleading claims our products would prevent, reduce the risk of, treat or cure serious diseases and health conditions such as cardiovascular disease, high blood pressure, and diabetic nerve pain without having scientific evidence to support those claims.

The enclosed FTC order requires us to stop selling dietary supplements and claiming that our products cure, treat, mitigate, prevent, or reduce the risk of any disease.

Some products, like vitamins and herbal extracts, may interfere with other treatments recommended by your doctor and cause serious health risks. Before you take any alternative treatment for a disease, talk to your doctor.

Learn more about the lawsuit against Health Research Laboratories and Whole Body Supplements at *https://www.ftc.gov/news-events/press-releases/2020/11/ftc-approves-administrative-complaint-against-supplement-marketer*.

Sincerely,

Kramer Duhon
Health Research Laboratories,
LLC Whole Body Supplements, LLC

Enclosure [Enclosed Order]

ATTACHMENT B

The envelope for the notification letter must be in the following form, with the underlined text completed as directed:

[*HEALTH RESEARCH LABORATORIES, LLC OR WHOLE BODY SUPPLEMENTS, LLC*
Street Address
City, State and Zip Code]

FORWARDING AND RETURN POSTAGE GUARANTEED ADDRESS CORRECTION SERVICE REQUESTED

[name and
mailing address of customer,
including zip code]

ABOUT YOUR PURCHASE OF [BLACK GARLIC BOTANICALS/BG18/THE ULTIMATE HEART FORMULA, OR NEUPATHIC]

ANALYSIS OF 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 Health Research Laboratories, LLC, Whole Body Supplements, LLC and their Managing Member and officer, Kramer Duhon ("Respondents").

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

This matter involves the Respondents' advertising for Black Garlic Botanicals, BG18, The Ultimate Heart Formula, and Neupathic. The complaint alleges Respondents violated Sections 5(a) and 12 of the FTC Act by disseminating false and unsubstantiated advertisements claiming that: (1) Black Garlic Botanicals, BG18, and The Ultimate Heart Formula will prevent, reduce the risk of, cure, mitigate, or treat cardiovascular disease, atherosclerosis, and/or hypertension; and (2) Neupathic will cure, treat, or mitigate diabetic neuropathy. Respondents Kramer Duhon and Health Research Laboratories are also parties to a previous federal court order in *FTC and State of Maine v. Health Research Laboratories, LLC, et al.*, 2:17-cv-00467- JDL (D. Me. Jan. 16, 2018).

The proposed consent order includes injunctive relief that addresses these alleged violations and contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future.

Part I would ban Respondents from advertising, marketing, promoting, or offering for sale any dietary supplements.

Part II would ban Respondents from making any disease prevention, reduction of risk, cure, mitigation, or treatment claim when advertising, marketing, promoting, or offering for sale any product.

Part III prohibits Respondents from making any representation about the health benefits, safety, performance, or efficacy of any food or drug, unless the representation is non-misleading, and at the time such representation is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this provision, "competent and reliable scientific evidence" means tests, analyses, research, or studies that: (1) have been conducted and evaluated in an objective manner by experts in the relevant condition or function to which the representation relates; (2) are generally accepted by such experts to yield accurate and reliable results; and (3) are randomized, double-blind, and placebo- controlled human clinical testing of the product or of an essentially equivalent product, when experts would generally require such human clinical testing to substantiate that the representation is true. In addition, this provision requires that when such tests or studies are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts as relevant to an assessment of such testing must be available for inspection and production to the Commission.

Part IV prohibits Respondents from making misrepresentations: (1) that the performance or benefits of any food or drug are scientifically or clinically proven or otherwise established; or (2) about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research.

Part V requires Respondents to preserve supporting data and documents relevant to assessing human clinical tests that they rely on to support claims within the scope of Part III of the proposed order.

Part VI requires Respondents to send notices to consumers who purchased Black Garlic Botanicals, BG18, The Ultimate Heart Formula, or Neupathic informing them about this matter and the Commission's order.

Part VII prohibits Respondents and their officers, agents, and employees from disclosing, using, or receiving any benefit from customer information that Respondents obtained in connection with sales of Black Garlic Botanicals, BG18, The Ultimate Heart Formula, or Neupathic.

Part VIII requires Respondents to cancel any subscription plan with a negative option feature related to Black Garlic Botanicals, BG18, The Ultimate Heart Formula, or Neupathic.

Parts IX through **XII** of the proposed order relate to compliance reporting and monitoring. Part IX is an order acknowledgment and distribution provision requiring Respondents to acknowledge the order, to provide the order to current and future owners, managers, business partners, certain employees, and to obtain an acknowledgement from each such person that they received a copy of the order. Part X requires Respondents to submit a compliance report one year after the order is entered, and to promptly notify the Commission of corporate changes that may affect compliance obligations. Part XI requires Respondents to maintain, and upon request make available, certain compliance-related records. Part XII requires Respondents to provide additional information or compliance reports, as requested.

Analysis to Aid Public Comment

Part XIII states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

MEDTRONIC PLC, MEDTRONIC, INC., AND INTERSECT ENT, INC.

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

Docket No. C-4763; File No. 211 0184
Complaint, May 7, 2022 – Decision, June 27, 2022

This consent order addresses the $1.1 billion acquisition by Medtronic, Inc. of certain assets of Intersect ENT, Inc. The complaint alleges that the Acquisition violated Section 7 of the Clayton Act and that the Acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act by substantially lessening competition markets for balloon sinus dilation products and ear, nose, and throat ("ENT") navigation systems in the United States. The consent order requires Respondents to divest the assets and business of Intersect's subsidiary Fiagon AG Medical Technologies to Hemostasis, LLC.

Participants

For the *Commission*: *Charles Dickinson,* and *Stephanie A. Wilkinson.*

For the *Respondents*: *Mike McFalls* and *Jonathan Klarfeld, Ropes & Gray LLP; Jackie Grise, Cooley LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Medtronic plc, through its subsidiary Respondent Medtronic, Inc., has entered into an agreement to acquire Respondent Intersect ENT, Inc., that such 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, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS

1. Respondent Medtronic plc is a public limited company organized, existing, and doing business under and by virtue of the laws of Ireland, with its executive offices and principal place of business located at 20 Lower Hatch Street, Dublin 2, and its United States address for service of process is 710 Medtronic Parkway, Minneapolis, Minnesota 55432.

2. Respondent Medtronic, Inc. ("Medtronic"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its executive

offices and principal place of business located at 710 Medtronic Parkway, Minneapolis, Minnesota 55432.

3. Respondent Intersect ENT, Inc. ("Intersect"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 1555 Adams Drive, Menlo Park, California 94025.

4. Each Respondent, either directly or through its subsidiaries, 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 Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

5. Pursuant to an Agreement and Plan of Merger dated as of August 6, 2021, Medtronic proposes to acquire all of the issued and outstanding securities of Intersect ("the Acquisition") for approximately $1.1 billion.

6. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. NATURE OF THE CASE

7. Medtronic is a large conglomerate medical device manufacturer with an outsized presence in markets for devices used in ear, nose, and throat ("ENT") procedures. Of most relevance here, Medtronic holds a dominant position in the market for ENT navigation systems and is one of only four current competitors in the market for balloon sinus dilation products. The Acquisition would give Medtronic control of the Intersect subsidiary, Fiagon, which is a nascent, innovative competitor to Medtronic for ENT devices, specifically ENT navigation systems and balloon sinus dilation products. But for the Acquisition, Fiagon would be a competitive threat to Medtronic's continued market dominance in ENT navigation systems and would provide physicians and their patients new and innovative treatment options in competition with Medtronic and its other competitors.

IV. THE RELEVANT MARKETS

8. The relevant lines of commerce in which to analyze the effects of the Acquisition are the research, development, licensing, manufacturing, marketing, distribution, and sale of (a) balloon sinus dilation products and (b) ENT navigation systems.

9. The United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. MARKET STRUCTURE

10. The markets for the research, development, licensing, manufacturing, marketing, distribution, and sale of balloon sinus dilation products and ENT navigation systems are both highly concentrated. Beyond Medtronic and Fiagon, there are only two significant competitors in the market for balloon sinus dilation products—Acclarent, Inc., a subsidiary of Johnson & Johnson; and Stryker Corporation, the now owner of Entellus Medical. Therefore, the Acquisition, if consummated, would reduce the number of independent manufacturers of balloon sinus dilation products from four to three. Fiagon, having just entered the U.S. market in 2021 after securing regulatory approvals, is poised to become an important competitive constraint on these established ENT market leaders, including Medtronic. Medtronic's dominant position in ENT navigation systems is challenged only by Acclarent, Stryker, Brainlab AG, Karl Storz SE & Co. KG, and Fiagon.

VI. BARRIERS TO ENTRY

11. Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. *De novo* entry would not take place in a timely manner because product development times, U.S. Food and Drug Administration approval requirements, and market adoption times are lengthy. A potential entrant into the relevant markets would also need to develop a reputation for consistent quality and service before physicians and health systems would substitute them for currently marketed devices.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by:

a. eliminating actual, direct, and future competition between Medtronic and Intersect in the relevant markets; and

b. increasing the likelihood in the relevant markets that (1) Medtronic would unilaterally exercise market power, (2) research and development would be reduced, and (3) customers would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

13. The Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

14. The Agreement and Plan of Merger entered into by Respondents constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this seventh day of May 2022, issues its Complaint against Respondents.

By the Commission.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Medtronic, Inc., a wholly owned subsidiary of Respondent Medtronic plc, of Respondent Intersect ENT, Inc. (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission having therefore considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of 30 days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Medtronic plc is a public limited company organized, existing, and doing business under and by virtue of the laws of Ireland, with its executive offices and principal place of business located at 20 Lower Hatch Street, Dublin 2, and its United States address for service of process is 710 Medtronic Parkway, Minneapolis, Minnesota 55432.

2. Respondent Medtronic, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its

executive offices and principal place of business located at 710 Medtronic Parkway, Minneapolis, Minnesota 55432.

3. Respondent Intersect ENT, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 1555 Adams Drive, Menlo Park, California 94025.

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

ORDER

I. Definitions

IT IS ORDERED that the definitions used in the Consent Agreement and the Decision and Order shall be incorporated in this Order to Maintain Assets by reference and made a part hereof.

II. Asset Maintenance

IT IS FURTHER ORDERED that Respondents shall, subject to their obligations under this Order to Maintain Assets, ensure that the Fiagon Assets are operated and maintained in the ordinary course of business consistent with past practices until such assets are fully transferred to the Acquirer, and shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Fiagon Business and related Fiagon Assets, to minimize the risk of any loss of their competitive potential, to operate them in a manner consistent with applicable laws and regulations, and to prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear);

B. Not sell, transfer, encumber, or otherwise impair the Fiagon Business and related Fiagon Assets (other than in the manner prescribed in the Orders), or take any action that lessens their full economic viability, marketability, or competitiveness;

C. Not terminate the operations of the Fiagon Business and related Fiagon Assets, and shall conduct or cause to be conducted the operations of the Fiagon Business and related Fiagon Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, ongoing operations, marketability, and competitiveness of the Fiagon Business and related Fiagon Assets; and

D. Use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Fiagon Business and related Fiagon Assets.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that have been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Fiagon Assets and consistent with the purposes of the Orders.

III. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Fiagon Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Fiagon Assets to the Acquirer, and (2) assist the Acquirer in operating the Fiagon Assets and Fiagon Business in all material respects in the manner in which Respondent Intersect did so prior to the Acquisition.

C. Respondents shall provide such Transition Assistance:

1. As set forth in the Divestiture Agreements, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At Direct Cost; and

3. For a period sufficient to meet the requirements of this Section III, which shall be, at the option of the Acquirer, for one year after the Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a written request to extend the time period for providing Transition Assistance in order to achieve the purposes of the Orders.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreements upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreements, and shall not limit any damages (including

indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreements.

IV. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Fiagon Assets to evaluate independently and offer employment to the Fiagon Employees.

B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Fiagon Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of Respondents with any of the Fiagon Employees, and to make offers of employment to any of the Fiagon Employees;

3. Remove any impediments within the control of Respondents that may deter Fiagon Employees from accepting employment with the Acquirer, including removal of any noncompete or confidentiality provisions of employment or other Contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Fiagon Employee who receives an offer of employment from the Acquirer;

   Provided, however, that nothing in the Orders shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Fiagon Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents; and

5. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Fiagon Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Fiagon Employee by the Acquirer.

C. Respondents shall provide financial incentives for Fiagon Employees to continue in their positions and, as may be necessary, to facilitate their employment by the Acquirer.

D. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Fiagon Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer;

Provided, however, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Fiagon Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Section IV.

V. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall not disclose (including to Respondents' employees), and not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents;

Provided, however, that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under the Orders or the Divestiture Agreements; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Fiagon Assets or Fiagon Business, or as required by law.

B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph V.A of this Order to Maintain Assets, and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of the Orders.

C. Respondents shall enforce the terms of this Section V and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other

actions that Respondents would take to protect their own trade secrets and proprietary information.

VI. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Jeryl Hilleman as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of this Section VI or Section VIII of the Decision and Order ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other

representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of the Decision and Order, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information, and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that

arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VI.B; or (b) receives Commission approval.

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

VII. Divestiture Trustee

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 the Fiagon Assets as required

by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of the Decision and Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Section VII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with the Orders.

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

D. Not later than 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 relevant divestiture or other action required by the Decision and Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of the Orders.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Section VII, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by the Decision and Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has

submitted a plan of divestiture or the Commission believes that the divestitures 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 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 the Decision and 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under this Section VII 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 best efforts to negotiate the most favorable price and terms available in each Contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by the Decision and Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 the Decision and 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Fiagon Assets required to be divested by the Decision and Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. 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 Section VII.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by the Decision and Order.

VIII. Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries, partnerships, or otherwise, any rights or interests, in whole or in part, in any balloon sinus dilation products or ENT navigation systems.

IX. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit compliance reports 30 days after this Order to Maintain Assets is issued and every 30 days thereafter until the Commission issues a Decision and Order in this matter, and additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented and plan to implement to comply with each paragraph of the Orders.

3. For a period of 5 years after filing a compliance report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall file their compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

X. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The proposed dissolution of Medtronic plc or Medtronic, Inc., respectively;

B. The proposed acquisition, merger, or consolidation of Medtronic plc or Medtronic, Inc.; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such changes may affect compliance obligations arising out of the Orders.

XI. Access

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with the Orders, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

XII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability, and competitiveness of the Fiagon Business

through its full transfer and delivery to the Acquirer; to minimize any risk of loss of competitive potential for the Fiagon Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Fiagon Assets except for ordinary wear and tear.

XIII. Term

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate the day after the Decision and Order in this matter becomes final or the Commission withdraws acceptance of the Consent Agreement pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34.

By the Commission.

DECISION

The Federal Trade Commission initiated an investigation of the proposed acquisition by Respondent Medtronic, Inc., a wholly owned subsidiary of Respondent Medtronic plc, of Respondent Intersect ENT, Inc. (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) 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 the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and 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. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Medtronic plc is a public limited company organized, existing, and doing business under and by virtue of the laws of Ireland, with its executive offices and principal place of business located at 20 Lower Hatch Street, Dublin 2, and its United States address for service of process is 710 Medtronic Parkway, Minneapolis, Minnesota 55432.

2. Respondent Medtronic, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its executive offices and principal place of business located at 710 Medtronic Parkway, Minneapolis, Minnesota 55432.

3. Respondent Intersect ENT, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 1555 Adams Drive, Menlo Park, California 94025.

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

ORDER

I. Definitions

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

A. "Medtronic plc" means Medtronic plc, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Medtronic, Inc., partnerships, divisions, groups, and affiliates controlled by Medtronic plc, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Medtronic" means Medtronic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Medtronic, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Intersect" means Intersect ENT, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Intersect ENT, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "Hemostasis" means Hemostasis, LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of

Delaware, with its executive offices and principal place of business located at 5000 Township Parkway, St. Paul, Minnesota 55110.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means:

1. Hemostasis; or

2. Any other Person that the Commission approves to acquire the Fiagon Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the Agreement and Plan of Merger dated as of August 6, 2021, by and among Medtronic, Inc., Project Kraken Merger Sub, Inc., and Intersect ENT, Inc.

