FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS JANUARY 1, 2019, TO JUNE 30, 2019

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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2019 TO JUNE 30, 2019

JOSEPH J. SIMONS, *Chairman*
Took oath of office May 1, 2018.

NOAH JOSHUA PHILLIPS, *Commissioner*
Took oath of office May 2, 2018.

ROHIT CHOPRA, *Commissioner*
Took oath of office May 2, 2018.

REBECCA KELLY SLAUGHTER, *Commissioner*
Took oath of office May 2, 2018.

CHRISTINE S. WILSON, *Commissioner*
Took oath of office September 26, 2018.

APRIL J. TABOR, *Acting Secretary*
Appointed December 28, 2018.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2019, TO JUNE 30, 2019

IN THE MATTER OF

SYCAMORE PARTNERS II, L.P., STAPLES, INC., AND ESSENDANT 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-4667; File No. 181 0180
Complaint, January 5, 2019 – Decision, January 5, 2019

This consent order addresses the $261.3 million acquisition by Staples, Inc. of certain assets of Essendant Inc. The complaint alleges that Sycamore's and Staples' access to certain commercially sensitive information ("CSI"), without adequate safeguards to ensure that Sycamore and Staples will not misuse the information, could lead to anticompetitive conduct. The consent order limits Sycamore's and Staples' access to: (1) CSI of Essendant's resellers; (2) CSI of end customers of Essendant's resellers; and (3) Essendant's CSI that includes, uses, or incorporates CSI of Essendant's resellers or CSI of end customers of Essendant's resellers.

Participants

For the *Commission*: *Ryan Andrews, Michael Blevins, Christopher Caputo, Stephanie Cummings, Charles Dickinson, Maria DiMoscato, Victoria Lippincott, Mike Mikawa, Danielle Sims, Stelios Xenakis,* and *Robert Zuver.*

For the *Respondents*: *Michael DeRita* and *Matthew J. Reilly, Kirkland & Ellis LLP; Clifford H. Aronson* and *Charles E. Crandall, Skadden, Arps, Slate, Meagher & Flom LLP.*

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 Sycamore Partners II, L.P. ("Sycamore"), a limited partnership subject to the jurisdiction of the Commission, and Respondent Staples, Inc. ("Staples"), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent Essendant Inc. ("Essendant"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it

appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Sycamore is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the Cayman Islands, with its executive offices and principal place of business located at 9 West 57th Street, 31st floor, New York, New York 10019. Sycamore is a private equity firm specializing in retail and consumer investments. Sycamore own and operates a number of retailers, including Staples.

2. Respondent Staples 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 500 Staples Drive, Framingham, Massachusetts 01702. Staples is the largest vertically integrated reseller of office products in the United States, selling to individual consumers through its website and retail stores, as well as to business-to-business customers through its North American Delivery division.

3. Respondent Essendant 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 One Parkway North Boulevard, Suite 100, Deerfield, Illinois 60015. Essendant is the largest wholesale distributor of office products in the United States, selling exclusively to resellers.

II. THIRD-PARTY OFFICE PRODUCTS RESELLERS

4. Essendant's reseller customers include large national accounts (such as Staples and Office Depot, Inc.), online retailers (such as Amazon.com, Inc. and Jet.com), and a large number of independently owned and operated dealers throughout the United States. Most of these resellers compete with Staples to sell office products and related services to midmarket business-to-business customers.

III. JURISDICTION

5. 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.

IV. THE ACQUISITION

6. Pursuant to an Agreement and Plan of Merger dated as of September 14, 2018, Staples and its affiliates propose to acquire all of the outstanding shares of common stock of Essendant ("the Acquisition").

V. THE RELEVANT MARKETS

7. The relevant line of commerce in which to analyze the effects of the Acquisition is the sale and distribution of office products to midmarket business-to-business customers. The sale and distribution of office products to midmarket business-to-business customers entails selling office products and related services to customers who purchase those products and services for consumption, not for resale. Midmarket customers are small- and medium-sized organizations.

8. The relevant geographic markets in which to analyze the effects of the Acquisition are local areas in the various resellers' territories.

VI. THE STRUCTURE OF THE MARKETS

9. The sale and distribution of office products to midmarket business-to-business customers in local areas is a relevant market. This market contains many resellers, with Essendant's reseller customers accounting for a substantial share of the market.

VII. ENTRY CONDITIONS

10. Entry into each relevant market would not be timely, likely, or sufficient to prevent or mitigate the anticompetitive effects described in Paragraph 11.

VIII. EFFECTS OF THE ACQUISITION

11. As a result of the Acquisition, Sycamore and Staples would have access to Essendant's reseller customers' commercially sensitive business information, which could allow Staples to offer higher prices than it otherwise would when bidding against a reseller for an end customer's business. Sycamore's and Staples' access to this commercially sensitive information may substantially lessen competition in the market for the sale and distribution of office products to midmarket business-to-business customers by eliminating direct and substantial competition between Respondents Staples' and Essendant's reseller customers which may result in higher prices to end customers.

IX. VIOLATIONS CHARGED

12. Sycamore's and Staples' access to commercially sensitive information could lead to anticompetitive conduct and constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and upon consummation, would constitute a violation of 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.

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this twenty-fifth day of January, 2019, issues its complaint against said Respondents.

By the Commission, Commissioner Chopra and Commissioner Slaughter dissenting.

DECISION
[Public Record Version]

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Staples, Inc. ("Staples") and its affiliates, whose owner is Sycamore Partners II, L.P. ("Sycamore"), of all of the outstanding shares of common stock of Essendant Inc., ("Essendant"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents a draft of the 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 ("Agreement Containing Consent Order" or "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.

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 accepts the executed Consent Agreement and places 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 the following Decision and Order ("Order"):

1. Respondent Sycamore is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the Cayman Islands, with its executive offices and principal place of business located at 9 West 57th Street, 31st floor, New York, New York 10019.

2. Respondent Staples 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 500 Staples Drive, Framingham, Massachusetts 01702.

3. Respondent Essendant 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 One Parkway North Boulevard, Suite 100, Deerfield, Illinois 60015.

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

ORDER

I. Definitions

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

A. "Sycamore" means Sycamore Partners II, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Sycamore Partners II, L.P., including but not limited to Staples, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Sycamore will include Essendant.

B. "Staples" means Staples, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Staples, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. "Essendant" means Essendant Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Essendant Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

D. "Respondent(s)" means Sycamore, Staples, and Essendant, individually and collectively.

E. "Commission" means the Federal Trade Commission.

F. "Acquisition" means the proposed acquisition of all of the outstanding shares of common stock of Essendant by Staples and its affiliates pursuant to the Agreement and Plan of Merger dated September 14, 2018, that was submitted by the Respondents to the Commission.

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

H. "Commercially Sensitive Information" means all confidential information, and all proprietary non-public information (*i.e.,* information that is not generally known or otherwise publicly available) Relating To Essendant Resellers and Essendant Resellers' End Users, including but not limited to: Essendant and Essendant Reseller bidding procedures and bid proposals, and all related documents, data, and materials, including term sheets, initial bid terms, final bid terms, and other documents that support cost and rate structures underlying the bids; responses to requests for either proposals or other solicitations; cost information, including cost of goods; customer contracts; customer lists; customer

product, service, and delivery specifications; customer purchasing histories; customer service and support requirements and materials; customer approvals and related information; price lists; actual sale prices (net and gross); rebate programs and rebates paid to customers; advertising, marketing and sales support payments or allowance programs, including actual payments under such programs; credit records; non-public advertising, promotional and marketing plans and materials, including website content; sales and marketing training and compliance materials; marketing methods and strategies; strategic plans; competitive intelligence and research; Essendant Reseller's and Essendant Reseller End User's identity and terms of service; and Essendant Reseller financial information, including profit and loss statements, balance sheets, and other confidential financial documents;

Provided, however, the term Commercially Sensitive Information (i) does not include information about Essendant Resellers that is presented in an aggregated (where information and identities of individual Essendant Resellers are not revealed) and anonymized (where identities of individual Essendant Resellers are not revealed) format; and (ii) does not include information about Staples.

I. "Compliance Program" means a program that meets the definition of an "effective" compliance program under the guidance of Chapter 8 of the Guidelines Manual of the United States Sentencing Commission (including, but not limited to, an effective in-person or web-based training program) established to ensure compliance with the requirements and prohibitions of this Order.

J. "End User" means any customer that purchases Office Products for its own consumption rather than for resale or redistribution. End Users include businesses (including private and public organizations) and individual consumers.

K. "Essendant Reseller" means any Reseller that purchases Office Products from Essendant, other than Staples.

L. "Essendant Reseller Commercially Sensitive Information" means:

1. All Commercially Sensitive Information Relating To an Essendant Reseller: (i) that is being, will be, or has been maintained in confidence by such Essendant Reseller; (ii) that has been or will be provided, disclosed, or made available to Essendant prior to the Acquisition or otherwise is or will be in Essendant's possession, custody, or control as of the Acquisition Date; or (iii) that will be provided, disclosed, or made available to Essendant after the Acquisition Date; for avoidance of doubt, Essendant Reseller Commercially Sensitive Information includes any Essendant Reseller End User's Commercially Sensitive Information; and

2. Any portion of any Essendant document that includes, uses, or incorporates Essendant Reseller Commercially Sensitive Information as described in the above sub-Paragraph I.L.1.

M. "Essendant Reseller Goods" means Office Products sold by Essendant and Essendant Resellers in the United States.

N. "Essendant Wholesale Business" means the wholesale sale and distribution of Office Products to Essendant Resellers and any ancillary services that support Essendant Resellers and Essendant Resellers' End Users, including, but not limited to:

1. Offering, sale, and distribution of Office Products, which span all product categories and brands of Office Products;

2. Offering, sale, and distribution of private label Office Products;

3. Office Product ordering support, including the Automatic Distributor Order Transfer ("ADOT") system;

4. Overnight delivery to Essendant Resellers;

5. National next-day drop-ship delivery to an Essendant Resellers End Users on behalf of an Essendant Reseller;

6. "Wrap and label" services that deliver orders to Essendant Resellers pre-packed for Essendant Resellers' End Users, with each Essendant Reseller's End User's order ready for delivery to the name and address on the package;

7. Direct purchasing assistance, coordinating direct purchasing of large quantities of Office Products at lower prices on behalf of Essendant Resellers; and

8. Marketing assistance that includes helping Essendant Resellers with print marketing and digital marketing support, including web content, digital analytics, as well as Promotional Activities, marketing, Merchandising, and merchandising tools and training.

O. "Firewalled Respondent Personnel" means Respondent Personnel who:

1. As of the date on which Respondents execute the Agreement Containing Consent Order, perform (i) Wholesaler Functions; (ii) Legal and Regulatory Functions; or (iii) Shared Services;

2. Are Persons who report directly to such Respondent Personnel identified in sub-Paragraph I.O.1 and who, on or after the date on which the Agreement Containing Consent Order is executed, perform or who are assigned to perform Wholesaler Functions, Legal and Regulatory Functions, or Shared Services;

3. Are described and identified pursuant to the provisions and procedures in Paragraph II.C. of this Order; or

4. Are specifically identified in Appendix A to this Order; *provided, however*, that Firewalled Respondent Personnel includes additional Respondent Personnel who are identified and approved as Firewalled Respondent Personnel pursuant to the provisions in Paragraph II.C.4. of this Order.

P. "Legal and Regulatory Functions" means activities necessary to comply with financial or other regulatory requirements, to obtain or provide legal advice, or otherwise comply with applicable laws and regulations, including this Order, to the extent that such activities require access to Essendant Reseller Commercially Sensitive Information.

Q. "Management Oversight Group" means the persons or positions in Staples that are listed in Appendix B to this Order. The Management Oversight Group may have access to Essendant Reseller Commercially Sensitive Information for the purposes described in Paragraphs II.B.5 and II.D. of this Order. All changes to the Management Oversight Group shall be in accordance with the procedures outlined in Paragraph II.D. of this Order.

R. "Merchandising" means determining the selection of products sold by Essendant or Staples that will be sourced from suppliers and re-sold on a wholesale or retail basis.

S. "Monitor" means the Person appointed pursuant to Paragraph III. of this Order, as well as his or her designees.

T. "Office Products" means consumables, equipment, and other products used by consumers, businesses, and other organizations, such as traditional office supplies (*e.g.,* pens, pencils, paper clips, staples, folders, and binders); copy paper; ink and toner; technology products (*e.g.,* laptops, personal computers, monitors, and tablets); office equipment (*e.g.,* printers and copiers); JanSan supplies (*e.g.,* bath tissue and dispensers, paper towels and dispensers, antibacterial lotion, and hand soap); breakroom supplies (*e.g.,* coffee, cold beverages, snacks, disposable plates, cups, cutlery, and napkins); office furniture; print and promotional services; managed print services; school supplies; safety supplies; and maintenance, repair and operations ("MRO") supplies.

U. "Ownership Interest" means any and all rights, title and interest, present and/or contingent, to own and/or hold any of the following: (i) any voting or non-voting stock, share capital, equity, membership interest, general or limited partnership interest, or any other interest(s) in a specified entity; or (ii) any notes or options or other instruments convertible into any voting or non-voting stock in a specified entity.

V. "Person" means any individual, partnership, joint venture, firm, corporation, limited liability company or partnership, association, trust, unincorporated organization, or other business or government entity.

W. "Promotional Activities" means the preparation and supply of price and non-price promotions, in-store displays, electronic or paper catalog and mailer pages, on-line pages, social media content, and newspaper inserts.

X. "Respondent Personnel" means any director, officer, employee, agent, representative, consultant, or other Persons designated, hired, retained, or otherwise representing Respondents.

Y. "Relating To" means discussing, analyzing, summarizing, describing, or constituting, but not merely referring to.

Z. "Reseller" means a Person that sells and distributes Office Products directly to End Users. Resellers include independent resellers, dealers, and distributors ("IDCs"), office supply superstores (*e.g.,* Staples, and Office Depot), online retailers, mass merchants, and club stores. For purposes of this Order, Staples is a Reseller.

AA. "Reseller Functions" means the activities of a Reseller that are typical of a Reseller operating separately and independently of and from any Wholesaler with which it is affiliated or in which it may have an interest, including marketing, advertising, promoting, distributing, pricing, and selling Office Products to End Users; *provided, however,* that no Wholesaler Functions are included in Reseller Functions.

BB. "Shared Services" means a Wholesaler Function that, before the Acquisition Date, was performed by Essendant and that, after the Acquisition Date, is transitioned to Respondent Personnel. Any Respondent Personnel providing Shared Services shall be Firewalled Respondent Personnel and subject to the provisions of Paragraph II.C. of this Order. Shared Services are listed in Appendix C.

CC. "Staples Customer Goods" means Office Products sold by Staples in the United States to End Users.

DD. "Staples Reseller Functions" means all Reseller Functions engaged in by Staples and all Respondent Personnel whose duties, responsibilities, activities or positions involve or constitute Reseller Functions. For purposes of this Order, Staples Reseller Functions are identified on Appendix D of this Order.

EE. "Wholesaler" means a Person that sells and distributes Office Products to Resellers. For purposes of this Order, Essendant is a Wholesaler.

FF. "Wholesaler Functions" means the activities of a Wholesaler, typical of a standalone Wholesaler with no related Reseller Functions, including the functions necessary to support the Essendant Wholesale Business; *provided, however,* that no Reseller Functions are included in Wholesaler Functions; *provided, further* that Essendant's Vertical Markets Group is included in Wholesaler Functions. Wholesaler Functions are listed in Appendix E.

II. Firewall and Related Requirements

IT IS FURTHER ORDERED that:

A. No later than the Acquisition Date, and except for (i) Firewalled Respondent Personnel as provided in Paragraph II.C. of this Order; (ii) the Management Oversight Group as provided in Paragraph II.D.; or (iii) to the extent necessary to comply with this Order, Respondents shall not:

1. Have access to, knowingly review, or otherwise request, solicit, seek, receive, or obtain, directly or indirectly, any Essendant Reseller Commercially Sensitive Information;

2. Disclose, provide, share, convey, discuss, exchange, transfer, circulate, or otherwise provide access to, directly or indirectly, any Essendant Reseller Commercially Sensitive Information to any Person except as expressly permitted under this Order; or

3. Use, directly or indirectly, any Essendant Reseller Commercially Sensitive Information for any purpose other than as provided in Paragraphs II.C and II.D of this Order.

B. Beginning no later than the Acquisition Date, Respondents shall: (i) take all actions necessary and appropriate to prevent access to, and the disclosure or use of, Essendant Reseller Commercially Sensitive Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of this Order, including, but not limited to, Respondent Personnel performing Staples Reseller Functions as identified Appendix D; (ii) not integrate relevant functions or services or share Essendant Reseller Commercially Sensitive Information until Respondents comply with the requirements of sub-Paragraphs II.B.3, II.B.5.b, II.C.1.b, II.C.2.a, and II.D.5, with the approval of the Monitor; and (iii) with the advice, assistance, and approval of the Monitor, establish and maintain a Compliance Program, which shall include the development, implementation, and maintenance of procedures, requirements, and a system of access and data controls with respect to protecting and segregating such Essendant Reseller Commercially Sensitive Information, including:

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

2. Maintaining Essendant Reseller Commercially Sensitive Information separate from other Respondent data and information and granting access to Essendant Reseller Commercially Sensitive Information only to Firewalled Respondent Personnel by reasonable and appropriate means such as, segregating data in information systems; physically separating, securing, and/or shielding all electronic and hard copies of such Essendant Reseller Commercially Sensitive Information, and any email and hard copy communication regarding such Essendant Reseller Commercially Sensitive Information; maintaining current information in human resources and other systems to identify members of Firewalled Respondent Personnel and the Management Oversight Group; physically separating Firewalled Respondent Personnel; and employing other processes designed to confine the flow, discussion, and dissemination of such Essendant Reseller Commercially Sensitive Information to Firewalled Respondent Personnel only, and ensuring that this information is not shared with Respondent Personnel performing Staples Resale Functions as identified in Appendix D;

3. Requiring all (i) Firewalled Respondent Personnel; (ii) members of the Management Oversight Group; and (iii) and any other Respondent Personnel who may have access to Essendant Reseller Commercially Sensitive Information to complete training on the requirements and prohibitions of this Order, sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of his/her/their responsibilities regarding the restrictions on the use and dissemination of Essendant Reseller Commercially Sensitive Information, and a statement attesting that he or she has received a copy of this Order or a summary of the key requirements and prohibitions of this Order (which summary will have been approved in advance by the Monitor), will comply with the terms of this Order, and will take all reasonable steps to assure that Respondent Personnel that report to him or her directly or indirectly will comply with the terms of this Order;

4. Preventing Firewalled Respondent Personnel from (i) participating in any way, directly or indirectly, in Staples Reseller Functions; and/or (ii) disclosing any Essendant Reseller Commercially Sensitive Information to any Respondent Personnel outside of Firewalled Respondent Personnel;

5. Preventing the Management Oversight Group from receiving or having access to Essendant Reseller Commercially Sensitive Information, and preventing Firewalled Respondent Personnel from directly or indirectly

disclosing Essendant Reseller Commercially Sensitive Information to the Management Oversight Group, unless and solely to the extent permitted pursuant to this Paragraph and with the Monitor's approval. In this regard, the Management Oversight Group:

a. May receive data and reports with detail only to the extent necessary for the management and oversight of the Essendant Wholesale Business. Such information may include budget reviews, long range plans, finance updates, but in no case shall the reports contain any information that reveals the identity of Essendant Resellers or Essendant Resellers' End Users; *provided, however*, nothing herein shall prevent the Management Oversight Group from receiving or having access to a list of Essendant Reseller Customers and their contact information, without more, and in each case, to enable the Management Oversight Group to perform the functions described in Paragraph II.D. of this Order:

   i. only after Respondents' chief legal officer, or designee (each of whom shall be trained regarding the requirements and prohibitions of the Order, and shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and disclosure of Essendant Reseller Commercially Sensitive Information), has reviewed any such Essendant Reseller Commercially Sensitive Information and verified that its disclosure to and use by the Management Oversight Group are in compliance with this Order; and

   ii. where any such disclosure or communication to the Management Oversight Group containing Essendant Reseller Commercially Sensitive Information shall be provided to the Monitor for review 7 days prior to disclosure or communication to the Management Oversight Group;

b. Shall receive training on the requirements and prohibitions of the Order, certify their understanding of and commitment to abide by the terms of the Order, and sign an appropriate non-disclosure agreement; and

c. To the extent Firewalled Respondent Personnel are permitted to disclose Essendant Reseller Commercially Sensitive Information to the Management Oversight Group, the Management Oversight Group shall not thereafter disclose such information to Respondent Personnel or any Persons that are not part of the Management

Oversight Group or use the disclosed information for any purpose except to the extent permitted by this Order.

C. Firewalled Respondent Personnel shall, as relevant to their position, have access to and may use Essendant Reseller Commercially Sensitive Information as reasonably necessary to perform Essendant Wholesaler Functions, to perform Legal or Regulatory Functions, and to fulfill Shared Services, subject to the use and disclosure restrictions set forth in sub-Paragraphs II.B.3-5 above, and for no other purpose, in accordance with the following:

1. Firewalled Respondent Personnel shall include only those Persons (and related functions or positions) who, as of the Acquisition Date:

   a. Perform Essendant Wholesaler Functions, Legal or Regulatory Functions, or Shared Services, or who report, directly to such Persons; *provided, however,* that Persons, functions, or positions included within Firewalled Respondent Personnel shall have access to and use of such Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their duties;

   b. Do not perform and are not responsible, directly or indirectly, for Staples Reseller Functions, and if any such Person, function, or position reports (directly or indirectly) to a Person responsible for Staples Reseller Functions, that Person, function, or position shall receive training on Order terms, sign an appropriate non-disclosure agreement (if applicable), certify compliance with the terms of the Order, and not disclose, provide, or otherwise make available Essendant Reseller Commercially Sensitive Information to the Person responsible (directly or indirectly) for Staples Reseller Functions; and

   c. Do not receive bonus or other tangible benefits related to the marginal sale of Staples Customer Goods as a disproportionate benefit to any bonus or tangible benefit related to the marginal sale of Essendant Reseller Goods.

2. Firewalled Respondent Personnel shall be trained on the requirements or prohibitions of the Order and shall execute non-disclosure agreements and statements attesting that they have received a copy or approved summary of this Order, will comply with the Order's terms, and will take all reasonable steps to assure that employees who report to them directly will comply with the Order's terms:

a. For Firewalled Respondent Personnel, no later than forty (40) days after Respondents execute the Agreement Containing Consent Order; and

b. For Firewalled Respondent Personnel identified after Respondents execute the Agreement Containing Consent Order, sufficiently in advance of the date on which they assume those responsibilities to permit them to be trained and to sign the required non-disclosure agreements and statements attesting that they have received a copy or approved summary of this Order, will comply with the Order's terms, and will take all reasonable steps to assure that employees who report to them directly will comply with the Order's terms.

3. Firewalled Respondent Personnel reporting directly or indirectly into Essendant Wholesaler Functions may use Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their Essendant Wholesaler Functions, and for no other purpose, and the Firewalled Respondent Personnel reporting directly or indirectly into the Legal or Regulatory Functions or Shared Services function may use Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their respective functions.

4. Respondents shall add to or change the Firewalled Respondent Personnel only pursuant to the following procedures:

a. Replacing or adding individuals who report directly to the Persons, functions, or positions specifically identified in Appendices A and C shall be in accordance with Respondents' usual and customary business practices;

b. Replacing any of the Persons or positions specifically identified in Appendices A and C, or re-organizing functions or positions specifically identified in Appendices A and C, shall be in accordance with the usual and customary business practices of Respondents after notification to and no objection from the Monitor, provided that the Monitor is provided with information about the position and individual, including the individual's background and prior positions held, 7 days prior to the replacement or reorganization;

c. Transitioning or replacing Persons or positions specifically identified in Appendix A to Shared Services shall require Respondents to provide the Monitor with information about the position and individual, including the individual's background and prior positions held, 7 days prior to the transition or replacement,

and such transition or replacement may take effect only if there is no objection from the Monitor;

d. Adding new functions or positions that are not specifically identified in Appendices A and C shall require prior notification to the Monitor and Commission staff in accordance with the following:

i. Commission staff shall have 10 business days from notification to consider the proposed change; and

ii. If Commission staff does not object, in writing, including the reasons for objecting, to the change within 10 days of notification, Respondents shall be permitted to make the change.

5. Respondents who wish to transfer an employee working within the Firewalled Respondent Personnel group to any position within either Staples or Sycamore must notify the Monitor 30 days prior to such transfer with information on the nature of the employee's prior and future job responsibilities, and the nature and extent of his or her exposure to Essendant Reseller Commercially Sensitive Information, in accordance with the following:

a. If the transferred employee will be in a position directly competing with the Essendant Wholesale Business, then such employee must be removed from access to Essendant Reseller Commercially Sensitive Information for a period of 6 months prior to assuming his or her new responsibilities;

b. If the transferred employee (i) will be in a position that supports a business that does not compete with or manage the Essendant Wholesale Business, or (ii) was not exposed to Essendant Reseller Commercially Sensitive Information, the transfer may take effect after the notice period if there is no objection from the Monitor; and

c. The transferred employee shall continue to be bound by the terms of the non-disclosure agreement signed pursuant to Paragraph II.C. of the Order for the duration of the Order.

D. The Management Oversight Group, as identified in Appendix B, may receive specified Essendant Reseller Commercially Sensitive Information as provided in Paragraph II.B.5 in order to make enterprise decisions to fulfill their oversight and management responsibilities; *provided, however,* that the Monitor must be notified 7 days in advance and must approve such receipt prior to the disclosure of

Essendant Reseller Commercially Sensitive Information to any member of the Management Oversight Group; *provided, further* that the Management Oversight Group and each member thereof shall:

1. Receive Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their oversight responsibilities;

2. Use such Essendant Reseller Commercially Sensitive Information only as necessary to perform their oversight responsibilities and not for any other purpose;

3. Protect the confidentiality of such Essendant Reseller Commercially Sensitive Information;

4. Not disclose such Essendant Reseller Commercially Sensitive Information to any Person not authorized to have it pursuant to this Order;

5. Receive training on the Order, and execute (i) a non-disclosure agreement providing written acknowledgment of his or her responsibilities regarding the restrictions on the use and dissemination of such Essendant Reseller Commercially Sensitive Information; and (ii) a statement attesting that he or she has received a copy of this Order or an approved summary, has been trained on the requirements and prohibitions of the Order, will comply with its terms, and will take all reasonable steps to assure that employees who report to him or her directly or indirectly will comply with the Order's terms, all no later than 40 days after Respondents have identified the Management Oversight Group member or in any event before such member may have access to or receive any Essendant Reseller Commercially Sensitive Information; and

6. Proposed additions to the Management Oversight Group shall be approved by the Monitor, and access to information shall follow the procedures outlined in this Paragraph II.D.

E. Respondents shall develop and implement written procedures and protocols and maintain a system of access and data controls to assure compliance with the requirements and prohibitions of this Order ("Compliance Program"), to be reviewed and approved by the Monitor, which shall include, but not be limited to, procedures for:

1. Monitoring compliance;

2. Requiring and enforcing compliance with appropriate remedial action in the event of non-compliance by Respondent Personnel;

3. Notifying the Monitor in writing of any non-compliance with this Order;

4. Distributing a copy of this Order or an approved summary to all (i) Firewalled Respondent Personnel; (ii) the Management Oversight Group; and (iii) any other Respondent Personnel who may have access to Essendant Reseller Commercially Sensitive Information within 7 days of the date this Order becomes final, and annually thereafter (or on such other schedule as the Monitor may approve) or, for Persons added to the Firewalled Respondent Personnel group or Management Oversight Group pursuant to Paragraph II.C.4 and II.D. of this Order no later than 20 days after Respondents have identified the additional Firewalled Respondent Personnel or Management Oversight Group member or in any event before such member may have access to or receive any Essendant Reseller Commercially Sensitive Information;

5. Training on the requirements and prohibitions of this Order for all (i) Firewalled Respondent Personnel; (ii) the Management Oversight Group; and (iii) any other Respondent Personnel who may have access to Essendant Reseller Commercially Sensitive Information, where the content of such training shall be approved by the Monitor prior to delivery, and periodic refresher training and communications shall occur no less frequently than annually;

6. Adding to or changing the composition of the Management Oversight Group;

7. Internal auditing or self-evaluation of adherence to each provision of the Order; and

8. The retention of documents and records in connection with Respondents' compliance with their obligations under this Order.

F. No later than 30 days of the date this Order become final, Respondents shall submit a detailed plan for complying with the provisions of Paragraph II. of this Order to the Commission and the Monitor. No later than 15 days after receipt of the detailed compliance plan, the Commission and the Monitor shall advise Respondents of any objections and proposed modifications to the plan.

G. The purpose of the provisions of Paragraph II. of this Order is to assure that Respondents maintain the confidentiality of and use Essendant Reseller Commercially Sensitive Information in a manner consistent with the applicable requirements and prohibitions, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III. Monitor

IT IS FURTHER ORDERED that:

A. Theodore Banks shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix F ("Monitor Agreement") and Non-Public Appendix G ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order. The Monitor Agreement shall become effective no later than the date this Order is issued.

B. Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order, in consultation with the Commission or its staff, on the following terms, which shall be included in the Monitor Agreement:

1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order, (ii) act in consultation with the Commission or its staff, and (iii) serve as an independent third party and not as an employee or agent of the Respondents or of the Commission.

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities Relating To compliance with this Order and to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as the Monitor deems are reasonably necessary or advisable to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and such consultants, accountants, attorneys, and other representatives and assistants as may be engaged by the Monitor, and hold them harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a suitable confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

C. The Monitor shall report in writing to the Commission (i) 30 days after this Order is issued or 30 days after Respondents submit their first interim compliance report pursuant to Paragraph V.B.1 of this Order, whichever is earlier, (ii) no later than 30 days after Respondents submit their subsequent interim and annual compliance reports as required by Paragraph V.B. of this Order, (iii) no later than 10 days after this Order terminates ("Final Report"), and (iv) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

D. The Commission may require the Monitor and each of the Monitor'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 Monitor's duties.

E. The Monitor's power and duties shall terminate 10 business days after the Monitor has completed his Final Report pursuant to Paragraph III.C.(iii) of this Order, or at such other time as directed by the Commission.

F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph III.

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.

IV. Prior Notice

IT IS FURTHER ORDERED that, for a period of 10 years from the date this Order is issued, Respondents shall not, without providing prior written notification ("Notification") to the Commission in the manner described in this paragraph, acquire directly or indirectly, through subsidiaries or otherwise, any Person engaged in selling Office Products directly or indirectly to any wholesaler, distributor, or reseller of Office Products or to Office Products End Users in the United States, or any Ownership Interest, in whole or in part, in such Person ("To-Be-Acquired Person"), *provided, however*, that prior notification shall not be required under Paragraph IV of this Order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. With respect to the Notification:

A. Notification required by this Paragraph shall contain:

1. The Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of Respondents and not of any other party to the transaction;

2. The name, headquarters address, telephone number, and the name of a contact person of the To-Be-Acquired Person;

3. A description of the proposed acquisition and the assets to be acquired, and the acquisition price;

4. If acquiring less than 100 percent ownership interest in a To-Be-Acquired Person, Respondents' plans if any, to acquire additional ownership interest in the future;

5. All documents Relating To communications between Respondents and the To-Be-Acquired Person;

6. A list of the top 20 customers and top 20 vendors of the To-Be-Acquired Person and the Respondents; and

7. All documents Relating To the proposed acquisition.

Provided, however, that Notification shall not be required for acquisitions resulting in total holdings of an Ownership Interest of 10 percent or less of a To-Be-Acquired Person.

B. Respondents shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 30 days after submitting such additional information or documentary material.

C. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

V. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. An interim compliance report 30 days after the Order is issued, and every 90 days thereafter until one year after the date this Order is issued, at which time Respondents shall submit reports in accordance with Paragraph V.B.2;

2. Annual compliance reports one year after the date this Order is issued, and annually for the next nine years on the anniversary of that date; and

3. Additional compliance reports as the Commission or its staff may request.

C. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order. 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 the Order. Respondents shall retain copies of all material written communications, as well as all non-privileged

internal memoranda, reports, and recommendations concerning completing their obligations under the Order for a period of 10 years, and shall provide copies of those records to Commission staff upon request.

D. Each compliance report shall be verified 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.

E. Respondents shall provide a copy of each compliance report to the Monitor at the same time that they submit compliance reports to the Commission and to the Compliance Division.

VI. Change in Respondent

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

A. Its proposed dissolution;

B. Its proposed acquisition, merger, or consolidation; or

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

VII. 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 Respondents 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 Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at the request of the authorized representative of the Commission and at the expense of the Respondents; and

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

VIII. 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 that Respondents maintain the confidentiality of Essendant Reseller Commercially Sensitive Information in a manner consistent with all applicable requirements and prohibitions of this Order.

IX. Term

IT IS FURTHER ORDERED that this Order shall terminate on January 25, 2029.

By the Commission, Commissioner Chopra and Commissioner Slaughter dissenting.

Appendix A: Firewalled Respondent Personnel

1. President & CEO
2. SVP, General Counsel
    a. Counsel, Associate General
    b. Assistant General Counsel
3. SVP, Chief HR Officer
4. SVP, Strategy & Corporate Development
    a. Chief Operating Officer, Automotive
5. President, Office & Facilities
    a. SVP, Trade Development
    b. Architect, Senior, User Experience
    c. Manager, Inventory Management & Analytics
    d. VP, Customer Care & Sales Operations

e. Manager Senior, Marketing Research & User Experience

i. Manager, Reseller Development

ii. Analyst Senior, III

iii. Associate, Marketing Services

iv. Specialist, Marketing Communications

v. Manager, Web – Marketing

f. VP, Vertical Markets

i. Director, Business Development – Enterprise Accounts

ii. Manager Senior, Business Development Healthcare

iii. Manager, Business Development Vertical Markets

iv. Director, Diverse Business Development

v. Director, Vertical Markets

vi. Director, New Channel

vii. Director, Vertical Markets Sales Operations

g. Director, Marketing Sales Programs

i. Manager, Marketing Tech Specialist

ii. Manager, Marketing Customer Enablement

iii. Manager, Marketing Programs – Operations

iv. Manager, Channel Marketing

v. Manager Assistant, Graphic Mfg & O

h. Director, Marketing

i. VP, Strategic Accounts

ii. Executive, Strategic Accounts

iii. Director, National Accounts

iv. Director, New Channel

v. Director, Strategic Groups – FE

vi. Manager, Strategic Events

j. VP, Sales – Mason

i. Manager, WB Mason

ii. Director, Operations & Logistics – Mason

iii. Director, Category Management

k. VP, Independent Channels

i. Director, Facilities Engagement

ii. Director, Strategic Groups

iii. Director, Field Support

iv. Director Senior, East Region Sales

v. Director, Inside Sales

vi. Director, Sales West Region

l. Director, Digital Services

6. SVP, CFO & CIO

a. VP, Treasurer

b. Controller & CAO

7. VP, Operations & Transportation

a. VP, Operations Region OH

8. SVP, Merchandising, Inventory & Pricing

a. VP, Office Products & Furniture

b. VP, Pricing & Margin Management

i. Director, Pricing

c. VP, Essendant Brands & Global Sourcing

d. VP, Merchandising

e. VP, Pricing/Business Integration

i. Manager, Price Development & Communications

ii. Manager Senior, Pricing Development & Communications

iii. Director, Pricing/Margin LG

f. VP, GM – Tech & Azerty

i. VP, Sales Azerty

ii. VP, Operations & Customer

g. SVP, Inventory

Non-Public Appendix A-1: Firewalled Respondent Personnel

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

Appendix B: Management Oversight Group

- John Lederer, Executive Chairman
- Sandy Douglas, Chief Executive Officer
- Joanne Harris, Chief Commercial Officer
- Edward Ludwigson, VP Management Operations

Appendix C: Shared Services

- Audit/Accounting/Compliance: SVP Corporate Controller; Assistant Controller; VP Financial Services & System; Director Corporate Credit; Director Finance, Staples Promotional Products; VP General Auditor

- Financial Planning and Analysis: Vice Chairman & CFO; VP Corporate Financial Planning & Analysis; Director, Financial Planning & Analysis

- Tax/Treasury: SVP Financial & Treasurer; Head of Tax

- Information Technology: Chief Technology Officer; SVP Chief Information Security Officer; SVP Global eCommerce Technology; VP Order Management Systems; VP Technical Operations SDS; VP Data & Analytics; Director Enterprise/Financial Systems; Director Threat Vulnerability Management; Director Security & Compliance; VP eCommerce Engineering; VP Data Solutions & Merch; VP eCommerce Product & Customer Experience; Director Quill Technology; Director e-Commerce Engineering; Director e-Commerce Product Management & Strategy; Director Supply Chain Systems; Director Telecom Remote Infrastructure Services; Director Business Systems

- Human Resources/Talent Management/Recruiting: Chief Human Resources Officer; VP Talent & Organizational Development; VP Talent Acquisition & Workforce Planning; Director Learning & Development; VP Total Rewards; Director Global Human Resources Operations; Directors Human Resources

- Real Estate: VP Real Estate; VP Property Management; VP Facilities Management & Design; Director Real Estate Development; Director Design & Construction; Director NA Fixture Procurement & Install

- Legal: Chief Legal Officer; VP Associate General Counsels; Senior Company Counsels

- Risk Management: Director Risk Management

- Merchandising: Chief Merchandising Officer; VP/DMMs; VP/GMMs; Director DMMs; VP Merchandise Operations & Vendor Management; Director Vendor Programs Administration; Director Portfolio Group; see also Staples Brands Group below

- Marketing: Chief Marketing Officer; VP Staples Creative Group; Director Category Marketing

- Supply Chain/Logistics: Chief Supply Chain Officer; VP Engineering & Operations Support: RVPs DC/FC/Fleet; VP Supply Chain Analytics & Strategy; Director DMM; VP Transportation & Supplier Collaboration; Distinguished Scientist; Director National Transportation; Directors Regional Delivery Operations; Directors Fulfillment Centers; Directors Distribution; Director Delivery Operations Planning; Director Transportation; Director Furniture Operations

- M&A/Strategy: EVP Corporate Development
- Integration: Director Business Integration PMO; Director Integration
- Communications/Investor Relations: Director Corporate Communications
- Staples Brands Group: SVP Staples Brands Group; VP Global Sourcing Manufacturing & Operations SBG; VP Global Sales Channels; VP Product Development & Management; Director Product Quality & Compliance; Director Product Design Innovation; Director Sourcing & Procurement; Director SBG International Supply Chain; Directors Product Strategy
- Inventory Planning: SVP Merchandise Planning & Inventory Management; Director Sales & Operations Planning; Directors Planning & Inventory Management
- Loss Prevention: Director North America Delivery & Corporate Investigations; Director Global Health & Safety; Director, Fraud Intelligence
- Customer Service: VP NAC Customer Service; VPs Contact Center Operations; Director Business Intelligence & Project Services; Director Workforce Planning
- Indirect Procurement: VP Procurement; Directors Strategic Sourcing

Appendix D: Staples Reseller Functions

- Staples Business Advantage ("SBA") Sales Admin & Ops (reporting to Vice President, Management Operations)
- SBA Pricing (reporting to Vice President, Pricing)
- SBA Commercial and Enterprise Sales (reporting to Senior Vice President, Commercial and Enterprise, SBA Sales)
- SBA Mid-market Sales (reporting to Vice President, Mid-market, SBA Sales)
- Quill (reporting to Senior Vice President, Quill)
- Customer Transformation (reporting to Vice President, Customer Transformation)
- Digital Business (reporting to Vice President, Digital Business)

- Staples Promotional Products ("SPP") (reporting to Vice President/General Manager, SPP)
- SBA Financial Planning & Analysis (reporting to Vice President, Financial Planning & Analysis)
- HiTouch (reporting to President, HiTouch,, who reports to Senior Vice President, Commercial and Enterprise, SBA Sales)
- Corporate Development—Tuck-in Integration (reporting to Director, Integration)
- North American Delivery B2B Marketing (reporting to Vice President, B2B Marketing)

Appendix E: Wholesaler Functions

- Senior Leadership Team (reporting to President & CEO) (excluding Assistant, Executive – CEO and Group President, Industrials)
- Legal (reporting to SVP, General Counsel) (Counsel, Associate General and Assistant General Counsel only)
- Strategy & Corporate Development (reporting to SVP, Strategy & Corporate Development) (Chief Operating Officer - Automotive only)
- Office & Facilities (reporting to President, Office & Facilities) (excluding Assistant, Executive)
- Finance, Accounting and Information Technology (reporting to SVP, CFO & CIO) (VP, Treasurer and Controller & CAO only)
- Operations & Transportation (reporting to VP, Operations & Transportation) (VP, Operations Region OH only)
- Merchandising, Inventory and Pricing (reporting to SVP, Merchandising, Inventory & Pricing) (excluding Consultant - Merch)
- Marketing Research & User Experience (reporting to Manager Senior, Marketing Research & User Experience)
- Vertical Markets Group (reporting to VP, Vertical Markets)

- Marketing Sales Programs (reporting to Director, Marketing Sales Programs) (excluding direct reports of Manager Assistant, Graphic Mfg & O)
- Marketing (Director, Marketing only)
- Strategic Accounts (reporting to VP, Strategic Accounts)
- WB Mason (reporting to VP, Sales - Mason) (excluding Assistant, Executive)
- Independent Channels (reporting to VP, Independent Channels)
- Office Products & Furniture (VP, Office Products & Furniture only)
- Pricing & Margin Management (reporting to VP, Pricing & Margin Management)
- Essendant Brands & Global Sourcing (VP, Essendant Brands & Global Sourcing only)
- Merchandising (VP, Merchandising only)
- Technology & Azerty (reporting to VP, GM – Tech & Azerty) (excluding Director, Category Management)
- Pricing/Business Integration (reporting to VP, Pricing/Business Integration)
- Inventory (SVP Inventory only)

Appendix F: Monitor Agreement

MONITOR RETENTION AGREEMENT

This Monitor Agreement ("Monitor Agreement") entered into on October 26, 2018 between Theodore Banks ("Monitor") and Staples, Inc. ("Staples") provides as follows:

WHEREAS the United States Federal Trade Commission (the "FTC") has accepted or will shortly accept for public comment an Agreement Containing Consent Orders, containing a proposed Decision and Order ("Order"), which, among other things, (i) would require Staples to implement a "firewall" restricting its use of confidential information of Essendant, Inc. ("Acquired"), as defined in the Decision and Order, (ii) implement an effective compliance program regarding provisions of the Order, and (iii) contemplates the appointment of a Monitor to monitor Staples' compliance with its obligations under the Order;

WHEREAS the FTC may appoint Theodore Banks as Monitor pursuant to the Order;

WHEREAS the Order further provides that Staples shall execute an agreement, subject to the prior approval of the FTC, that confers all the rights and powers necessary to permit the Monitor to monitor Staples' compliance with the terms of the Order; and

WHEREAS the parties to this Monitor Agreement intend to be legally bound, subject only to the FTC's approval of this Agreement.

NOW, THEREFORE, the parties agree as follows:

All capitalized terms used in the Agreement and not specifically defined herein shall have the respective definitions given to them in the Order.

A. Monitor's Responsibilities. The Monitor shall be responsible for monitoring Staples' compliance with its obligations as set forth in the Order ("Monitor's Responsibilities"). In so doing, the Monitor shall act in consultation with the FTC or its staff and **shall serve as an independent third party and not as an employee or agent of the Staples or the FTC**. The Monitor shall have all rights, duties, powers and authorities required by the Order, and nothing in the Monitor Agreement shall change, amend, modify or otherwise limit those rights, duties, powers, and authorities.

B. Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to the personnel, books and records of Staples kept in the ordinary course of business, facilities, technical information related to Staples' compliance with its obligations under the Order and such other relevant information as the Monitor may reasonably request.

Staples shall cooperate with any reasonable request of the Monitor. The Monitor shall give Staples reasonable written notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Staples' operations. At

the request of the Monitor, Staples shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Staples who have knowledge relevant to the proper discharge of the Monitor's responsibilities under the Order.

C. Compliance Reports. Staples shall provide the Monitor with copies of all compliance reports filed with the FTC in a timely manner, but in any event, no later than five (5) days after the date on which Staples files such report with the FTC.

D. Additional Personnel. Staples agrees that, to the extent authorized by the Order, the Monitor shall have the authority to employ, at the expense of the Staples, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's Responsibilities.

E. Monitor's Obligations. The Monitor shall:

1. Carry out the Monitor's Responsibilities, including submission of periodic reports to the FTC or its staff concerning performance by Staples of its obligations under the Order, and any additional written reports as may be requested by the FTC or its staff;

2. Maintain the confidentiality of all non-public information, including Acquired's Commercially Sensitive Information, provided to the Monitor by Staples, Acquired, any supplier or customer of the Staples, Acquired, the FTC, or FTC staff in connection with the Monitor's Responsibilities ("Confidential Information"). Such Confidential Information shall be used only for the purpose of discharging the Monitor's obligations pursuant to this Monitor Agreement and not for any other purposes, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may only disclose Confidential Information to:

   a. Persons employed by or working with the Monitor under this Monitor Agreement and who have executed a confidentiality agreement consistent with the provisions of this Agreement;

   b. Persons employed by Staples that are entitled to have access to such Confidential Information;

   c. FTC staff that are working on this matter; or

   d. Persons employed by Acquired that are entitled to have access to such Confidential Information.

3. Maintain a record and inform the FTC or its staff of all persons to whom Confidential Information related to this Monitor Agreement has been disclosed;

4. Require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such third parties

to treat Confidential Information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Monitor Agreement;

5. Maintain the confidentiality for a period of ten (10) years after the termination of this Monitor Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose Confidential Information relating thereto except as required by law, or as may be permitted by Staples. In the event the Monitor is requested pursuant to subpoena or other legal process to produce any documents or to provide testimony relating to this matter in judicial or administrative proceedings to which the Monitor is not a party, Staples shall reimburse the Monitor at standard billing rates for all professional time and expenses, including reasonable attorneys' fees, incurred in preparing for and responding to requests for documents and providing testimony;

6. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with FTC staff regarding disposition of any written and electronic materials (including materials that Staples 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 FTC staff, as directed by the FTC staff. In response to a request by Staples to return or destroy materials that Staples provided to the Monitor, the Monitor shall inform FTC staff of such request and, if the FTC staff does not object, shall comply with the Staples' request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor.

For the purpose of this Monitor Agreement, information shall not be considered confidential or proprietary to the extent it is or becomes part of the public domain (other than as a 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 know to the recipient at the time of receipt from a source other than the Monitor, Staples, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Staples, when such source was not known to the recipient after the due inquiry to be restricted from making such disclosure to such recipient.

F. Monitor Payment. Staples will pay the Monitor for services rendered by the Monitor and other employees performing services pursuant to this Agreement in accordance with the fee schedule listed on Schedule A to this Agreement. In addition, Staples will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably 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. The Monitor shall invoice Staples monthly, including details and an explanation of all matters for which the Monitor submits an invoice to Staples. Staples shall pay such invoices within thirty (30) days of receipt. At its own expense, Staples may retain an

independent auditor to verify such invoices. The Monitor and Staples shall submit any disputes about invoices to the FTC for assistance in resolving such disputes.

G. Monitor's Indemnification and Limitation of Liability. Staples shall indemnify and hold harmless the Monitor against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's Responsibilities, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence, willful misconduct, or bad faith by the Monitor. In addition, the parties shall not be liable to each other for any consequential, incidental, special or punitive damages, nor shall the Monitor be liable for direct compensatory damages in excess of the fees actually received by the Monitor for the performance of services hereunder.

H. Disputes. In the event of a disagreement or dispute between Staples and the Monitor concerning Staples' obligations under the Order, and, in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the staff of the FTC in charge of compliance.

I. Conflicts of Interest. If the Monitor becomes aware during the term of this Monitor Agreement that the Monitor 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 the Monitor's Responsibilities, the Monitor shall immediately inform the Staples and FTC staff of any such conflict. The Monitor may accept other retentions during the term of this Monitor Agreement and thereafter, provided that, during the pendency of this Monitor Agreement, the Monitor agrees not to accept any other engagement which would result in the Monitor working in a position directly adverse to the FTC or Staples in any substantially related matter.

J. Standard of Care. In the performance of the Monitor's Responsibilities, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of the person's own business affairs.

K. Term. This Monitor Agreement shall terminate no later than: (i) the date set forth in the relevant provisions of the Order; (ii) the date on which the FTC appoints a substitute monitor pursuant to the Orders; (iii) the date Staples notifies the Monitor that Staples has received a notification from FTC staff that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Orders; or (iv) with at least thirty (30) days advance notice to be provided by the Monitor to Staples and to the FTC, upon resignation of the Monitor.

L. Termination. In the event that FTC staff notifies Staples that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Order, Staples shall be entitled to immediately terminate this Monitor Agreement.

M. Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of the State of Delaware,

including all matters of construction, validity and performance. The Order shall govern this Monitor Agreement and any provisions herein which conflict or are inconsistent with it may be declared null and void by the FTC and any provision not in conflict shall survive and remain a part of this Monitor Agreement.

N. Not an Attorney-Client Relationship. Staples and Monitor acknowledge that the relationship formed through this Agreement is not that of attorney/client and that no attorney/client privileges will apply to any communications between them.

O. Disclosure of Information. Nothing in this Monitor Agreement shall require Staples to disclose any material information that is subject to a legally recognized privilege or that Staples is prohibited from disclosing by reason of law.

P. Assignment. This Monitor Agreement may not be assigned or otherwise transferred by Staples or the Monitor without the consent of Staples, the Monitor, and the approval of the FTC. Any such assignment or transfer may only be made in a manner consistent with the terms of the Order.

Q. Modification. No amendment, modification, termination, or waiver of any provision of this Monitor Agreement shall be effective unless made in writing, signed by all parties, and approved by the FTC. Any such amendment, modification, termination, or waiver may only be made in manner consistent with the terms of the Order.

R. Approval by the FTC. This Monitor Agreement shall have no force or effect with respect to the Order until approved by the FTC.

S. Entire Agreement. This Monitor Agreement, and those portions of the Order incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreement and understandings between the parties, written or oral, with respect to the subject matter hereof.

T. Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.

U. Section Headings. Any heading of a section is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

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

MONITOR

Theodore Banks

STAPLES

Cristina Gonzalez

Statement of the Commission

Non-Public Appendix G: Monitor Compensation

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

Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson

Staples, Inc. ("Staples"), now owned by the private equity fund Sycamore Partners ("Sycamore"), proposes to merge with Essendant, Inc. ("Essendant"). Staples is the world's largest retailer of office products and related services. In addition to sales in other channels, Staples sells office supplies directly to mid-sized businesses. Essendant is a wholesale distributor of office products and sells to independent commercial dealers/resellers and others in the upstream office supply distribution market. The independent dealers that are customers of Essendant compete with Staples for downstream sales to mid-sized business customers. Thus, for the most part, Staples and Essendant do not compete with each other; rather, Staples competes with Essendant's customers.

Following a staff investigation that considered several possible vertical and horizontal theories of competitive harm, the Commission has voted 3-2 to issue a complaint and accept a settlement, which would resolve the only competitive concern arising out of this transaction that is supported by the evidence. Specifically, the Commission found that, without adequate safeguards post-merger, Staples would gain access to the competitively sensitive information of Essendant's dealer customers and the customers of those dealers, which could enable Staples to engage in anticompetitive conduct. To resolve this issue, the Commission's proposed order imposes firewalls and other safeguards to protect the competitively sensitive information of Essendant's dealer customers, as well as the sensitive information of the customers of those dealers.

The structure of this market and the competitive questions about the proposed transaction required an in-depth, careful investigation and analysis. That is exactly what the staff conducted. They interviewed more than a hundred market participants, analyzed party and third-party data, reviewed full document productions by the merging parties that included millions of documents, and conducted sophisticated economic analyses using the best economic tools available. Staff thoroughly investigated every theory of anticompetitive harm that might reasonably be applicable to this case. Based on that investigation, staff found that the evidence did not support any claims of likely anticompetitive harm other than the one for which a remedy has been obtained. We agree.[1]

1 Commissioner Chopra's dissent suggests that the Commission is "jumping to conclusions" and that "an independent fact-finder or Court" would likely reach different conclusions. But the Commission is basing its

The primary theory of harm that was considered and rejected involves Staples potentially raising Essendant's prices. This hypothetical conduct potentially would force Essendant's independent dealer customers to raise prices to their customers—the mid-sized businesses—some of whom would presumably look for other suppliers. Staples would lose money from whatever sales Essendant lost due to its higher prices. But if enough businesses that switched sales away from the independent dealers decided to buy from Staples, in theory, the overall strategy could be profitable. The evidence, however, did not support this theory.

First, the evidence showed that rather than absorbing price increases from Essendant, many independent dealers would switch to Essendant's largest competitor, S.P. Richards. The evidence demonstrated that S.P. Richards offers comparable products and services and is viewed as a strong substitute for Essendant. Staff closely scrutinized the strengths and weaknesses of S.P. Richards relative to Essendant, including geographically, and the evidence showed that S.P. Richards is a viable substitute for Essendant. Although there are some transaction costs to switching wholesalers, the evidence showed that a substantial number of independent dealers have switched their wholesaler in the past, use both wholesalers today, and reported that they would be willing to shift their business in the face of a price increase from Staples.[2] Further, the evidence showed that many independent dealers could take other actions to counter any attempt by Staples to increase prices or degrade services, including buying directly from office supply manufacturers or from other sources. Thus, the evidence did not support the theory that Staples could profitably raise the prices that Essendant charges its customers in the first place.

The record further showed that even if Staples raised Essendant's prices and in turn independent dealers that used Essendant as their primary wholesaler raised prices, the customers those dealers would lose would not likely switch to Staples. Staples' share in the downstream market for mid-sized businesses is small. And even that small share likely overstates Staples' competitive significance, because Staples is not presently a particularly close substitute for mid-sized end customers who currently purchase from Essendant dealers. The evidence indicated that Staples' niche of this market is focused on customers who are less reliant on high-touch services. In contrast, the customers of Essendant's dealers typically value service, such as optimized delivery, personalized customer service, and inventory services, and, accordingly, find Staples unattractive. Even if Essendant's dealer customers stuck with Essendant in the face of a price increase, the downstream customers that those dealers would lose from the resulting higher prices would not switch to Staples; they would likely switch to dealers buying from S.P. Richards or other sources of supply. Thus, there was insufficient evidence to support the theory that Staples would engage in any kind of post-merger cost-increasing or "foreclosure" strategy aimed at Essendant and its customers.

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conclusions on, as we describe above, staff's extremely thorough investigation conducted in this matter. The notion that the Commission is relying on an "insufficiently developed record" is simply untenable.

2 Although Commissioner Slaughter argues that "some qualitative evidence indicates that switching from Essendant to SPR is costly for independent resellers," as discussed, the strong weight of the evidence rejects Commissioner Slaughter's hypothesis.

Staff also investigated a number of other theories of harm. They considered whether there would be a loss of potential competition in which either Staples or Essendant would move into the distribution space currently occupied by its merger partner. The investigation found insufficient evidence to support such a theory of competitive harm. Staff also considered whether the combined entity could exercise increased market power on the "buy side"—*i.e.*, in purchasing supplies from manufacturers or other suppliers—that Staples could then exploit against its suppliers. A significant portion of the procompetitive efficiencies expected to arise from the merger would indeed flow from lowering purchasing costs. However, while the record reflects that such cost savings are likely to be achieved, the evidence did not support the theory that those cost savings would result from an increase in Staples' buyer market power. Such cost savings are only anticompetitive when they result from an exercise of market power by the buyer, which requires that the buyer possesses the ability to reduce *overall* market demand and price by reducing its own purchases. This conduct inflicts a welfare loss under well-recognized monopsony models—but that welfare loss does not occur when, for example, a buyer obtains a reduced price from suppliers by offering to buy *more* of their output, or by reducing the suppliers' transactions costs.[3] The evidence here did not support any monopsony theory, and instead was consistent with procompetitive cost reductions.