H. "Acquisition Date" means the date Respondents consummate the Acquisition.

I. "Business Information" means books, records, data, and information, wherever located and however stored, used in or related to the Fiagon Assets and Fiagon Business, including electronic medical records, documents, written information, graphic materials, and data, and data and information in electronic format. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, research and development, registrations, licenses, permits (to the extent transferable), manufacturing and operations. Business Information includes Confidential Business Information.

J. "Confidential Business Information" means all Business Information that is not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

K. "Contract" means an agreement, mutual understanding, arrangement, license agreement, lease, consensual obligation, commitment, promise, or undertaking, whether written or oral, express or implied, or legally binding or not.

L. "Direct Cost" means a cost not to exceed the actual cost of labor, materials, travel, and other expenditures. The cost of any labor included in Direct Cost shall not exceed the then-current average hourly wage rate for the employee providing such labor.

M. "Divestiture Agreement" means:

1. Sale and Purchase Agreement dated March 23/24/25, 2022, by and among Intersect ENT, Inc., and Hemostasis, LLC, and all amendments, exhibits, attachments, agreements, and schedules thereto;

2. Transitional Services Agreement dated March 24/25, 2022, by and among Intersect ENT, Inc., Intersect ENT International GmbH, Intersect ENT GmbH, and Fiagon NA LLC, and all amendments, exhibits, attachments, agreements, and schedules thereto; or

3. Any agreement between a Respondent (or a Divestiture Trustee) and an Acquirer to purchase the Fiagon Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

The Divestiture Agreements are contained in Nonpublic Appendix A.

N. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee) consummate the divestiture of the Fiagon Assets as required by Section II of this Order.

O. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

P. "Employee Information" means for each Fiagon Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

Q. "FDA" means the United States Food and Drug Administration.

R. "Fiagon Assets" mean Respondents' rights, title, and interests in and to all tangible and intangible assets, wherever located, used in or relating to each Fiagon Product and the Fiagon Business, including all:

1. Intellectual Property;

2. Real property interests, whether owned or leased, together with all easements, rights of way, buildings, improvements, Fiagon Facilities, parking lots, and appurtenances thereto;

3. Tangible personal property, including all fixtures, furnishings, machinery, equipment, computer hardware, supplies, and inventories;

4. Intangible rights and property including going concern value and goodwill;

5. Rights under any and all Contracts, at the option of the Acquirer;

6. Business Information; and

7. Governmental Permits and all pending applications or renewals thereof, including from and to the FDA.

S. "Fiagon Business" means all business conducted by Respondent Intersect prior to the Acquisition Date relating to the research, development, manufacture, marketing, sale, and distribution of Fiagon Products.

T. "Fiagon Employees" mean any and all full-time, part-time, or contract individuals employed by Respondent Intersect at any time since August 6, 2021, whose job responsibilities relate or related to any aspect of the Fiagon Business.

U. "Fiagon Facilities" mean:

1. 3913 Todd Lane, Building 100, Suite 101, Austin, Texas 78744; and

2. Neuendorfstrasse 23B, 16761 Hennigsdorf, Germany.

V. "Fiagon Products" mean all balloon sinus dilation products and ear, nose, and throat ("ENT") navigation systems developed or in development, manufactured, assembled, marketed, sold, owned, or controlled by Fiagon AG Medical Technologies either before or after it was acquired by Respondent Intersect, including VenSure, VirtuDrive CUBE4D, VirtuEye, and VirtuLink product lines, all products and supplies related thereto, and any pipeline products.

W. "Governmental Permit" means all consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of the Fiagon Assets

to the Acquirer and for such Acquirer to operate the Fiagon Business. Governmental Permits includes all communications with the FDA.

X. "Intellectual Property" means all intellectual property of any kind, including patents, patent applications, mask works, trademarks, service marks and applications, copyrights, trade dress, commercial names, trade names, inventions, discoveries, written and unwritten know-how, customer lists, trade secrets, proprietary information, internet web sites, internet domain names, social media, and all content related exclusively to the Fiagon Products and Fiagon Business that is displayed on any website.

Y. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to the Orders.

Z. "Orders" mean this Order and the Order to Maintain Assets entered in this action.

AA. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, governmental body, or other entity.

BB. "Third Party" means any Person other than the Respondents or the Acquirer.

CC. "Transition Assistance" means technical services, personnel, assistance, training, and other logistical, administrative, and transitional support as required by the Acquirer and approved by the Commission to facilitate the transfer of the Fiagon Assets to the Acquirer, including support related to audits, finance and accounting, human resources, information technology and systems, maintenance and repair of Fiagon Facilities and equipment, manufacturing, manufacturing, purchasing quality control, research and development, technology transfer, regulatory compliance, sales and marketing, customer service, supply chain management, and custom transfer logistics.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Fiagon Assets, absolutely and in good faith, as an ongoing business, to Hemostasis.

B. If Respondents have divested the Fiagon Assets to Hemostasis 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:

1. Hemostasis is not acceptable as the acquirer of the Fiagon Assets, then Respondents shall immediately rescind the Divestiture Agreements, and shall divest the Fiagon Assets no later than 120 days from the date this Order

is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Fiagon Assets to Hemostasis was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Fiagon Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Respondents shall assist the Acquirer to conduct a due diligence investigation of the Fiagon Assets that the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording the Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Business Information, and Fiagon Facilities, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

D. Respondents shall obtain, prior to the Divestiture Date and at their sole expense, all consents from Third Parties and all Governmental Permits that are necessary to effect the complete transfer and divestiture of the Fiagon Assets to the Acquirer and for the Acquirer to operate all aspects of the Fiagon Business;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all consents from Third Parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant third party that are acceptable to the Commission, or has otherwise obtained all necessary consents and waiver; and

2. With respect to any Governmental Permits relating to the Fiagon Assets that are not transferable or not transferred on the Divestiture Date, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the Fiagon Assets under Respondents' Governmental Permits pending the Acquirer's receipt of its own Governmental Permits, and Respondents shall provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Permits.

E. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Fiagon Products under any patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair the Acquirer's freedom to manufacture, distribute, market, sell, or offer for sale any Fiagon Products anywhere in the world, including new versions of the Fiagon Products.

F. Upon written notice from an Acquirer to Respondents, Respondents shall assist, in a timely manner and at no greater than Direct Cost, the Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to Intellectual Property related to a Fiagon Product acquired by the Acquirer pursuant to Section II.

G. For any lawsuit related to a Fiagon Product that is filed prior to the Divestiture Date, in which Respondent Intersect is alleged to have infringed the Intellectual Property of a Third Party, which Respondent Intersect has prepared or is preparing to defend against as of the Divestiture Date, Respondents shall:

1. Cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses in a timely manner and at their sole expense in connection with obtaining resolution of any pending patent litigation related to that Fiagon Product;

2. Waive conflicts of interest, if any, to allow Respondents' outside legal counsel to represent that Acquirer in any ongoing patent litigation related to that Fiagon Product; and

3. Permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of Respondents' outside counsel related to that Fiagon Product.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreements shall constitute a violation of this Order;

Provided, however, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreements after the Commission issues this Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Fiagon Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Fiagon Assets to the Acquirer, and (2) assist the Acquirer in operating the Fiagon Assets and Fiagon Business in all material respects in the manner in which Respondent Intersect did so prior to the Acquisition.

C. Respondents shall provide such Transition Assistance:

1. As set forth in the Divestiture Agreements, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At Direct Cost; and

3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, for one year after the Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a written request to extend the time period for providing Transition Assistance in order to achieve the purposes of this Order.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreements upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreements, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreements.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Fiagon Assets to evaluate independently and offer employment to the Fiagon Employees.

B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Fiagon Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of Respondents with any of the Fiagon Employees, and to make offers of employment to any of the Fiagon Employees;

3. Remove any impediments within the control of Respondents that may deter Fiagon Employees from accepting employment with the Acquirer, including removal of any noncompete or confidentiality provisions of employment or other Contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Fiagon Employee who receives an offer of employment from the Acquirer;

   Provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Fiagon Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents; and

5. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Fiagon Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Fiagon Employee by the Acquirer.

C. Respondents shall provide financial incentives for Fiagon Employees to continue in their positions and, as may be necessary, to facilitate their employment by the Acquirer.

D. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Fiagon Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer;

Provided, however, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Fiagon Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

VI. Asset Maintenance

IT IS FURTHER ORDERED that Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Fiagon Assets are operated and maintained in the ordinary course of business consistent with past practices until such assets are fully transferred to the Acquirer, and shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Fiagon Business and related Fiagon Assets, to minimize the risk of any loss of their competitive potential, to operate them in a manner consistent with applicable laws and regulations, and to prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear);

B. Not sell, transfer, encumber, or otherwise impair the Fiagon Business and related Fiagon Assets (other than in the manner prescribed in the Orders), or take any action that lessens their full economic viability, marketability, or competitiveness;

C. Not terminate the operations of the Fiagon Business and related Fiagon Assets, and shall conduct or cause to be conducted the operations of the Fiagon Business and related Fiagon Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, ongoing operations, marketability, and competitiveness of the Fiagon Business and related Fiagon Assets; and

D. Use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Fiagon Business and related Fiagon Assets.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that have been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Fiagon Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall not disclose (including to Respondents' employees), and not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents;

Provided, however, that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under this Order, the Order to Maintain Assets, or the Divestiture Agreements; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Fiagon Assets or Fiagon Business, or as required by law.

B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph VII.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.

C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Jeryl Hilleman as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VIII or the Section relating to the Monitor in the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor

Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information, and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

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

IX. Divestiture Trustee

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 the Fiagon Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for

opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Not later than 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 relevant divestiture or other action required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, 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 authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures 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 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 divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX 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 best efforts to negotiate the most favorable price and terms available in each Contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

Provided further, however, that Respondents shall select such person within 5 days of 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 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 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 fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Fiagon Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. 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 Section IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section IX.

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

X. Respondents Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without prior approval of the Commission, acquire directly or indirectly, through subsidiaries, partnerships, or otherwise, any rights or interests, in whole or in part, in any balloon sinus dilation products or ENT navigation systems.

XI. Acquirer Prior Approval

IT IS FURTHER ORDERED that:

A. For a period of 3 years after the Divestiture Date, neither Hemostasis nor any other Acquirer shall sell or otherwise convey to any Person, through subsidiaries or otherwise, without the prior approval of the Commission, any of the Fiagon Assets that were divested pursuant to Section II; and

B. For a period of 7 years after the term of Paragraph XI.A ends, neither Hemostasis nor any other Acquirer shall sell or convey, through subsidiaries or otherwise, without the prior approval of the Commission, any of the Fiagon Assets that were

divested pursuant to Section II, to any Person engaged in the research, development, manufacture, marketing, or sale of any balloon sinus dilation products or ENT navigation systems;

Provided, however, Hemostasis is not required to obtain prior approval of the Commission under this Section XI for a change of control, merger, reorganization, or sale of all or substantially all of its business.

XII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit:

a. Interim compliance reports 30 days after this Order is issued and every 30 days thereafter until Respondents have fully complied with the provisions of Sections II, IV, and VI;

b. Annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and

c. Additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order and the Order to Maintain Assets. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures

Respondents have implemented and plan to implement to comply with each paragraph of the Orders, including detailed descriptions related to:

a. The transfer and delivery to the Acquirer of the Fiagon Assets and Fiagon Business;

b. Any transitional services being provided by Respondents to the Acquirer; and

c. The timing for the completion of such obligations.

3. For a period of 5 years after filing a compliance report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall file their compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XIII. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The proposed dissolution of Medtronic plc or Medtronic, Inc., respectively;

B. The proposed acquisition, merger, or consolidation of Medtronic plc or Medtronic, Inc.; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such changes may affect compliance obligations arising out of this Order.

XIV. Access

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order,

registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

XV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint, create a viable and effective competitor with the Fiagon Business that is independent of Respondents, and ensure the Acquirer can operate the Fiagon Assets and Fiagon Business at least equivalent in all material respects to the manner in which Respondent Intersect operated the Fiagon Assets and Fiagon Business prior to the Acquisition.

XVI. Term

IT IS FURTHER ORDERED that this Order shall terminate on June 27, 2032.

By the Commission.

Nonpublic Appendix A

Divestiture Agreements

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

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Medtronic plc, Medtronic, Inc. ("Medtronic"), and Intersect ENT, Inc. ("Intersect") (together, "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that otherwise would result from Medtronic's acquisition of Intersect.

Pursuant to an Agreement and Plan of Merger dated as of August 6, 2021, Medtronic proposes to acquire all of the issued and outstanding securities of Intersect for approximately $1.1 billion (the "Acquisition"). The Commission's Complaint alleges that the Acquisition violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the Acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the U.S. markets for balloon sinus dilation products and ear, nose, and throat ("ENT") navigation systems.

The proposed Decision and Order ("Order") contained in the Consent Agreement requires Respondents to divest to Hemostasis, LLC ("Hemostasis") the assets and business of Intersect's subsidiary Fiagon AG Medical Technologies ("Fiagon"). Respondents must complete the transfer no later than 10 days after Medtronic consummates its acquisition of Intersect. The Commission has issued, and Respondents have agreed to comply with, an Order to Maintain Assets that requires Respondents to operate and maintain the divestiture assets in the normal course of business through the date the approved buyer acquires the divested assets.

The Commission has placed the Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or make the proposed Order final.

II. The Relevant Markets and Competitive Effects

The Commission's Complaint alleges that the relevant product markets in which to analyze the Acquisition are the research, development, licensing, manufacturing, marketing, distribution, and sale of (a) balloon sinus dilation products and (b) ENT navigation systems. Balloon sinus dilation products are catheter devices used to clear blocked sinuses in patients suffering from chronic rhinosinusitis. ENT navigation systems allow physicians to view and track the location of operating instruments such as balloon sinus dilation products during sinus surgery.

The relevant geographic market in which to analyze the competitive effects of the Acquisition is the United States. Balloon sinus dilation products and ENT navigation systems are medical devices subject to approval by the U.S. Food and Drug Administration before sale in the United States. As such, medical devices not approved for sale in the Untied States do not provide competitive alternatives for U.S. consumers.

The Acquisition would likely substantially lessen competition in the relevant markets. The U.S. markets for balloon sinus dilation products and ENT navigation systems are both highly concentrated. The Acquisition, if consummated, would reduce the number of independent manufacturers of balloon sinus dilation products from four to three. Fiagon, having just entered the U.S. market in 2021 after securing regulatory approvals for its balloon sinus dilation products, is poised to become an important competitive constraint on the established ENT market leaders, including Medtronic. In ENT navigation systems, Medtronic currently holds a dominant position, and the Acquisition would eliminate a nascent competitive threat in Fiagon.

III. The Proposed Order and the Order to Maintain Assets

The proposed Order and the Order to Maintain Assets would remedy the Acquisition's likely anticompetitive effects by requiring Respondents to divest the entirety of the Fiagon business and assets to Hemostasis. Hemostasis is an established participant in the ENT medical device segment and has the expertise, sales infrastructure, and resources to restore the competition that otherwise would have been lost pursuant to the Acquisition. The parties must divest all facilities and equipment, intellectual property, business information, and other assets used with and related to the Fiagon business. Hemostasis also intends to retain Fiagon employees. Because Hemostasis will acquire all assets related to the Fiagon business, and the parties are required to obtain all third-party consents before the divestiture transaction is consummated, Hemostasis will be able to begin manufacturing its own supply of ENT navigation systems and balloon sinus dilation products from day one.

The proposed Order contains additional provisions designed to ensure the effectiveness of the relief. For example, the proposed Order requires the Respondents to assist and cooperate in the defense against any intellectual property litigation related to the Fiagon assets. Respondents are required to provide Hemostasis with transition assistance for up to one year following the divestiture of the assets and must cooperate with and assist Hemostasis to evaluate and offer employment to employees involved in the business and assets subject to divestiture. Respondents have also agreed not to enforce any employee noncompete or confidentiality agreements against Hemostasis relating to employees that interview or accept employment with Hemostasis. The proposed Order and the Order to Maintain Assets further require Medtronic to operate and maintain the divestiture assets in the ordinary course of business, including maintaining the economic viability, marketability, and competitiveness of the Fiagon business until the divestiture transaction takes place.