In their dissenting statements, Commissioners Slaughter and Chopra raise a number of issues concerning this transaction. We address each below.

Both dissents question the parties' efficiency claims, arguing in particular that the merged firm's proffered ability to buy office supplies at lower prices should not be fully credited as an efficiency because it could instead constitute evidence of an increase in monopsony power. However, as we discuss above, this issue was carefully considered and the record did not support this concern based on the facts of this case. In any event, our decision does not rest on efficiencies, but rather on the absence of evidence that this acquisition will result in anticompetitive harm outside of the specific area addressed in our order.

Commissioner Chopra argues that, post-merger, Sycamore "will have a strong incentive to rapidly increase margins to make a clear case to a potential future acquirer,"[4] on the grounds that private equity firms "generally take controlling equity stakes in firms with the hope of realizing significant gains through sale to a buyer or an exit through public markets"[5] and likely "will operate assets much differently" than an independent Staples would.[6] Commissioner Chopra has repeatedly stated his negative view of private equity,[7] but the application of that

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3 Roger D. Blair & Jeffrey L. Harrison, Monopsony: Antitrust Law and Economics 45-48 (2d ed. 2011).

4 Statement of Commissioner Chopra, *Sycamore Partners, Staples, and Essendant* (Jan. 28, 2018) at 3 (hereinafter "Chopra Statement").

5 Chopra Statement at 3 n.9.

6 Chopra Statement at 4.

7 *See, e.g.*, Pallavi Guniganti, FTC Commissioner hits out at private equity, GCR (Sept. 28, 2018), https://globalcompetitionreview.com/article/usa/1174735/ftc-commissioner-hits-out-at-private-equity; Statement of

general view to the facts of this case does not raise a cognizable antitrust concern. The antitrust laws focus on curbing harm to the competitive process. This concern has nothing to do with the competitive process; it would exist regardless of whether Sycamore owned Staples, did not own Staples, or started a brand new private equity fund and made its first acquisition the purchase of Essendant.[8] The Commission does not dwell on motives that have no relevance to how the acquiring company would use the acquired business to harm the competitive process.

Commissioner Slaughter's dissent raises concerns that de novo entry is unlikely. The staff and the majority do not rest any part of their analysis on a likelihood of de novo entry. We assume it will not occur, and so do not rely on it for our conclusions.

Commissioner Slaughter also is concerned that switching between Essendant and its primary direct competitor in wholesaling, S.P. Richards, is costly and unlikely. As discussed above, the evidence does not support this concern. We know that independent resellers are not locked in to either Essendant or S.P. Richards; indeed, many independent resellers use both. Staff's investigation, involving hundreds of interviews, also showed that switching wholesalers was not an insurmountable hurdle for independent resellers; in fact, many of them can and do switch or credibly leverage one wholesaler off the other in negotiations. Moreover, while the dissent speculates that there may be geographic areas in which switching would be more difficult, as noted above, staff investigated this issue and concluded that the evidence did not support this concern.

As we also discuss above, this concern only would rise to the level of an antitrust problem if the customers of Essendant's dealers were likely to switch to Staples to a sufficient degree to provide Staples with an incentive to raise prices to Essendant's customers. But the evidence did not support this hypothesis; rather, it showed that sufficient switching to Staples is unlikely because of Staples' low share in this particular downstream market, and the differentiation between the services Staples and the wholesalers provide. As a law enforcement agency, our fidelity must be to the facts—not speculation.

Commissioner Slaughter asserts that staff concluded significant price effects would arise as a part of a raising rivals' cost strategy by Staples. This mischaracterizes the staff's analysis. Staff specifically concluded that a raising rivals' cost strategy would not be profitable for

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Commissioner Rohit Chopra, *Linde AG, Praxair, Inc. and Linde PLC* (Oct. 22, 2018) at 2-3, https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

8 Commissioner Chopra also expressed concerns that the firewall remedy is potentially penetrable, and thus he would allow independent resellers to freely port customer data to another wholesaler. But the Commission has employed firewalls in past vertical merger cases, and the integrity of those firewalls was robust. Fed. Trade Comm'n, The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics at 17 n.34 (Jan. 2017) ("All vertical merger orders were judged successful."), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. Also, many independent resellers already use both Essendant and S.P. Richards. As a result, such an addition to the Order would not change competitive conditions much, but would impose an undue burden on the merging parties. And finally, independent resellers did not request this remedy during our investigation.

Staples. Overall, Commissioner Slaughter is substituting hypotheses for the informed conclusions drawn from the staff's thorough investigation.

Commissioner Chopra, on the other hand, claims we put too much faith in economic models. Not so. As in any case, we considered staff's recommendation based on their investigation of documents, interviews, data, and economic analysis. In this case, none of those items supported taking any action other than the remedies we have imposed.

In addition to commenting on this specific transaction, Commissioner Slaughter's dissent raises a series of generalized concerns about merger enforcement, and in particular, vertical merger enforcement. Although a detailed discussion of the many and complex issues implicated by a general critique of vertical merger enforcement is beyond the scope of this statement, a few points are worth noting.

First, the dissent seems to suggest that our decision in this case is part of a decades-long, bipartisan pattern of faulty analysis, improper assumptions, unreliable predictions, underweighting evidence of anticompetitive effect, and overweighting evidence of efficiencies. But there is a vigorous debate over whether that assertion has any merit, and the sources cited in the dissent have been subject to substantial criticism for both methodological flaws and irrelevance to competition policy.[9] Consistent with our long-standing tradition of self-evaluation, learning, and evidence-based policy-making, the Commission has instituted a series of public hearings, in part, to determine whether the evidence supports the concerns raised by our dissenting colleagues. In this process, we hope our colleagues are willing to subject the sources on which they rely to the same scrutiny they apply to those that have garnered widespread acceptance in the past.

Second, while the dissent tries to carve a sharp distinction between the Commission's approach to vertical mergers and the dissent's preferred approach, this is a false dichotomy. There is no disagreement that vertical mergers can be pro- or anticompetitive; that as the economy generates increased merger activity, there may be more mergers—and more problematic mergers—that should be reviewed carefully; that Section 7 of the Clayton Act is an incipiency statute; and that we should seek to enjoin or otherwise remedy anticompetitive transactions before they are consummated. There is no dispute that vertical mergers can harm competition in several ways, which have been well-known at least since the seminal article on vertical foreclosure theory was published in the *Yale Law Journal* in 1986.[10] Likewise, we fully

9 *See, e.g.,* Joshua D. Wright et al., "Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," Sept. 14, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524; Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, OECD (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf; Greg Werden & Luke Froeb, "Don't Panic: A Guide to Claims of Increasing Concentration" (Apr. 16, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912; Carl Shapiro, *Antitrust in a Time of Populism*, (Oct. 24, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

10 *See* Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 YALE L.J. 209 (1986).

agree with the dissent's view that we should investigate all potential theories of harm in vertical mergers—just as the staff did in this matter. We also agree that under the Horizontal Merger Guidelines, claimed efficiencies must be verified, cognizable, merger-specific, and passed through[11], and we recognize that it is not a rarity for merging parties to overstate efficiencies or fail to support them properly.[12] And, we agree that where there is credible evidence, the Commission should obtain relief that will eliminate the relevant harm, and that structural remedies are usually preferred but not always essential. The decision in this case embodies that view.

So with what aspect of the Commission's vertical enforcement philosophy does the dissent disagree? One point appears to be a simple misapplication of particular facts—the dissent's claim that the Commission challenges few vertical mergers. But the Commission has blocked or obtained relief in numerous vertical transactions in that period. In fact, in the two years that our current Chairman served as Bureau Director and Commissioner Wilson served as Chief of Staff under then-Chairman Timothy J. Muris, the Commission voted to block one vertical transaction, which the parties abandoned as the result of the Commission vote to seek to enjoin it, and obtained a divestiture of the acquired, offending asset in another case.[13] The fact that the parties chose not to litigate does not negate the Commission's willingness to challenge these deals. And of course, of the 1,500 to 2,000 or so HSR filings we receive annually, the overwhelming majority are universally recognized as presenting no anticompetitive concerns at all. Thus, the fact that most of them were not remedied means nothing.

More broadly, the dissent seems to take issue with the Commission's emphasis on bringing cases where theories are supported by facts. But the incipiency standard under Section 7 imposes meaningful obligations on the government before allowing it to block a transaction. Specifically, it requires us to establish more than a theoretical concern—it must be probable (not certain) and substantial. Simply theorizing a harm that might arise out of a merger is not enough. We must be able to explain and to prove with facts how a given vertical merger is likely to cause harm in the *case at hand*. We must provide evidence.

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11 The Commission's hearings that addressed vertical mergers considered whether the Commission should promulgate vertical merger guidelines. One question that may be considered is whether the standards for efficiency claims in vertical mergers should parallel the standards for horizontal mergers.

12 We do not, however, share Commissioner Slaughter's apparent view that the staff does not test efficiency claims. The staff rigorously, and often skeptically, examine any and all efficiency claims. Indeed, staff has declined to credit the parties' proffered efficiencies in so many litigated cases that many antitrust lawyers and economists have argued that efficiencies are ineffective as a defense in court. *See, e.g.*, Herbert Hovenkamp, Appraising Merger Efficiencies, 24 GEO. MASON L. REV. 703, 704 (2017) ("Few areas of merger law are more controversial than the treatment of such efficiency claims, which are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful."); Timothy J. Muris & Bilal Sayyed, Three Key Principles for Revising the Horizontal Merger Guidelines, The Antitrust Source at 7 (Apr. 2010) ("In our experience, agency leaders do not apply different levels of proof, but some (not all) investigating attorneys appear more skeptical of efficiency claims than they do of potential anticompetitive effect claims.").

Finally, the dissent appears to suggest that the Commission commit to a retrospective review of every transaction that raises antitrust concerns, but where the Commission does not challenge the transaction because the evidence available at the time indicates that those concerns are unlikely to be realized. That suggestion is interesting in theory and given unlimited resources, we might well support it. Also interesting would be retrospectives on vertical mergers we chose not to challenge, and retrospectives on assumptions we have made about how markets likely would develop in cases where we brought enforcement actions (*e.g.*, a finding of high entry barriers in the challenged market). But the practical reality is that we do not have remotely enough resources to institute such a program, even if the data were available (which may not be true in many cases). Consider, for instance, some of our recent enforcement numbers. In FY 2017, the FTC issued 33 second requests and brought 21 merger enforcement actions.[14] One could easily claim that each transaction subject to a second request was a close call. Thus, to do a retrospective for every merger subject to a second request but that did not result in an enforcement action would have required us to do 12 retrospectives. Commissioner Slaughter also would commit us to do retrospectives on transactions where relief was obtained. Her approach would likely commit us to doing on the order of five times or more the number we have done in most years, which is not possible with our current resources.

The issue of retrospectives is a critical one for the Commission and merger enforcement more generally. This is why expanding our merger retrospective program has been a priority of the Chairman and Commissioner Wilson since before confirmation, and why it is one of the issues being explored in our Hearings.[15] The Commission has a record of conducting retrospectives and, after the Hearings conclude, we will synthesize what we have learned and develop an approach or approaches for additional retrospectives that make sense. We are likely to consider how to best use our existing resources, which may militate in favor of one approach, and also what would be a more optimal approach assuming access to more resources. But we cannot commit to a program that is unsustainable with our current resources and may in many cases be impossible to implement even with unlimited resources.

In closing, we emphasize one overarching point: as a law enforcement agency, we are constrained by the parameters of our authorizing statute and the facts of the case in front of us. That constraint is critical to the rule of law and the effective functioning of markets. Even in the context of a merger review, which, as both dissents emphasize, is a forward-looking exercise, we must base our predictions on facts supporting a cognizable theory under Section 7 of the Clayton Act. The dissents highlight a number of concerns, but all of those concerns were either investigated assiduously and ruled out by staff or speak to potential injuries that fall outside the scope of antitrust law. For these reasons, we decline to take broader action and vote to accept the consent decree as currently formulated.

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14 FTC & DOJ, Hart-Scott-Rodino Annual Report FY 2017, https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

15 *See* Fed. Trade Comm'n, *Hearings on Competition and Consumer Protection in the 21st Century*, https://www.ftc.gov/policy/hearings-competition-consumer-protection.

Concurring Statement

Statement of Commissioner Christine S. Wilson

Staff in this case conducted a thorough examination, sifted through the resulting evidence to identify legitimate antitrust concerns, and crafted a remedy to address them. I therefore support the action the Commission takes today. Given my dissenting colleagues' desire to abstract from the facts of this case to discuss vertical merger policy writ large, I write separately to express my views. To be clear, I base my vote upon the theories, evidence, and facts of this case, rather than upon any general view of what the Commission's vertical merger policy is or should be.

A. The Concerns Voiced About Vertical Mergers Are Part of a Broader Debate

It is fashionable today to argue that antitrust policy has long been too permissive. My two dissenting colleagues echo this claim,[1] citing left-leaning Washington think tanks and a few academics.[2] According to some proponents of this view, our alleged laxity in antitrust enforcement has led to historic levels of consolidation and concentration. This, in turn, is apparently the cause of all that ails us, from declining competitiveness to greater income inequality, stagnant wages, and reduced innovation.[3]

Yet there is scant evidence that markets are less competitive today than they were in some ill-defined golden age of yore. Commentators most often point to general upward trends in the number of mergers, their valuations, or the size of the largest businesses.[4] While I do not

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1 Dissenting Statement of Commissioner Rebecca Kelly Slaughter at 2 & n.6, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) ("I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement. . . . I am also concerned about under-enforcement of horizontal mergers."); Dissenting Statement of Commissioner Chopra at 2, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) ("I share the concerns raised by Commissioner Slaughter and agree that our approach can lead to lax enforcement.").

2 Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 1 ("Right now, a great debate is taking place in Washington policy circles and even around the country at family dinner tables. The debate concerns the consequences for American citizens of fewer and more dominant companies controlling large swaths of industries and firms across sectors of the economy."); *see id.* at 1 n.1 (collecting citations to work by the Roosevelt Institute, Open Markets Institute, and academics Grullon et al.).

3 *See, e.g.,* Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (2017) [hereinafter A Better Deal], https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf ("Over the past thirty years, growing corporate influence and consolidation has led to reductions in competition, choice for consumers, and bargaining power for workers. The extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.")

4 *See, e.g.*, Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 2 (arguing vertical mergers "present an enforcement challenge that we must meet" because "companies announced mergers at record rates in 2018," "three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components," and "some observers believe that recent high-profile vertical mergers . . . will spark further vertical merger activity"); A Better Deal, *supra* note 3, at 1 ("Over the last thirty years, courts and permissive regulators have allowed large companies to get larger, resulting in higher prices and limited consumer choice in daily expenses such as travel, cable, and food and beverages.").

dispute the accuracy of these broad statistics, they simply do not support such a sweeping claim about the failure of American antitrust policy. What I would find persuasive, but have not seen, is evidence that firms' market power has increased significantly in relevant *antitrust* markets throughout the American economy and that this change has meaningfully harmed American consumers.[5] My dissenting colleagues do not make this more probative claim, and for good reason; there is no such evidence today.

What we see instead are highly flawed analyses[6] that have been roundly criticized.[7] Perhaps the most common mistake assumes increased concentration, and consequently consumer harm, using *ad hoc* estimates of increased revenue shares in one industry or another.[8] As any practitioner knows, broadly defined "industries" are rarely coterminous with relevant antitrust markets,[9] which usually are defined around the demand substitutes available to customers. Nor are revenues always the best measure of competitive significance. Even if these industry revenue shares were calculated within a relevant antitrust market, and even if they contained all relevant competitors,[10] courts routinely recognize that such shares are merely the first step in a much deeper market power analysis.[11] They therefore tell us nothing about whether merger

5 As in any case we bring, such an analysis typically requires one to define a relevant market, identify competitors, estimate each rival's competitive significance, evaluate entry, exit, repositioning, and other changes to these competitive dynamics, and estimate how consumer welfare is likely to change as a result of the proposed transaction.

6 *See* OPEN MARKETS INSTITUTE, AMERICA'S CONCENTRATION CRISIS (2019), *available at* https://concentrationcrisis.openmarketsinstitute.org/; JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); COUNCIL OF ECONOMIC ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (updated May 2016), *available at* https://obamawhitehouse.archives.,gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

7 *See* Michael Vita & F. David Osinski, *John Kwoka's* Mergers, Merger Control, and Remedies: *A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf; Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912 (critiquing the CEA analysis).

8 *See, e.g.*, OPEN MARKETS INSTITUTE, *supra* note 6; Senate Democrats, A Better Deal, *supra* note 3, at 2-3.

9 For example, the Open Markets Institute estimates market shares for the $525 billion "e-commerce" industry, which is hardly a relevant antitrust market. *See* OPEN MARKETS INSTITUTE, *supra* note 6, "E-Commerce."

10 Omitting or conflating competitors is a common defect in these data. For example, the recent Open Markets Institute analysis discloses in fine print that it omits all imports, which are significant for products such as washing machines. *See id.* ("Data does not include market share for foreign imports."). The same analysis also lumps all "Store Brand" (private label) peanut butter brands together, thereby treating products sold by many different competitors as if they were all under one roof. *See id.*, "Peanut Butter."

11 *See, e.g.*, United States v. General Dynamics Corp., 415 U.S. 486, 494-98 (1974) (affirming the district court's dismissal of a merger challenge in which "[t]he Government sought to prove a violation of § 7 of the Clayton Act principally through statistics showing that within certain geographic markets the coal industry was concentrated among a small number of large producers; that this concentration was increasing; and that the acquisition of United Electric would materially enlarge the market share of the acquiring company and thereby contribute to the trend

policy has allowed firms to amass the market power required to raise prices, restrict output, or reduce quality.

Despite the dearth of evidence that antitrust policy has failed to arrest the accumulation of market power,[12] many – including proponents of the so-called "Better Deal" – question essentially everything we have learned about sound antitrust enforcement. They ask: Should we continue to use the consumer welfare standard as our lodestar, or instead jettison it in favor of a more flexible (and amorphous) multifaceted analysis that examines a merger's impact on wage levels, employment, suppliers, competitors, and any other goals the decision-maker cares to add? Should we continue to evaluate horizontal mergers under the current framework, which considers industry structure alongside entry, efficiencies, and several other competitive dynamics,[13] or should we return to earlier rules that emphasized industry structure to the exclusion of any other relevant factors?[14] Finally, and most pertinent for today's discussion, should we assume that, in the words of Commissioner Slaughter, vertical mergers "can be just as

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toward concentration" because "[i]n *Brown Shoe v. United States*, we cautioned that statistics concerning market share and concentration . . . were not conclusive indicators of anticompetitive effects" and finding that changes in a coal miner's ability to compete in the future merit discounting its present market share); Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999) (explaining, in a Section 2 case, that "market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share"). These cases make clear that courts have rejected the old Structure-Conduct-Performance paradigm advanced by Joe Bain. *See generally* Herbert J. Hovenkamp, The Neal Report and the Crisis in Antitrust, at 4, Univ. Iowa L. Stud. Res. Paper No. 09-09 (Mar. 5, 2009), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348707 (describing the fall of the S-C-P model into "the dung heap of defunct economic doctrines").

12 Although there is today no evidence of a widespread failure of competition policy, there is ample evidence that vested interests abuse government regulation to carve out spaces safe from competition. Competitor-erected licensing requirements keep capable individuals from entering the vocations of their choice. Certificate of need requirements keep new hospitals from entering incumbents' regions. Local government regulations restrict the ability of "gig economy" competitors, particularly ride-hailing services and short-term lodging rental firms, to compete against long-established franchises. Sectoral regulation, such as in banking, communication, and transportation, often favors large incumbents over nimble new competitors. Regulatory processes at the U.S. Food and Drug Administration – for example, Citizens' Petitions – are abused by branded manufacturers to delay the entry of lower-cost generic competitors, sometimes for years. Government-imposed restraints are at least as deleterious to competition as those imposed by private entities, and in many instances are more durable.

13 *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (issued Aug. 19, 2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

14 *See, e.g.*, Open Markets Institute, The Failure and Potential Redemption of Federal Merger Policy at 2, Comments Submitted to the U.S. Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21st Century, Comment #FTC-2018-0053-D-0021 (filed Aug. 20, 2018) [hereinafter Open Markets Institute FTC Comments] ("The agencies should look to the 1968 Merger Guidelines as a template. Accordingly, they should abandon the current rule of reason-like framework and establish market share and market concentration thresholds for horizontal and vertical mergers. Mergers that exceed these thresholds should be presumptively or per se illegal.")

pernicious in sapping our economy's vitality"[15] and that "the current approach to vertical integration has led to substantial under-enforcement"?[16]

B. Procedural Concern

Before turning to the substance, my dissenting colleagues' eagerness to rethink vertical merger policy raises a procedural concern: It is folly to think that the Commission unilaterally can "fix" this perceived problem simply by being more aggressive. As the decision of the federal district court in the AT&T-Time Warner case makes clear,[17] the antitrust agencies do not have the last word, and aggressive agency enforcement may well backfire by creating binding precedents that constrain future challenges to problematic deals.

C. Substantive Concerns

Recognizing both our limited authority to alter antitrust law and the fact that we as government enforcers bear the ultimate burden of proof before a neutral decision-maker (*i.e.*, a federal court), let us finally turn to the crux of the issue raised by my dissenting colleagues: What do we know about the likely competitive effects of vertical mergers?

We know that vertical mergers by definition combine firms that operate at different levels of production. Consequently, and unlike in a horizontal merger, a vertical merger does not alter concentration in any relevant market.[18] Purely vertical mergers therefore do not implicate many of the key competitive dynamics – and particularly the elimination of current competition between the merging firms – at play in horizontal mergers.[19] Indeed, even the scholar my colleague cites in support of her sweeping skepticism of existing vertical merger policy says that competitive harm is likely to occur only in a narrow set of circumstances.[20] Ultimately, we seek

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15 Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 1.

16 *Id.* at 2.

17 United States v. AT&T, No. 17-2511, slip op. at 4 (D.D.C. June 12, 2018), *appeal docketed*, No. 18-5214 (D.C. Cir.)

18 For example, if a merger unites a firm with 30 percent of upstream market and a firm with 25 percent of the downstream market, immediately after close the combined firm would still control 30 percent of the upstream market and 25 percent of the downstream market. Its shares have not changed, nor have those of its competitors. By contrast, a horizontal merger combining firms with 25 and 30 percent of the *same* relevant antitrust market results in a combined firm with 55 percent and a marketplace with one fewer competitor.

19 *See, e.g.*, D. Bruce Hoffman, Director, FTC Bureau of Competition, Vertical Merger Enforcement at the FTC: Remarks at the Credit Suisse 2018 Washington Perspectives Conference, at 2-3, Washington D.C., Jan. 10, 2018, *available at* https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf ("In contrast [to horizontal mergers], vertical mergers do not combine substitutes, and in fact often involve complements . . . . Where horizontal mergers reduce competition on their face . . . vertical mergers do not.").

20 *See* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with other commentators that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset

to determine not whether harm is theoretically possible, but whether – as required by Section 7 of the Clayton Act – such harm is likely to "substantially lessen competition, or to tend to create a monopoly" in a relevant antitrust market.[21]

On the other side of the ledger, we know that integrating operations at different levels of production often yields clear economic benefits.[22] Perhaps the most commonly cited benefit in the economic literature is the elimination of double marginalization (EDM), which is simply to say that a firm has an economic incentive to reduce the total profit margin it charges customers when it operates at successive levels of production.[23] Some commentators view EDM as a phenomenon inherent in vertical mergers,[24] which may indicate that a lower burden of proof for at least some efficiencies claims would be appropriate in the vertical merger context.[25] That

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potential competitive harms in many cases"); Steven C. Salop, Revising the Vertical Merger Guidelines: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 8 (Nov. 1, 2018), *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf ("A stronger overarching procompetitive presumption for vertical mergers does not make sense *in oligopoly markets*."); *see also, e.g.*, James C. Cooper, Luke M. Froeb, Dan O'Brien, & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 641 (2005) ("The theory shows that vertical practices potentially can harm competition. This finding is fragile, however, as anticompetitive equilibria emerge only under specific – and difficult to verify – assumptions about (among other things) costs, demand, the nature of input contracts, conditions of entry, the slope of reaction functions, and the information available to firms.").

21 15 U.S.C. § 18; *AT&T*, No. 17-2511, slip op. at 4 (holding the government failed to meet its burden under Section 7 "to establish that the proposed transaction is likely to lessen competition substantially").

22 For the seminal work, see R.H. Coase, *The Nature of the Firm*, 4 ECONOMETRICA 386 (1937).

23 *See, e.g.*, Francine Lafontaine, Vertical Mergers: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 86 (Nov. 1, 2018), *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf ("Eliminating 'double markups'"); Remarks of D. Bruce Hoffman, *supra* note 19, at 3 ("Due to the elimination of double-marginalization and the resulting downward pressure on prices, vertical mergers come with a more built-in likelihood of improving competition than horizontal mergers."); Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, at 74, 75-76 (Fall 2007) (seeking to categorize the circumstances under which the net competitive effects of a vertical merger, including the elimination of double marginalization, "will benefit consumers" or "might be anticompetitive").

24 Transcript at 19, 25, 116, 141, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf (statements of Prof. Shapiro) ("[T]here are some inherent efficiencies – at least possible efficiencies including elimination of double marginalization. . . . So I think what is fundamentally different is that how do we handle the efficiencies in the vertical deals than horizontal, and we are hearing from panels about these inherent efficiencies, which economists would agree with, including me.")

25 The FTC also held hearings on the appropriate welfare standard. *See* FTC, Hearings on Competition and Consumer Protection in the 21st Century, Hearings #1 & #5 (review of competition and consumer protection landscape, concentration and competitiveness in the U.S. economy, privacy regulation, consumer welfare standard in antitrust; consumer welfare and vertical merger policy), Sept. 13, 2018 & Nov. 1, 2018, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century. This debate similarly could have implications for the analysis of both vertical and horizontal mergers. For example,

said, our recent hearing on vertical mergers featured a lively debate on whether EDM arises in all vertical mergers.[26] Focusing solely upon the narrow circumstances under which anticompetitive effects are plausible,[27] economic theory suggests that the potential gains from EDM are likely significant.[28]

Vertical mergers also generate other procompetitive benefits. For example, these mergers allow firms at successive levels to coordinate their production, design, or innovation activities, thereby reducing costs, increasing quality, and speeding the introduction of new products.[29] Vertical integration also incentivizes greater investment by harmonizing upstream and downstream incentives and by reducing transaction costs, "free-riding," and the risk of hold-up.[30] Although my colleague is correct to note that vertical agreements short of a merger can confer similar procompetitive benefits,[31] I have not seen any evidence – and she does not cite any – for the proposition that these contractual arrangements necessarily replicate the benefits of a full merger. To the contrary, economists have long known that there are many circumstances in which contractual arrangements may be inferior to mergers.[32]

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if total surplus (or aggregate economic welfare) is selected as the appropriate welfare standard, then it would be unnecessary to analyze whether and to what extent efficiencies may be passed through to consumers. *See*, *e.g.*, Roger D. Blair and D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497 (2013).