The Commission will appoint Jeryl Hilleman to act as an independent Monitor to oversee the Respondents' compliance with the requirements of the Order, and to keep the Commission informed about the status of the transfer of the Fiagon business to Hemostasis. The proposed Order requires that the divestiture to Hemostasis be completed no later than 10 days after Medtronic consummates the Acquisition.

In addition to requiring the divestiture of the Fiagon assets and business, the proposed Order requires Respondents to obtain prior approval from the Commission before making certain future acquisitions in the relevant markets for a period of ten years from the date the Order is issued.

The proposed Order also requires Hemostasis to obtain prior approval from the Commission before transferring any of the divested assets to any buyer for the first three years after Hemostasis acquires the divestiture assets. For the seven years following the initial three-year period, the proposed Order requires Hemostasis to obtain prior approval from the Commission before transferring any of the divested assets to any buyer engaged in the research, development, manufacture, marketing, or sale of any balloon sinus dilation products or ENT navigation systems.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

HACKENSACK MERIDIAN HEALTH, INC.,
AND
ENGLEWOOD HEALTHCARE FOUNDATION

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9399; File No. 201 0044
Complaint, December 3, 2020 – Decision, June 27, 2022

This case addresses the $400 million acquisition by Hackensack Meridian Health, Inc. of certain assets of Englewood Healthcare Foundation, d/b/a Englewood Health. The complaint alleges that the acquisition, if consummated, will violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for inpatient general acute care hospital services in Bergen County, New Jersey. After abandoning the proposed transaction, Respondents Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation moved to dismiss the Administrative Complaint. The order dismisses the Complaint.

Participants

For the *Commission*: *Lindsey Bohl, Christopher Caputo, Samantha Gordon, Jacob Hamburger, Nandu Machiraju, Harris Rothman, Anthony Saunders,* and *Cathleen Williams.*

For the *Respondents*: *Kenneth Vorrasi, Faegre Drinker Biddle & Reath LLP; Jane Willis* and *Chong Park, Ropes & Gray LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Hackensack Meridian *Health*, Inc. ("HMH") and Englewood Healthcare Foundation, d/b/a Englewood Health ("Englewood") have executed an affiliation agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

NATURE OF THE CASE

1. HMH, the largest healthcare system in New Jersey, seeks to acquire Englewood, an independent hospital and health system (the "Proposed Transaction") located in Bergen County, New Jersey ("Bergen County") less than ten miles away from two HMH hospitals, including HMH's flagship hospital.

2. The Proposed Transaction would enhance HMH's dominant position in Bergen County by giving it control of three of the six inpatient general acute care ("GAC") hospitals in Bergen County. Englewood is the third-largest provider of inpatient GAC hospital services in Bergen County and competes head-to-head with HMH for patients and inclusion in insurer networks. The Proposed Transaction would eliminate this competition, leading to higher healthcare prices and diminished incentives to compete on quality and access.

3. According to HMH's Board minutes: [redacted] As HMH's Chief Executive Officer recognized, [redacted] Another HMH executive shared that view: [redacted]

4. The Proposed Transaction will substantially lessen competition in the market for inpatient GAC hospital services sold and provided to commercial insurers and their enrollees (including self-insured and fully insured employers and their covered lives). The relevant geographic market for evaluating the Proposed Transaction is no broader than Bergen County.

5. If the Proposed Transaction were allowed to consummate, Respondents would control approximately half of the inpatient GAC hospital services sold and provided in Bergen County to commercial insurers and their enrollees. Only two meaningful competitors would serve the market post-transaction, Holy Name Medical Center ("Holy Name") and The Valley Hospital ("Valley"), both with significantly smaller market shares than Respondents.

6. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("2010 Merger Guidelines"), a post-acquisition market concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders an acquisition presumptively unlawful. Based on inpatient admissions, the Proposed Transaction would significantly increase concentration and result in a highly concentrated market for inpatient GAC hospital services in Bergen County sold and provided to commercial insurers and their enrollees. The Proposed Transaction results in an increase in concentration that is well beyond the thresholds set forth in the 2010 Merger Guidelines and therefore is presumptively anticompetitive.

7. HMH and Englewood compete to provide inpatient GAC hospital services to patients in Bergen County. For HMH, Englewood is consistently identified as a top of competitor in Bergen County. Both parties routinely track each other's market share, performance on quality, patient transfers to each other's hospitals, and other competitive metrics. Quantitative analysis also confirms that HMH and Englewood are close competitors.

8. Today, HMH possesses significant bargaining leverage in negotiations with health insurers who are assembling health-plan networks for commercial customers. HMH is able to secure high reimbursement rates and burdensome contract terms in network negotiations with

insurers that other hospitals providing inpatient GAC hospital services in Bergen County are not able to obtain.

9. Englewood is a high-quality, independent alternative to HMH in Bergen County because it is proximately located to both of HMH's Bergen County facilities—Hackensack University Medical Center ("HUMC") and Pascack Valley Medical Center ("PVMC")—and offers very similar services as HMH's flagship facility, HUMC. If HMH were to acquire Englewood, insurers would have few alternatives for inpatient GAC hospital services in Bergen County. HMH would be able to demand higher rates from insurers for the combined entity's services, which, in turn, may lead to higher insurance premiums, co-pays, deductibles, or other out-of-pocket costs and/or fewer benefits for plan enrollees.

10. HMH and Englewood also compete on non-price factors such as facility improvements and service line expansion, and the Proposed Transaction would eliminate competition between the Respondents on these non-price factors.

11. Entry or expansion by other GAC hospitals will not be likely, timely, or sufficient to offset the adverse competitive effects that likely will result from the Proposed Transaction. New hospital construction or expansion is costly and takes many years to complete. New Jersey's Certificate of Need ("CON") process also requires hospitals to seek regulatory approval before adding any new licensed beds.

12. Respondents have not demonstrated cognizable, merger-specific efficiencies that would be sufficient to rebut the strong presumption of harm and evidence that the Proposed Transaction likely will lead to significant anticompetitive effects in the relevant market.

II.

JURISDICTION

13. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

14. The Proposed Transaction constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III.

RESPONDENTS

15. Respondent HMH, a New Jersey non-profit corporation, operates the largest health system in New Jersey. Headquartered in Edison, New Jersey, HMH is the largest employer in Bergen County and reported $5.9 billion in revenue in 2019.

16. HMH is the largest health system in New Jersey as a result of a series of recent acquisitions. On July 1, 2016, Hackensack University Health Network ("HUHN") merged with Meridian Health to form HMH, which was at the time the second-largest health system in the state. The merged system combined 11 GAC hospitals across seven counties. Following the HUHN-Meridian Health transaction, on January 3, 2018, HMH merged with the JFK Health System expanding HMH to 16 hospitals and over 450 patient care locations and physician offices. On January 3, 2019, HMH added yet another facility: the behavioral health provider Carrier Clinic.

17. Today, HMH operates 12 GAC hospitals, two children's hospitals, two rehabilitation hospitals, and one behavioral health hospital spanning across eight counties in Northern and Central New Jersey. It employs over 7,000 physicians. In Bergen County, HMH operates HUMC, its 781-bed flagship academic medical center, and partially owns and operates as part of a joint venture PVMC. Both HUMC and PVMC are GAC hospitals located within Bergen County. HMH also operates Palisades Medical Center ("Palisades") and partially owns and operates as part of a joint venture Mountainside Medical Center ("Mountainside")—both located within fifteen miles of HUMC in counties adjacent to Bergen. PVMC, Palisades, and Mountainside are community hospitals that provide primary and secondary inpatient GAC hospital services and generally refer patients to HUMC for more complex services.

18. HMH Medical Group is a healthcare network consisting of over 1,000 physicians and advanced providers. The HMH Medical Group offers primary and specialty care at over 300 locations spanning eight counties in New Jersey. HMH Medical Group primary care physicians provide internal medicine, family medicine, pediatrics, and geriatrics among other services. The HMH Medical Group also employs specialists that provide care in a variety of specialty fields including cardiology, oncology, breast surgery, vascular surgery, neurology, neurosurgery, OB/GYN care, and orthopedics, as well as more than 25 pediatric subspecialties.

19. Respondent Englewood, a New Jersey non-profit corporation, is an independent hospital and healthcare network in Northern New Jersey. It is headquartered in Englewood, New Jersey. It is composed of Englewood Hospital and Medical Center, the Englewood Physician Network, and the Englewood Healthcare Foundation. In 2019, Englewood accumulated approximately $768.9 million in revenue.

20. Englewood Hospital is an inpatient GAC services hospital located in Bergen County. Englewood's services include cardiac surgery and care, cancer care, orthopedic surgery, spine surgery, vascular surgery, women's health, and bloodless medicine and surgery. Englewood Hospital has 531 licensed beds and currently operates 318 beds.

21. The Englewood Health Physician Network includes over 500 physicians who offer primary care and specialty services at more than 100 locations in six counties in New Jersey and New York. Englewood also operates two outpatient imaging centers in Bergen County and one outpatient imaging center in Essex County. Englewood has minority interests in two joint-venture outpatient surgical facilities.

IV.

THE PROPOSED TRANSACTION

22. Englewood initiated a search for a larger health system partner beginning in mid-2018. Through its consultant, the Chartis Group, Englewood principally engaged with five potential health system partners, and after receiving initial bids, continued discussions with HMH, [redacted].

23. In February 2019, Englewood's Board of Trustees narrowed the pool of potential partners to HMH and [redacted], both of which submitted final bids in early April 2019. Englewood's Board selected HMH, and the parties ultimately entered into a definitive affiliation agreement on September 23, 2019 (*i.e.*, the Proposed Transaction).

24. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, and a modified timing agreement entered into between the Respondents and Commission staff, absent this Court's action, Respondents would be free to close the Proposed Transaction after 11:59 p.m. EST on December 7, 2020.

V.

RELEVANT SERVICE MARKET

25. Inpatient GAC hospital services sold and provided to insurers and their enrollees is a relevant service market in which to analyze the Proposed Transaction. Inpatient GAC hospital services include a broad cluster of hospital services—medical, surgical, and diagnostic services requiring an overnight hospital stay—for which competitive conditions are substantially similar. Here, inpatient GAC hospital services cover all such services where both HMH and Englewood sell and provide to commercial insurers and their enrollees overlapping services. Non-overlapping services are not included in the relevant service market, as the Proposed Transaction will not substantially lessen competition.

26. Although the Proposed Transaction's likely effect on competition could be analyzed separately for each individual inpatient GAC hospital service, it is appropriate to evaluate the Proposed Transaction's likely effects across this cluster of inpatient GAC hospital services because these services are offered in Bergen County under substantially similar competitive conditions. Thus, grouping the hundreds of individual inpatient GAC hospital services into a cluster for analytical convenience enables the efficient evaluation of competitive effects without forfeiting the accuracy of the overall analysis.

27. Outpatient services are not included in the inpatient GAC hospital services market because commercial insurers and their enrollees cannot substitute outpatient services for inpatient services in response to a price increase on inpatient GAC hospital services. Additionally, outpatient services are offered by a different set of competitors under different competitive conditions in Bergen County.

28. The inpatient GAC hospital services market does not include services offered by a different set of competitors under different competitive conditions than, and which are not substitutes for, inpatient GAC hospital services. For example, inpatient GAC hospital services do not include services related to psychiatric care, substance abuse, and rehabilitation services.

29. The Proposed Transaction threatens significant harm to competition in a service market for inpatient GAC hospital services sold and provided to commercial insurers and their enrollees. As a result, this service market is a relevant market for analyzing the Proposed Transaction.

V.

RELEVANT GEOGRAPHIC MARKET

30. The appropriate relevant geographic market to analyze the effects of the Proposed Transaction is no broader than Bergen County, New Jersey.

31. Located in northeast New Jersey, Bergen County is the most populous county in the state with a population of just under one million people (between the populations of the 11th- and 12th-largest cities in the United States). It is bordered by New York to the north and east, and is located just across the Hudson River from Manhattan, to which it is connected by the George Washington Bridge.

32. The Bergen County market satisfies the hypothetical monopolist test.

33. Insurers offering fully insured commercial plans must meet regulatory requirements that mandate a certain level of geographic access. Insurers likely could not meet geographic access requirements that are required for marketing commercial plans in Bergen County if those insurers did not include any Bergen County hospitals in-network.

34. Patients prefer to access inpatient GAC hospital services close to where they live. For this reason, even if an insurer could assemble a commercial plan that met the appropriate geographic access requirements, an insurer would face significant difficulty marketing a plan that did not include in network any Bergen County hospitals that provide inpatient GAC hospital services.

35. Bergen County also is the main area of competition between HMH's Bergen County hospitals, HUMC and PVMC, and Englewood for inpatient GAC hospital services. HMH and Englewood each analyze competition within Bergen County.

VI.

MARKET STRUCTURE AND THE PROPOSED TRANSACTION'S PRESUMPTIVE ILLEGALITY

36. The Proposed Transaction will significantly increase concentration in Bergen County for inpatient GAC hospital services sold and provided to commercial insurers and their enrollees. Under the 2010 Merger Guidelines, a post-acquisition market concentration level above 2,500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders an acquisition presumptively unlawful.

37. In a market no broader than Bergen County for inpatient GAC hospital services sold and provided to commercial insurers and their enrollees, the Proposed Transaction exceeds these thresholds and thus is presumptively unlawful.

38. HMH's market share would increase to approximately half the inpatient GAC hospital services sold and provided to commercial insurers and their enrollees. The Proposed Transaction would combine the first- and third-largest providers of these services and increase the HHI for Bergen County by approximately 900 for a post-merger HHI of almost 3,000. The Proposed Transaction therefore is presumptively unlawful.

VII.

ANTICOMPETITIVE EFFECTS

39. HMH and Englewood compete closely today to the benefit of commercial insurers and their enrollees. The Proposed Transaction would eliminate this important head-to-head competition.

A.

Competition among Hospitals Benefits Consumers

40. Hospital competition for commercially insured patients occurs in two distinct but related stages. First, hospitals compete for inclusion in commercial insurers' networks. Second, in-network hospitals compete to attract patients, including commercial insurers' health-plan enrollees.

41. In the first stage of hospital competition, hospitals compete to be included in commercial insurers' health networks. To become an "in-network" provider, a hospital negotiates with an insurer and enters into a contract if it can agree with the insurer on terms. The hospital's reimbursement terms for services rendered to a health plan's enrollees are a central component of those negotiations.

42. Insurers attempt to contract with local hospitals (and other healthcare providers) that offer services that current or prospective members of the health plan want. In-network

hospitals are typically significantly less expensive for health-plan enrollees to seek care from than a hospital that is not included in the health plan's network (an "out-of-network provider"). Unsurprisingly, a hospital likely will attract more of a health plan's enrollees when it is in-network. Hospitals therefore have an incentive to offer competitive terms and reimbursement rates to induce the insurer to include the hospital in its health-plan network.

43. From the insurer's perspective, having hospitals in-network is beneficial because it enables the insurer to create a health-plan provider network in a particular geographic area that is attractive to current and prospective enrollees, typically local employers and their employees.

44. A hospital has significant bargaining leverage if its absence would make the insurer's health-plan network substantially less attractive (and therefore less marketable) to its current and prospective enrollees. This relative attractiveness to the insurer depends largely on whether other nearby hospitals could serve as viable in-network substitutes in the eyes of the plan's enrollees. The presence of alternative, conveniently located, high-quality competitors limits the bargaining leverage of a hospital in negotiations with the insurer. Where there are fewer meaningful alternatives, a hospital will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more onerous contract terms.

45. A merger involving hospital facilities and services that are substitutes in the eyes of insurers and their health-plan enrollees increases the combined hospital's bargaining leverage. Such a merger in turn may lead to higher prices and/or poorer quality because the merger eliminates an available alternative that an insurer could otherwise offer (or threaten to offer) its health-plan members. Increases in reimbursement rates significantly impact insurers' health-plan enrollees, such as through higher cost-sharing payments and/or fewer benefits. For fully insured employers, increased healthcare costs would come in the form of higher premiums. Self-insured employers would fully bear those increased healthcare costs because they pay for claims directly. Individual consumers also could feel the burden of increased costs in the form of higher insurance premiums, co-pays, deductibles, or other out-of-pocket costs.

46. In the second stage of competition, hospitals compete to attract patients to their facilities by offering convenient, high-quality healthcare services. Patients often face similar out-of-pocket costs to access in-network providers. As a result, in-network hospitals often compete on non-price features, such as location, quality of care, access to services and technology, reputation, physicians and faculty members, amenities, conveniences, and patient satisfaction. Hospitals compete on these non-price dimensions to attract all patients, regardless of whether they are covered by insurance (including Medicare Advantage and Medicaid Managed Care), traditional Medicare and Medicaid, or are patients without any insurance. A merger of competing hospitals eliminates this form of non-price competition between the hospitals.

B.

The Proposed Transaction Would Eliminate Close Competition Between HMH and Englewood

47. In Bergen County, HMH and Englewood are close competitors. In analyzing whether to enter into an affiliation agreement with HMH, Englewood observed that a strategic benefit of such a relationship was that it [redacted] Englewood also believed, in part, that [redacted]

48. Quantitative evidence confirms the closeness of competition between HMH and Englewood. It shows that, if Englewood were not available, a significant fraction of patients that previously went Englewood would seek care at a HMH hospital. Likewise, if HUMC and PVMC were to become unavailable to patients for inpatient GAC hospital services, many patients that previously went to one of one of these HMH hospitals would receive care at Englewood.

49. Today, this close head-to-head competition between Respondents incentivizes them to keep prices lower and quality of care higher than they would without this competition.

50. HMH possesses significant bargaining leverage in negotiations with insurers, which it uses to demand high reimbursement rates and burdensome contractual terms. Englewood and HMH are important alternatives for insurers constructing networks in Bergen County. But if HMH were to acquire Englewood, HMH would own three out of the six hospitals that provide inpatient GAC hospital services in Bergen County, and insurers would have few alternatives to turn to for inpatient GAC hospital services in Bergen County. As a result, post-merger, HMH will likely be able to demand higher reimbursement rates and/or more onerous contractual terms than it does today, which, in turn, will harm consumers.

C.

The Proposed Transaction Will Eliminate Non-Price Competition

51. HMH and Englewood compete with one another to attract patients, which incentivizes them to improve quality, technology, amenities, equipment, access to care, and service offerings.

52. Respondents monitor each other's quality and brand recognition. Respondents have invested in their physician networks and facilities to provide high quality services to patients in Bergen County and compete to attract Bergen County residents to their facilities. Englewood has demonstrated an interest in and a track record of expanding its ability to handle more tertiary care. And HMH is in the process of a $714 million expansion and modernization project to accommodate more complex tertiary and quaternary care.

53. Patients benefit from this non-price competition. The Proposed Transaction will diminish the combined firm's incentive to compete on these non-price dimensions, including on

quality of care, facilities, and service offerings, to the detriment of all patients who use these hospitals.

VIII.

LACK OF COUNTERVAILING FACTORS

A.

Entry Barriers

54. *De novo* entry into inpatient GAC hospital services in Bergen County will not be timely, likely, or sufficient enough to counteract the anticompetitive effects of the Proposed Transaction. Expansion by current market participants is also unlikely to deter or counteract the Proposed Transaction's likely harm to competition for inpatient GAC hospital services in Bergen County.

55. Construction of a new hospital involves high costs and significant financial risks, including the time and resources it would take to conduct studies, develop plans, acquire land or repurpose a facility, garner community support, obtain regulatory approvals, and build and open a facility. New Jersey also is a Certificate of Need ("CON") state. Building or expanding an existing hospital in a CON state is expensive and time consuming.

B.

Efficiencies

56. Respondents have not demonstrated cognizable, merger-specific efficiencies that would be sufficient to rebut the strong presumption and evidence of the Proposed Transaction's likely significant anticompetitive effects in the relevant market.

IX.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

57. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth.

58. The Proposed Transaction constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

59. The allegations of Paragraphs 1 through 56 above are incorporated by reference as though fully set forth.

60. The Proposed Transaction, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the fifteenth day of June, 2021, at 10:00 am EST, is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC, 20580, as the place, when and where an evidentiary 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 and the Clayton 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 this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) 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 Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. 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 pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days

of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Proposed Transaction challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Proposed Transaction is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as HMH and Englewood were offering and planning to offer prior to the Proposed Transaction.

2. A prohibition against any transaction between HMH and Englewood that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, HMH and Englewood provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the Proposed Transaction or to restore Englewood as viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this third day of December, 2020.

By the Commission.

ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On May 24, 2022, the Commission withdrew this matter from adjudication to facilitate consideration of whether further relief was warranted following judicial award of

preliminary injunctive relief and Respondents' termination of their merger agreement and withdrawal of their Hart-Scott-Rodino Notification and Report Forms. The Commission has now determined to return this matter to adjudication for the sole purpose of dismissing the Complaint. Accordingly,

IT IS HEREBY ORDERED that this matter is returned to adjudication; and

IT IS FURTHER ORDERED that Respondents' Motion to Dismiss Complaint filed April 5, 2022, is **GRANTED** and the Complaint in this matter is **DISMISSED** without prejudice.

By the Commission.

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC, WHOLE BODY SUPPLEMENTS, LLC, AND KRAMER DUHON

Docket No. 9397. Order, January 18, 2022

Order granting Complaint Counsel's requests to amend the Complaint and set a new hearing date and partially grant their other requests.

ORDER GRANTING IN PART COMPLAINT COUNSEL'S SECOND MOTION TO AMEND COMPLAINT AND NOTICE AND REQUEST FOR REMAND INSTRUCTIONS

On December 1, 2021, consistent with our Order Denying Final Decision Under Rule 3.12(b)(2) and Denying Summary Decision at 6-7 (Nov. 19, 2021) ("Order Denying Final Decision"), Complaint Counsel moved to amend the Complaint. *See* Complaint Counsel's Second Motion to Amend Complaint and Notice and Request for Remand Instructions (Dec. 1, 2021) ("Motion"). Complaint Counsel also asked the Commission to set a new hearing date and provide instructions on remand concerning scheduling, discovery, and additional requirements for Respondents' answer. Respondents object to the proposed amendments and remand instructions. *See* Respondents' Response to Complaint Counsel's Second Motion to Amend Complaint and Notice and Request for Remand Instructions (Dec. 10, 2021) ("Response"). We grant Complaint Counsel's requests to amend the Complaint and set a new hearing date and partially grant their other requests.

I. MOTION TO AMEND THE COMPLAINT

Complaint Counsel state that their proposed amendments generally fall into two categories, with some overlap. First, the amendments add support for the requested fencing-in relief, including by adding allegations concerning a previous action brought by the FTC and the State of Maine against Respondents in the District of Maine and a related stipulated order.[1] Other allegations

1 Per the proposed Amended Complaint, the complaint in the Maine action charged Health Research Laboratories and Kramer Duhon with violating the Federal Trade Commission Act ("FTC Act") by disseminating deceptive ads with false and unsubstantiated health and disease-related claims. *See* Motion Attachment 1 (Amended Complaint) ¶ 5 (citing Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Health Research Labs., LLC*, No. 2:17-CV-00467 (D. Me. Nov. 30, 2017)). The parties resolved that action with a Stipulated Final Judgment and Order ("Stipulated Order") that, among other things, prohibited Respondents from making representations about health benefits, safety, performance, or efficacy of a food, drug, or dietary supplement unless those representations were non-misleading and substantiated by competent and reliable scientific evidence. *See* Motion Attachment 1 (Amended

falling into this category include those concerning the breadth and timing of ad dissemination as well as communications between Respondents and their consultants regarding the ad claims. Motion at 2-3. Second, the amendments clarify the factual and legal allegations in the Complaint and provide greater notice of the claims against Respondents, including by specifying the relevant time period of the challenged conduct, explicitly alleging wide dissemination and materiality, adding detail regarding how Respondents' substantiation was deficient, adjusting language to emphasize that Respondents' claims are challenged under both Sections 5(a) and 12 of the FTC Act, and replacing the Notice of Contemplated Relief with a proposed Order. Motion at 2-3. Respondents object to the amendments, particularly the inclusion of facts regarding the Maine action, and the requested relief. Response at 2.

"[T]he Commission may freely grant leave to amend complaints when the public interest so requires." *Champion Home Builders Co.*, 99 F.T.C. 397, 399 (1982) (citing *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 50 (1st Cir. 1964)). We find that this standard is met here, as the amendments buttress and provide greater notice of the allegations and the requested relief. Although Respondents now oppose the inclusion of facts regarding the Maine litigation, they previously objected to Complaint Counsel's reliance on these facts partly *because* they were not included in the original Complaint and Respondents "did not receive fair notice" of them. Respondents' Opposition to Summary Disposition and Reply Findings of Fact, Conclusions of Law, and Brief 14-15 (Sept. 10, 2021). Respondents also asserted that the original Complaint did not provide sufficient notice or clarity regarding the relief sought. *Id.* at 21, 23, 26-27. The amendments would address these purported deficiencies. Thus, the public interest would be served by amending the Complaint to ensure that additional notice is provided and to avoid future dispute about the sufficiency of the Complaint. *See Sunshine Biscuits, Inc.*, 52 F.T.C. 110, 116 (1955) (upholding amendment that clarified the complaint "to remove any possibility of doubt or misunderstanding on respondent's part as to the charge it must meet").

Respondents take issue with the breadth of the amendments, describing them as a "wholesale revision of the case." *See* Response at 1-2. The amendments, however, do not change the theory of the case but only clarify and buttress existing charges and add specificity to and support for Complaint Counsel's requested relief.[2]

Complaint) ¶¶ 8-9. The court subsequently denied a contempt motion alleging that Respondents had disseminated mailers that violated one section of the Stipulated Order. *Id.* ¶¶ 15-16.

2 Among the proposed amendments, Complaint Counsel seek to modify the allegations that Respondents' representations "were not substantiated" at the time they were made to say that these representations "are false or misleading, or were not substantiated" when made. Motion Attachment 1 (proposed Amended Complaint) ¶¶ 46, 48, 50, 52). These amendments clarify the linkage between the Complaint's individual counts and its concluding paragraph, which alleges violation of both Section 5(a) of the FTC Act (prohibiting unfair or deceptive acts or practices) and Section 12 of the FTC Act (prohibiting false advertisements). They are not substantive changes to the causes of action or the theory of the case. As we have explained, claims that are not substantiated at the time they are disseminated are by their nature misleading. *See* Order Denying Final Decision at 6-7 (citing *ECM BioFilms, Inc.*, 160 F.T.C. 652, 709 (2015), *aff'd sub nom., ECM BioFilms, Inc. v. FTC*, 851 F.3d 599 (6th Cir. 2017); *FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984)).

In any case, Respondents have not made any argument that the breadth of the amendments will deprive them of a fair hearing, undermine their ability to present a defense, or otherwise cause undue prejudice. Indeed, the case is in the pre-trial stage and discovery is ongoing, so Respondents will have ample time to respond to the new allegations. *See Champion Home Builders*, 99 F.T.C. at 399 ("[I]t is clear that amending the complaint at this relatively early stage of the proceeding, where discovery is still ongoing and trial some months distant, would not prejudice respondent. Respondent would have adequate time to respond fully to the charges in the amended complaint.") (citing *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961)). These circumstances afford no basis for rejecting the proposed amendments. *See Exquisite Form Brassiere*, 301 F.2d at 501 (upholding amendment after complaint counsel had completed their case-in-chief but ample time remained for answer and preparation of a defense); *James Carpets, Inc.*, 81 F.T.C. 1043, 1046 (1972) ("It does not appear to us that the amending of the complaint at [the pre-trial] stage of the proceeding will deprive respondents of the opportunity to answer the charges therein or to present a defense thereto.").

Respondents also argue that allegations regarding the Maine action and the Stipulated Order should be excluded because (1) if the present allegations involve conduct covered by the Stipulated Order, the claims have been decided and rejected by the District Court and cannot be relitigated here and (2) if the present allegations involve conduct not covered by the Stipulated Order, the Maine litigation is irrelevant to this proceeding. Response at 2. Complaint Counsel, however, explain that allegations regarding the Maine litigation are relevant to "the deliberateness" of Respondents' alleged conduct and therefore have been included to support the fencing-in relief requested. Motion at 2-3. *See, e.g.*, *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994) (explaining that the seriousness and deliberateness of the violation are among the factors to be considered in determining appropriate relief); *see also In re Traffic Jam Events*, 2021 WL 5124183, at *22 (FTC Oct. 25, 2021) (the "failure of prior enforcement efforts in stopping unlawful activity" is a relevant consideration in determining how broad a remedy to impose) (quoting *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000)) (ellipsis omitted), *petition for review filed*, No. 21-60947 (5th Cir. Dec. 21, 2021). For example, facts regarding the Maine litigation could have relevance to Respondents' knowledge of substantiation requirements. Thus, the allegations regarding the Maine litigation may prove relevant to this proceeding without requiring relitigation of issues already decided.

Finally, Respondents argue that the relief requested in the proposed Order is not authorized by the FTC Act. Response at 2. Arguments to that effect can be addressed at a later point, if any violations are established and the Commission needs to consider the appropriate relief. Accordingly, we grant Complaint Counsel's request to amend the Complaint.

II. REQUEST TO REQUIRE RESPONDENTS TO ANSWER EACH ALLEGATION

As discussed extensively in the Order Denying Final Decision, Respondents have sidetracked this proceeding by shifting their position regarding their Amended Answer, first admitting all material allegations pursuant to Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2), but then asserting that certain critical allegations were not in fact admitted because they were part of the "counts." In light of this, Complaint Counsel have asked us to require Respondents to

provide in their Answer a specific response to each individual factual allegation in the Amended Complaint, even if they decide to again invoke Rule 3.12(b)(2). Motion at 6.

Complaint Counsel have also asked us to amend the third paragraph of the Notice to reflect this requirement. We agree that, given Respondents' history, greater clarity will be needed regarding which paragraphs or allegations are actually admitted and which are denied should Respondents attempt again to invoke Rule 3.12(b)(2). Accordingly, if Respondents elect not to contest the allegations of fact set forth in the Amended Complaint, the Answer should state that Respondents admit all of the material facts to be true, as per Rule 3.12(b)(2), and must also provide a specific response to any portion of the Complaint that is not admitted. The first sentence of the third paragraph of the Notice shall be amended accordingly.

III. REQUEST TO EXTEND THE HEARING DATE

Complaint Counsel also ask us to set an evidentiary hearing date six months from the date of remand and to amend the Notice to reflect that new date. The hearing was originally set for July 13, 2021, a date that has come and gone. *See* Complaint at 12. Commission Rule 3.41(b) requires hearings to proceed "with all reasonable expedition." 16 C.F.R. § 3.41(b). Six months strikes an appropriate balance between the competing needs of providing a prompt resolution and ensuring that the parties have sufficient time to conduct discovery and prepare their case. We therefore find good cause to set a new hearing date for July 19, 2022, which is approximately six months from the date of remand. *See id.*

IV. REQUESTS FOR INSTRUCTION ON REMAND REGARDING DISCOVERY AND SCHEDULING

In our Order Denying Final Decision, we stated that, in light of Respondents' litigation conduct, the Chief Administrative Law Judge ("ALJ") should consider on remand whether Respondents' counsel should be suspended or barred from participating in this proceeding under Commission Rule 3.42(d), 16 C.F.R. § 3.42(d), for dilatory and obstructionist conduct. Order Denying Final Decision at 8-9. Complaint Counsel have requested that we instruct the ALJ to do this "promptly," in order to avoid a later procedural delay. Motion at 6. We agree that the efficiency of this proceeding on remand would be enhanced by considering this issue promptly and leave it to the ALJ to set an appropriate briefing schedule.[3]

Complaint Counsel also ask us to require that a new scheduling order give the parties at least three months after remand to conduct additional fact discovery and an additional six weeks to produce expert reports and conduct expert depositions. Complaint Counsel also request that the parties be permitted to serve up to 50 additional document requests, 25 additional interrogatories, and 50 additional requests for admission (without any limitation on the number of requests for admission for authentication and admissibility of exhibits), to conduct fact witness and expert

3 Respondents object to the characterization of their conduct as improper and provide a lengthy defense of their shifting positions. Respondents are free to make these arguments to the ALJ when he considers whether suspension of counsel is appropriate under Rule 3.42(d).

depositions, and to complete expert reports. Motion at 6-7. We leave it to the ALJ to determine the timing and scope of additional discovery as appropriate and permitted by Commission regulations.[4] We note, however, that one of the reasons cited by Complaint Counsel for their request for additional discovery is the need to change paragraph references and make other adjustments based on the revisions in the Amended Complaint. Motion at 5. To the extent a discovery request is substantively identical to one already served and is modified only to reflect the Amended Complaint's paragraph numbers or slight wording changes, this would not constitute a new request.