26 *See* FTC, Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), Nov. 1, 2018, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

27 Hearing #5 Transcript, *supra* note 27, at 19, 25, 116, 141, (statements of Prof. Salop and Mssrs. Hoffman and Yde agreeing that, in Mr. Yde's words, "we are only going to look at vertical transactions where we are confident that we are looking at an oligopoly at both stages"); Salop, *Revising the Vertical Merger Guidelines*, *supra* note 20, at 8 (arguing "[e]nforcement should be focused on oligopoly markets" because in these markets the risk of anticompetitive harm may be larger and the likelihood of procompetitive benefits may be smaller); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1972 (2018) ("While vertical mergers in oligopoly markets should not be subject to near-per se illegality, they also are not entitled to near-per se legality."); *see id.* at 1967 ("[F]oreclosure concerns cannot simply be dismissed in oligopoly markets."); *id.* at 1969 ("[I]n oligopoly markets with multiple competitors, vertical mergers can harm competition from input or customer foreclosure, even without coordination.").

28 Cooper, Froeb, O'Brien, & Vita, *supra* note 20, at 658 ("Most models that predict (potential) harm from vertical restraints require pre-existing market power at multiple stages of production. This condition usually implies the existence of efficiencies from vertical control, and the magnitude of the efficiency often rises monotonically with the level of pre-existing market power.").

29 *See, e.g.*, Salop, Revising the Vertical Merger Guidelines, *supra* note 20, at 13.

30 *See, e.g.*, Lafontaine, Vertical Mergers, *supra* note 23, at 86.

31 *See* Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 4 (asserting "claimed [efficiency] benefits should not be taken at face value" because, among other things, "[t]he claimed benefits may not be merger-specific and instead may be achieved via unilateral conduct or contractual arrangements").

32 *See, e.g.*, Paul L. Joskow, *Vertical Integration*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 321 (C. Menard & M. Shirley eds., 2008) (summarizing the literature on various forms of vertical integration, from

We also know that economic models that attempt to predict the net competitive effect of a given vertical merger are often more art than science. Most models identify the possibility of both procompetitive and anticompetitive effects, and sometimes even their magnitude, but make no attempt to assign probabilities to any of them. Standing alone, these "highly stylized [and] largely game-theoretic models" do not provide clear guidance on how to separate the wheat from the chaff.[33] The economic evidence regarding completed transactions, however, indicates the typical vertical merger does not harm competition.[34]

Given limitations in the models, and particularly in their ability to reliably predict anticompetitive harm, we must marry these theoretical models with hard evidence collected during the investigation. When the theory and facts both point to a potential diminution in competition, it may be appropriate to take remedial steps, as we have done here. When the model, the evidence, or both do not support this view, it is not appropriate to act.

D. When Crafting a Remedy, We Must Take Care Not to Impose a Cure Worse than the Disease

Even when we identify a vertical merger that presents meaningful antitrust problems, that is not the end of the analysis. As in any case, we must then choose a remedy that is narrowly tailored to address the likely competitive harms without doing collateral damage. This task is

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contracting to merger, and explaining that "[c]ontractual incompleteness, and its interaction with the attributes of different types of transactional attributes including asset specificity, complexity, and uncertainty, plays a central role in the evaluation of the relative costs of governance through market-based bilateral contracts versus governance through internal organization"); Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 J. ECON. PERSP. 171, 179-192 (2002) (describing the "make-versus-buy" decision, graphing the relative attractiveness of various options, and addressing its application to vertical integration); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978) (identifying "the possibility of post-contractual opportunistic behavior" as one reason a firm may choose "an intrafirm rather than an interfirm transaction").

33 Michael A. Salinger, *Vertical Mergers*, *in* I OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 551, 574 (Roger D. Blair & D. Daniel Sokol eds., 2015).

34 *See, e.g.*, Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding "even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances"); Cooper, Froeb, O'Brien, & Vita, *supra* note 20, at 658 ("Most studies find evidence that vertical restraints/vertical integration are procompetitive" and "[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings."); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies "indicated vertical integration resulted in positive welfare changes" or "no change" in welfare); David Reiffen and Michael Vita, *Is There New Thinking on Vertical Mergers? A Comment*, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases").

sometimes more difficult than it sounds; as I have written previously, misguided behavioral remedies – particularly in vertical mergers – have sometimes *decreased* competition and harmed consumers. For example, I have been deeply troubled by behavioral remedies imposed in previous vertical mergers that required "compulsory innovation," the "compulsory FRAND licensing of a product that did not yet exist," and "long-term bans on serving specific current clients."[35]

Given the risks of either undershooting or overshooting the mark, I support conducting targeted retrospectives to analyze prior enforcement decisions and determine whether, going forward, revisions to enforcement policy or remedies need to be undertaken. I have long advocated for a more extensive merger retrospectives program, as retrospectives serve as an important check on whether we are employing sound enforcement policies.[36] But I am wary of clearing mergers with remedies, after extensive investigations, while simultaneously threatening to undo those mergers later, which is precisely what Commissioner Slaughter hopes to do.[37] Absent certainty, a merged entity will be reluctant to make capital and other investments that may be lost if a subsequent merger challenge forces it to unwind the transaction. This uncertainty is bad for both businesses and their consumers. If applied on anything like the scale Commissioner Slaughter envisions, it also risks returning the Commission to its earlier role as the "national nanny" with an ongoing mandate to monitor prices, output, entry, and other marketplace developments throughout the economy.[38]

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35 Christine Wilson & Keith Klovers, *Yes We Can, But Should We? Merger Remedies During the First Obama Administration*, CPI ANTITRUST CHRONICLE 2 (Dec. 2014). As I explained there, I have substantially fewer qualms about long-standing and less invasive tools, such as the "firewalls, fair dealing, and transparency provisions" the Antitrust Division endorsed in the 2004 edition of its *Policy Guide*. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 22-25 (June 2004), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf.

36 *See* "Dynamic Efficiencies in Merger Analysis," Submission of the Business and Industry Advisory Committee, Presented by Christine S. Wilson to the OECD Competition Committee (June 6, 2007) at para. 58 (asserting that "it would be instructive for enforcement agencies to perform retrospective studies of merger enforcement decisions . . . to assess the efficacy of merger policy generally, and would be particularly useful in assessing the impact of dynamic efficiencies, given that benefits from such efficiencies may accrue over extended periods of time").

37 Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 9-10 ("With the benefit of pre-commitment, hindsight, and ongoing monitoring, we may be able to refine and bolster confidence in our analysis and deter or prosecute future anticompetitive conduct by Staples. Ultimately, if there is sufficient evidence of actual anticompetitive effects as a result of the transaction, we can and should bring an enforcement action to break-up the merger.").

38 *See, e.g.*, Daniel A. Crane & Thibault Schrepel, *The Democrats' 'Better Deal' Is Neither Better Nor a Deal*, N.Y.U. J. L. & BUS. 1, 4 (2017) ("Allowing the agencies to give conditional blessing to a merger and then hover over the merged company for years with the constant threat of divestiture would create a 'national nanny' culture in which the agencies became de facto regulators rather than competition enforcement agencies. The fear of post hoc divestiture orders would deter beneficial investments and tearing apart companies integrated for years would result in chaos and economic loss (for all of the reasons recognized by the D.C. Circuit in *Microsoft*). It's a bad idea.").

Conclusion

For all of these reasons, I have grave concerns about my dissenting colleagues' enthusiasm for treating all vertical mergers with skepticism and conducting a fundamental reevaluation of our vertical merger policy. Policy should be dictated by applicable law and relevant facts. On that basis, there are very few vertical mergers that should be challenged. Two of my colleagues believe that this is one of those few vertical mergers that the Commission should challenge, based on nothing more than a hunch that Staples "may" or "might" be able to harm rivals by integrating vertically. I prefer to base my analysis on the evidence we have gathered and the law as it exists today, and therefore vote to accept the limited relief we order.

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Summary

- This transaction violates the law, and I am skeptical that this settlement is in the public interest. While Commission staff worked hard to explore key aspects of the transaction, I am concerned that the Commission is jumping to conclusions without further investigation into the buyer's plans, especially given the limitations of our economic models.

- Our investigation should have more closely analyzed how the buyer will flex its muscles with suppliers. The Commission seems too quick to assume this is an "efficiency" instead of a harm stemming from increased market power.

- In addition, the evidence points to potential harm to independent dealers, especially in geographic markets where Essendant is the market leader and where switching may be difficult.

Sycamore Partners, a private equity fund that controls office supply giant Staples, seeks to acquire Essendant (NASDAQ: ESND), the largest office products wholesale distributor in the U.S and supplier to thousands of independent dealers. The merger combines two powerhouses, each the largest competitor within their respective level of office supply distribution. The market for nationwide wholesale distribution of office supplies is particularly concentrated, where Essendant is one of only two U.S. wholesalers supplying a wide assortment of office products nationwide.

At first glance, the transaction is a vertical merger, but it also raises important horizontal concerns. I believe the Commission is relying on an insufficiently developed record that underestimates the likely anticompetitive harms on both of these fronts. I share the concerns raised by Commissioner Slaughter and agree that our approach can lead to lax enforcement.

Sycamore reportedly announced that it would put a "firewall" into place – regardless of whether or not the FTC required one[1] – to prevent Staples from exploiting sensitive dealer data from Essendant. The Commission has voted to put Sycamore's promise on paper, rather than seek additional measures to address anticompetitive harms or block the transaction altogether.

Horizontal Concerns

Both Staples and Essendant source office supply products from a wide range of upstream trading partners, including small and large manufacturers alike. Proponents of the merger will claim that this will create "efficiencies" in the form of increased buyer power that reduces prices paid to suppliers. But is this an efficiency or a harm?

To start, efficiencies are far from a sure-fire defense to an anticompetitive merger.[2] Increased buyer power exerted by the combined firm against its upstream trading partners in this matter would not be an efficiency at all if it stems from an increase in market power on the buy side of the market.[3] Sycamore's expanded empire potentially allows it to squeeze its suppliers, in effect transferring income from those suppliers to the merged firm, with little or no resource savings.[4] In my view, the Commission's analysis did not adequately rule out the possibility of this type of harm from the merger.[5]

My colleagues voting for this settlement claim that the potential for this type of harm was ruled out after a thorough analysis and investigation. I disagree. If an independent fact-finder or a Court reviewed the same evidence, I think they would disagree too and find that there are many unanswered questions.

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1 *See* Andy Braithwaite, *Dealer Organisations Unite for FTC Letter*, OPI, Oct. 1, 2018, https://www.opi net/news/dealer-organisations-unite-for-ftc-letter/.

2 *See* Federal Trade Commission et al. v. Penn State Hershey Medical Center et al., 838 F.3d 327, 347 (3rd Cir. 2016), where Judge Michael Fisher, in a unanimous reversal siding with the Commission, noted that the Court has never formally adopted the efficiencies defense, and the Supreme Court has ". . . cast doubt on its availability." Judge Fisher added that ". . . we are skeptical that such an efficiencies defense even exists." *Id.* at 348.

3 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, § 12 (2010) [hereinafter Horizontal Merger Guidelines], http://www.ftc.gov/os/2010/08/100819hmg.pdf. *See also* C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers,* 127 YALE LAW JOURNAL 2078 (2018); Jonathan Sallet, *Buyer Power in Recent Merger Reviews*, ANTITRUST, Vol. 32, No. 1, at 82 (Fall 2017).

4 The Department of Justice's lawsuit challenging the proposed merger of Anthem and Cigna alleged that the increased buyer power of the combined firm would give Anthem enhanced leverage over physician practices and hospitals, likely reducing the rates that both types of providers earn. Although the complaint predicted likely reductions in output from hospitals and physicians, the Department of Justice argued that the court did not need to make such a finding. *See* Complaint at 27 and Plaintiff's Supplemental Memorandum on the Buy-Side Case, at 2 [hereinafter Department of Justice Buy-Side Memo], United States v. Anthem, Inc., No. 16-1493 (ABJ) (D.D.C. 2017).

5 I am also concerned that Sycamore might use its increased buyer power to extract favorable non-price terms from suppliers to give itself preferential treatment over its rivals, further hampering vigorous competition. *See* Hemphill & Rose, *supra* note 3, at 2103-2104.

Manufacturers with market power and must-have brands may very well be able to protect themselves from an anticompetitive exercise of buyer power by the merged firm, but this is an area where we needed further analysis and investigation to reach a conclusion about potential monopsony power over a broad range of suppliers. Even if the wealth transfer from suppliers to Sycamore will translate into some cost savings for end-user purchasers, this is not necessarily an adequate legal justification.

Six months ago, this Commission ordered divestitures of blood plasma collection centers in the Grifols-Biotest merger, since the combined entity would be able to use its increased bargaining leverage to lower payments to suppliers of blood plasma.[6] The Commission rightfully did not seek to determine whether the reduced supply costs would be passed through to final consumers, since the reduction was caused by the merged firm's increased market power.[7]

Here, it is possible there will be some legitimate resource savings that are not merely the result of increased market power on the buy side of the market, such as supply chain improvements. However, it is unclear whether these are substantial or even merger-specific. Moreover, while benefits to downstream consumers might be weighed against harm to suppliers as a matter of prosecutorial discretion, it is not a bulletproof defense as a matter of law.[8]

Vertical Concerns

The record evidence and the buyer's track record suggest that Sycamore will have a strong incentive to rapidly increase margins to make a clear case to a potential future acquirer.[9] Absent this transaction, Essendant cannot easily raise prices or reduce service to its dealers, because Essendant would lose sales, either because dealers would switch to another wholesaler, such as S.P. Richards, or because the dealers would pass on price increases to their B2B customers, some of whom would then switch to competing dealers, including Staples. After this transaction, however, Sycamore would capture revenue from B2B customers that switch to

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6 *In the Matter of Grifols, S.A., and Grifols Shared Services North America, Inc.*, C-4654, Sept. 18, 2018, https://www.ftc.gov/news-events/press-releases/2018/09/ftc-approves-final-order-requiring-grifols-sa-divest-assets.

7 This competitive harm is within the purview of the Clayton Act and is well recognized in the 2010 Horizontal Merger Guidelines. Horizontal Merger Guidelines, *supra* note 3, at § 12 ("Example 24: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output."). *See* Sallet, *supra* note 3, at 84. *See also* Judge Millett's opinion in United States v. Anthem, Inc.: "[I]ncreased bargaining power is not a procompetitive efficiency when doing so 'simply transfers income from supplier to purchaser without any resource savings.'" United States v. Anthem, Inc. 855 F.3rd 345, 371(D.C. Cir. 2017).

8 Case law supports the assertion that harm in one market cannot be offset by benefits in another. United States v. Philadelphia National Bank, 374 U.S. 321, 370-71 (1963); Department of Justice Buy-Side Memo, *supra* note 4, at 10 (citing *Philadelphia National Bank* for this conclusion).

9 Private equity firms generally take controlling equity stakes in firms with the hope of realizing significant gains through sale to a buyer or an exit through public markets.

Staples in reaction to a price increase or reductions in customer service from Essendant. This strategy seems even more likely given Sycamore's actions to date since taking ownership of Staples.

The evidence in the record points to regional differences across markets in the country. The risk of steering to Staples will be particularly high in geographic markets where Essendant is the market leader.[10] Regional managers incentivized on sales and operating margin targets will be particularly susceptible to this type of conduct. This is not nefarious – this is just obvious.

The Commission has put great faith in its interpretation of the economic evidence to justify its conclusion. However, Commissioner Wilson rightfully notes in her statement that economic models are often more art than science. We must be humble about their predictive power, and this matter is a perfect illustration. The Commission's economic model predicts competitive harm, but largely ignored regional differences. I agree with Commission Slaughter that our prediction likely *underestimates* the harmful effects. How can the majority confidently reach an accurate conclusion on the vertical effects of this transaction without a closer look at specific geographic markets where effective switching would be particularly difficult?

I am also less confident than the majority that Essendant-supplied dealers can easily switch to S.P. Richards to discipline any attempt by Sycamore to disadvantage Staples's rivals. Record evidence indicates that some dealers have high switching costs. In addition, the majority's conclusion that Staples is a poor substitute for Essendant-backed dealers seems to assume that the industry will operate as it has in the past, despite being known for rapid changes. If anything, there will be even greater change.

Buyer Incentives

The Commission's decision to wave through this transaction with few strings attached rests on an incomplete picture of the competitive landscape over the long term, since we did not conduct rigorous analysis on what the buyer plans to do post-purchase.

Section 7 of the Clayton Act is a forward-looking statute, requiring enforcers to make certain predictions about how a transaction might change competitive dynamics in a market. We are much wiser when we consider the buyer's plans and track record. This will also help us determine how other market participants will respond so we can analyze the impact on competition. For example, an investigation might uncover that a buyer who is a dominant player is purchasing a company that poses a threat to their dominance to shut off potential competition. This is just one example of many where a buyer's plans have a major impact on competition.

In this matter, the buyer, Sycamore, is a well-known private equity fund specializing in retail and consumer investments. While some investment firms have strategies to invest substantial capital to grow and nurture a business, other investment firms might not have a

10 While I was open to counterarguments that existing competitors could constrain these price increases, there was not conclusive evidence that allayed concerns about anticompetitive effects in regions where Essendant is the market leader.

strategy that is aligned with vigorous competition. Sycamore's investment approach and track record suggest that the fund will operate assets much differently than a typical buyer, in ways that lead to higher margins, without any guarantee of greater output and service offerings.[11] This is not the first time Sycamore Partners has come before the FTC. In 2015, the agency approved the fund as a divestiture buyer in the dollar store market. But Sycamore quickly resold the assets.[12] The majority seems to believe we should wear blindfolds when it comes to this type of buyer evidence.

At a minimum, our failure to consider Sycamore's incentives gives me less confidence in our ability to accurately predict the likely competitive outcome of this transaction using our traditional merger analysis tools.[13] In addition, Sycamore and Staples have been buying up a range of companies in the supply chain, and this transaction will likely force the hand of its competitors to consolidate more quickly, leading to greater reductions in competition over the long term. Going forward, I hope the Commission can conduct in-depth analysis on buyer incentives and long-term market impact to inform how we can best exercise our prosecutorial discretion.

Abuse of Data

The Commission is codifying a firewall reportedly promised by Sycamore (regardless of any action on the Commission's part), overseen by a monitor, to prevent Sycamore from exploiting commercially-sensitive data. Essendant's business model gives it access to detailed data about the purchase history and usage for its dealers and their customers. Many B2B suppliers in the U.S., like Essendant, collect sensitive financial data in order to set sales terms. Dealers are rightfully concerned this data will be weaponized against them. In addition, if Staples can get its hands on how much end-users are currently paying through an existing dealer, it might bid *less* aggressively for their business.

While the firewall will reduce the chance of misuse of data, it does not eliminate it. Given the hundreds of customers and resellers of Essendant, it may be difficult to police the firewall, especially with oral communications. We could have sought the return of detailed data to customers, who would be free to continue to keep their data with Essendant, but only if they chose to. If this data was portable, this could even reduce switching costs and foster competition,

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11 *See* Khadeeja Safdar & Miriam Gottfried, *How One Investor Made a Fortune Picking Over the Retail Apocalypse*, Wall Street Journal, Mar. 21, 2018, https://www.wsj.com/articles/how-one-investor-made-a-fortune-picking-over-the-retail-apocalypse-1521643491.

12 *See* Commission letter approving application filed by Sycamore Partners II, L.P. to permit Dollar Express to sell and assign stores and leases to Dollar General Corporation, *In the Matter of Dollar Tree, Inc., and Family Dollar Stores, Inc.,* C-4530, April 27, 2017, https://www.ftc.gov/news-events/press-releases/2017/04/ftc-approves-sycamore-partners-ii-lp-application-sell-323-family.

13 Commissioner Slaughter's statement argues for more retrospective analysis of consummated mergers. I agree, and it will be especially important to pursue these lookbacks when we have not carefully considered buyer-specific incentives.

since prospective wholesalers could use the data to ensure proper service and customized offerings.

Conclusion

I agree with the Commission's complaint that this transaction violates the Federal Trade Commission Act and the Clayton Act. The Commission's proposed remedy takes steps to safeguard against some of the potential anticompetitive conduct stemming from the vertical aspects of this transaction. But, based on my review of the evidence, there are unresolved issues regarding other aspects of competition that may be harmed from this transaction. I am skeptical that this proposed settlement is in the public interest.

My colleagues voting in favor of this settlement acknowledge that it is critical for the Commission's actions to be based on facts and sound analysis. But in this matter, the Commission is simply jumping to conclusions.

Dissenting Statement

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

Right now, a great debate is taking place in Washington policy circles and even around the country at family dinner tables. The debate concerns the consequences for American citizens of fewer and more dominant companies controlling large swaths of industries and firms across sectors of the economy.[1] While mergers between direct competitors contribute to this phenomenon and raise competitive concerns, vertical mergers that integrate trading partners can be just as pernicious in sapping our economy's vitality.

By its proposed acquisition of Essendant, Inc. ("Essendant"), Sycamore Partners, the parent company of Staples, Inc. ("Staples"), would acquire the country's largest, and one of only two, nationwide office product wholesale distributors. Today, the Commission voted to accept a proposed consent agreement placing certain conditions on the Staples-Essendant merger. While I appreciate that the Commission chose to impose conditions rather than clearing the transaction outright, I disagree with the Commission's decision because I believe that staff identified significant evidence of likely harm, and I do not believe that the parties have provided evidence showing that the merger's likely harm is offset by cognizable procompetitive benefits. I also agree with many of the points raised by Commissioner Chopra in his dissent; he has done a thorough job outlining the horizontal elements of this transaction and articulating important points for the Commission's consideration.

I write separately to highlight some observations regarding vertical merger enforcement generally, to explain my dissent, and to urge the Commission to commit to a retrospective investigation of the merger that will facilitate the Commission's ability to take any necessary enforcement action, including against any anticompetitive conduct by the post-merger firm.

Observations Regarding Vertical Merger Enforcement

Notwithstanding the majority's apparent view that the resolution of a vertical merger investigation is an inappropriate occasion for a discussion of vertical merger enforcement generally, I would like to make some broad observations about vertical mergers and share my views on how the Commission should approach them before addressing the specific merits of the Staples-Essendant merger.

Vertical tie-ups are occurring across the economy, and they present an enforcement challenge that we must meet. According to Thomson Reuters, companies announced mergers at

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1 *See, e.g.,* Adil Abdela & Marshall Steinbaum, *The United States Has a Market Concentration Problem*, (Sept. 11, 2018), http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-United-States-has-a-market-concentration-problem-brief-final.pdf; Open Markets Institute, AMERICA'S CONCENTRATION CRISIS (Nov. 29, 2018), https://concentrationcrisis.openmarketsinstitute.org; Gustavo Grullon, Yelena Larkin, & Roni Michaely, "Are U.S. Industries Becoming More Concentrated?" (last revised Oct. 27, 2018), https://ssrn.com/abstract=2612047 (concluding that, "[i]n the last two decades, over 75% of U.S. industries have experienced an increase in concentration levels" and that concentrated industries have higher profit margins without increased operational efficiency).

record rates in 2018,[2] and three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components.[3] Moreover, some observers believe that recent high-profile vertical mergers, including the potential clearance of the AT&T-Time Warner merger by the courts, will spark further vertical merger activity.[4]

Given the enormous impact these mergers will have on the economy, markets, and consumers, the Commission should carefully examine all mergers, including vertical mergers, with a forward-looking perspective. As the Supreme Court explained, Section 7 of the Clayton Act enables the Commission to prevent anticompetitive mergers in their incipiency without having to wait until the merger's anticompetitive effects come to fruition.[5] I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement.[6]

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2 *See* Thomson Reuters, *Mergers & Acquisitions Review, First Nine Months of 2018*, at 1–2, 5 (2018).

3 *See id*.; Thomson Reuters, *Mergers & Acquisitions Review, Full Year 2017*, at 3, 6 (2017); Thomson Reuters, *Mergers & Acquisitions Review, Full Year 2016*, at 2, 6 (2016); U.S. Dep't of Justice Press Release, "Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner." (Nov. 20, 2017) (discussing harm from vertical merger); U.S. Dep't of Justice Press Release, "Statement of the Department of Justice Antitrust Division on the Closing of its Investigation of the Cigna-Express Scripts Merger." (Sept. 17, 2018) (discussing vertical merger analysis); U.S. Dep't of Justice Press Release, "Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger." (Oct. 10, 2018) (citing vertical integration); *see also* U.S. Dep't of Justice Press Release, "Lam Research Corp. and KLA-Tencor Corp.

Abandon Merger Plans." (Oct. 5, 2016) (discussing potential harm from abandoned vertical merger); European Commission Press Release, "Commission Approves Acquisition of Rockwell Collins by UTC, Subject to Conditions." (May 4, 2018) (citing vertical component).

4 Tony Romm & Brian Fung, *AT&T- Time Warner Merger Approved, Setting the Stage for More Consolidation Across Corporate America*, WASH. POST, (June 12, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/06/12/att-time-warner-decision; Cecelia Kang, Brooks Barnes, & Michael J. de la Merced, *AT&T-Time Warner Ruling has Deal Makers Bracing*, N.Y. TIMES, (June 10, 2018), https://www.nytimes.com/2018/06/10/technology/att-time-warner-ruling html.

5 *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317–18 (1962) ("[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."); *Phila. Nat'l Bank v. United States*, 374 U.S. 321, 362 (1963) (Section 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future").

6 I am also concerned about under-enforcement of horizontal mergers, but for the purposes of this case I am confining my comments to vertical merger analysis. *Cf.* Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1, 3–5 (2016) (documenting a decline in the number of vertical merger enforcement actions by presidential administration after the period between 1994 and 2000, but also noting that the level of enforcement is impracticable to judge absent further information); Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994–July 2018* (Georgetown Univ. Law Ctr., Aug. 23, 2018) (showing that, in the period

Dissenting Statement

Concerns about vertical mergers are not new.[7] We know that vertical mergers, particularly those involving highly concentrated markets, can pose a variety of significant threats to competition.[8] Indeed, agency investigations have identified a range of competition concerns,[9] including limiting access to or raising the costs of key inputs,[10] restricting access to an important customer,[11] inhibiting entry by new competitors,[12] evading regulations,[13] facilitating coordination,[14] or, as the Commission also alleged in this case, allowing anticompetitive information sharing.[15] But, among the enforcement actions that the Commission brings, many

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between 2001 and 2018, the number of vertical merger enforcement actions remain lower than the six-year period between 1994 and 2000).

7 Some have argued that vertical mergers are rarely, if ever, anticompetitive and in fact are almost always procompetitive. *See* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 225–45 (1978); Richard A. Posner, *Antitrust Law*, 223–29 (2d ed. 2001). However, more recent economic literature provides good cause to be skeptical about this perspective. For a summary of Post-Chicago School thinking on vertical mergers, see Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L. J. 1962, 1966 n.17 (2018) (identifying papers). The 1984 Merger Guidelines, which offer agency guidance on non-horizontal mergers, took a particularly narrow view of harm from vertical integration, and have recently been criticized as inconsistent with contemporary analysis and ripe for revision. *Compare* U.S. Dep't of Justice, 1984 Merger Guidelines (1984), http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf *with* Fed. Trade Comm'n, Hr'g No. 5: Competition and Consumer Protection in the 21st Century, Tr. 57:3-15, 68:9-11 (Nov. 1, 2018) (Prof. Shapiro stating that the 1984 Merger Guidelines are not consistent with contemporary vertical merger analysis, noting the "complete shift" in agency thinking on unilateral effects, and calling for revised guidelines); *but see* Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, 74–82 (Fall 2007).

8 Such threats can also be heightened in nascent or rapidly evolving markets, markets with significant barriers to entry, or markets that may benefit from potential entry.

9 *See* D. Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, 4–7 (Jan. 10, 2018) (summarizing recent vertical merger enforcement actions), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc; Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994–July 2018* (Georgetown Univ. Law Ctr., Aug. 23, 2018).

10 *See* In re The Boeing Company, Dkt. C-4188 (compl. filed Oct. 3, 2006), https://www ftc.gov/sites/default/files/documents/cases/2006/10/0510165complaint.pdf.