Accordingly,

IT IS HEREBY ORDERED THAT Complaint Counsel's Second Motion to Amend Complaint and Notice and Request for Remand Instructions is **GRANTED IN PART**.

IT IS FURTHER ORDERED THAT the evidentiary hearing in this proceeding shall commence at 10:00 am on July 19, 2022.

IT IS FURTHER ORDERD THAT within 5 days of this Order, Complaint Counsel shall file an Amended Complaint as submitted as Attachment 1 to the Motion, except the Notice shall be modified to include the new hearing date and instructions, as specified in this opinion, regarding the required contents of an answer should Respondents elect not to contest the allegations of fact set forth in the Amended Complaint.

IT IS FURTHER ORDERED THAT Respondents shall file their Answer to the Amended Complaint within 14 days of service, pursuant to Commission Rule 3.12(a), 16 C.F.R.

§ 3.12(a). If Respondents elect not to contest the allegations of fact set forth in the Amended Complaint, pursuant to Commission Rule 3.12(b)(2), 16 C.F.R. § 3.12(b)(2), the Answer must state that Respondents admit all the material facts to be true and must also provide a specific response to any portion of the Complaint that is not admitted. And

IT IS FURTHER ORDERED THAT, this proceeding is hereby remanded to the ALJ for discovery, evidentiary hearing, and initial decision, and for consideration of whether Respondents' counsel should be suspended or barred from future participation in this proceeding under Commission Rule 3.42(d), 16 C.F.R. § 3.42(d), for dilatory or obstructionist conduct.

By the Commission.

4 Commission Rule 3.35, 16 C.F.R. § 3.35, limits the number of interrogatories that may be served to 25.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, January 19, 2022

Order granting the ALJ's request to further extend the time period for filing the Initial Decision to February 17, 2022.

ORDER GRANTING EXTENSION OF TIME

This proceeding involves two theories of liability: (1) an allegedly anticompetitive agreement between Altria Group, Inc. ("Altria") and JUUL Labs, Inc. ("JLI") (collectively, "Respondents"), alleged by the Commission's Complaint to violate Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act; and (2) Altria's acquisition of an ownership stake in JLI, alleged by the Complaint to violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Respondents deny liability under either theory. Chief Administrative Law Judge D. Michael Chappell conducted the trial of this matter over several weeks in June 2021.

The FTC's Rule of Practice 3.51(a) provides that "[t]he Administrative Law Judge ['ALJ'] shall file an initial decision within 70 days after the filing of the last filed initial or replyproposed findings of fact, conclusions of law and order" and that the ALJ may extend this time period by up to 30 days for good cause. 16 C.F.R. § 3.51(a). Pursuant to FTC Rule 3.51(a), Judge Chappell issued an order on December 17, 2021, extending the time for filing the Initial Decision from the initial presumptive deadline, December 22, 2021, to January 21, 2022 ("Order"). Judge Chappell now requests that we further extend the time period to February 17, 2022.

FTC Rule 3.51(a) provides that the Commission may further extend the time period for good cause. We find that good cause exists in this case. The record of the multi-week trial is extensive, involving numerous witnesses and complex issues under two major theories of liability. Over 2,480 exhibits were admitted into evidence. Order at 1. Thirty-seven witnessestestified, either live or by deposition, resulting in over 3,400 pages of trial transcript from witnesses' live testimony. *Id.* The parties submitted 3,900 proposed findings of fact. *Id.* The parties' proposed findings of fact and conclusions of law, replies to findings of fact and conclusions of law, post-trial briefs, and reply briefs total over 4,000 pages. *Id.* at 1-2. As JudgeChappell indicates, these substantial materials must be thoroughly reviewed to give proper consideration to the issues raised in the proceeding. Under these circumstances the extension of time requested by Judge Chappell is appropriate.

Accordingly,

IT IS HEREBY ORDERED that the time for filing the Initial Decision in thisproceeding is extended to February 17, 2022.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC, WHOLE BODY SUPPLEMENTS, LLC, AND KRAMER DUHON

Docket No. 9397. Order, January 21, 2022

Order granting Complaint Counsel's motion to withdraw this Matter from adjudication for the purpose of considering a consent agreement.

ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel having moved that this matter be withdrawn from adjudication in order to enable the Commission to consider a proposed consent agreement, and Respondents consenting to the motion; and

Complaint Counsel and Respondents, having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by Respondents and by Complaint Counsel and approved by the Director of the Bureau of Consumer Protection that, if accepted by the Commission, would resolve the claims against Respondents in their entirety;

IT IS ORDERED that pursuant to Section 3.25(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.25(c), that this matter in its entirety be, and it is hereby withdrawn from adjudication until April 19, 2022, and that all proceedings before the Administrative Law Judgein this matter are hereby stayed pending a determination by the Commission with respect to the proposed Consent Agreement, pursuant to Section 3.25(f) of the Commission's Rules of Practice, 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Section 3.25(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

DANAHER CORPORATION,
AND
GENERAL ELECTRIC COMPANY

Docket No. C-4710. Order, January 31, 2022

Letter Order granting Sartorius Stedium Biotech S.A.'s petition to acquire Novasep Process SaS's chromatography equipment business.

LETTER ORDER APPROVING ACQUISITION

Fiona Schaeffer, Esquire
Milbank

Rebecca Farrington, Esquire
White & Case LLP

Re: *In the Matter of Danaher Corp.*
Docket No. C-4710

Dear Ms. Schaefer and Ms. Farrington:

This letter responds to the Petition for Prior Approval of Sartorius Stedium Biotech S.A.'s Proposed Acquisition of Novasep Process SaS's Chromotography Equipment Business ("Petition"), filed on October 28, 2021. The Petition requests that the Federal Trade Commission approve, pursuant to Paragraph X of the Order in this matter, Sartorius's proposed acquisition of Novasep's chromatography equipment business. The Petition was placed on the public record for comments until December 20, 2021, and no comments were received.

After consideration of the Petition and other available information, the Commission has determined to approve the proposed acquisition. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with the Petition, and has assumed them accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

BOSTON SCIENTIFIC CORPORATION

Docket No. C-4684. Order, February 8, 2022

Letter Order granting respondent's application for approval of an amendment to the Transition Manufacturing Agreement.

LETTER ORDER APPROVING AMENDMENT

Michael B. Bernstein, Esq.
Arnold & Porter Kaye Scholer LLP

Re: In the Matter of *Boston Scientific Corporation and BTG plc*
File No. 191-0039, Docket No. C-4684

Dear Mr. Bernstein:

This letter is in reference to an application for approval of an amendment filed by Boston Scientific Corporation ("BSC") on December 15, 2021. BSC requests Commission approval of its proposed amendment to the Transition Manufacturing Agreement, incorporated by reference into the Decision and Order entered in this case.

After consideration of BSC's application and other available information, the Commission has determined to approve the proposed change as set forth in BSC's application. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with BSC's application and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ILLUMINA, INC.,
AND
GRAIL, INC.

Docket No. 9401. Order, March 1, 2022

Order to take appropriate action to withdraw the subpoena enforcement matter against Caris pending in the U.S. District Court for the District of Columbia in *FTC v. Caris Life Sciences*, Case No. 1:21-mc-00115-RJL (D.D.C.).

ORDER TO WITHDRAW FROM COURT ENFORCEMENT OF SUBPOENAS ISSUED TO CARIS LIFE SCIENCES

On August 24, 2021, the Commission ordered the General Counsel to take appropriate action to enforce in federal district court two subpoenas for documents and testimony issued in this administrative proceeding to nonparty Caris Life Sciences ("Caris"). In accordance with that order, on September 9, 2021, the General Counsel filed a petition to enforce the subpoenas in the U.S. District Court for the District of Columbia.

On February 9, 2022, counsel for the parties filed in the administrative proceeding a Joint Stipulation to Exclude Caris-Related Material from the Record ("Joint Stipulation"). The Joint Stipulation explained that, while awaiting resolution of the subpoena enforcement action, the parties had reached an agreement that neither Complaint Counsel nor Respondents would rely on any Caris-related material, and each party would withdraw any Caris-related material already in evidence. *Id.* at 1. On February 10, 2022, the Commission moved to stay the federal district court subpoena enforcement proceeding pending the Commission's decision on whether to dismiss that action, and the district court granted that stay the next day. The ALJ then granted the parties' request to enter the Joint Stipulation. Order on Pending Motions at 2-3 (Feb. 16, 2022). The parties now move jointly to request that the Commission withdraw from enforcement of the Caris-related subpoenas.

In light of the parties' Joint Stipulation and agreement not to rely on Caris-related materials in this matter, we find that the subpoena enforcement action against Caris is now moot. Accordingly,

IT IS HEREBY ORDERED that the General Counsel take appropriate action to withdraw the subpoena enforcement matter against Caris pending in the U.S. District Court for the District of Columbia in *FTC v. Caris Life Sciences*, Case No. 1:21-mc-00115-RJL (D.D.C.).

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, March 2, 2022

Order granting the Joint Motion to Extend Deadlines for the Parties' Appeal Briefs.

ORDER EXTENDING BRIEFING SCHEDULE

On February 15, 2022, Chief Administrative Law Judge D. Michael Chappell ("ALJ") issued his Initial Decision in this matter. On February 16, 2022, Complaint Counsel filed a Notice of Appeal pursuant to Commission Rule 3.52(b), 16 C.F.R. § 3.52(b).

On February 18, 2022, the parties jointly moved to extend the briefing schedule for the appeal. Joint Mot. to Extend Deadlines for the Parties' Appeal Briefs ("Motion"). Under the parties' proposal, the due dates would shift as follows:

	Current deadline	**Proposed deadline**
Complaint Counsel's Opening Appeal Brief to the Commission	March 17, 2022	March 31, 2022
Respondent's Answering Brief	30 days after Appeal Brief served	7 days after Answering Brief served
Complaint Counsel's Reply Brief	45 days after Appeal Brief filed	14 days after Answering Brief filed

We have determined pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), to grant the Motion for good cause shown. We previously extended the ALJ's deadline to issue his Initial Decision due to the volume and complexity of the record in this matter. Order, Jan. 19, 2022. The ALJ's Initial Decision addresses two distinct theories of liability, each involving sub- theories and several lines of evidence. We find that a modest extension of the briefing schedulewill enable the parties to address appropriately the complexity of the issues presented.

Accordingly,

IT IS HEREBY ORDERED THAT the Joint Motion to Extend Time for the Parties' Appeal Briefs is **GRANTED**; the briefs in this proceeding shall be due as follows:

	Due on:
Complaint Counsel's Opening Appeal Brief	March 31, 2022
Respondents' Answering Brief	May 16, 2022
Complaint Counsel's Reply Brief	May 31, 2022

IT IS FURTHER ORDERED THAT filing an opening appeal brief by March 31, 2022 will be treated as perfecting Complaint Counsel's appeal in accordance with Commission Rule 3.52(b)(2), 16 C.F.R. § 3.52(b)(2).

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HACKENSACK MERIDIAN HEALTH, INC.,
AND
ENGLEWOOD HEALTHCARE FOUNDATION

Docket No. 9399. Order, April 7, 2022

Order setting deadline for Respondents to file any answer(s) to the Motion for Continuance to enable the Commission to issue a timely ruling on the Motion.

ORDER SETTING EXPEDITED RESPONSE DEADLINE

On August 4, 2021, the United States District Court for the District of New Jersey granted Complaint Counsel's motion for a preliminary injunction to enjoin the proposed merger between Respondents Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation until completion of this administrative proceeding. *FTC v. Hackensack Meridian Health, Inc.*, No. 20-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021). The Third Circuit Court of Appeals affirmed the district court's injunction on March 22, 2022. *FTC v. Hackensack Meridian Health, Inc.*, No. 21-2603, 2022 WL 840463 (3d Cir. Mar. 22, 2022). On March 31, 2022, Respondents notified Complaint Counsel that they were abandoning their transaction. On April 5, 2022, Respondents mutually terminated their merger agreement and withdrew their Hart-Scott-Rodino Notification and Report Forms.

That same day, Complaint Counsel and Respondents filed competing motions regarding appropriate next steps in this proceeding. Complaint Counsel moved to withdraw the matter from adjudication so that the Commission could evaluate whether further relief is warranted. Respondents moved to dismiss the Complaint on the basis that the administrative action is now moot and no further adjudicative proceedings are necessary, appropriate, or in the public interest. Additionally, Complaint Counsel filed an expedited motion for a 60-day continuance of the administrative proceeding, in which the evidentiary hearing is scheduled to begin on April 22, 2022, to avoid the potentially unnecessary, significant expense to litigating and third parties of preparing for the hearing and complying with imminent prehearing deadlines while the Commission considers the other two motions ("Motion for Continuance"). According to Complaint Counsel, Respondents declined to join the motion for continuance because Respondents believe that this matter is moot and that dismissal is the only appropriate next step.

Under Commission Rules 3.22(d) and 4.4(c), 16 C.F.R, §§ 3.22(d) & 4.4(c), Respondents' answer to the Motion for Continuance is due on April 18, 2022, "or such longer or shorter time as may be designated by the ... Commission." Delaying Commission action until after April 18 would subject the parties and third parties to the burdens and expense of complying with prehearing deadlines in the interim, including the submission of motions for *in camera* treatment and pretrial briefs. *See* Order Granting Joint Motion to Amend Scheduling Order (Nov. 16, 2021). To enable the Commission to issue a timely ruling on the Motion for Continuance, we will order Respondents to file any answer(s) to the Motion for Continuance no later than 1:00 pm E.D.T. on April 8, 2022.

Accordingly,

IT IS HEREBY ORDERED that Respondents must file any answer(s) to Complaint Counsel's Expedited Motion for a 60-Day Continuance of Administrative Proceedings, filed on April 5, 2022, no later than 1:00 pm E.D.T. on April 8, 2022.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HACKENSACK MERIDIAN HEALTH, INC.,
AND
ENGLEWOOD HEALTHCARE FOUNDATION

Docket No. 9399. Order, April 8, 2022

Order granting Complaint Counsel's Expedited Motion for a 60-Day Continuance of Administrative Proceedings.

ORDER GRANTING A 60-DAY CONTINUANCE

On August 4, 2021, the United States District Court for the District of New Jersey granted the Federal Trade Commission's motion for a preliminary injunction against the proposed merger between Respondents Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation until completion of this administrative proceeding. *FTC v. HackensackMeridian Health, Inc*., No. 20-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021). The Third Circuit Court of Appeals affirmed the district court's injunction on March 22, 2022. *FTC v. Hackensack Meridian Health, Inc.*, No. 21-2603, 2022 WL 840463 (3d Cir. Mar. 22, 2022). OnMarch 31, 2022, Respondents notified Complaint Counsel that they were abandoning their transaction. On April 5, 2022, Respondents mutually terminated their merger agreement and withdrew their Hart-Scott-Rodino Notification and Report Forms.

That same day, Complaint Counsel and Respondents filed competing motions regarding appropriate next steps. Complaint Counsel moved to withdraw the matter from adjudication so that the Commission could evaluate whether further relief is warranted ("Motion to Withdraw"). Respondents moved to dismiss the Complaint on the basis that the administrative action is now moot and no further adjudicative proceedings are necessary, appropriate, or in the public interest ("Motion to Dismiss"). Additionally, Complaint Counsel filed an expedited motion for a 60-day continuance of the administrative proceeding, scheduled to begin on April 22, 2022, to avoid what Complaint Counsel describe as the potentially unnecessary, significant expense to litigatingand third parties of preparing for the hearing and complying with imminent prehearing deadlineswhile the Commission considers the other two motions. Respondents oppose the continuance motion as well as the Motion to Withdraw because, in their view, with the merger now abandoned, the only appropriate course of action is dismissal of the administrative proceeding. *See* Respondents' Opposition to Complaint Counsel's Emergency Motion for a 60-Day Continuance of Administrative Proceedings & Its Motion to Withdraw the Matter from Adjudication (Apr. 8, 2022). Respondents do not object, however, to a limited continuance to give the Commission sufficient time to decide the Motion to Dismiss. *Id.* at 3.

Commission Rule 3.41(b) provides that "[t]he Commission, upon a showing of good cause, may order a later date for the evidentiary hearing to commence." 16 C.F.R. § 3.41(b). Wefind good cause to continue the hearing and prehearing deadlines for 60 days while the parties brief the Motion to Dismiss and the Commission considers the parties' competing motions.

Complaint Counsel's response to the Motion to Dismiss is due on April 18, 2022.

Further, Respondents may file a reply in support of their Motion to Dismiss within 5 working days after service of Complaint Counsel's response. During this same period, there are a numberof prehearing deadlines requiring parties, third parties, and the Chief Administrative Law Judge to expend significant time and resources. Among other things, by April 12, third parties and Respondents must file motions for *in camera* treatment of proposed trial exhibits, and Complaint Counsel must file their pretrial brief. Respondents must file their pretrial brief(s) by April 18. *See* Order Granting Joint Motion to Amend Scheduling Order (Nov. 16, 2021). The hearing itself is slated to begin on April 22. Depending on the resolution of the pending motions, these filings and the hearing may prove unnecessary. Therefore, we find good cause to continue for 60days the hearing and prehearing deadlines.

Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's Expedited Motion for a 60-Day Continuance of Administrative Proceedings filed on April 5, 2022, is **GRANTED**;

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence at 10:00 a.m. on June 23, 2022; and

IT IS FURTHER ORDERED that unless modified by the Chief Administrative Law Judge, all related prehearing deadlines shall be extended by sixty (60) days.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HOMEADVISOR, INC.,
D/B/A
ANGI LEADS AND HOMEADVISOR POWERED BY ANGI

Docket No. 9407. Order, April 20, 2022

Order granting respondent's motion for an extension of time to oppose the motion for summary decision.

ORDER EXTENDING TIME TO OPPOSE MOTION FOR SUMMARY DECISION

On April 7, 2022, Complaint Counsel filed and served a motion seeking summary decision in this proceeding. The motion and accompanying exhibits totaled over 8000 pages andincluded 19 declarations of individuals, including third parties. Respondent's opposition is due on April 22, 2022. Respondent has moved for an extension of time until 5:00 pm on May 27, 2022, to oppose the motion for summary decision in order to allow it to serve subpoenas on and take depositions of the individuals who submitted declarations in support of Complaint Counsel's motion. Complaint Counsel do not oppose the proposed extension.

Commission Rule 3.24(a)(3) states that the Commission may permit affidavits submitted on a motion for summary decision "to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." 16 C.F.R. §§ 3.24(a)(3). Under Commission Rule 4.3(b), the Commission may for good cause shown extend any time limit prescribed in the Rules. 16 C.F.R. § 4.3(b). Here, the Commission finds good cause to grant the extension to allowRespondent to take discovery of the declarants and prepare its opposition.

Accordingly,

IT IS HEREBY ORDERED that Respondent's Unopposed Motion for Extension of Time to Oppose Motion for Summary Decision is **GRANTED**. The deadline for submission of Respondent's opposition to Complaint Counsel's motion for summary decision shall be 5:00 pm EDT on May 27, 2022.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

INTUIT, INC.

Docket No. 9408. Order, May 6, 2022

Order granting respondent's unopposed Motion to Withdraw the Matter from Adjudication.

ORDER WITHDRAWING MATTER FROM ADJUDICATION PURSUANT TO RULE 3.26(C) OF THE COMMISSION RULES OF PRACTICE

On May 4, 2022, counsel for Respondent in this proceeding filed a Motion to Withdraw the Matter from Adjudication. Complaint Counsel has not registered any objection to Respondent's Motion. Accordingly,

IT IS ORDERED, pursuant to Rule 3.26(c) of the Commission Rules of Practice, 16 C.F.R. § 3.26(c) (2022), that this matter in its entirety be and it hereby is withdrawn from adjudication, and that all proceedings before the Administrative Law Judge be and they hereby are stayed.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, May 13, 2022

Order extending the time to rule on Complaint Counsel's motion to take official notice of a decision by the Food and Drug Administration.

ORDER EXTENDING TIME FOR RULING ON MOTION FOR OFFICIAL NOTICE OF FDA DECISION

On March 31, 2022, Complaint Counsel moved for the Commission to take official notice of a March 24, 2022 decision by the Food and Drug Administration (FDA) to grant marketing authorization to certain e-cigarette devices ("FDA Decision"). Complaint Counsel's Motion Requesting Official Notice of FDA Decision ("Motion"). On April 7, 2022, Respondents opposed the Motion ("Opposition"). Commission Rule 3.22(a) provides that the Commission shall rule on a motion within 45 days of the last-filed answer or reply to the motion,if any, unless there is good cause to extend the deadline. As explained herein, we find that there is good cause to extend the time for ruling on the Motion until issuance of a final opinion and order in this matter.

Commission Rule 3.43(f) authorizes the Commission to take "official notice" of any material fact that is not subject to reasonable dispute in that it is either generally known within the Commission's expertise, or capable of accurate and ready determination by resort to sourceswhose accuracy cannot reasonably be questioned. A material fact is one "that might affect the outcome of the suit under the governing law[.]" *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,248 (1986).

Complaint Counsel explain that the FDA Decision granted marketing authorization to Logic Technology Development LLC ("Logic") for certain e-cigarettes and associated e-liquids under the Logic Pro and Logic Power brands. Motion at 3 and Ex. A pp. 1, 5. Complaint Counsel argue that the FDA Decision is material to this proceeding because, "[m]uch like Altria's discontinued MarkTen cigalike product, the newly approved Logic products do not contain nicotine salts nor are they pod-based products." Motion at 5. Thus, according to

Complaint Counsel, the FDA's approval of the Logic products tends to refute the ALJ's conclusions that Altria's products, several of which lacked nicotine salts and were not pod-based, lacked conversion potential[1] and therefore would have been unlikely to receive FDA marketing authority (known as "PMTA approval"). *Id.* According to Complaint Counsel, the ALJ credited testimony that the cigalike format of Altria's MarkTen products would not appeal to a sufficient pool of smokers to generate sufficient conversion potential, that the lack of nicotine salts was a problem for conversion, and that these issues raised serious concerns for receiving FDA approval. Motion at 5-6. Complaint Counsel assert that the FDA's decision to authorize two Logic products

1 In this context, "conversion potential" refers to the ability of a product to convert adult smokers away from combustible cigarettes.

that lacked nicotine salts, one of which is a cigalike, "severely undercuts" Respondents' claims that Altria's existing products would have been unable to obtain PMTA approval. *Id.* at 6.

Respondents do not contest the accuracy of Complaint Counsel's proffered records insofar as they evidence the FDA Decision. Rather, Respondents argue that Complaint Counselunfairly denied them the opportunity to develop context around the Logic products by failing to make available for deposition an executive of the parent company that owns Logic. Opposition at 1. Respondents state that this failure deprived them of the opportunity to develop evidence ofthe performance, consumer appeal, and PMTA process for the Logic products. *Id.* at 1-2.

Further, Respondents question Complaint Counsel's contention that the FDA Decision is material to this proceeding. *Id.* at 2. Specifically, say Respondents, absent discovery and context, the authorization of the Logic products has no bearing on whether entirely different products would have obtained authorization, and in any event no bearing on the ALJ's determination that there was a consensus within Altria at the time of the investment at issue thatits on-market products would not have obtained PMTA approval. *Id.*

We find the FDA Decision to be not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned, as required by Rule 3.43(f). Under our precedent, official notice may be taken of references "generally accepted as reliable." *In re Basic Research, LLC,* 2006 WL 271518, at *1 (F.T.C. Jan. 23, 2006) (citing *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984)). "Matters of official notice include those contained in public records, such as judicial decisions, statutes, regulations, and 'records and reports of administrative bodies.'" *In re S.C. State Bd. ofDentistry*, 138 F.T.C. 229, 240 (2004) (citing *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003)). The fact of the FDA Decision, as reported in FDA documents, is not subject to reasonable dispute, and Respondents do not attempt to dispute it.

A fact must also be material for us to take official notice of it. Rule 3.43. Whether the FDA Decision is material depends in part on what that decision implies about PMTA approval prospects for Altria's former cigalike products and its former products lacking nicotine salts. These issues, and this assessment, will benefit from the full briefing and oral argument that willaccompany Complaint Counsel's appeal. The Commission will weigh Respondents' concerns about the scope of discovery taken of Logic when considering whether to grant the Motion andwhat inferences, if any, to draw from the FDA Decision.

Accordingly,

IT IS HEREBY ORDERED THAT the deadline for ruling on Complaint Counsel's Motion for Official Notice of FDA Decision is **EXTENDED** until the issuance of the Commission's final opinion and order in this matter.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HACKENSACK MERIDIAN HEALTH, INC.,
AND
ENGLEWOOD HEALTHCARE FOUNDATION

Docket No. 9399. Order, May 24, 2022

Order granting Complaint Counsel's motion to withdraw the matter from adjudication to allow the Commission to determine whether further relief is warranted.

ORDER WITHDRAWING PROCEEDING FROM ADJUDICATION

On August 4, 2021, the United States District Court for the District of New Jersey granted the Federal Trade Commission's motion for a preliminary injunction against the proposed merger between Respondents Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation until completion of this administrative proceeding. *FTC v. Hackensack Meridian Health, Inc*., No. 20-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021). The Third Circuit Court of Appeals affirmed the district court's injunction on March 22, 2022. *FTC v. Hackensack Meridian Health, Inc.*, No. 21-2603, 2022 WL 840463 (3d Cir. Mar. 22, 2022). On March 31, 2022, Respondents notified Complaint Counsel that they were abandoning their transaction. Respondents mutually terminated their merger agreement and withdrew their Hart- Scott-Rodino Notification and Report Forms on April 5, 2022.

Complaint Counsel have moved the Commission to withdraw the matter from adjudication to allow the Commission to determine whether further relief is warranted. Respondents, on the other hand, seek dismissal of the Complaint on the bases that the administrative action is now moot, that further proceedings would be unnecessary and wasteful, and that there is no need for any additional relief. Because Respondents support immediate dismissal, they oppose withdrawing the case from adjudication. The question of whether further relief may be warranted, however, may bear on the issues presented. Therefore, we find that it is in the public interest to withdraw the matter from adjudication and stay all proceedings in this matter for 60 days while the Commission considers the potential need for additional relief.

Accordingly,

IT IS HEREBY ORDERED that this matter is withdrawn from adjudication until July 15, 2022, and that during the period the matter is withdrawn from adjudication all proceedings in this matter before the Chief Administrative Law Judge are stayed and all pending deadlines in this matter are tolled.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HOMEADVISOR, INC.,
D/B/A
ANGI LEADS AND HOMEADVISOR POWERED BY ANGI

Docket No. 9407. Order, May 26, 2022

Order granting respondent's motion for an additional extension of time to oppose the motion for summary decision.

SECOND ORDER EXTENDING TIME TO OPPOSE MOTION FOR SUMMARY DECISION

On April 22, 2022, the Commission granted Respondent HomeAdvisor, Inc.'s motion to extend until May 27, 2022 the time for Respondent to oppose Complaint Counsel's motion for summary decision. Respondent sought that extension so that it could serve subpoenas on and take depositions of individuals who submitted declarations in support of Complaint Counsel's motion. *See* 16 C.F.R. § 3.24(a)(3). Respondent now seeks an additional 10-day extension. Respondent asserts that the limited availability of certain third-party witnesses and the timing ofcertain third-party declarants' document productions have resulted in depositions being scheduled up until just two days before the current deadline for their opposition. Respondent represents that Complaint Counsel, as a professional courtesy, do not oppose the requested extension.

Under Commission Rule 4.3(b), the Commission may for good cause shown extend any time limit prescribed in the Rules. 16 C.F.R. § 4.3(b). In light of the timing of Respondent's third-party discovery and the relatively short length of the requested extension, the Commissionfinds good cause to grant the extension to allow Respondent to complete its depositions and prepare its opposition.

Accordingly,

IT IS HEREBY ORDERED that Respondent's Unopposed Motion for Extension ofTime to Oppose Motion for Summary Decision, filed May 23, 2022, is **GRANTED**. The deadline for submission of Respondent's opposition to Complaint Counsel's motion forsummary decision shall be 5:00 pm EDT on June 6, 2022.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, May 27, 2022

Order scheduling oral argument.

ORDER SCHEDULING ORAL ARGUMENT

Complaint Counsel have filed their Appeal Brief perfecting their appeal from the Initial Decision in this matter; Respondents have filed their Answering Brief; and [Complaint Counsel must file their Reply Brief on or before May 31, 2022] or [Complaint Counsel filed their Reply Brief on May 31, 2022]. Commission Rule 3.52(b)(2), 16 C.F.R. § 3.52(b)(2), provides that the Commission ordinarily will schedule an Oral Argument within fifteen days after the date on which the Reply Brief is filed. Commission Rule 3.51(a), 16 C.F.R. § 3.51(a), however, provides that the Commission may extend for good cause any of the time periods relating to an appeal from an Initial Decision. The briefing in this proceeding raises numerous issues and draws upon an extensive evidentiary record, and a new Member of the Commission has recently taken office. The Commission therefore has determined to conduct the Oral Argument in this matter on July 14, 2022, commencing at 1:00 pm EDT. The argument will be conducted virtually, by video conferencing. Pursuant to Rule 3.52(h), 16 C.F.R. § 3.52(h), public access to the argument, to the extent permitted by any *in camera* orders and for monitoring purposes only, will be provided via telephone or live web streaming.

Each side will be allotted forty-five minutes to present its argument. Complaint Counsel will have the opportunity to open the argument and may reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than July 7, 2022, at 5:00 pm EDT.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HEALTH RESEARCH LABORATORIES, LLC, WHOLE BODY SUPPLEMENTS, LLC, AND KRAMER DUHON

Docket No. 9397. Order, June 6, 2022

Order granting Complaint Counsel's second motion that this matter be withdrawn from adjudication in order to enable the Commission to consider a proposed consent agreement.

SECOND ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel having filed a second motion that this matter be withdrawn from adjudication in order to enable the Commission to consider a proposed consent agreement, and Respondents consenting to the motion; and

Complaint Counsel and Respondents, having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by Respondents and by Complaint Counsel and approved by the Director of the Bureau of Consumer Protection that, if accepted by the Commission, would resolve the claims against Respondents in their entirety;

IT IS ORDERED that pursuant to Section 3.25(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.25(c), that this matter in its entirety be, and it is hereby withdrawn from adjudication, and that all proceedings before the Administrative Law Judge in this matter are hereby stayed pending a determination by the Commission with respect to the proposed Consent Agreement, pursuant to Section 3.25(f) of the Commission's Rules of Practice, 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Section 3.25(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HOMEADVISOR, INC.
D/B/A
ANGI LEADS AND HOMEADVISOR POWERED BY ANGI

Docket No. 9407. Order, June 28, 2022

Order granting respondent's request for oral argument on the issues.