11 *See* U.S. Dep't of Justice Press Release, "AMC Required to Divest Movie Theatres, Reduce NCM Ownership and Complete Screen Transfers in Order to Complete Acquisition of Carmike Cinemas." (Dec. 20, 2016), https://www.justice.gov/opa/pr/amc-required-divest-movie-theatres-reduce-ncm-ownership-and-complete-screen-transfers-order.

12 *See* Fed. Trade Comm'n Press Release, "FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp." (June 24, 2002).

13 *See* In re Fresenius Medical Care AG & Co. KGaA, Dkt. C-4236 (compl. filed Oct. 21, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/10/081021freseniuscmpt.pdf.

14 *See* United States v. Premdor, Inc. (compl. filed Aug. 3, 2001), https://www.justice.gov/atr/case-document/complaint-184.

15 *See* In re PepsiCo, Inc., Dkt. C-4301 (compl. filed Feb. 26, 2010), https://www ftc.gov/sites/default/files/documents/cases/2010/02/100226pepsicocmpt.pdf; In re The Coca-Cola Company, Dkt. C-4305 (compl. filed Sept. 27, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/09/100927cocacolacmpt.pdf; In re

are settled with behavioral remedies rather than divestitures, and few of our enforcement actions challenge vertical mergers outright.[16]

I understand that predicting the net effects of vertical mergers can be difficult, but I am worried about the reliability and permissiveness of the conclusions we draw from the evidence gathered and analysis conducted by staff. I am concerned that we end up allowing vertical mergers that are anticompetitive in an effort to avoid challenges to procompetitive mergers.

In particular, I am concerned that our conclusions depend on unreliable assumptions and predictions about how a vertically integrated firm will conduct itself and are too credulous about claimed procompetitive benefits unique to vertical integration.[17] The Commission should always thoroughly investigate all potential theories of harm in vertical mergers. Where the Commission identifies competitive concerns, it should be more willing to challenge and seek to block vertical mergers.

Where the Commission finds evidence that a vertical merger is likely to enhance a firm's incentive and ability to engage in anticompetitive conduct, the parties must demonstrate that claimed efficiencies are verifiable, merger-specific, do not arise from anticompetitive reductions in output or service, are not mitigated by any costs necessary to achieve the efficiencies, and fully offset the anticompetitive harm.[18] If these requirements are not met, then the Commission should challenge the merger.

Merging parties will almost always cite benefits of vertical integration, including enhancing product quality, reducing costs, or streamlining operations.[19] But such claimed benefits often go unsubstantiated. The claimed benefits may not be merger-specific and instead may be achieved via unilateral conduct or contractual arrangements. Even where they are merger-specific, the claimed benefits may be mitigated or eliminated by opportunity costs.[20] To the extent that our enforcement decisions rely on claimed efficiency benefits of a transaction,

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Broadcom Limited, Dkt. C-4622 (compl. filed July 3, 2017), https://www.ftc.gov/system/files/documents/cases/1710027_broadcom_brocade_complaint.pdf.

16 *See* Salop & Culley, *supra* note 9.

17 Professor Salop articulated a similar concern in his recent article on vertical merger enforcement, criticizing an enforcement framework that "presum[es] that efficiency benefits are highly likely while competitive harms are unlikely or speculative." Salop, *supra* note 7, at 1963.

18 In addition, I share Commissioner Chopra's concern that merger effects that are claimed as "efficiencies" may in fact be harms that cannot be credited as procompetitive benefits.

19 *See* Steven C. Salop & Daniel P. Culley, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners,* GEORGETOWN LAW FACULTY PUBLICATIONS AND OTHER WORKS. 1392 at 5, 32–37 (2014), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub.

20 *See* Salop, *supra* note 7, at 1970–71 n.37 (citing William P. Rogerson, "A Vertical Merger in the Video Programming and Distribution Industry: Comcast-NBCU" (2011), in *The Antitrust Revolution: Economics, Competition, and Policy*, 534 (John E. Kwoka, Jr. & Lawrence J. White eds., 6th ed. 2014)).

those claimed benefits should not be taken at face value; any investigation should include a requirement that the parties substantiate the magnitude and merger-specificity of the claimed benefits in the same way the Commission endeavors to substantiate theories of harm.[21] In other words, have the parties met their burden of providing adequate evidence to show that the claimed benefits are verifiable, merger-specific, and sufficiently large to give the Commission enough comfort that the merger indeed will not be, on balance, anticompetitive?

In practice, the likely anticompetitive effects of some vertical mergers may be difficult to predict reliably enough at the time of the transaction to mount a successful challenge. This uncertainty does not excuse the Commission from its obligation to utilize all of our authority to ensure that parties never abuse their position.[22] As noted above, the Commission's authority under Section 7 is forward-looking, and we are charged with preventing the exercise or attainment of market power, not merely correcting its abuse. It is particularly important that enforcers are mindful of this point when evaluating mergers between vertical partners in a supply chain; it may be more difficult to predict whether vertical mergers will be anticompetitive, procompetitive, or competitively neutral, but such difficulty does not alter our fundamental obligation to preempt illegal vertical integration.

When faced with a close case—a vertical merger that raises meaningful competitive concerns, but where we have not identified sufficient evidence to justify a court challenge,[23] or where we obtained a limited consent decree—the Commission would do well to adopt a general practice of planned retrospective investigations that could inform subsequent enforcement decisions, including a decision to challenge the consummated merger if necessary.[24] While the

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21 *Cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) [Hereinafter "Horizontal Merger Guidelines"] ("Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."); Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. OF ANTITRUST ENFORCEMENT 459, 467–68 (2018).

22 Some have proposed additional legislative authority that would shift the burden of proof to the parties to certain mergers to show that their transaction is unlikely to substantially lessen competition. For example, Senator Amy Klobuchar proposed legislation that would shift the burden of proof to parties to certain large vertical mergers (in excess of $5 billion) or certain vertical mergers involving very large firms (with assets, net annual sales, or market capitalization exceeding $100 billion). *See* Consolidation Prevention and Competition Promotion Act of 2017, S.1812, 115th Cong. (2017) [Hereinafter "CPCPA"].

23 *See* 15 U.S.C. § 21(b); 15 U.S.C. § 45(b).

24 The idea of routinely conducting retrospectives of close-call vertical mergers has been suggested by others, including Professor Tim Wu and former Commission Chairman Robert Pitofsky. *See* Tim Wu (@superwuster), Twitter (Nov. 26, 2018, 9:33 AM) https://twitter.com/superwuster/status/1067109078214864896 ("Re-reading [the] AT&T - Time Warner opinion I am struck by sense that in hard vertical cases, retroactive merger review might be the way to go. Indeed the US might even announce that the merger will be watched."); Robert Pitofsky, "Subsequent Review: A Slightly Different Approach to Antitrust Enforcement." (Aug. 7, 1995) (Suggesting that, in close cases, the Commission "put[] the parties on notice that at some future time—two, three or four years down the road—it

anticompetitive effects of consummated mergers are more difficult to remedy and involve significant interim competitive harms from delayed enforcement, the ability to bring such challenges is an important enforcement backstop.[25]

In such close cases, the Commission should commit publicly, at the time the investigation concludes, to a follow-up retrospective investigation a few years after the merger is consummated and should require the parties to provide whatever data might be necessary to complete it.[26] To the extent necessary, the Commission should also request and obtain information from relevant third parties. This retrospective should compare the reality of the post-merger market with the predictions the Commission made at the time of the transaction about whether anticompetitive harms and benefits would be realized.

Where the Commission's predictions were incorrect and there is sufficient evidence of anticompetitive effects as a result of the transaction, this retrospective investigation would allow the Commission to challenge the consummated merger or any anticompetitive behavior by the merged entity. Knowing that the Commission will conduct such a follow-up study also could disincentivize the parties from making over-reaching claims during the investigation and incentivize them to behave in a more procompetitive manner after the merger is consummated.[27] Furthermore, if the Commission finds that the parties had materially misrepresented the likely effects or benefits of the merger, it can take appropriate action.[28]

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intends to revisit the market segment and the transaction to see if the transaction and others like it led to anticompetitive effects."), https://www.ftc.gov/public-statements/1995/08/subsequent-review-slightly-different-approach-antitrust-enforcement.

25 *See, e.g.*, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 2018 WL 4855459 (Oct. 5, 2018) (order requiring divestiture in private consummated merger enforcement action).

26 The Commission could seek and obtain such information from merging parties, and other firms, pursuant to Section 6 of the Federal Trade Commission Act. *See* 15 U.S.C. § 46.

27 *See* Pitofsky, *supra* note 24 ("First, parties claiming efficiencies or brushing off the possibility of anticompetitive practices may be induced in the years following the merger to pursue more aggressively the efficiencies or avoid more carefully anticompetitive effects. Second, lawyers, economists and others defending transactions may be a little more cautious in submitting extravagant claims if they know they will be called to account at a later date.").

28 *Cf.* Fed. Trade Comm'n Press Release, "Hearst Corp. to Disgorge $19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint." (Dec. 14, 2001) (disgorgement and divestiture obtained for illegally withholding materials required for Hart-Scott-Rodino notification and consummating anticompetitive merger); U.S. Dep't of Justice Press Release, "Bristol-Myers Squibb Pleads Guilty to Lying to the Federal Government About Deal Involving Blood-Thinning Drug." (May 30, 2007) (guilty plea obtained and fine levied for two violations of the False Statements Act in connection with a Commission conduct matter); *see also* European Commission Press Release, "Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover." (May 18, 2017) (fine levied for providing incorrect or misleading information during merger investigation). To be sure, parties must refrain from making material misrepresentations in connection with any government proceeding, not merely vertical merger investigations. I emphasize this requirement here to underscore the importance of truthful and correct representations by parties as part of our forward-looking merger review. The spirit of this prohibition should deter not only explicit misrepresentations but also pre-merger claims or pre-commitments that are generally inconsistent with post-merger conduct. *Cf.* Kenneth Li, *AT&T's WarnerMedia Accuses DOJ with 'Collaborating' with Dish in HBO Dispute*, REUTERS (Nov. 1, 2018),

At a minimum, these retrospective investigations could allow the Commission to analyze whether its predictions about market behavior were accurate and to improve its analysis going forward. As the majority concedes, such retrospectives can have significant value. Chairman Simons has spoken frequently about the importance of the Commission's "tradition of self-critical examination,"[29] and routine study of the accuracy of our analysis can play an important role in that tradition.[30] The Commission has already identified one recent merger as a potential subject of a retrospective investigation, including on the effects of efficiencies.[31] Similarly, Bureau of Economics Director Bruce Kobayashi has urged stakeholders to identify vertical mergers that merit retrospective investigation.[32] I applaud and join these calls for retrospective review generally, and I emphasize their importance as part of our vertical merger enforcement program.

I acknowledge that these retrospective investigations will require significant resources, and I share the majority's concerns about how best to allocate our existing resources. I do not believe that a program of retrospective investigations in close cases would require unlimited resources, however, because these instances should arise relatively infrequently.[33] I understand that reasonable Commissioners can disagree on what constitutes a close case—this case appears to be one such example—but I would nevertheless propose that the Commission determine whether a retrospective is appropriate based on the evidence presented in a given case. In any event, as with other areas of enforcement, I believe that bolstering our program of retrospective merger reviews is a compelling reason for Congress to devote additional resources to the

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https://www.reuters.com/article/us-media-att-dish/atts-warnermedia-accuses-doj-with-collaborating-with-dish-in-hbo-dispute-idUSKCN1N667O (Department of Justice criticizing WarnerMedia blackout of HBO on Dish network following AT&T proposed commitment to refrain from blackouts on Turner networks following a merger with Time Warner).

29 *See* Prepared Remarks of Chairman Joseph Simons, at 3, Hearing on Oversight of the Federal Trade Commission, Before the Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, United States Senate, (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423967/js_oral_remarks_hearing_on_oversight_of_the_federal_trade_commission.pdf; *see also* Prepared Remarks of Chairman Joseph Simons Announcing the Competition and Consumer Protection Hearings, at 3 (Jun. 20, 2018), https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf.

30 Retrospective analysis has also received additional legislative support. Senator Amy Klobuchar's bill promised to expand Commission authority to obtain information relevant to retrospective analysis of merger consent decrees. *See* CPCPA, *supra* note 22.

31 Statement of the Commission, Concerning the Proposed Affiliation of CareGroup, Inc.; Lahey Health System, Inc.; Seacoast Regional Health System, Inc.; BIDCO Hospital LLC; and BIDCO Physician LLC (Nov. 29, 2018).

32 Fed. Trade Comm'n, Hr'g No. 5: Competition and Consumer Protection in the 21st Century, Tr. 86:2-15 (Nov. 1, 2018).

33 *Cf.* Pitofsky, *supra* note 24 ("Circumstances that justify 'subsequent review' or 'conditional clearance' are rare.

Most times, the enforcement agencies are in a position to make the difficult prediction that anticompetitive effects will or will not occur.").

Commission's enforcement activities. If the majority's intuition is correct that the Commission encounters enough close cases to require a dramatic increase in our appropriations in order to staff retrospectives for such cases, then we owe it to ourselves and to the public to advocate for and dedicate adequate resources to scrutinize and improve upon our conclusions.[34]

Staples/Essendant Case

As noted above, Essendant is one of only two nationwide office product wholesale distributors, along with S.P. Richards ("SPR"). SPR and Essendant provide important services to local and independent office product resellers, who, in turn, serve the office product needs of mid-sized businesses across the country.[35] Staples competes with independent resellers to serve mid-sized businesses and, as a result of this vertical merger, Staples will control the price and quality of the wholesale distribution services that Essendant provides to Staples's Essendant-backed independent reseller competitors.

I appreciate that the Commission's staff have given serious treatment to a range of theories of anticompetitive harm from the merger. I am also pleased that the Commission imposed conditions that seek to deal with the very real threat of anticompetitive information sharing and to enhance our ability to review Staples's future acquisitions in the office supply industry. I voted against the resolution of this investigation, however, because I believe that staff identified significant evidence of likely harm to competition, and I am concerned that the conclusions drawn from the evidence staff identified may underestimate the likely harm. I am also concerned that the parties have not met their burden of substantiating the efficiencies necessary to offset the transaction's likely harm. The conditions imposed by the Commission's proposed consent order do not fully resolve these concerns.

As noted in the statement of the majority, staff conducted an analysis of whether the integrated firm could profitably implement a strategy of raising rivals' costs. Staff's analysis considered the extent to which independent resellers would switch to SPR and the extent to which mid-sized businesses would switch from independent resellers to Staples given such a strategy. The result of staff's analysis indicated that the transaction would result in significant harm. The majority accuse me of mischaracterizing this analysis. I do not; I simply disagree with the conclusion that the majority draws from staff's analysis. I believe this analysis is evidence of harm. It suggests that, as a result of a strategy of raising rivals' costs, mid-sized businesses would be forced to pay higher prices or suffer diminished quality of service regardless of which supplier they chose for their office supply needs.

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34 *Cf.* Pitofsky, *supra* note 24 ("[T]he approach offers some hope, never air tight, that enforcement officials perplexed by the uncertainties of a situation, will not make the mistake of allowing deals to proceed that have major anticompetitive and anticonsumer effects. If the significant anticompetitive effects begin to occur after the transaction is complete, all concerned parties know the enforcement agency may review the deal again and take actions necessary to preserve or restore a competitive market.").

35 Essendant and SPR also serve resellers who, in turn, serve small and large businesses.

The majority have concluded that independent resellers can easily switch from Essendant to SPR if the integrated firm implemented such a strategy, and, therefore, that this strategy would not be profitable. The key relevant inputs in staff's analysis, however, are consistent with the conclusion that independent resellers can easily switch from Essendant to SPR, and staff's analysis nonetheless predicts significant harm. Moreover, some qualitative evidence indicates that switching from Essendant to SPR is costly for independent resellers.

The majority have offered reasons to believe that the harm estimated in staff's analysis is too high or insufficiently reinforced by other lines of evidence. I acknowledge those points, but I believe that staff's analysis is significant evidence that harm from the transaction is likely, and, indeed, I am concerned that there are reasons to believe that the estimated harm is too low. For example, we did not have data at sufficient levels of granularity to assess whether there are certain markets where mid-sized businesses would switch to Staples in larger numbers than we have estimated. In addition, I am concerned that independent resellers have only two viable options in the market for nationwide wholesale distribution today—Essendant and SPR—and that *de novo* entry by other firms into the nationwide wholesale distribution business is unlikely. As a result, even if SPR is a viable alternative to Essendant for many independent resellers, it is likely the only viable option and thus may be able to charge higher prices to resellers looking to avoid a relationship with Staples.

The majority insist that their decision does not rest on crediting claimed efficiencies, but given my disagreement about whether and to what extent there is evidence of likely harm, I briefly describe below my assessment of the efficiencies evidence adduced in this investigation. Taking staff's estimate of harm on its face, the Commission must ask whether there is sufficient evidence to conclude that cognizable efficiencies do in fact offset that estimate. I am not persuaded that there is such evidence.

As an initial matter, upon review of the record, I do not believe that efficiencies from the elimination of double marginalization are a meaningful effect of this merger. Focusing on the identified claims, I am concerned that the parties have not produced evidence showing that the claimed efficiencies are indeed efficiencies and not harms, are merger-specific, are not mitigated by any costs that must be incurred to achieve the efficiencies, or will likely be realized at sufficient magnitudes after the merger is consummated.[36] The Commission brings significant experience to bear in our analysis of efficiencies in the office supply industry, but that expertise does not excuse the parties from meeting their burden to substantiate their claims, and I do not believe that the remaining substantiation provides a sufficient basis to credit the efficiency claims made in this case. Confronted, as I am, with what I believe to be evidence of likely harm

36 As discussed in note 21 above, our analysis of efficiencies claims is predicated on information in the parties' possession. This is true in both horizontal and non-horizontal mergers. It is therefore incumbent on the parties to substantiate their claimed efficiencies, including by detailed and comprehensive responses to requests from Commission staff, to allow the Commission to credit any cognizable efficiencies against any likely harm. *Cf.* Horizontal Merger Guidelines § 10; *see also* Herbert J. Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 726 (2017) ("[I]nformation is asymmetrical: firms almost always know more about their own internal processes and the costs of changing them than any outsider, including the merger enforcement Agencies.").

and a lack of evidence of cognizable, offsetting efficiencies, I must respectfully disagree with the majority that the transaction is unlikely to result in anticompetitive harm outside the scope of the Commission's order.

Our consent order does not address Staples's control over Essendant prices to its independent reseller competitors or its enhanced incentives to hamper independent reseller competitiveness. I also share Commissioner Chopra's concerns about the efficacy of the firewall to remedy the information sharing harm. Accordingly, I do not believe the consent order fully remedies the merger's likely anticompetitive effects.

A Retrospective and Monitoring

The Commission's order requires that Staples provide prior notice of any acquisitions in excess of 10% of any independent reseller or other marketer of office supplies. Staples's market position relative to other independent resellers was a significant issue in our investigation, and I believe that prior notice will be a useful tool for the Commission to monitor whether Staples will pursue a strategy of raising rivals' costs in local office supply markets.

In addition, I call on the Commission to commit publicly to a targeted retrospective investigation, within several years of the acquisition's consummation, to evaluate other aspects of the market bearing on our analysis, and to assess whether such developments are consistent with our pre-merger analysis. Besides this analysis, I urge the Commission to monitor conduct in this industry, and I encourage Essendant-backed independent resellers and other stakeholders to report any evidence of anticompetitive conduct by Staples. With the benefit of pre-commitment, hindsight, and ongoing monitoring, we may be able to refine and bolster confidence in our analysis and deter or prosecute future anticompetitive conduct by Staples. Ultimately, if there is sufficient evidence of actual anticompetitive effects as a result of the transaction, we can and should bring an enforcement action to break-up the merger.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission ("Commission") has accepted an Agreement Containing Consent Order ("Consent Agreement") from Sycamore Partners II, L.P. ("Sycamore"), Staples, Inc. ("Staples"), and Essendant Inc. ("Essendant") (collectively, "Respondents") to remedy the anticompetitive effects that otherwise would result from Staples' acquisition of all of the outstanding shares of common stock of one of its wholesalers, Essendant (the "Acquisition"). The proposed Consent Agreement, among other things, limits the persons within Sycamore and Staples who have access to certain commercially sensitive information.

On September 14, 2018, Staples and its affiliates agreed to acquire all of the outstanding shares of common stock of Essendant. The Complaint alleges that Sycamore's and Staples' access to certain commercially sensitive information ("CSI"), without adequate safeguards to ensure that Sycamore and Staples will not misuse the information, could lead to anticompetitive conduct. The proposed Consent Agreement remedies this concern by limiting Sycamore's and Staples' access to: (1) CSI of Essendant's resellers; (2) CSI of end customers of Essendant's resellers; and (3) Essendant's CSI that includes, uses, or incorporates CSI of Essendant's resellers or CSI of end customers of Essendant's resellers.

On January 25, 2019, by a vote of 3-2—with Chairman Simons, Commissioner Phillips and Commissioner Wilson voting in the affirmative, and Commissioner Chopra and Commissioner Slaughter dissenting—the Commission issued an Administrative Complaint, and accepted for public comment an Agreement Containing Consent Order, resolving allegations in the Complaint that the 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 eliminating direct and substantial competition between Staples' and Essendant's reseller customers in the market for the sale and distribution of office products to midmarket business-to-business customers. The elimination of this competition could result in higher prices for midmarket end customers. The proposed Consent Agreement would remedy the alleged violations by limiting Sycamore's and Staples' access to CSI as described above.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. The Commission issued the accompanying Decision and Order ("Order") as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission's Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After 30 days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw from the Consent Agreement, or modify the accompanying Order.

II. THE PARTIES

Sycamore is a private equity firm specializing in retail and consumer investments. Sycamore acquired Staples in September 2017. Headquartered in Framingham, Massachusetts,

Staples is the largest vertically integrated reseller of office products in the United States, selling office products to consumers through its e-commerce website and retail stores and to corporate and government end customers through its North American Delivery business. Before Sycamore acquired Staples, Staples reported sales of $18.2 billion, which includes revenues from its U.S. and foreign operations.

Essendant is the largest wholesale distributor of office products in the United States, with net sales of over $5 billion in 2017. Headquartered in Deerfield, Illinois, Essendant sells and distributes office products to thousands of commercial resellers through its extensive network of more than 60 U.S. distribution centers. Essendant also provides value-added services to its reseller customers, such as digitized product content and marketing tools. Essendant's broad base of reseller customers includes large national accounts (such as Staples, Office Depot, and Costco), independent dealers, and online retailers. Essendant does not offer its products directly to end customers, i.e. customers buying office products for their own use.

III. THE PRODUCTS AND STRUCTURE OF THE MARKETS

Staples and Essendant both provide a broad and deep assortment of office products across a number of product categories—including traditional office supplies, copy paper, ink and toner, janitorial and sanitation supplies, breakroom supplies, and technology products—but do so at different levels of the supply chain. Staples sells office products directly into all end customer segments—including individual consumers, small/home office, midmarket (small-and-medium businesses or "SMB"), and enterprise (large organizations such as Fortune 100 companies or the federal government).

Essendant and S.P. Richards Company ("SPR") are the only two U.S. wholesalers supplying a wide assortment of office products as well as value-added services to commercial resellers, including thousands of independently owned and operated dealers (also known as the independent dealer channel, "IDC" or, collectively, "IDCs"), throughout the United States. The IDCs, which predominately serve midmarket end customers in their local communities, excel at providing high-touch service and customizing their programs and services to fit the needs of their customers. The IDCs compete directly with Staples to sell office products to these midmarket customers.

The relevant line of commerce in which to analyze the effects of the Acquisition is the sale and distribution of office products to midmarket business-to-business customers. The sale and distribution of office products to midmarket business-to-business customers entails selling office products and related services to customers who purchase those products and services for consumption, not for resale. The relevant geographic markets in which to analyze the effects of the Acquisition on this market are local. Most midmarket customers have one or only a few locations in the same local area. Likewise, most of the IDCs who serve these midmarket customers compete in one or a small handful of local markets. These relevant markets contain many resellers—including Staples, Office Depot, independent resellers (including Essendant's resellers and SPR's resellers), Amazon, and others—with Essendant's reseller customers accounting for a substantial share of the market. Entry into these markets would not be timely,

likely, or sufficient to mitigate the anticompetitive effects of the Acquisition, which are described below.

IV. THE EFFECTS OF THE ACQUISITION

To carry out the distribution activities currently undertaken by Essendant under its "Wrap and Label" and "Drop-ship" programs, Essendant's reseller customers must regularly provide Essendant with CSI about their end customers.

Under the Wrap and Label program, Essendant's resellers furnish detailed information about each end customer's orders so that Essendant can deliver products to the reseller pre-packed for the end customer. This saves a reseller the time necessary to sort through multiple unlabeled pallets and compile each end customer's orders for the day. Similarly, under the Drop-ship program, Essendant delivers products directly to a reseller's end customer on behalf of the reseller when the end customer's location is outside of the reseller's local delivery area. This allows an Essendant reseller to serve end-customer locations outside of the reseller's delivery area on a next-day basis seamlessly. To take advantage of these programs, Essendant's resellers must regularly furnish CSI such as end-customer names, locations, purchasing history, and product and service preferences.

Absent a remedy, the Acquisition would give Staples access to information it previously could not obtain relating to Essendant's resellers' (i.e., Staples' competitors') end customers. The Commission's Complaint alleges that this detailed end-customer information, together with Staples' access to Essendant's resellers' costs of goods, could enable Staples to offer higher prices than it otherwise would when bidding for an end customer's business against one of Essendant's resellers. Accordingly, access to this CSI may substantially lessen competition in the market for the sale and distribution of office products to midmarket business-to-business customers by eliminating direct and substantial competition between Staples and Essendant's resellers, which could result in higher prices to midmarket end customers.

V. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the likely anticompetitive effects of the Acquisition by limiting Sycamore's and Staples' access to (1) CSI of Essendant's resellers; (2) CSI of end customers of Essendant's resellers; and (3) Essendant's CSI that includes, uses, or incorporates CSI of Essendant's resellers or CSI of end customers of Essendant's resellers (hereinafter, "Protected Commercially Sensitive Information"). Specifically, the proposed Consent Agreement requires Sycamore and Staples to create a firewall separating Staples' business-to-business end customer selling functions from Essendant's wholesale selling function. The firewalled employees will have responsibilities for performing Essendant's former wholesale functions for Essendant's resellers. Sycamore and Staples will be required to take all actions necessary to prevent access to, or the disclosure or use of, Protected Commercially Sensitive Information. After the Acquisition, only those Staples employees performing wholesale, legal and regulatory, or shared services functions or members of a prescribed management oversight group will have access to the Protected Commercially Sensitive Information, and only to the extent necessary to perform their assigned functions.

The proposed Consent Agreement also provides for the appointment of a monitor for ten years to assure Sycamore's and Staples' compliance with the Consent Agreement. Further, the proposed Consent Agreement contains appropriate reporting requirements.

Finally, the proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by Sycamore or Staples resulting in total holdings of an ownership interest of more than ten percent of any company meeting specific criteria related to office products sales (a "Notifiable Acquisition"). Under the proposed Consent Agreement, for the next ten years, Sycamore and Staples will be required to give the Commission thirty days' advanced notice of any Notifiable Acquisition that is not subject to the Hart-Scott-Rodino Act. Sycamore and Staples must also provide the Commission with information about and documents relating to the to-be-acquired company. If 30 days expire without Commission action, Sycamore and Staples will be permitted to consummate the Notifiable Acquisition.

The Consent Agreement will have a term of ten years.

* * *

The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement or modify its terms in any way.

Complaint

IN THE MATTER OF

CREAXION CORPORATION, MARK PETTIT, INSIDE PUBLICATIONS, LLC OF GEORGIA, AND CHRISTOPHER KOROTKY

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

Docket No. C-4668; File No. 172 3066
Complaint, January 31, 2019 – Decision, January 31, 2019

This consent order addresses Creaxion Corp.'s endorsement and advertising format practices with respect to the advertising and promotional campaign they created and implemented for FIT Organic Mosquito Repellent. The complaint alleges that the respondents violated Section 5(a) of the Federal Trade Commission Act by misrepresenting that certain endorsements reflected the independent experiences or opinions of impartial users, and by deceptively failing to disclose that certain endorsers had material connections with the endorsed product, namely that they were paid spokespersons, they were reimbursed for the cost of the product, or they owned or were employed by Creaxion, the public relations firm hired to promote the product. The complaint also alleges that the respondents violated Section 5(a) by misrepresenting that certain advertisements were independent statements and opinions of impartial publications when they actually were paid commercial advertising. The consent order prohibits misrepresenting the status of any endorser or person reviewing the product or service, including that he or she is an independent user or ordinary consumer of the product or service; and any representation about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such endorser and any respondent, or other individual or entity affiliated with the product or service.

Participants

For the *Commission*: *Karen Mandel* and *Shira Modell.*

For the *Respondents*: *Craig G. Kunkes, Robbins Ross Alloy Belinfante Littlefield LLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Creaxion Corporation, Mark Pettit, Inside Publications, LLC of Georgia, and Christopher Korotky (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 Creaxion Corporation ("Creaxion") is a Delaware corporation with its principal office or place of business at 1080 Peachtree Street NE, Suite 1810, Atlanta, Georgia 30309. Creaxion is a marketing and public relations company.

2. Respondent Mark Pettit is the Chief Executive Officer of Creaxion. Individually or in concert with others, he controls, or has the authority to control, or participated in, the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Creaxion.

3. Respondent Inside Publications, LLC of Georgia ("Inside Publications") is a Georgia limited liability company with its principal office or place of business at 1050 Crown Pointe Parkway, Atlanta, Georgia 30338. Inside Publications publishes specialty sports periodicals, including *Inside Gymnastics*, *Inside Cheerleading*, *Inside Dance*, *Inside Volleyball*, and *Cheer Biz*.

4. Respondent Christopher Korotky is the sole member and owner of Inside Publications. Individually or in concert with others, he controls, or has the authority to control, or participated in, the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Inside Publications.

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.

Course of Conduct

6. In April 2016, Creaxion was hired by HealthPro Brands Inc. ("HealthPro") to help launch and promote FIT Organic Mosquito Repellent to consumers, media, retailers, and others. The parties agreed that Creaxion would produce a strategic media campaign tied to the worldwide outbreak of the Zika Virus.

Promotional Agreements Related to the Zika Outbreak and the 2016 Summer Olympics in Brazil

7. In May 2016, Mr. Pettit (Creaxion) contacted Mr. Korotky (Inside Publications) to broker a partnership between HealthPro and Inside Publications, through which Inside Publications would distribute FIT Organic Mosquito Repellent to athletes and others attending the 2016 Summer Olympics in Brazil, the epicenter of the Zika outbreak.

8. HealthPro and Inside Publications subsequently entered a "Social and Digital Media Activation and Athlete Engagement" agreement for FIT Organic Mosquito Repellent [Ex. A], pursuant to which Inside Publications would be paid for providing the following services, among others:

a. Publishing two magazine articles featuring FIT Organic Mosquito Repellent, including a "feature article" on the product discussing its background, use, and benefits, and an "advertorial" that would denote the product as the "Official Mosquito Repellent" of Inside Publications;

b. Placing FIT Organic Mosquito Repellent in promotional "Good Luck" gift baskets from *Inside Gymnastics* to the top ten potential male and female athletes competing for spots on the U.S. Olympic Gymnastics team;

c. Procuring athlete endorsements for FIT Organic Mosquito Repellent – the proposal identified as a potential endorser Jake Dalton, a 2012 Olympian and World Champion gymnast, while the female athlete would be determined later;

d. Designating FIT Organic Mosquito Repellent as the "Official Mosquito Repellent" of Inside Publications and directing its employees to travel with, use, and promote the product before and during the Olympic Games; and

e. Promoting FIT Organic Mosquito Repellent on social media, specifically twenty-five posts by Inside Publications and fifteen or twenty posts by the athlete endorsers. The posts by Inside Publications would identify the product as the "Official Mosquito Repellent" of, as applicable, *Inside Gymnastics* or *Inside Volleyball* magazines. The proposal included an example post: "We've landed in Brazil and we're applying our Fit Organic Mosquito Repellent as we cover the 2016 Olympic Games! USDA-certified organic. The real deal, just like us!"

9. Mr. Pettit acted as an intermediary between Inside Publications and HealthPro, forwarding the Inside Publications proposal to each for signature.

10. Olympic gold medal gymnast Carly Patterson Caldwell agreed in May 2016 to become a paid spokesperson for FIT Organic Mosquito Repellent. Under the agreement, Ms. Patterson Caldwell received several thousand dollars for her promotional activities, including taking part in social media posts and a feature advertorial published in *Inside Gymnastics*.

11. Olympic gold medal gymnast Jake Dalton agreed in July 2016 to become a paid spokesperson for FIT Organic Mosquito Repellent. Mr. Pettit negotiated the terms of that agreement with Mr. Dalton's agent. Under the agreement, Mr. Dalton received several thousand dollars for his promotional activities, including promoting the product to his fans and social media followers in accordance with the Inside Publications proposal.

12. Creaxion's responsibilities with respect to the FIT Organic Mosquito Repellent launch included managing gymnastics sponsorships and promotions, coordinating and managing the Inside Publications and Jake Dalton sponsorships, and coordinating the Carly Patterson Caldwell sponsorship. In this capacity, Mr. Pettit and Creaxion drafted, reviewed, and monitored social media posts endorsing FIT Organic Mosquito Repellent, including those by Jake Dalton and Inside Publications.

Social Media Promotions of FIT Organic Mosquito Repellent

13. Pursuant to their respective endorsement agreements, spokespersons Ms. Patterson Caldwell and Mr. Dalton posted social media endorsements of FIT Organic Mosquito Repellent. In numerous instances, the endorsements did not disclose the spokespersons' paid promotional relationships with HealthPro. The posts include, but are not necessarily limited to, those compiled in the attached Exhibits B and C. These materials contain the following statements and depictions:

a. Carly Patterson shared Inside Gymnastics's [sic] post
June 3 at 11:44am

I was definitely bummed to have to make the decision to not go to Rio for the summer Olympics because of the threat of the Zika virus, but working on starting a family and being safe and protecting myself was way more important to my husband and me! I am so thankful to have found a safe and organic product (FIT Organic) that will ease my worries as mosquito season approaches.

[Ex. B at 1 (Facebook post)]; and

b. **jake_dalton** Looking forward to the holiday weekend! And, of course, I'll be using my organic mosquito repellent from @fitorganicusa. You should too! #Organic #Safe

[Ex. C at 3 (Instagram post with a picture of Mr. Dalton holding a bottle of FIT Organic Mosquito Repellent)].

14. Inside Publications also posted and reposted statements on social media about FIT Organic Mosquito Repellent, primarily through its *Inside Gymnastics* accounts, including some featuring endorsements by Mr. Dalton and Ms. Patterson Caldwell. In numerous instances, Inside Publications did not disclose the spokespersons' paid promotional relationships with HealthPro or that its own statements were paid commercial advertising. The posts included, but were not necessarily limited to, those compiled in the attached Exhibit D. These materials contain the following statements and depictions:

a. **Inside Gymnastics** @InsideGym · 8 Jun 2016

Great choice champ! @Jake_Dalton will use @fitorganic mosquito repellent on the Road to Rio! #FightZika

[Ex. D at 1 (Twitter post with a picture of Mr. Dalton applying FIT Organic Mosquito Repellent to arm)];

b. **insidegym** With summer weather still making waves across the country, mosquitos are also still out and about! Make sure to throw @fitorganicusa

in your backpack! #clean #organic #safe #indiansummer [emoji omitted]

[Ex. D at 2 (Instagram post showing a bottle of FIT repellent)];

c. **insidegym** 👍👍

#Repost @fitorganicusa

U.S. Olympian @jake_dalton Ready for Closing Ceremonies in Rio. Protected by Fit Organic Mosquito Repellent!

[Ex. D at 2 (Instagram post with a picture of Mr. Dalton applying FIT Organic Mosquito Repellent to arm)];

d. **insidegym** Yes! We'll be packing this for Brazil ourselves! 💯

#Repost @carlypatterson04 Thank you so much @fitorganicusa for the mosquito repellent! I love the smell & love that it's all organic & safe! I'm a buffet for mosquitoes so this is a game changer!

[Ex. D at 4 (Instagram post with a picture of Ms. Patterson Caldwell holding two bottles of FIT Organic Mosquito Repellent)].

Inside Gymnastics Magazine Print and Online Articles Promoting FIT Organic Mosquito Repellent

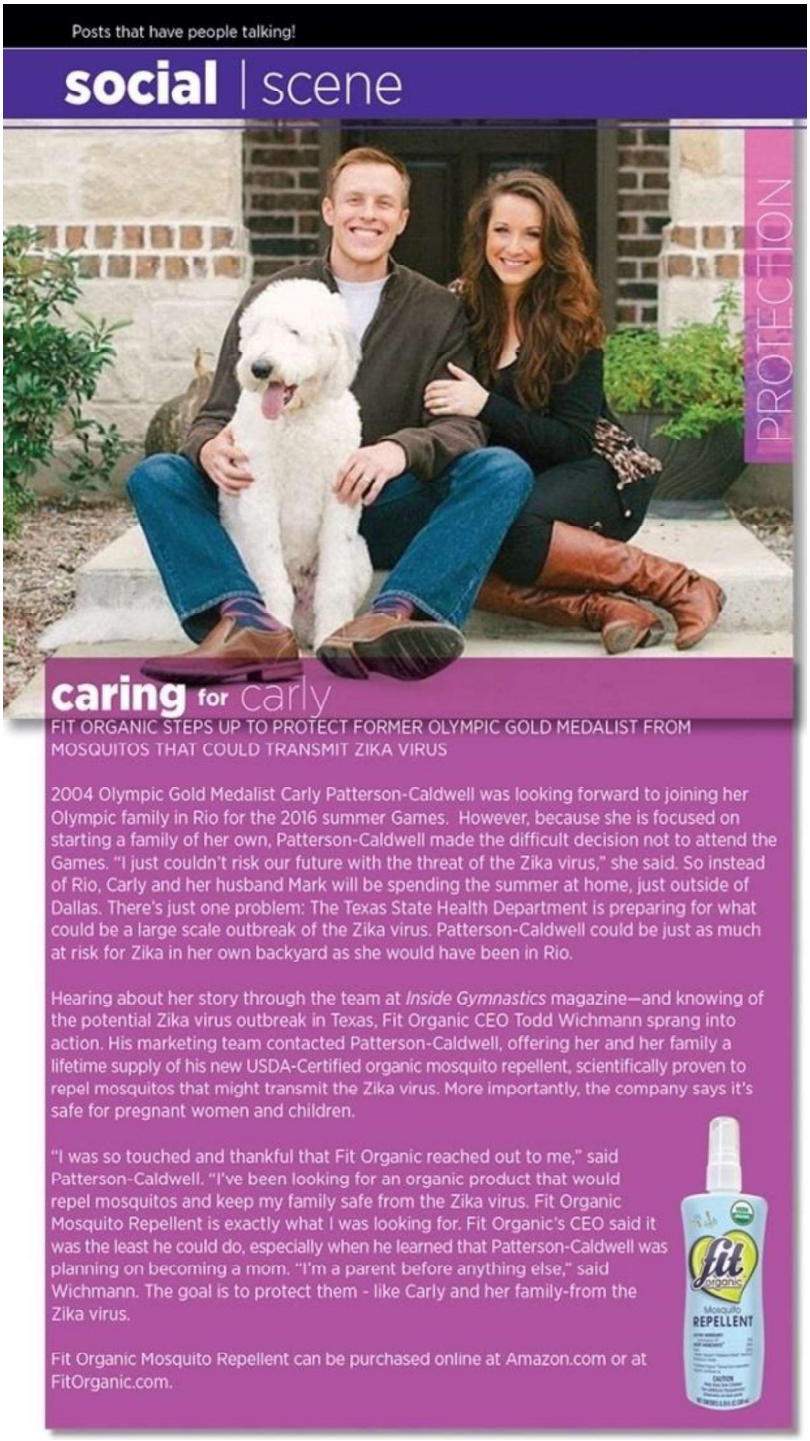
15. On June 1, 2016, Mr. Pettit emailed HealthPro the text of a draft Carly Patterson Caldwell advertorial for *Inside Gymnastics*, which he helped craft with Mr. Korotky and Inside Publications.

16. Later that day, Mr. Pettit emailed a substantially similar draft to which he added a reference to the donation of FIT Organic Mosquito Repellent to charities.

17. Inside Publications published an online version of the "Caring for Carly" article on June 2, 2016, on the *Inside Gymnastics* website, www.insidegymnastics.com. [*See* Ex. B at 3.]

18. Inside Publication posted a link to the online article on the *Inside Gymnastics* Facebook page on June 3, 2016, which Ms. Patterson Caldwell reposted on Facebook the same day. [Ex. B at 1, 3.]

19. In July 2016, *Inside Gymnastics* magazine published its *Guide to the Games* print issue, which included the below "social scene" article [Ex. E at 5]:



Posts that have people talking!

social | scene

PROTECTION

caring for carly

FIT ORGANIC STEPS UP TO PROTECT FORMER OLYMPIC GOLD MEDALIST FROM MOSQUITOS THAT COULD TRANSMIT ZIKA VIRUS

2004 Olympic Gold Medalist Carly Patterson-Caldwell was looking forward to joining her Olympic family in Rio for the 2016 summer Games. However, because she is focused on starting a family of her own, Patterson-Caldwell made the difficult decision not to attend the Games. "I just couldn't risk our future with the threat of the Zika virus," she said. So instead of Rio, Carly and her husband Mark will be spending the summer at home, just outside of Dallas. There's just one problem: The Texas State Health Department is preparing for what could be a large scale outbreak of the Zika virus. Patterson-Caldwell could be just as much at risk for Zika in her own backyard as she would have been in Rio.

Hearing about her story through the team at *Inside Gymnastics* magazine—and knowing of the potential Zika virus outbreak in Texas, Fit Organic CEO Todd Wichmann sprang into action. His marketing team contacted Patterson-Caldwell, offering her and her family a lifetime supply of his new USDA-Certified organic mosquito repellent, scientifically proven to repel mosquitos that might transmit the Zika virus. More importantly, the company says it's safe for pregnant women and children.

"I was so touched and thankful that Fit Organic reached out to me," said Patterson-Caldwell. "I've been looking for an organic product that would repel mosquitos and keep my family safe from the Zika virus. Fit Organic Mosquito Repellent is exactly what I was looking for. Fit Organic's CEO said it was the least he could do, especially when he learned that Patterson-Caldwell was planning on becoming a mom. "I'm a parent before anything else," said Wichmann. The goal is to protect them - like Carly and her family-from the Zika virus.

Fit Organic Mosquito Repellent can be purchased online at Amazon.com or at FitOrganic.com.

fit organic
Mosquito
REPELLENT

Complaint

20. The *Guide to the* Games issue also included the following article [Ex. E at 6]:

the latest on **ZIKA**

Many traveling to the Olympic Games are concerned about the Zika virus and its potential affects. Some, including former Olympic Champ Carly Patterson-Caldwell, even decided not to attend the Games because of Zika concerns (see story earlier in issue). Here is some information from the CDC on the disease.

"Zika virus disease (Zika) is a disease caused by the Zika virus, which is spread to people primarily through the bite of an infected Aedes species mosquito. The most common symptoms of Zika are fever, rash, joint pain, and conjunctivitis (red eyes). The illness is usually mild with symptoms lasting for several days to a week after being bitten by an infected mosquito. People usually don't get sick enough to go to the hospital, and they very rarely die of Zika. For this reason, many people might not realize they have been infected. However, Zika virus infection during pregnancy can cause a serious birth defect called microcephaly, as well as other severe fetal brain defects. Once a person has been infected, he or she is likely to be protected from future infections."

During the Games, the team at Inside Gymnastics will be using Fit Organic Mosquito Repellant Spray, the official mosquito repellant of Inside Gymnastics magazine. Five years in development, the new Fit Organic Mosquito Repellent Spray is a unique formula comprised of two key ingredients: organic lemongrass grown in Nepal and organic oleic acid derived from sunflowers in the United Kingdom. The company is providing product complimentary to a number of athletes, including U.S. gymnast Jake Dalton.



21. On or around August 17, 2016, Inside Publications also posted on the *Inside Gymnastics* website a third article referring to FIT Organic Mosquito Repellent [Ex. F]:

Move Over, Mosquitos!

> A lot of headlines leading up to the Olympics have centered around Brazil's battle with Zika. Athletes are mindful of the situation and are taking precautions to ensure their protection. U.S. Gymnast Jake Dalton recently became a Brand Ambassador for Fit Organic, a company that produces an organic mosquito repellent, which he uses daily in Rio. "I actually have Fit Organic right by the door and I use it right before we go out every day to protect ourselves. I use it if I want to go out and sit on the balcony because I like to be outdoors. It's just one less thing I have to worry about now. My family is also going to be using it here in Rio." The team at Inside Gymnastics is also using Fit Organic throughout our stay in Rio, and we thank them for supplying us with product!

22. The articles "Caring for Carly," "the latest on ZIKA," and "Move Over, Mosquitos!" did not disclose they were paid commercial advertising. [*See, e.g.,* Exs. E, F.]

Creaxion's Online Consumer Review Program

23. Creaxion also conducted an online consumer review program that reimbursed individuals, including Mr. Pettit and other Creaxion employees, for purchasing FIT Organic Mosquito Repellent and posting online reviews. Examples of such reviews are compiled in the attached Exhibit F. These materials contain the following statements and depictions:

a. **Worked for me in Brazil** 9/29/2016



by **Mark**

I used this product on a recent hike in a Brazilian rainforest and didn't get a single mosquito bite. A fellow hiker had been bitten by several mosquitos. Apparently, the spray he was using did not work. I loaned him my Fit Organic repellent and he loved it. He finished the hike without any more bites. This product smells great and is light on your skin. I highly recommend it;

b. **Works great** 10/5/2016



by **BeewhisperDon**

With all the rain we have had in Southest [sic] NC this year the mosquitoes have been terrible. After returning from Brazil,my [sic] brother Mark told me about this amaszing [sic] spray he used there to combat the mosquitoes. I ordered mine right away. After only one

application I was sold. The little buggers wouldn't even land. All natural, smells great, not greasy. It works!!!;

c. **Works and smells great!** 9/28/2016



by **Laura**

Great product and doesn't make you cough or feel like you're putting on chemicals when you spray it on like DEET. Not only does it work, it smells so fresh and natural. I'm very satisfied; and

d. **Great Product!** 11/8/2016



by PatyG Verified purchaser

I recommend this product. I really like the smell of it and that [sic] is deet free. I am constantly at parks with my kids and I feel comfortable reapplying the product without compromissing [sic] my kids [sic] skin with chemicals. The lemongrass scent is awesome! I love this brand I was already using the vegetable wash.

[Ex. G at 1, 4-5.]

24. The reviews did not disclose that the reviewers were reimbursed for buying the product or the reviewers' relationships to the public relations and marketing company hired to promote the product. [*See, e.g.,* Ex. G.]

Count I
False or Misleading Endorsement Claims

25. Through the means described in Paragraphs 13, 14, 19, and 20, Respondents have represented, directly or indirectly, expressly or by implication, that the statements by and depictions of Ms. Patterson Caldwell and Mr. Dalton about FIT Organic Mosquito Repellent reflected the independent experiences or opinions of impartial users.

26. Through the means described in Paragraphs 23 and 24, Respondents Creaxion and Pettit have represented, directly or indirectly, expressly or by implication, that the statements about FIT Organic Mosquito Repellent by Respondent Pettit and other participants in Respondent Creaxion's online consumer review program reflected the independent experiences or opinions of impartial users.

27. In fact, the statements by Ms. Patterson Caldwell, Mr. Dalton, Respondent Pettit, and other participants in Respondent Creaxion's online consumer review program did not reflect the independent experiences or opinions of impartial users because (a) they were created as a part of an advertising campaign to promote FIT Organic Mosquito

Repellent, and (b) the online consumer reviews were by individuals who were reimbursed for buying the product and included statements by the owner and employees of the public relations firm hired to promote the product. Therefore, the representations set forth in Paragraphs 25 and 26 are false or misleading.

Count II
Deceptive Failure to Disclose Material Connections with Endorsers

28 Through the means described Paragraphs 13, 14, 19, and 20, Respondents have represented, directly or indirectly, expressly or by implication, that the statements by Ms. Patterson Caldwell and Mr. Dalton about FIT Organic Mosquito Repellent (and related depictions) reflected their experiences or opinions.

29. Through the means described in Paragraphs 23 and 24, Respondents Creaxion and Pettit have represented, directly or indirectly, expressly or by implication, that the statements about FIT Organic Mosquito Repellent by Respondent Pettit and other participants in Respondent Creaxion's online consumer review program reflected the experiences or opinions of individuals who had used the product.

30. In numerous instances in which Respondents made the representations set forth in Paragraphs 28 and 29, they failed to disclose, or disclose adequately, that (a) Ms. Patterson Caldwell and Mr. Dalton were paid to endorse FIT Organic Mosquito Repellent, and (b) the online consumer reviews were by individuals who were reimbursed for buying the product and included statements by the owner and employees of the public relations firm hired to promote the product. These facts would be material to consumers in evaluating the endorsements of FIT Organic Mosquito Repellent in connection with a purchase or use decision.

31. Respondents' failure to disclose the material information described in Paragraph 30, in light of the representations made in Paragraphs 28 and 29, is a deceptive act or practice.

Count III
Deceptively Formatted Advertising

32. Through the means described in Paragraphs 14 and 19 through 22, Respondents have represented, directly or indirectly, expressly or by implication, that the social media posts by *Inside Gymnastics* and other Inside Publications magazines about FIT Organic Mosquito Repellent, and the articles "Caring for Carly," "the latest on ZIKA," and "Move Over Mosquitos!" were independent statements and opinions of impartial publications regarding FIT Organic Mosquito Repellent.

33. In fact, those posts and articles were not independent statements and opinions of impartial publications regarding FIT Organic Mosquito Repellent; they were paid commercial advertising. Therefore, the representation set forth in Paragraph 32 is false or misleading.

Violations of Section 5

34. 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 thirty first day of January, 2019, has issued this Complaint against Respondents.

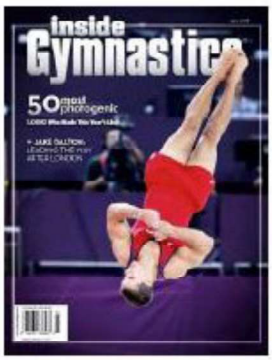
By the Commission.

Complaint

Exhibit A

inside publications

Inside Publications
Proposal Prepared For Fit Organic
Social and Digital Media Activation and Athlete Engagement



Inside Publications Brands
Inside Gymnastics, Inside Volleyball, Inside Cheerleading, Cheer Biz, Inside Dance

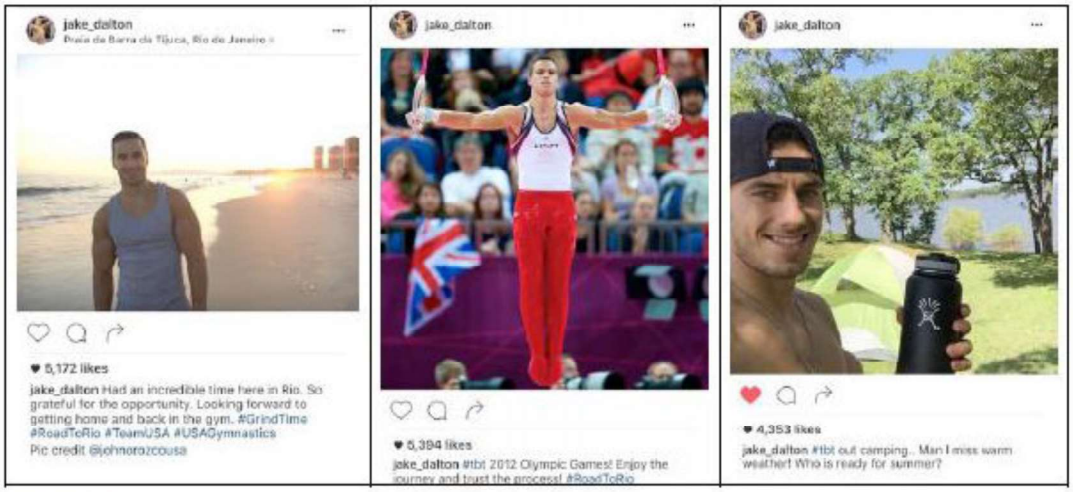
Educational / Feature Elements / Advertorial
Jul/Aug issue of *Inside Gymnastics*, Summer issue of *Inside Volleyball*

*Feature article on the product with background on development, explanation of use & benefits
*Advertorial will be tagged denoting that Fit Organic is the "Official Mosquito Repellent" of Inside Publications (see below)



Gift Basket Inclusion, Sampling
Inside Gymnastics will be sending "Good Luck" gift baskets to the top 10 potential U.S. women and top 10 potential U.S. men vying for spots on the team. Fit Organic will be included in each of the 20 gift baskets with a product and note.

Athlete Endorsement
Jake Dalton - 2012 Olympian, World Championship medalist, U.S. National Champion on Floor and Vault



Female Athlete - TBD

Complaint

Official Mosquito Repellent of Inside Publications (in actual posts, product would be listed as Official Mosquito Repellent of Inside Gymnastics and Inside Volleyball magazines)
Fit Organic becomes the Official Mosquito Repellent of Inside Publications and the team will travel with, use and promote the product leading up to the Games and during the Games

Social Media
Inside Publications and Endorsed Athlete will promote Fit Organic through social media leading up to the Games and during the Games. The teams will travel with the product and show it in use in photo posts during the Games.
* 25 Social Media Posts from Inside Publications (700,000 Followers combined FB, Instagram, Twitter) now through the Games
* 20 Social Media posts from Jake Dalton now through the Games (300,000+ Followers)
* 15 Social Media posts from female athlete now through the Games (TBD)

Example post: "We've landed in Brazil and we're applying our Fit Organic Mosquito Repellent as we cover the 2016 Olympic Games! USDA-certified organic. The real deal, just like us!"

Note: In addition to our Olympic-oriented sports, *Inside Cheerleading* and *Inside Dance* also have target audiences that are outdoors quite frequently – for camps, practices, game day, etc where the product would be of interest and beneficial as well, particularly given that it is safe for children.