ORDER SCHEDULING ORAL ARGUMENT AND EXTENDING DEADLINE FOR COMMISSION RULING

On April 7, Complaint Counsel filed a Motion for Summary Decision in this proceeding ("the Motion"). Respondent HomeAdvisor, Inc., has filed an Opposition to that motion and Complaint Counsel have submitted a Reply. Respondent's Opposition requests oral argument regarding the Motion, and we believe that entertaining oral argument would be beneficial.

The Commission has determined to conduct the oral argument on July 14, 2022, at 11:00 a.m. EDT. The argument will be conducted virtually, by video conferencing. Public access tothe argument, to the extent consistent with the protection of confidential information and for monitoring purposes only, will be provided via telephone or live web streaming.

Each side will be allotted 45 minutes to present its argument. Complaint Counsel will have the opportunity to open the argument and may reserve time for rebuttal. If either party wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the oral argument, any such compilation may contain only public information that is already in the summary decision record, and copies must be filed with the Secretary of the Commission and provided to opposing Counsel no later than July 11, 2022, at 5:00 pm EDT.

The Commission's deadline for ruling upon the Motion, currently July 29, 2022, will be extended to September 12, 2022 to facilitate full consideration following oral argument of the issues presented. Accordingly,

IT IS HEREBY ORDERED that the Commission will conduct oral argument regarding Complaint Counsel's Motion for Summary Decision on July 14, 2022, as specified above; and

IT IS FURTHER ORDERED that the Commission's deadline for ruling on Complaint Counsel's Motion for Summary Decision is extended to September 12, 2022.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, June 30 2022

Order granting respondent's motion to reschedule the oral argument in this matter.

ORDER RESCHEDULING ORAL ARGUMENT

On May 27, 2022, the Commission issued an order scheduling the Oral Argument in this matter for July 14, 2022. On June 2, 2022, Respondents filed a Motion to Reschedule Oral Argument ("Motion") to a date after July 31, 2022, stating that Altria's lead counsel would be out of the country on July 14 and would be unable to participate absent the extension. Motion at 1. The Motion states that Complaint Counsel consent to the relief sought. *Id.*

The Commission has determined to reschedule the Oral Argument in this matter for September 12, 2022, commencing at 11:30 a.m. EDT. The argument will be conducted virtually, by video conferencing. Pursuant to Commission Rule 3.52(h), 16 C.F.R. § 3.52(h), public access to the argument, to the extent permitted by any *in camera* orders and for monitoring purposes only, will be provided via telephone or live web streaming.

Each side will be allotted forty-five minutes to present its argument. Complaint Counsel will have the opportunity to open the argument and may reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than September 6, 2022, at 5:00 p.m. EDT.

By the Commission.

DEBT COLLECTION COORDINATION PROJECT

FTC File No. P064803 – Decision, March 14, 2022

RESPONSE TO NATIONAL DEBT HOLDINGS, LLC'S PETITION TO QUASH A CIVIL INVESTIGATIVE DEMAND DATED DECEMBER 20, 2021

By PHILLIPS, Commissioner:

National Debt Holdings, LLC ("National Debt") petitions to quash a civil investigative demand issued on December 20, 2021, on the grounds that the Commission's leadership structure is unconstitutional. Alternatively, the company objects to the CID's request for its balance sheets and income statements on the grounds that the request is unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. For the reasons below,we deny the petition to quash.

I. Background

National Debt's business involves the purchase and sale of debts that companies have "charged off" their books. Pet. 1. On December 20, 2021, the Commission issued a CID for information in support of an investigation into whether the company has engaged in deceptive or unfair practices or otherwise unlawful acts in connection with (a) its marketing and sale of "Debt Portfolios" or (b) debt collection activities, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45 or the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a-1692p, and whether an action seeking monetary relief would be in the public interest. Pet. Ex. A.[1]

The CID's return date was January 19, 2022; however, because of complications in rendering service, National Debt was not served until January 10, 2022. The company contacted Commission staff on January 19, and a meet-and-confer was held January 24. During that meeting, Commission staff advised National Debt that they would recommend extending the return date to February 9, 2022, and that they were amenable to a rolling production schedule. National Debt also raised concerns about producing documents containing consumers' sensitive PII or privileged materials, requested that the CID's document requests be limited to three years,and raised general concerns about the breadth of the CID. Although Commission staff understood that National Debt would follow up with a proposed production schedule, the company instead filed its Petition to Quash on January 31, 2022, and that same day sent a letter to staff in which it elaborated its objections.

1 The CID was authorized by an April 15, 1999, Commission Resolution permitting the use of compulsory process in agency investigations into possible violations of the FDCPA and the FTC Act.

Through continued engagement, Commission staff and National Debt's counsel have resolved all but two of the company's objections to the CID. The objections that remain are (1) National Debt's contention that the CID should be quashed because "the Supreme Court's decision in *Seila Law LLC v. CFPB* renders the FTC's leadership structure unconstitutional, and by extension invalidates its ability to issue and enforce the CID," Pet. 2; and (2) the company's objection to the CID's request for its balance sheets and income statements, *see* Pet. 7 & Pet. Ex. A at 6.

II. Analysis

Neither of National Debt's remaining objections to the CID is well taken. As we have explained, in *Seila Law v. CFPB*, 140 S.Ct. 2183 (2020), the Supreme Court expressly declined to revisit its ruling in *Humphrey's Executor* that the removal protections afforded commissioners under FTC Act are constitutional. Because National Debt does not support its objection to producing its balance sheets and income statements with any facts or argument, it has failed to establish that complying with the CID would pose an undue burden, and we find the requested information may be relevant to the Commission's investigation.

A. The Supreme Court has not overturned its precedent upholding the FTC Act's constitutionality.

National Debt argues that the FTC lacks authority to issue or enforce the CID because the agency's leadership structure—specifically, the for-cause removal protections afforded FTC Commissioners[2]—is unconstitutional. Pet. 2-4. Although the Supreme Court upheld the constitutionality of those same provisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), National Debt argues that the Court's decision in *Seila Law* "limited *Humphrey's Executor*'s holdings to multimember expert agencies that do not wield substantial executive power." Pet. 3 (quotation marks omitted).

We addressed this issue in our resolution of another motion to quash, filed by Beam Financial in 2020. *See In re: Civil Investigative Demand to Beam Financial, Inc.*, 2020 WL 5037434 (Aug. 17, 2020). In that order, we explained that, in *Seila Law*, the Supreme Court "expressly declined the petitioner's invitation to overturn *Humphrey's Executor*, its precedent sustaining the constitutionality of the FTC's for-cause removal provisions." *Id.*, citing *Seila Law*, 140 S.Ct. at 2192. "The Court distinguished *Humphrey's Executor* in substantial part on the ground that the CFPB is a single-director agency, whereas the FTC is a bipartisan, multimemberbody." *Id.* Because the Supreme Court declined to overrule *Humphrey's Executor* in *Seila Law*, we declined to depart from their ruling in the context of a petition to quash a CID. National Debt's petition to quash makes the same arguments that we rejected in *Beam* and we reject themhere for the same reasons.

2 *See* 15 U.S.C. § 41 (Commissioners "shall be appointed for terms of seven years," which expire on a staggered basis, and "may be removed by the President" only "for inefficiency, neglect of duty, or malfeasance in office").

B. National Debt has not shown that complying with the CID would pose an undue burden or that the information sought is not relevant to the investigation.

To establish that complying with an agency investigative process imposes an undue burden, the recipient must show that compliance "threatens to unduly disrupt or seriously hinder"the normal operations of its business. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 & n.49 (D.C. Cir. 1987); *see also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986). This test is "not easily met" because "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Texaco*, 555 F.2d at 882. The recipient of process must establish the existence of an undue burden with specific facts. *Id.*; *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-1329 (1998).

The petition to quash does not provide any specific facts or argument in support of its objection to producing financial information except the conclusory statement that "production of its confidential financial information [is] overbroad[,] unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence." Pet. 7. That is not enough to establish an undue burden. Petitioners must make "a record . . . of the measure of their grievance"; they may not ask us to assume it. *FTC v. Standard American, Inc.*, 306 F.2d 231, 235(3d Cir. 1962).

To the extent National Debt's objection can be read to argue that financial information can never be relevant to the Commission's investigation, we disagree. As the D.C. Circuit plainlyput it, "financial information can be relevant to a pre-complaint investigation into possible section 5 violations." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089-1090 (D.C. Cir. 1992). Here, National Debt's balance sheets and income statements may help Commission staff verify the accuracy of other information requested by the CID, such as information regarding the company's sales and holdings of debt portfolios. In addition, the company's financial information may help the Commission determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest, one of the stated objectives of the CID. *See* Pet. Ex. A at 1.

We therefore deny National Debt's request to quash the challenged document request.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** National Debt Holdings, LLC's Petition to Quash or Modify Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT National Debt Holdings, LLC, shall comply infull with the Commission's Civil Investigative Demand no later than 15 days from the date of this order, subject to any modifications as to scope or timing that Commission staff maydetermine.

By the Commission,

Responses to Petitions to Quash

LIBERTY AUTO CITY, INC.

FTC File No. 222 3077 – Decision, June 13, 2022

RESPONSE TO LIBERTY AUTO CITY, INC.'S PETITION TO MODIFY OR QUASH CIVIL INVESTIGATIVE DEMAND DATED APRIL 12, 2022

By WILSON, Commissioner:

Liberty Auto City, Inc. (Liberty) petitions the Commission to modify or quash a Civil Investigative Demand (CID) issued on April 12, 2022 in connection with the Commission's investigation into whether Liberty has engaged in unfair or deceptive practices with respect to the marketing, sale, and financing of automobiles in violation of Section 5 of the FTC Act or the Equal Credit Opportunity Act (ECOA).

Specifically, Liberty requests that the Commission extend the time it may petition to quash or limit the CID, or in the alternative, that the Commission quash the CID as unreasonable. *Petition*, at 3-4. For the reasons set forth below, we deny Liberty's petition.

I. Background

Liberty is an auto dealership network located in Libertyville, Illinois, a suburb of Chicago. It sells new and used Chrysler, Jeep, Dodge, Ram, and Subaru vehicles, and offers consumers financing in connection with those sales. Liberty sells over 3,000 vehicles per year. *Petition*, at 2.

In early 2022, the Commission initiated an investigation into whether Liberty has engaged in violations of the FTC Act or the ECOA. In particular, the Commission sought to determine whether Liberty's auto sales and lending practices constituted unfair or deceptive practices or reflected discrimination on a prohibited basis – resulting in higher vehicle sales prices, periodic payments, "add-on" charges, or other harm to consumers.[1] On April 12, 2022, the Commission issued a CID to Liberty, seeking the production of documents and responses to interrogatories. The CID requests information related to Liberty's financing and add-on practices, including its communications with financing companies and add-on providers, data regarding Liberty's auto financing transactions, and consumer complaints, among other documents and information. *See* CID, at 2-6 (interrogatories), 6-9 (documents), 10 (data). The CID's specified time period is April 1, 2019 through the present. *Id.* at 2.

The Commission served the CID on Liberty through Federal Express on April 13, 2022. *Petition*, at 1. Liberty did not send the CID to its counsel until April 20, 2022, when Liberty's owner, Joseph Massarelli, returned from travel. *Id.* On April 21, 2022, Liberty's counsel had a brief call with FTC staff, in which staff explained the meet and confer process and the requirements

1 "Add-ons" are additional products or services not provided by the vehicle manufacturer, for which Liberty charges consumers a fee. *See* CID, at 11.

for any proposed modification to the CID. On April 27, 2022, Liberty's counsel contacted FTC staff to schedule a meet and confer call, which was held on May 2, 2022.

During the May 2 call, Liberty raised several concerns with the CID, including that some requests seemed too broad and would require manual scanning of hard copy documents. *See Petition*, at 2-3. FTC staff clarified the scope of certain requests and expressed a willingness to accept certain modifications if Liberty justified them in writing and committed to making initial productions by the CID's May 12, 2022 deadline.

Liberty also requested an extension of the deadline to file a petition to quash the CID, which by Commission rules was set for the following day, May 3, 2022 – 20 days after service of the CID. *See* 16 C.F.R. § 2.10(a)(1). Staff orally denied the request, explaining that such extensions are not granted absent extraordinary circumstances, but recommended that the parties continue to negotiate in good faith about the CID's scope and a reasonable production schedule.

Liberty filed its petition to modify or quash the CID the next day. *Petition*, at 9. Since that time, FTC staff have continued to negotiate with Liberty. However, other than a preliminary response to a few of the CID's interrogatories, Liberty has not produced any documents or other information in response to the CID.[2]

II. Analysis

A. There Is No Good Cause To Extend The Petition To Quash Deadline.

Liberty first requests a 45-day extension of the date by which it must file a petition to quash or limit the CID. *Petition*, at 2-6. The Commission's rules require petitions to quash or modify compulsory process to be brought within 20 days of service. 16 C.F.R. § 2.10(a)(1). That timeline exists to facilitate efficient investigations of potentially unlawful practices. CIDs such as the one directed to Liberty only issue if there is reason to believe that the recipient may have information or documents relevant to unfair or deceptive practices. *See* 15 U.S.C. § 57b-1(c). CIDs enable Commission staff to obtain information needed to investigate potentially unlawful conduct, which may be significantly harming consumers. The 20-day period ensures that disputes regarding a CID's validity or scope are promptly presented to the Commission for resolution, which in turn enables the staff investigation to proceed efficiently and without delay – or to be adjusted as needed depending on the Commission's ruling.

Importantly, Liberty does not seriously dispute the relevance of the documents and information the CID seeks. Nor does it contend that the CID exceeds the authority of the agency, or that the CID's requests are too indefinite. *Cf. United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (explaining the limited grounds for challenging FTC compulsory process). Liberty claims only that there are "logistical challenges in discerning the scope, type, and ability to produce documents" responsive to the CID, and that its owner "is preparing for a significant medical

2 This is so despite Liberty's representation in its Petition that it "anticipates being able to make the first in a rolling production of information and/or documents" by May 12. *Petition*, at 5.

procedure in mid-May 2022." *Petition*, at 5-6. Liberty asserts that it "cannot reasonably work through all potential issues as to the likely thousands of transactions for which the FTC seeks documentation and information by May 3, 2022," and that it needs the extension to attempt to "come to agreement with the FTC on such issues." *Id.* at 5.

As a threshold matter, mere statements by counsel in a brief do not provide a factual basis for Liberty's claims. A petition to quash must include "all appropriate arguments, affidavits, and other supporting documentation." 16 C.F.R. § 2.10 (a)(1). Liberty did not submit any such factual support for its claims. The Commission routinely denies petitions to quash that lack an adequate evidentiary basis.[3] As the Supreme Court has explained, recipients challenging FTC compulsory process must "ma[ke] a record that would convince us of the measure of their grievance rather than ask us to assume it." *Morton Salt*, 338 U.S. at 653-54 (rejecting as inadequate "mere assertions in . . . briefs"); *see also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986) (mere "conclusory allegations" do not "constitute evidence" that could show an administrative subpoena is unduly burdensome).

Even if the Commission were to set aside that failure, Liberty's stated reasons do not amount to good cause to extend the petition to quash deadline. Although certain FTC officials possess "the authority to rule upon" such "requests for extensions of time," 16 C.F.R. § 2.10 (a)(5), whether to grant an extension rests within their sound discretion. Here, Liberty requested an extension the day before the May 3 deadline, and did not identify compelling reasons for an extension. In similar contexts, courts have found good cause to extend deadlines when the party seeking relief can "show that the deadlines cannot reasonably be met despite [the party's] diligence." *Capitol Sprinkler Inspection, Inc. v. Guest Servs.*, 630 F.3d 217, 226 (D.C. Cir. 2011) (cleaned up). As noted, Liberty cites only abstract "logistical challenges" to complying with the CID. *Petition*, at 5-6. Liberty does not provide any detail regarding the specific volume of responsive documents, the number of personnel hours it estimates compliance would require, or the estimated dollar cost of such efforts. Nor does Liberty explain why it was unable to conduct, within the standard 20-day period, an assessment enabling Liberty to determine whether it had any potentially valid grounds to quash or modify the CID – and if so, to prepare a petition.

Further undermining its extension request, Liberty also has not shown that it has been diligent in attempting to meet existing deadlines. *See Capitol Sprinkler*, 630 F.3d at 226. Liberty admits that it received the CID on April 13, but did not forward it to counsel until one week later, when its owner returned from unspecified travel.[4] *Petition*, at 1. While that delay may be

3 *See, e.g., In re October 30, 2013 Civil Investigative Demand Issued to HealthyLife Sciences, LLC*, FTC File No. 122-3287 (Dec. 20, 2013), at 2 (rejecting claim of undue burden where CID recipient "has not provided any affidavits or other evidence" to establish that burden); *In re February 11, 2014 Civil Investigative Demand Issued to Ziegler Supersystems, Inc.*, FTC File No. 131-0206 (Apr. 21, 2014), at 10-11 (noting that CID recipient must make a factual record to support a claim of undue burden); *In re January 16, 2014 Civil Investigative Demand Issued to The College Network, Inc.*, FTC File No. 132-3236 (Apr. 21, 2014), at 8, 11 (denying petition to quash CID specification where recipient provided "no factual support" for its claimed burden).

4 The cover letter transmitting the CID states in bold font that Liberty should contact FTC counsel "as soon as possible" to schedule a call to discuss the CID, and cautions Liberty to "read the attached documents closely." Apr.

understandable, further delays ensued. Liberty's counsel waited six additional days to follow up with FTC staff to schedule the first meet and confer call, which, as a result, took place only the day before the May 3 petition to quash deadline. A second meet and confer call was scheduled for May 13, 2022, but Liberty canceled and rescheduled for May 18, 2022, further delaying progress in its discussions with FTC staff. Absent persuasive explanations for these delays (set forth in sworn affidavits), we are left to conclude that Liberty's actions "do not bespeak diligence or any sense of urgency at all." *Capitol Sprinkler*, 630 F.3d at 226. Liberty has failed to demonstrate good cause for its extension request, and we therefore deny it.

B. The CID Is Not Unduly Burdensome Or Unreasonable.

Liberty also requests, in the alternative, that the Commission quash the CID "in its entirety as unreasonable" and unduly burdensome. *Petition*, at 2, 6. We deny this request, too.

Agency process is not unduly burdensome unless compliance "threatens to unduly disrupt or seriously hinder normal operations" of the recipient's business. *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc). Of course, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* Accordingly, the test for undue burden "is not easily met." *Id.*; *see also Maryland Cup*, 785 F.2d at 477, 479. Liberty has not made the required showing.

Liberty cites the number of the CID's interrogatories (25), document requests (12), and data requests (74), but we find these numbers entirely reasonable given the nature of the investigation and size of Liberty's business. *See Petition*, at 2 (noting that Liberty sells over 3,000 vehicles per year). The CID's requests are limited in time, and are tailored to provide the agency with specific information about Liberty's add-on sales and procedures and its financing practices – areas plainly relevant to assessing compliance with the fair lending and consumer protection laws at issue. *See Texaco*, 555 F.2d at 882 (recognizing that subpoenas were "broad in scope" but finding that breadth necessary to match the FTC's "comprehensive" investigation). Indeed, as noted, Liberty does not dispute the relevance of the requested information. And the number of requests or volume of responsive documents alone does not show undue burden. *See, e.g.*, *In re March 19, 2014 Civil Investigative Demand Issued to Police Protective Fund, Inc.* (*PPF*), FTC File No. 132-3239 (May 22, 2014) ("[A] 'sheer volume of requests' does not itself establish that the CID is overbroad or imposes undue burden."); *FDIC v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (mere fact that a subpoena called for thousands of financial documents and one million other documents was not sufficient to establish undue burden); *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) ("[a]bsent a showing of disruption, the sheer number of documents sought does not demonstrate" undue burden).

Nor does Liberty provide any affidavits or other factual documentation to support its conclusory claim that complying with the CID will "seriously hinder" its operations, "if not require it to cease conducting business altogether to focus exclusively on responding to the CID." *Petition*,

12, 2022 Letter, at 1-2. The CID itself states that any petition to limit or quash the CID must be filed "no later than twenty (20) days after service of the CID." CID, at 11.

at 6. A CID recipient bears the burden to show *how* a CID interferes with its ability to operate its business. *See Garner*, 126 F.3d at 1146 (rejecting claim of undue burden where recipient failed "to enunciate how these subpoenas constitute a 'fishing expedition'"); *see also FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (finding no undue burden where subpoena recipients "did not adduce a single shred of evidence" to support their claim that compliance would result in "'the virtual destruction of a successful business'"); *Texaco*, 555 F.2d at 882. The conclusory statements Liberty advances "do not constitute evidence that the company's normal operations will be seriously disrupted" by producing the requested material." *Maryland Cup*, 785 F.2d at 477; *see also Doe v. United States (In re Admin. Subpoena)*, 253 F.3d 256, 268-69 (6th Cir. 2001) (finding insufficient recipient's "general and conclusory statement" regarding burden).

Finally, Liberty argues that the CID is unduly burdensome because responding to it will require engaging a third-party document vendor to scan and prepare documents for production, will involve review by counsel and others to ensure truthfulness, and "may" require "significant labor." *Petition*, at 3, 6. As the D.C. Circuit explained in another FTC matter, "[t]he difficulty with [this] argument is that it could be made with respect to almost any investigation." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090-91 (D.C. Cir. 1992). Such burdens fall within the ordinary, reasonable costs that attend any government investigation, and do not make the CID unduly burdensome. *See id.*; *see also Texaco*, 555 F.2d at 882 ("Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest."). As we have previously explained, it is not enough merely to assert that a CID request "is overbroad and burdensome and that 'gathering, copying, and scanning all documents and responses [to the CID] would take a significant amount of time and resources that the organization simply does not have.'"[5] *PPF*, FTC File No. 132-3239, at 7. Those assertions need to be supported with competent evidence that makes a specific showing of severe business disruption. *See id.* (noting that "a blanket objection" does not suffice, and that a CID recipient must show a request is "highly disruptive").

Nor has Liberty shown that the cost of such efforts is too high "relative to the financial positions" of the company when "measured against the public interest of this investigation." *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *aff'd*, 636 F.2d 781 (D.C. Cir. 1980); *see also Maryland Cup*, 785 F.2d at 479 (holding cost of compliance not unduly burdensome "in the light of the company's normal operating costs"). In fact, Liberty has provided no information about its financial position, human resources, or other capabilities relevant to complying with the CID, giving us no factual basis to conclude that the burden on the company is undue.

Moreover, as Liberty acknowledges, Commission staff have repeatedly expressed willingness to further narrow or limit some of the CID's requests in light of Liberty's concerns, and have made several concrete proposals for compromise. *See Petition*, at 3, 5. Liberty apparently

5 To the extent the asserted burdens stem from Liberty's own document practices (such as "maintain[ing] documents in hard copy" in a format that requires scanning "on a flatbed scanner," (*Petition*, at 3), such burdens "cannot excuse" Liberty from compliance with the CID. *See, e.g.*, *Letter Ruling re Civil Investigative Demands Issued to D. R. Horton, Inc. and Lennar Corp.*, FTC File Nos. 102-3050 & 102-3051 (Mar. 9, 2010), at 6 ("Burden caused by Petitioners' own organizational design cannot excuse them from compliance with the CIDs.").

has not responded to staff and attempted to negotiate any formal modification of the CID that might reduce burden while satisfying staff's investigational needs. That path remains open to Liberty. As issued, however, the CID is well within permissible limits and imposes no undue burden.

III. CONCLUSION

For the foregoing reasons, Liberty's petition to quash is denied.

IT IS HEREBY ORDERED THAT Liberty Auto City, Inc.'s Petition to Modify or Quash the April 12, 2022 Civil Investigative Demand be, and hereby is, DENIED.

IT IS FURTHER ORDERED THAT Liberty shall comply in full with the Commission's Civil Investigative Demand no later than **Wednesday, June 22, 2022, at 9:00 a.m. (Central Time)**, or at such other date, time, and location as the Commission staff may determine.

By the Commission,

ADVISORY OPINION INTERPRETING THE HOLDER RULE

FTC File No. P124802 – Issued, January 18, 2022

COMMISSION STATEMENT ON THE HOLDER RULE AND ATTORNEYS' FEES AND COSTS

This advisory opinion addresses the Federal Trade Commission's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2, commonly known as the Holder Rule, and its impact on consumers' ability to recover costs and attorneys' fees. This issue has arisen repeatedly in court cases, with some courts correctly concluding that the Holder Rule does not limit recovery of attorneys' fees and costs when state law authorizes awards against a holder,[1] and others misinterpreting the Holder Rule as a limitation on the application of state cost-shifting laws to holders.[2]

Background on the Rule. The Commission adopted the Holder Rule to protect consumers when they purchase goods or services on credit. The Commission identified multiple practices that sellers use to "cut off" consumers' rights so that the holder of the loan may demand full payment from the consumer despite misconduct by the seller.[3] The Commission determined that sellers' use of these practices to foreclose consumer claims and defenses constitutes an unfair practice under Section 5 of the FTC Act.[4] To preserve consumers' claims and defenses, the Holder Rule requires

1 *See, e.g.*, *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988); *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987); *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985); *Reliance Mortg. Co. v. Hill-Shields*, No. 05-99-01615-CV, 2001 Tex. App. LEXIS 140 (Tex. App. Jan. 10, 2001); *Oxford Fin. Cos. v. Velez*, 807 S.W.2d 460 (Tex. App. 1991); *Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416 (Tex. App. 1989); *see also Pulliam v. HNL Auto. Inc.*, 60 Cal. App. 5th 396, 274 Cal. Rptr. 3d 547, 559-67 (Cal. Ct. App. 2021), *review granted*, 484 P.3d 564, 277 Cal. Rptr. 3d 323 (Cal. Apr. 28, 2021) (No. S267576) (concluding that Holder Rule does not limit attorney fee recovery from holder; rejecting contrary position attributed to FTC and ruling that such an agency interpretation would not be entitled to deference).

2 *See, e.g.*, *Spikener v. Ally Fin., Inc.*, 50 Cal. App. 5th 151, 162, 263 Cal. Rptr. 3d 726, 735 (Cal. Ct. App. 2020) (concluding statements by the Commission in 2019 (84 Fed. Reg. 18,711, 18,713 (May 2, 2019)) demonstrate "clear intent" to preempt attorney fee recovery "regardless of whether state claim being asserted pursuant to the Holder Rule contains fee-shifting provisions", but declining to express opinion on whether costs are preempted for the same reason); Order on Motion, *Reyes v. Beneficial State Bank*, No. BCV-17-100082 (Cal. Sup. Ct., Kern Co., Dec. 5, 2019), *appeal docketed*, No. F080827 (Cal. Ct. App. Feb. 13, 2020) (ruling state statute is preempted by Commission statements on application of Holder Rule to attorney's fees); *see also Lafferty v. Wells Fargo Bank, NA*, 25 Cal. App. 5th 398, 414-16, 275 Cal. Rptr. 3d 842, 855-57 (Cal. Ct. App. 2018) (concluding that second sentence of the Holder Rule Notice caps attorneys' fees claim against defendant-holder unless "another state or local cause of action can be found to support such a claim," but that costs are not subject to the same cap).

3 *See* 40 Fed. Reg. 53,506, 53,507-08 (1975) (use of promissory notes and waiver of defense clauses in seller-financed sales); *Id.* at 53,514-15 (use of "vendor-related" or "direct" loans by third party) (1975); *see also* FTC, Statement of Enforcement Policy, 41 Fed. Reg. 34,594, 34,596 (1976). (explaining affiliation and referral standards applicable to "transactions in which a seller accepts the proceeds of a loan extended directly from a lender to a purchaser.").

4 40 Fed. Reg. at 53,523.

a seller that finances sales to include in credit contracts the following provision, also known as the "Holder Rule Notice":

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2(a). Where the seller is not the creditor but receives payment from the proceeds of a loan by a creditor that has a referral or business relationship with the seller (defined in the Rule as a "Purchase Money Loan"), the consumer credit contract must have the same provision, except the words "PURSUANT HERETO OR" are omitted. *Id.* § 433.2(b). A creditor or assignee of credit contracts with the Holder Rule Notice is thus subject to any claims or defenses that the consumer could assert against the seller.

Analysis. The Holder Rule does not eliminate any rights the consumer may have as a matter of separate state, local, or federal law. Consequently, whether costs and attorneys' fees may be awarded against the holder of the credit contract is determined by the relevant law governing costs and fees.[5] Nothing in the Holder Rule states that application of such laws to holders is inconsistent with Section 5 of the FTC Act or that holders should be wholly or partially exempt from these laws.

Further, if the applicable law requires or allows costs or attorneys' fee awards against a holder, the Holder Rule does not impose a cap on such an award. The sentence in the Holder Rule Notice that limits recovery to "amounts paid by the debtor" applies only to monetary recovery against holders based on the Holder Rule Notice (*i.e.*, recovery on the claims or defenses the debtor could assert against the seller); the Rule places no cap on a consumer's right to recover from the holder for other reasons. Thus, for example, in an action between a consumer and a holder, if the applicable law authorizes the consumer to recover costs or fees from parties that unsuccessfully oppose the consumer's claims or defenses, a prevailing consumer's right to recovery against the holder is not restricted by the Holder Rule Notice. In this scenario, the cost or fee award is separate and supported by a law that is independent of the Holder Rule. Thus, the Holder Rule Notice does

5 States have passed varying laws regarding recovery of attorneys' fees and costs under which responsibility to pay fees may depend on a variety of factors. *Compare* ALASKA R. CIV. P. 82(a) (2021) ("Except as otherwise agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule"); WASH. REV. CODE § 4.84.330 (2021) (if a contract provides for fees to one party, the prevailing party is entitled to fees); KY. REV. STAT. Ann. § 367.220(1) (West 2015) (court may award attorneys' fees and costs to prevailing party in any action under Kentucky Consumer Protection Act), *with* WASH. REV. CODE § 4.84.185 (court may award fees incurred in opposing claims or defenses that court finds were "frivolous and advanced without reasonable cause"); COLO. REV. STAT. § 6-1-113(2)(b) (2021) (in successful action to enforce liability, "person who is found to have engaged or caused another to engage in" deceptive trade practice is liable for costs and attorney fees).

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not limit costs or attorneys' fees that the applicable law directs or permits a court to award against a holder because of its role in litigation.

In a situation where the applicable law permits assessing costs or attorneys' fees exclusively against the seller, the seller's liability for such costs and fees may be raised against the holder because of the Holder Rule Notice. The holder's obligation to pay costs or fee awards available exclusively against the seller, however, would be limited to the amount paid by the consumer. Thus, for example, if a consumer is awarded fees in a suit solely against the seller, or the law allows awards only against a seller that has engaged in specified conduct, the Holder Rule Notice authorizes the consumer to recover such an award from the holder up to the amount paid. The consumer also may rely on a claim against the seller for costs or attorneys' fees to offset an obligation to the holder.

Some courts have read the Commission's statements in a 2019 Rule Confirmation notice regarding the Holder Rule as mandating a different result.[6] Insofar as these decisions conclude that the Holder Rule precludes state law from providing for costs or attorneys' fees against the holder, they misconstrue the Commission's statements. Neither the Rule itself nor the 2019 Rule Confirmation notice say that the Holder Rule invalidates state law or that there is a federal interest in limiting state remedies. To the contrary, the 2019 Rule Confirmation says that nothing in the Holder Rule limits recovery of attorneys' fees if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct.[7]

By direction of the Commission.

6 *Supra* note 2.

7 We have previously observed that the Holder Rule Notice does not limit the availability of injunctive relief against a holder: "The final sentence of the Holder Rule Notice does not restrict the types of remedies available when a claim or defense is preserved; it simply states that the money that a consumer may obtain from a holder based on the Notice may not exceed amounts paid. The Commission affirms that the plain language of the Rule does not limit the types of relief a court may award against a holder." 84 Fed. Reg. at 18,713 n.32.

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