Packaged Program Fee:
- ☐ **$7,000 (Including Male Athlete Involvement)**
- ☐ **$9,500 (Including Female Athlete Involvement)**

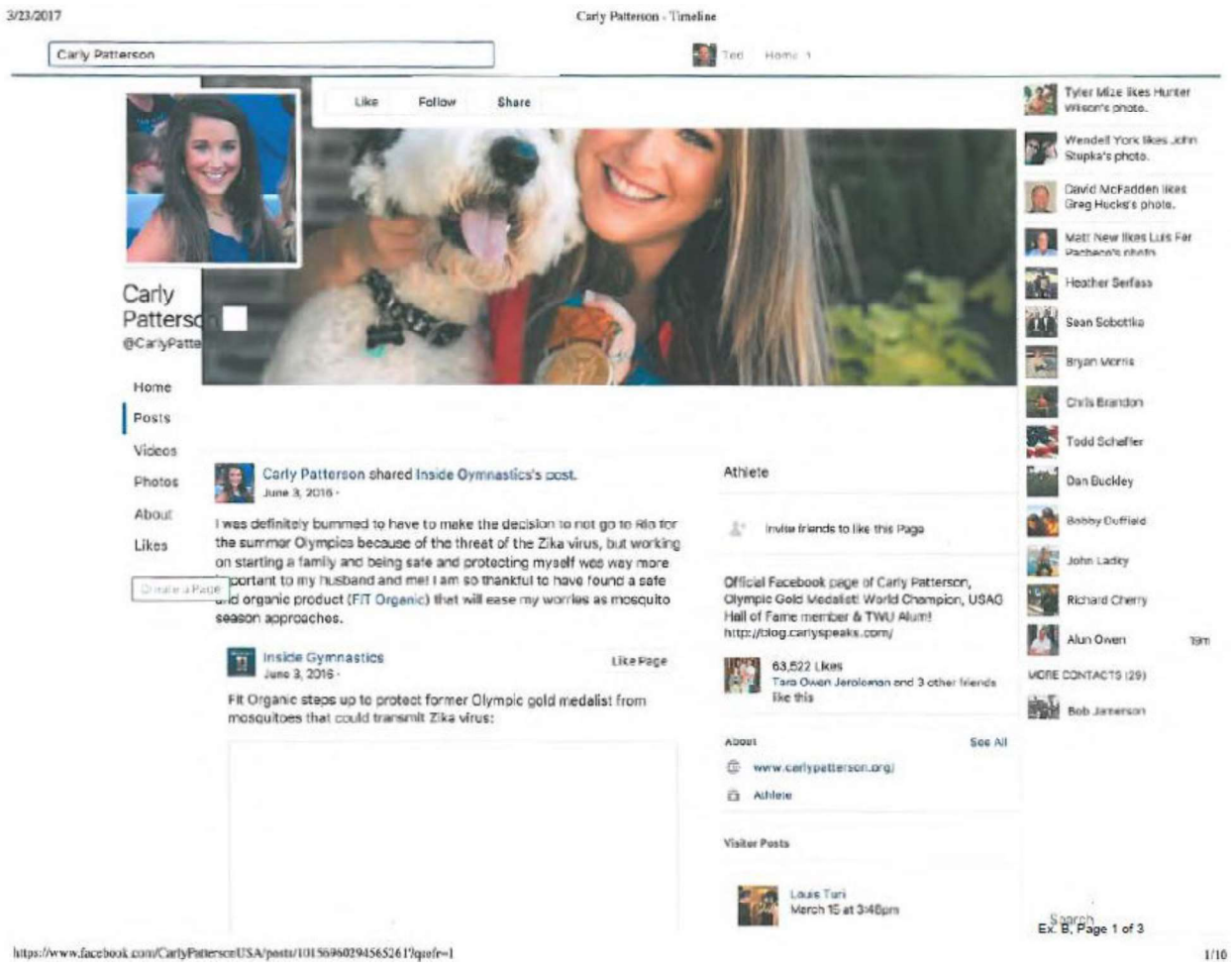
Note: Male/Female Athletes to be approved by both parties.

Agreed to,

_____	_____
Chris Korotky, Inside Publications	Todd Wichmann, Fit Organic

###

Exhibit B


3/23/2017
Carly Patterson - Timeline
Carly Patterson
Like
Follow
Share
Carly Patterson shared Inside Gymnastics's post.
June 3, 2016
I was definitely bummed to have to make the decision to not go to Rio for the summer Olympics because of the threat of the Zika virus, but working on starting a family and being safe and protecting myself was way more important to my husband and me! I am so thankful to have found a safe and organic product (FIT Organic) that will ease my worries as mosquito season approaches.
Inside Gymnastics
June 3, 2016
Like Page
Fit Organic steps up to protect former Olympic gold medalist from mosquitoes that could transmit Zika virus:
Home
Posts
Videos
Photos
About
Likes
Athlete
Invite friends to like this Page
Official Facebook page of Carly Patterson, Olympic Gold Medalist! World Champion, USAG Hall of Fame member & TWU Alum!
http://blog.carlyspeaks.com/
63,522 Likes
Tara Owen Jeroleman and 3 other friends like this
About
See All
www.carlypatterson.org
Athlete
Visitor Posts
Louis Turi
March 16 at 3:46pm
Tyler Mize likes Hunter Wilson's photo.
Wendell York likes John Stupka's photo.
David McFadden likes Greg Hucks's photo.
Heather Serfass
Sean Sobottka
Bryan Morris
Chris Brandon
Todd Schaffer
Dan Buckley
Bobby Duffield
John Ladley
Richard Cherry
Alun Owen
MORE CONTACTS (29)
Bob Jamerson
https://www.facebook.com/CarlyPattersonUSA/posts/10156960294565261?qiefr=1
Ex. B, Page 1 of 3
1/10

Complaint

3/23/2017 Carly Patterson - Timeline



Timeline Photos Options Share Send Like

Carly Patterson
Like This Page · June 1, 2016 ·

Thank you so much FIT Organic for the mosquito repellent! I love the smell & love that it's all organic & safe! I'm a buffet for mosquitos so this is a game changer! — with Carly Patterson Caldwell.

Like Comment Share

Mark Pettit and 305 others Top Comments

237 shares 44 Comments

Carly Patterson Of course!! But I'm going to make you come to Dallas to get it;)
Like · Reply · June 1, 2016 at 9:23pm

Stacy Amador Does it really work?
Like · Reply · 1 · June 2, 2016 at 1:36am

Carly Patterson Yes! It's been tested and proven even on the mosquitos that carry Zika! And it smells good!
Like · Reply · 2 · June 2, 2016 at 10:50am

View more replies

Sarah Marquez Can it be used on toddlers and infants?
Like · Reply · June 2, 2016 at 11:42am

Write a comment...

Ex. B, Page 2 of 3

https://www.facebook.com/CarlyPattersonUSA/photos/a.101507/10208602681.715979.1736/10156507685802 61/?type=3&theater 1/1


Carly Patterson shared Inside Gymnastics's post
I was definitely bummed to have to make the decision to not go to Rio for the summer Olympics because of the threat of the Zika virus, but working on starting a family and being safe and protecting myself was way more important to my husband and me! I am so thankful to have found a safe and organic product (FIT Organic) that will ease my worries as mosquito season approaches.
Inside Gymnastics
Like Page
Fit Organic steps up to protect former Olympic gold medalist from mosquitoes that could transmit Zika virus:
Caring for Carly | Inside Gymnastics
2004 Olympic Gold Medalis...
INSIDEGYMNASTICS.COM
Like
Comment
Share
Chronological

Complaint

Exhibit C

Jake Dalton on Twitter: "Getting Rio Ready! Not worried about Zika. F...dy covered. Love the Fit mosquito repellent https://t.co/BXS4Z6OPgN" 4/7/17, 4:44 PM



https://twitter.com/jake_dalton/status/743830095668731906?lang=en Page 1 of 1

Youtube | Jake Dalton (@jake_dalton) • Instagram photos and videos 4/7/17, 4:27 PM



jake_dalton Following

26,823 likes 32w

jake_dalton Made it back to the US! Thanks @fitorganicusa for protecting me during my trip in Rio!!

view all 79 comments

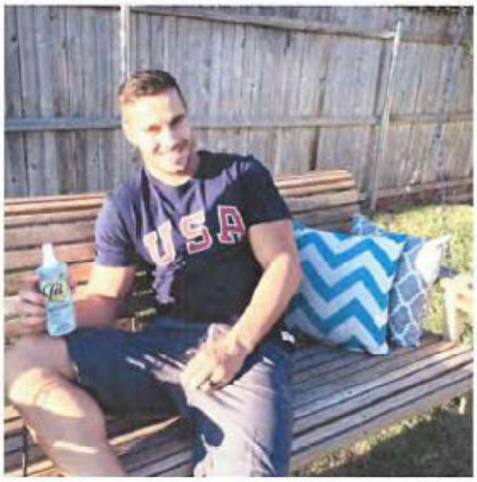
priscillaa_12 @mralex43 the real daddy

Add a comment...

https://www.instagram.com/p/BJfTRwwjbMc/?taken-by=jake_dalton Page 1 of 1

Complaint

Youtube | Jake Dalton (@jake_dalton) • Instagram photos and videos 4/7/17, 4:26 PM



jake_dalton Following

20,900 likes 30w

jake_dalton Looking forward to the holiday weekend! And of course, I'll be using my organic mosquito repellent from @fitorganicusa. You should too! #Organic #Safe

Add a comment...

https://www.instagram.com/p/BJ32P-zDr60/?taken-by=jake_dalton Page 1 of 1

Ex. C, Page 3 of 3

InsidePub-000098

Complaint

Exhibit D



Ex. D, Page 1 of 5

InsidePub-000019



InsidePub-000021





Ex. D, Page 2 of 5

InsidePub-000022



InsidePub-000025

Complaint



insidegym

2,412 likes 31w

insidegym A big thank you to @fitorganicusa for providing their organic mosquito repellant to the team at Inside Gymnastics and also to gymnast @jake_dalton to use here in Rio! Love the

Add a comment...



insidegym

3,101 likes 41w

insidegym Gymnasts making news left and right!
#Repost #fitorganicusa She's big news! Carly Patterson appeared on CNN talking about the Zika virus and the difficult

Add a comment...

Ex. D, Page 3 of 5

InsidePub-000026

InsidePub-000030



insidegym

3,609 likes 42w

insidegym Yes! We'll be packing this for Brazil ourselves! 💯
#Repost @carlypattersonO4 Thank you so much @fitorganicusa for the mosquito repellent! I love the smell & love that it's all organic & safe! I'm a buffet for mosquitos so this is a game changer!

jennielartzt I have been using lemon/eucalyptus oil in a spray.

Add a comment...



insidegym

2,755 likes 43w

insidegym We'll be bringing this with us to Brazil!
#Repost @cleanwithfit It's here! Our certified USDA #organic Mosquito Repellent has been released! It has been

Add a comment...

Ex. D, Page 4 of 5

InsidePub-000033

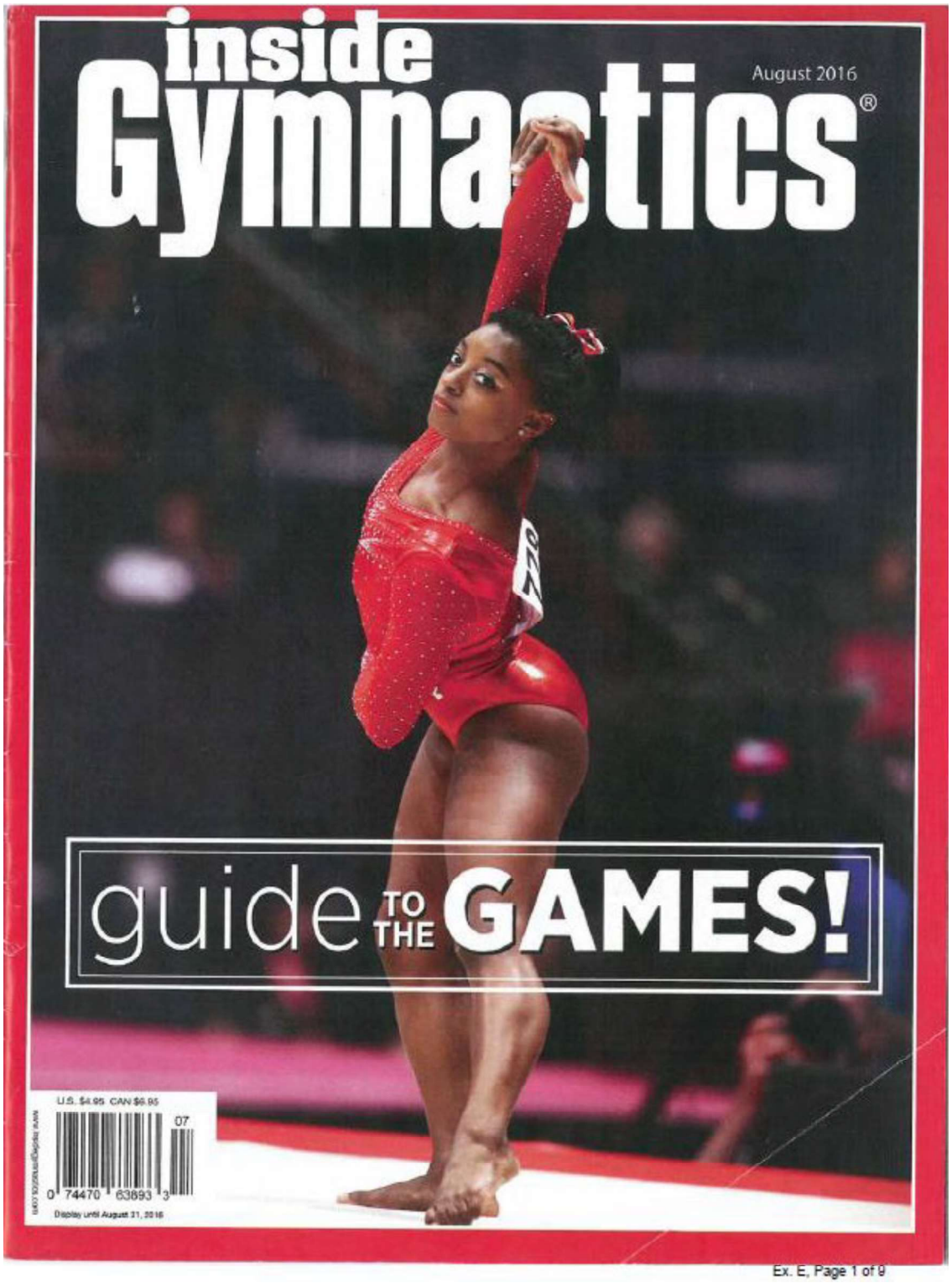
InsidePub-000034



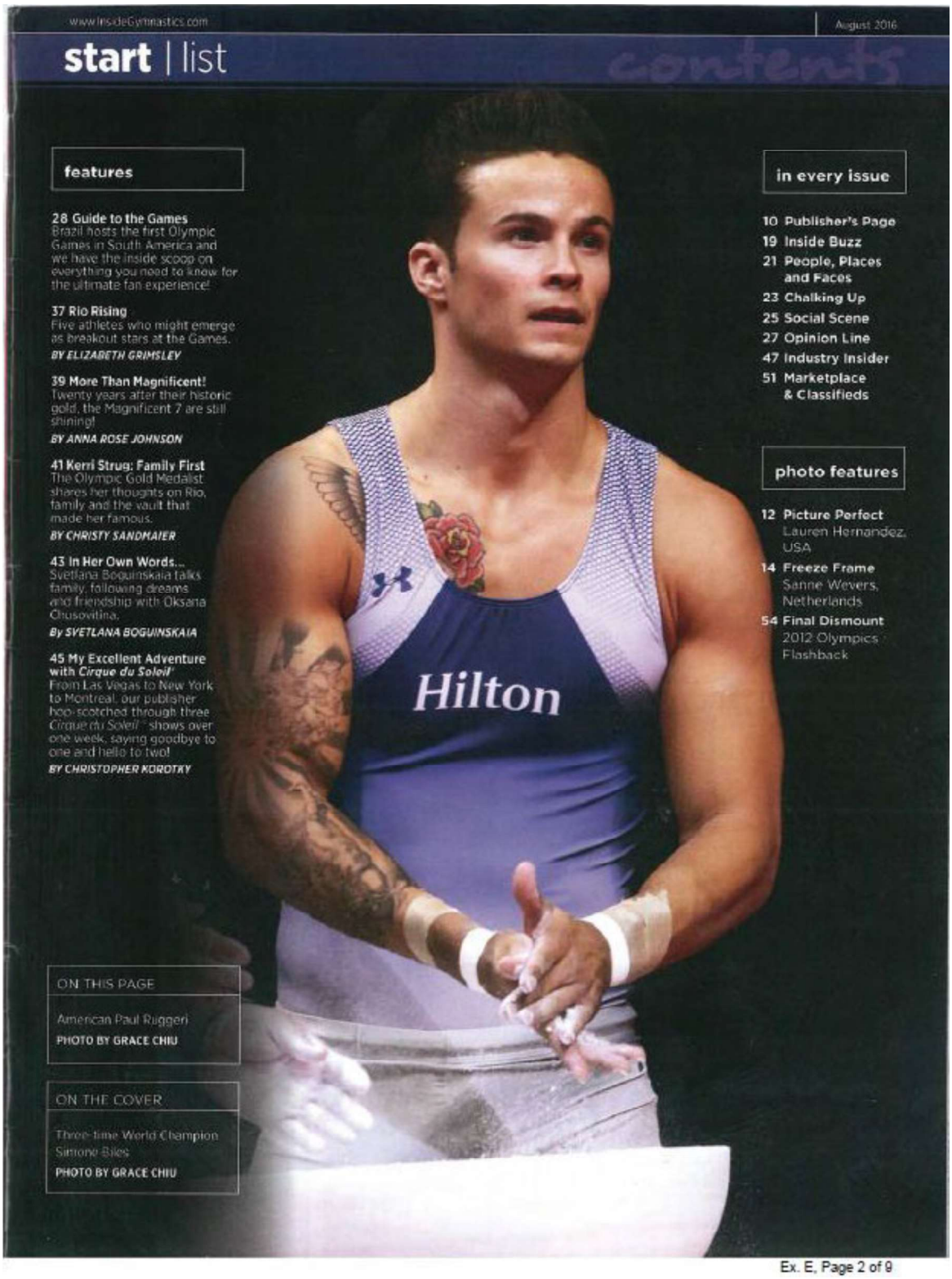
Ex. D, Page 5 of 5

Complaint

Exhibit E



Ex. E, Page 1 of 9



Ex. E, Page 2 of 9

Complaint

My take | August 2016

publisher's | page



I've been to every Olympic Games since 1996, with the exception of Athens (we were launching a sister magazine at the time), and each one holds remarkable memories of incredible moments. In 1996, I remember being in awe of Alexei Nemov's incredible style and the personality he infused into the sport. And of course, the Magnificent 7 – who we look back on in this issue – were simply magical with a will and determination like no other. They charted a new course in history and hold a special place in the hearts and minds of fans of the sport. In 2000, my good friend Steve McCain represented the USA and I experienced that Games through the eyes of his family, whom I traveled with. I remember my heart racing with each set Team USA performed, knowing how much each had gone through to compete. I remember John Roethlisberger, now a columnist for the magazine, eating his first donut in years at the conclusion of competition, having dedicated himself to a nutrition plan for years that would give him the best shot for optimal performance. Though it was one sacrifice, that donut represented the greater sacrifices that all athletes make when they dedicate themselves to a lifelong dream. In 2008, I remember the overall pageantry of the Games. Beijing wanted to put forth the greatest display ever of Olympic force, so to speak, and they put on an event that is one for the ages. From the 2012 Games, I remember the Fierce Five and what a monumental moment and team effort it was reaching the top of the podium. I remember Gabby Douglas gently wiping a tear from her eye and the joy that was beaming from her face.



Grace Chiu

Gabby Douglas reacts to seeing her name at the top of the leader board in the Women's All-Around competition in London.

Though each Games was uniquely different, one thing all had in common was the unique sense of 'world community' and the incredible ability to bridge divides through sport. People set aside their differences and unify through an experience that is virtually indescribable. It's about so much more than sports. It's about pride of nation. It's about celebrating life. It's about finding common ground and camaraderie, even amongst the fiercest of competitors.

Walking through the Olympic grounds, people from hundreds of countries around the world are laughing together, smiling at each other and sharing stories while celebrating sport and life. Simply put, there is nothing like it. At each Games, I get goosebumps over and over and over, whether watching an incredible feat of sport or watching friendships develop, joined by this unbelievable experience called the Olympic Games.

As I prepare to head to Rio, I know I'll once again experience moments for a lifetime over a two-week span. Covering the sport, we get to know the athletes who will represent our country and have the opportunity to see first-hand all of the blood, sweat and tears that go into making a team. I remember asking U.S. Olympian Terin Humphrey what went through her head the moment an Olympic medal was being placed around her neck. She paused for a moment and then told me that both good times and tough times flashed through her mind and she realized at that moment that every sacrifice, every tough day she had endured was absolutely worth it. She told me that it was an accomplishment not only for herself, but for her country she was representing and how proud that made her. Something no one can ever take away. The Olympic spirit, defined.

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Submissions: Photo, content/story, letters to the editor and ad submissions are welcome. All submissions become property of Inside Gymnastics magazine. For return of materials, please include a self-addressed stamped envelope with adequate postage. Inside Gymnastics assumes no responsibility for unsolicited contributed material.
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inside Gymnastics MAGAZINE



10 hot topics that have the gymnastics community buzzing!

First Rotation

inside | buzz

trending

Photo by Grace Chin

{2} **Move Made, Please!** - We're loving the USA Gymnastics video series *Made in America*, available on their YouTube channel. Well done!

San Jose Sellout - Weeks before the Women's Olympic Trials in San Jose, USA Gymnastics announced that the event was officially sold out. We expect an absolutely electric atmosphere in the SAP Center!

{3}

Zika Confusion - A group of 150 health experts issued an open letter calling for the 2016 Olympics to be delayed or moved due to health concerns, but the World Health Organization responded that there was no public health justification for a change. Still, concerns about the virus understandably abound. Our team will be wearing Fit Organic mosquito repellent during the Games.

{4}

Russian Revolution? - The Russian men's gymnastics program has worked for years to return to the glory of its golden age and continue to make strides, including a victory at the recent European Championships, edging Great Britain.

{5}

{6} **Noteworthy in the NCAA** - The debate continues to rage regarding early commitments of athletes to NCAA programs. Which side of the debate are you on? Let us know @insideGym.

A Moment for Maddie - U.S. Gymnast Maddie Desch announced her retirement from elite gymnastics, having struggled for some time with a back injury. "I have decided to let my body heal and look forward to the amazing chapter I have ahead at the University of Alabama," she said.

{7}

{8} **Ninja Challenge - Got Skills?** - How are your Ninja skills? Test them out at a USA Gymnastics premiere event this summer! (More in *Chalking Up*)

Coach Elise! - The University of Washington has a new women's head coach - 2000 Olympic medalist Elise Ray, who has served as the associate head coach since the beginning of last season. Congratulations, Elise!

{9}

{10} **Golden Viewing!** - Gabby Douglas' docu-series, *Douglas Family Gold*, debuted last month on Oxygen and gives fans a glimpse into her life off of the competition floor.

{1} *Rio Ready - A decade of training. Thousands of hours in the gym. Years of blood, sweat and tears... It All Comes Down To This!*

Rio hosts the first-ever Olympics in South America this August, and *Inside Gymnastics* will be on the scene bringing you the latest and greatest from Brazil! Among the highlights will be the showdown between defending Olympic Champ Gabby Douglas and defending and three-time World Champ Simone Biles! Will the British women make the podium? Who will surprise the world? And can Kohei (pictured) continue his reign?

LONGINES

Complaint


Posts that have people talking!
social | scene
caring for Carly
FIT ORGANIC STEPS UP TO PROTECT FORMER OLYMPIC GOLD MEDALIST FROM MOSQUITOS THAT COULD TRANSMIT ZIKA VIRUS
2004 Olympic Gold Medalist Carly Patterson-Caldwell was looking forward to joining her Olympic family in Rio for the 2016 summer Games. However, because she is focused on starting a family of her own, Patterson-Caldwell made the difficult decision not to attend the Games. "I just couldn't risk our future with the threat of the Zika virus," she said. So instead of Rio, Carly and her husband Mark will be spending the summer at home, just outside of Dallas. There's just one problem: The Texas State Health Department is preparing for what could be a large scale outbreak of the Zika virus. Patterson-Caldwell could be just as much at risk for Zika in her own backyard as she would have been in Rio.
Hearing about her story through the team at Inside Gymnastics magazine—and knowing of the potential Zika virus outbreak in Texas, Fit Organic CEO Todd Wichmann sprang into action. His marketing team contacted Patterson-Caldwell, offering her and her family a lifetime supply of his new USDA-Certified organic mosquito repellent, scientifically proven to repel mosquitos that might transmit the Zika virus. More importantly, the company says it's safe for pregnant women and children.
"I was so touched and thankful that Fit Organic reached out to me," said Patterson-Caldwell. "I've been looking for an organic product that would repel mosquitos and keep my family safe from the Zika virus. Fit Organic Mosquito Repellent is exactly what I was looking for." Fit Organic's CEO said it was the least he could do, especially when he learned that Patterson-Caldwell was planning on becoming a mom. "I'm a parent before anything else," said Wichmann. The goal is to protect them – like Carly and her family–from the Zika virus.
Fit Organic Mosquito Repellent can be purchased online at Amazon.com or at FitOrganic.com.
PROTECTION
Must Reads
SYTYCD!
We're loving the new season of the Emmy Award-winning FOX series, So You Think You Can Dance! Focusing on "the next generation" of dancers, this season pairs 10 young dancers (under 13-years-old) with All-Star favorites from past seasons to compete for the title of "America's Favorite Dancer." We had the opportunity to interview the top 10 recently, and we're so impressed with the incredible level of talent and mind-boggling maturity of the talented field!
BTW 200,000+ are Following Us on Instagram. Are you?!
Follow us! @InsideGym @InsideGym /InsideGymnastics
"CHEW ON A PAIR OF THESE"
NARROW
ENGLISH BULLDOG
LADY
WWW.ENGLISHBULLDOGGRIPS.COM
ENGLISH BULLDOG
PREMIUM DOWEL GRIPS
ORDER ONLINE
www.unitedathletic.com
OR CALL
1-800-877-5294

We're proponents of the U.S. gymnasts wearing red, white and blue leotards in Olympic team finals. Remember the Magnificent 7 in their beautiful patriotic leotard in Atlanta 1996? Yes, the Fierce Five were stunning in 2012 with red leotards (dazzling with crystals), but fans back home long for the celebrated, patriotic look. We can't wait to see what they step onto the competition floor wearing! U.S. Olympic gymnast Wendy Bruce Martin shares her perspective on the fashion front...

a return to PATRIOTIC LEOTARDS?

Whenever fans see our U.S. gymnasts wearing leotards that are not red, white and blue during the Olympics, it can cause a little uproar – as we've seen on social media! Some say that focusing on a leotard color rather than the athlete's accomplishment is ridiculous. I do agree that leotard color does not take away from a gymnast's accomplishment, whatsoever. I also understand why it bothers coaches, athletes, and fans. Instead of sending congratulatory tweets, we've seen many cases of fans debating leotard colors after a competition. Personally, I do feel leotard selection does matter, and it has nothing to do with gymnastics.

Every four years, a select few earn the opportunity to represent their country at the Olympics, the world's greatest sports stage. But competing in the Olympics is a representation of so much more. The United States of America chooses their most qualified athletes and supports them in their battle. The people of the United States sit at home, watching with pride. For two weeks, Americans put their religious, political, and racial differences aside and the entire country comes together to bestow love and support upon their athletes. *Their* athletes, representing *their* nation.

These athletes are not only competing for themselves. They are competing for their coach, their gym, their state, their country and the people of that country. They are not alone in their fight. They represent all the people of the United States. They are symbols of what the United States stands for. Our athletes are the image of strength, compassion, acceptance, diversity and power. They represent freedom and opportunity.

Wearing the colors that represent the United States is a symbol that shows pride, honor, and fellowship among all Americans. The red, white and blue, and the stars and stripes are unmistakably American. It is an honor to be able to wear them.

I was a member of the 1992 Olympic team and our leotards were red, white and blue, and our warm-up suits were red, white and blue with huge stars and stripes. When we received our apparel, we felt pride in being a part of TEAM USA, and the apparel symbolized that. When we put on our leotards we felt it, we felt it with pride. We felt the patriotism.

To me, it mattered. Not everyone is given the opportunity to represent their country. I wanted to be in our colors. When standing on the awards stand, I was proud to be in red, white and blue. I was proud to represent the country that gave me the opportunity to achieve my dreams, and I was proud to be an American.



Wendy Bruce Martin was a member of the 1992 Olympic team and has been involved in gymnastics for 36 years, including coaching for 22. She received a degree in psychology and is a certified mental toughness coach, who owns the Mental Toughness Company, GET PSYCHED! and is co-owner of Gold Medal Moms. You can visit Wendy at www.WendyBruceMartin.com







the latest on ZIKA

Many traveling to the Olympic Games are concerned about the Zika virus and its potential affects. Some, including former Olympic Champ Carly Patterson-Caldwell, even decided not to attend the Games because of Zika concerns (see story earlier in issue). Here is some information from the CDC on the disease.

"Zika virus disease (Zika) is a disease caused by the Zika virus, which is spread to people primarily through the bite of an infected Aedes species mosquito. The most common symptoms of Zika are fever, rash, joint pain, and conjunctivitis (red eyes). The illness is usually mild with symptoms lasting for several days to a week after being bitten by an infected mosquito. People usually don't get sick enough to go to the hospital, and they very rarely die of Zika. For this reason, many people might not realize they have been infected. However, Zika virus infection during pregnancy can cause a serious birth defect called microcephaly, as well as other severe fetal brain defects. Once a person has been infected, he or she is likely to be protected from future infections."

During the Games, the team at Inside Gymnastics will be using Fit Organic Mosquito Repellent Spray, the official mosquito repellant of Inside Gymnastics magazine. Five years in development, the new Fit Organic Mosquito Repellent Spray is a unique formula comprised of two key ingredients: organic lemongrass grown in Nepal and organic oleic acid derived from sunflowers in the United Kingdom. The company is providing product complimentary to a number of athletes, including U.S. gymnast Jake Dalton.



guide TO THE GAMES! Rio2016

Complaint

ADVERTORIAL

in the SPOTLIGHT: #REBELLEVEL

Rebel Gymnastics



Gordon Steinecke, Vice President of Design for Rebel Gymnastics, talks about the company's line of products, its innovative design and quality, and Olympic-year trends.





Rebel Gymnastics is relatively new to the gymnastics market. How has the reception been?
Overwhelmingly positive! People are so excited about our new line and there is a lot of interest and buzz in the gymnastics world. We are looking forward to having Rebel in every gym across America. Gymnastics is a special sport where the girl's leotard accentuates their beautiful movements. Gymnasts want to pair their hard work with a leotard that shows off those hard-earned skills.

What are some of the characteristics that make Rebel Gymnastics leotards unique?
It's more than just the uniqueness of design; it's the Rebel attitude behind it. We are the first company to bring the fashion-industry's design style to competitive gymnasts. We aim to provide an increased level of product choice, customization, design intricacy, service and value to our customers.

Karen Noseff Aldridge, the founder of the company, has a background in mainstream fashion that she infused into the leotard designs. Talk a little about that...
Because of her background, Karen was able to see where there was something missing in the cheer world... the couture, stylish, designer cheer uniform. Now, there are many more design options than just an old boring cheer uniform. With that same vision, we want to fill the gap for gymnasts and revolutionize the gymnastics world. Innovating designs have helped raise the bar and bridge that gap between being just a leotard, but having a leotard that elevates a gymnast's performance to a whole new level. It's not just about designing a leotard that fits the same mold; it's about shattering that mold and pushing boundaries.

With this being an Olympic year, red, white and blue or patriotic themed leotards are a big hit. Is this a big initiative for Rebel Gymnastics this year as well?
What's great about Rebel is that we strive to give our customers what their heart desires and, with it being an Olympic year, red, white and blue leos are definitely on trend. We are thrilled to create looks that incorporate the patriotism customers are feeling, and add a flair only Rebel can offer. Taking things to #RebelLevel is what we do.

What are some of the other trends we can expect in leotards over the next year?
At Rebel it's not just about what's trendy, it's also about creating the best. The best design, the best fabrics, the best fits, and getting it all with the best value. Our designs are one-of-a-kind, show stopping pieces that are only limited by what you can dream up. With Rebel, anything is possible!

For companies interested in learning more about Rebel Gymnastics and its line of products, what are the best ways for them to connect?
Call our corporate office at 855.Rebel68 to begin designing a custom leotard. We also have an active Social Media presence. Make sure you are following it all and be some of the first to see everything new with Rebel Gymnastics!



@rebelgymnastics
@rebelgymnastics
/rebelgymnasticsleos

Images by Rebel Gymnastics

View the most recent Lookbook at
www.rebel-gymnastics.com

Ex. E, Page 7 of 9

EQUIPMENT: latest & greatest

ADVERTORIAL

With the 2016 Olympic games just around the corner, and some serious U.S. hardware in sight, gym enrollment numbers are sure to soar after the games. Be sure your gym is ready for the surge with the BEST and NEWEST equipment on the market!

MANCINO MANUFACTURING CO., INC.
Mini Foam Vault Table
Mancinomats.com



AMERICAN ATHLETIC, INC.
AirTrack Training Set by AAI
AmericanAthletic.com/airtrak



NORBERT'S ATHLETIC PRODUCTS, INC.
Ninja Challenge Course
Norberts.net



AMERICAN GYMNAST
Parallel Blocks Set
American-Gymnast.com



RESILITE
Incline Skill Development System
Resilite.com



DEARY'S GYM SUPPLY (DGS)
Workstation and Multi Bar
GymSupply.com



ROSS ATHLETIC SUPPLY
Ross Athletic 7' x 14' Competition Trampoline
RossAthletic.com



EXTREME ATHLETIC SUPPLY
X-Factor Floor Bars
EASupply.net



SPIETH AMERICA
New Inflatable Line by Spieth America
SpiethAmerica.com



GMR
By GMR Alumaflex Competition Balance Beam
ByGMR.com



TUMBL TRAK
Hurdle Helper
TumblTrak.com

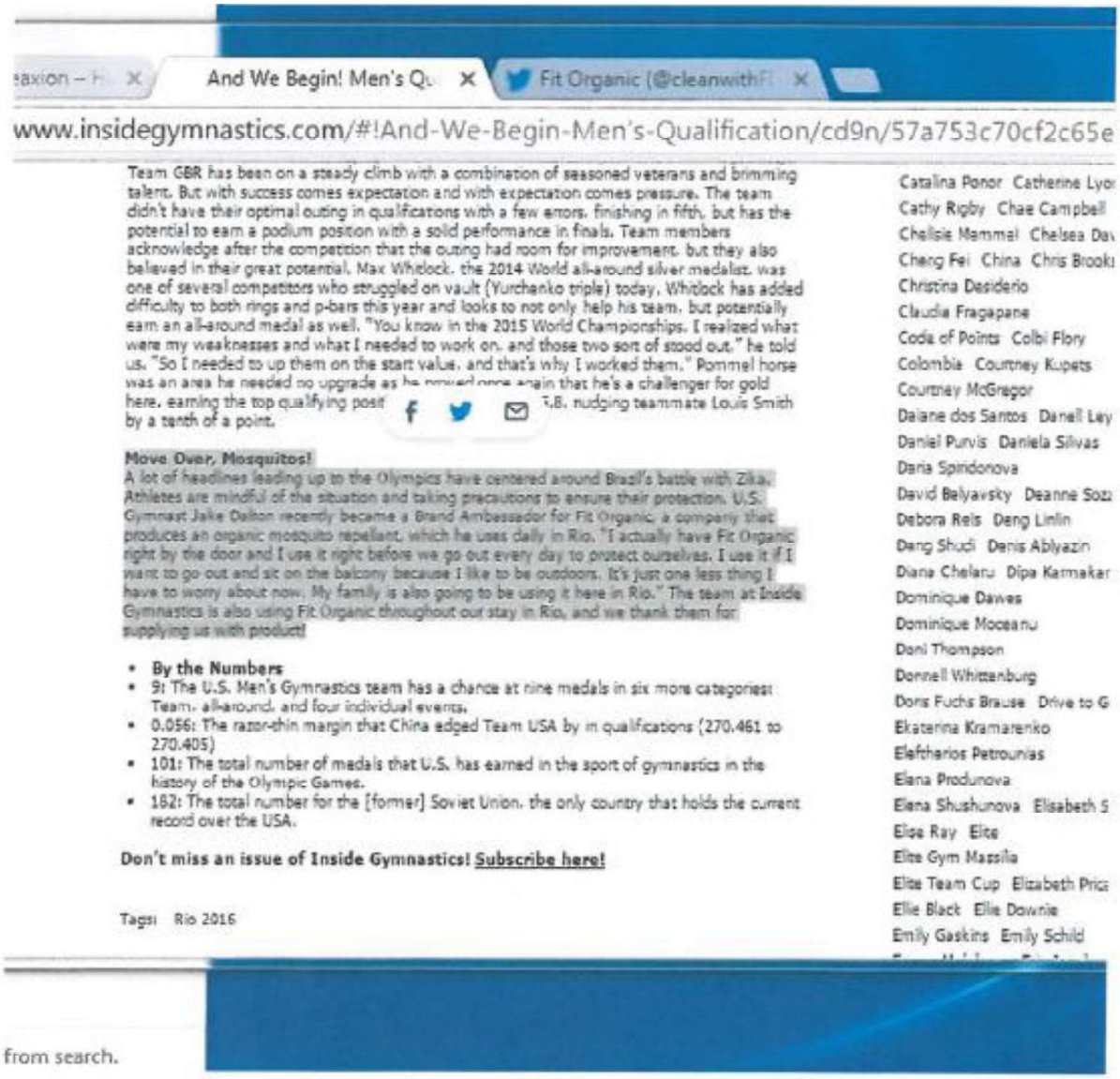


Complaint



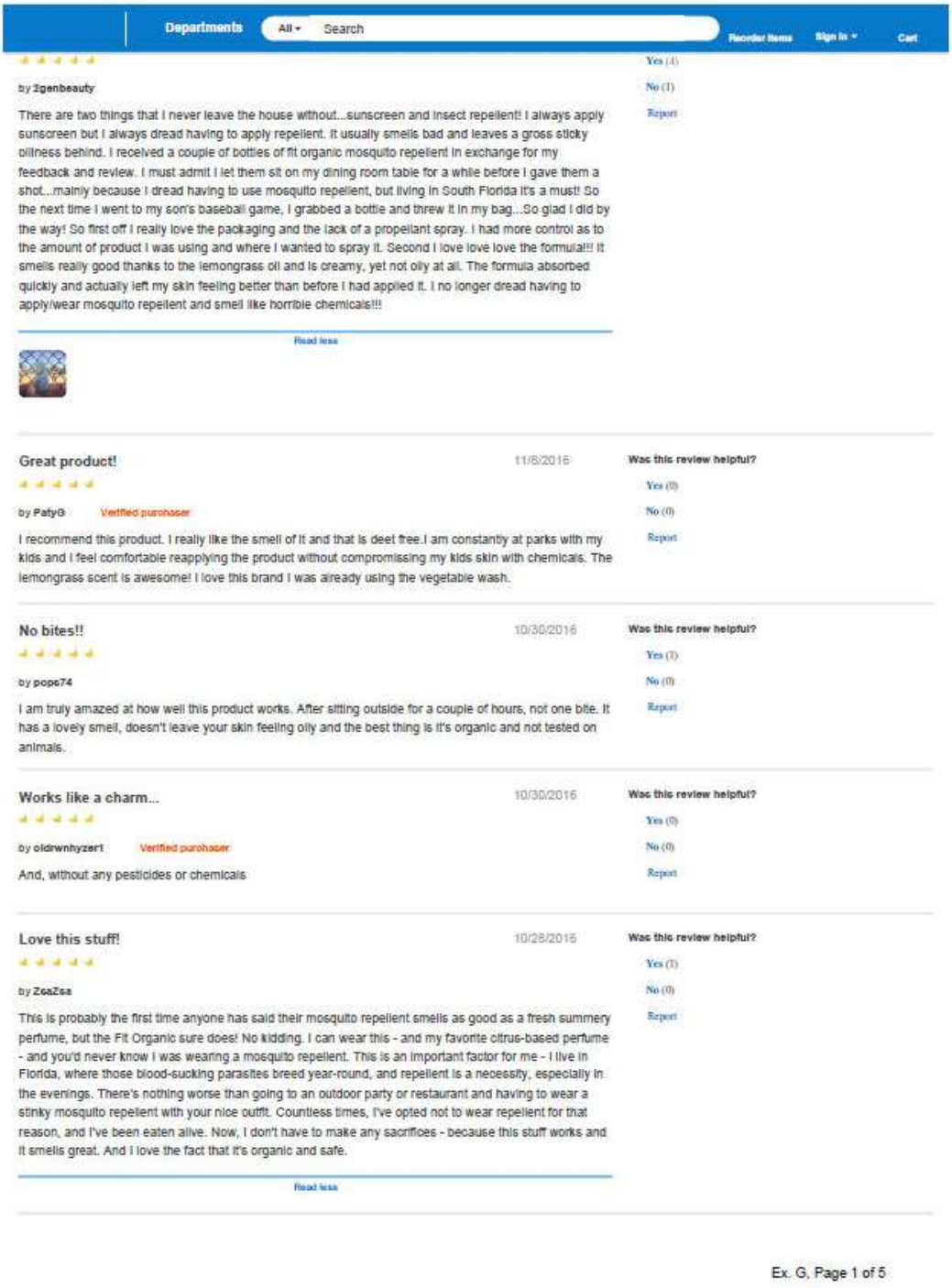
Ex. E, Page 9 of 9

Exhibit F


And We Begin! Men's Qu
Fit Organic (@cleanwithFi
www.insidegymnastics.com/#!And-We-Begin-Men's-Qualification/cd9n/57a753c70cf2c65e
Team GBR has been on a steady climb with a combination of seasoned veterans and brimming talent. But with success comes expectation and with expectation comes pressure. The team didn't have their optimal outing in qualifications with a few errors, finishing in fifth, but has the potential to earn a podium position with a solid performance in finals. Team members acknowledge after the competition that the outing had room for improvement, but they also believed in their great potential. Max Whitlock, the 2014 World all-around silver medalist, was one of several competitors who struggled on vault (Yurchenko triple) today. Whitlock has added difficulty to both rings and p-bars this year and looks to not only help his team, but potentially earn an all-around medal as well. "You know in the 2015 World Championships, I realized what were my weaknesses and what I needed to work on, and those two sort of stood out," he told us. "So I needed to up them on the start value, and that's why I worked them." Pommel horse was an area he needed no upgrade as he proved once again that he's a challenger for gold here, earning the top qualifying post
T.B. nudging teammate Louis Smith by a tenth of a point.
Move Over, Mosquitos!
A lot of headlines leading up to the Olympics have centered around Brazil's battle with Zika. Athletes are mindful of the situation and taking precautions to ensure their protection. U.S. Gymnast Jake Dalton recently became a Brand Ambassador for Fit Organic, a company that produces an organic mosquito repellant, which he uses daily in Rio. "I actually have Fit Organic right by the door and I use it right before we go out every day to protect ourselves. I use it if I want to go out and sit on the balcony because I like to be outdoors. It's just one less thing I have to worry about now. My family is also going to be using it here in Rio." The team at Inside Gymnastics is also using Fit Organic throughout our stay in Rio, and we thank them for supplying us with product!
By the Numbers
9: The U.S. Men's Gymnastics team has a chance at nine medals in six more categories: Team, all-around, and four individual events.
0.056: The razor-thin margin that China edged Team USA by in qualifications (270.461 to 270.405)
101: The total number of medals that U.S. has earned in the sport of gymnastics in the history of the Olympic Games.
162: The total number for the [former] Soviet Union, the only country that holds the current record over the USA.
Don't miss an issue of Inside Gymnastics! Subscribe here!
Tags: Rio 2016
Catalina Ponor Catherine Lyo
Cathy Rigby Chae Campbell
Chellsie Memmel Chelsea Da
Cheng Fei China Chris Brook
Christina Desiderio
Claudia Fragapane
Code of Points Colbi Flory
Colombia Courtney Kupets
Courtney McGregor
Daiane dos Santos Danell Ley
Daniel Purvis Daniela Silvas
Daria Spiridonova
David Belyavsky Deanne Soz
Debora Reis Deng Linlin
Deng Shudi Denis Ablyazin
Diana Chelaru Dipa Karmakar
Dominique Dawes
Dominique Moceanu
Doni Thompson
Donnell Whittenburg
Doris Fuchs Brause Drive to G
Ekaterina Kramarenko
Eleftherios Petrounias
Elena Produnova
Elena Shushunova Elisabeth S
Elise Ray Elite
Elite Gym Massila
Elite Team Cup Elizabeth Pric
Ellie Black Ellie Downie
Emily Gaskins Emily Schild
from search.

Complaint

Exhibit G



Departments All Search Reorder Items Sign In Cart

by 2genbeauty

There are two things that I never leave the house without...sunscreen and insect repellent! I always apply sunscreen but I always dread having to apply repellent. It usually smells bad and leaves a gross sticky oilIness behind. I received a couple of bottles of fit organic mosquito repellent in exchange for my feedback and review. I must admit I let them sit on my dining room table for a while before I gave them a shot...mainly because I dread having to use mosquito repellent, but living in South Florida it's a must! So the next time I went to my son's baseball game, I grabbed a bottle and threw it in my bag...So glad I did by the way! So first off I really love the packaging and the lack of a propellant spray. I had more control as to the amount of product I was using and where I wanted to spray it. Second I love love love the formula!!! It smells really good thanks to the lemongrass oil and is creamy, yet not oily at all. The formula absorbed quickly and actually left my skin feeling better than before I had applied it. I no longer dread having to apply/wear mosquito repellent and smell like horrible chemicals!!!

Read less

Yes (4) No (1) Report

Great product! 11/6/2016

by PatyG Verified purchaser

I recommend this product. I really like the smell of it and that is deet free.I am constantly at parks with my kids and I feel comfortable reapplying the product without compromissing my kids skin with chemicals. The lemongrass scent is awesome! I love this brand I was already using the vegetable wash.

Was this review helpful? Yes (0) No (0) Report

No bites!! 10/30/2016

by popo74

I am truly amazed at how well this product works. After sitting outside for a couple of hours, not one bite. It has a lovely smell, doesn't leave your skin feeling oily and the best thing is it's organic and not tested on animals.

Was this review helpful? Yes (1) No (0) Report

Works like a charm... 10/30/2016

by oldirwnhyzert Verified purchaser

And, without any pesticides or chemicals

Was this review helpful? Yes (0) No (0) Report

Love this stuff! 10/26/2016

by ZoaZoa

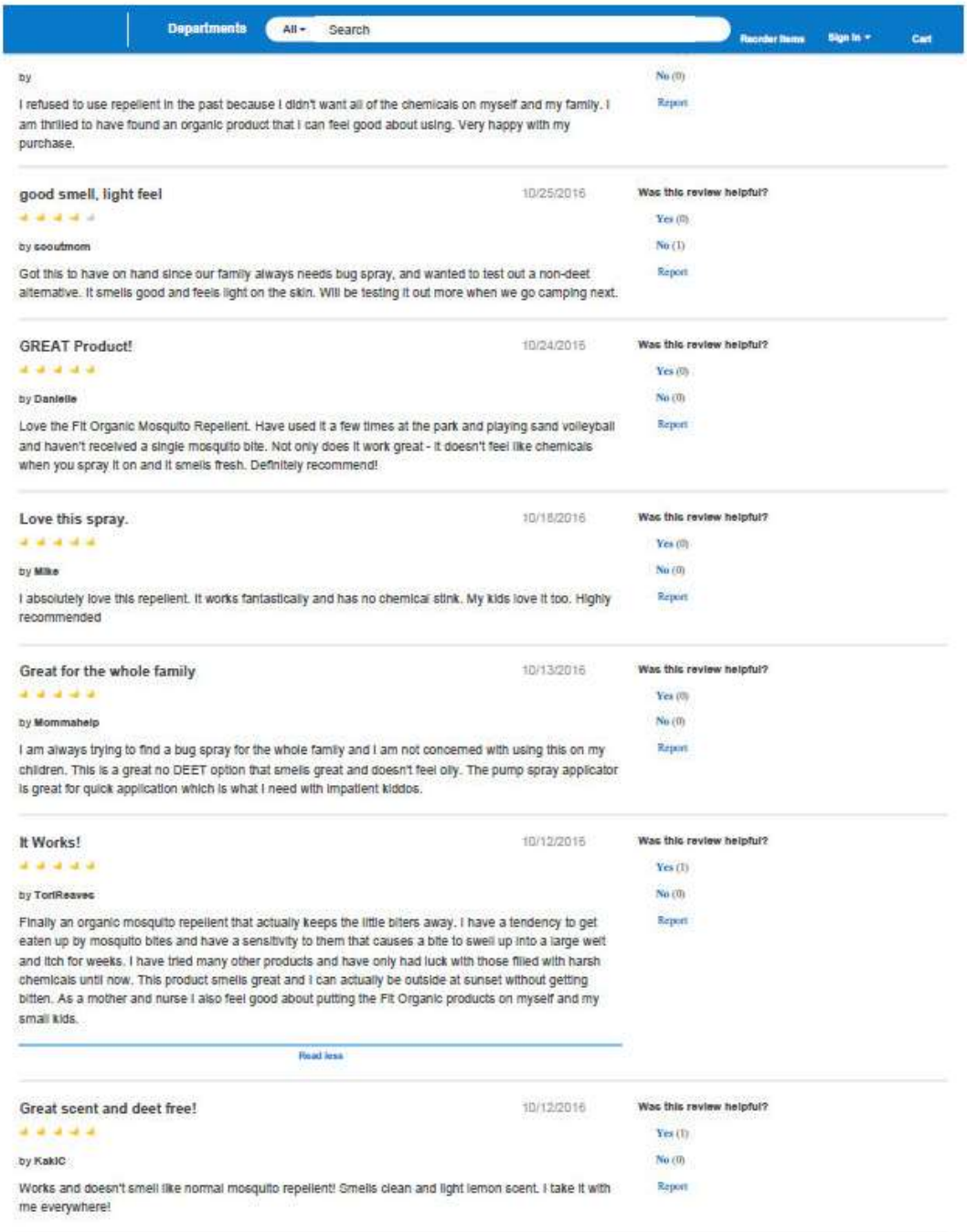
This is probably the first time anyone has said their mosquito repellent smells as good as a fresh summery perfume, but the Fit Organic sure does! No kidding. I can wear this - and my favorite citrus-based perfume - and you'd never know I was wearing a mosquito repellent. This is an important factor for me - I live in Florida, where those blood-sucking parasites breed year-round, and repellent is a necessity, especially in the evenings. There's nothing worse than going to an outdoor party or restaurant and having to wear a stinky mosquito repellent with your nice outfit. Countless times, I've opted not to wear repellent for that reason, and I've been eaten alive. Now, I don't have to make any sacrifices - because this stuff works and it smells great. And I love the fact that it's organic and safe.

Read less

Was this review helpful? Yes (1) No (0) Report

Ex. G, Page 1 of 5

Fit Organic Mosquito Repellent - Walmart.com Page 3 of 7



Departments All Search Reorder Items Sign In Cart

by

I refused to use repellent in the past because I didn't want all of the chemicals on myself and my family. I am thrilled to have found an organic product that I can feel good about using. Very happy with my purchase.

No (0)
Report

good smell, light feel 10/25/2016

by **scoutmom**

Got this to have on hand since our family always needs bug spray, and wanted to test out a non-deet alternative. It smells good and feels light on the skin. Will be testing it out more when we go camping next.

Was this review helpful?
Yes (0)
No (1)
Report

GREAT Product! 10/24/2016

by **Danielle**

Love the Fit Organic Mosquito Repellent. Have used it a few times at the park and playing sand volleyball and haven't received a single mosquito bite. Not only does it work great - it doesn't feel like chemicals when you spray it on and it smells fresh. Definitely recommend!

Was this review helpful?
Yes (0)
No (0)
Report

Love this spray. 10/18/2016

by **Mike**

I absolutely love this repellent. It works fantastically and has no chemical stink. My kids love it too. Highly recommended

Was this review helpful?
Yes (0)
No (0)
Report

Great for the whole family 10/13/2016

by **Mommahelp**

I am always trying to find a bug spray for the whole family and I am not concerned with using this on my children. This is a great no DEET option that smells great and doesn't feel oily. The pump spray applicator is great for quick application which is what I need with impatient kiddos.

Was this review helpful?
Yes (0)
No (0)
Report

It Works! 10/12/2016

by **TorriReaves**

Finally an organic mosquito repellent that actually keeps the little biters away. I have a tendency to get eaten up by mosquito bites and have a sensitivity to them that causes a bite to swell up into a large welt and itch for weeks. I have tried many other products and have only had luck with those filled with harsh chemicals until now. This product smells great and I can actually be outside at sunset without getting bitten. As a mother and nurse I also feel good about putting the Fit Organic products on myself and my small kids.

Read less

Was this review helpful?
Yes (1)
No (0)
Report

Great scent and deet free! 10/12/2016

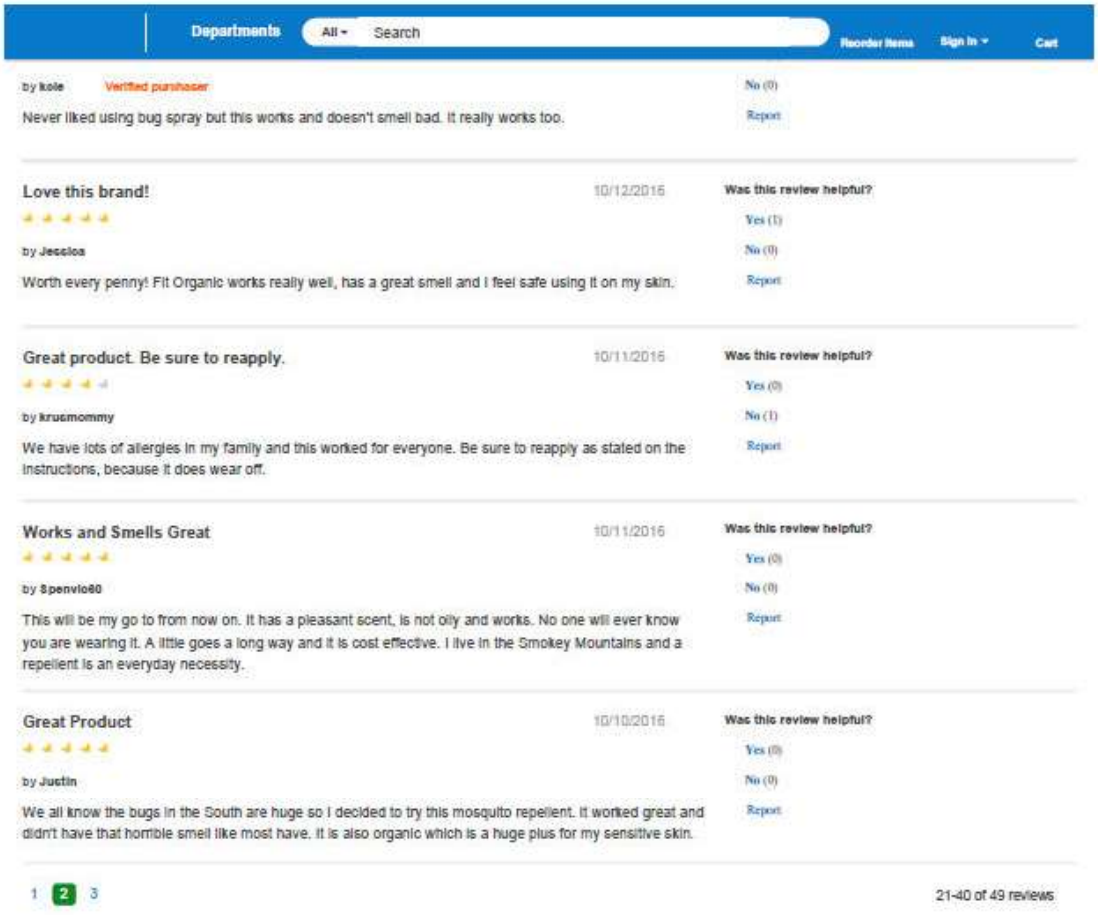
by **KakiC**

Works and doesn't smell like normal mosquito repellent! Smells clean and light lemon scent. I take it with me everywhere!

Was this review helpful?
Yes (1)
No (0)
Report

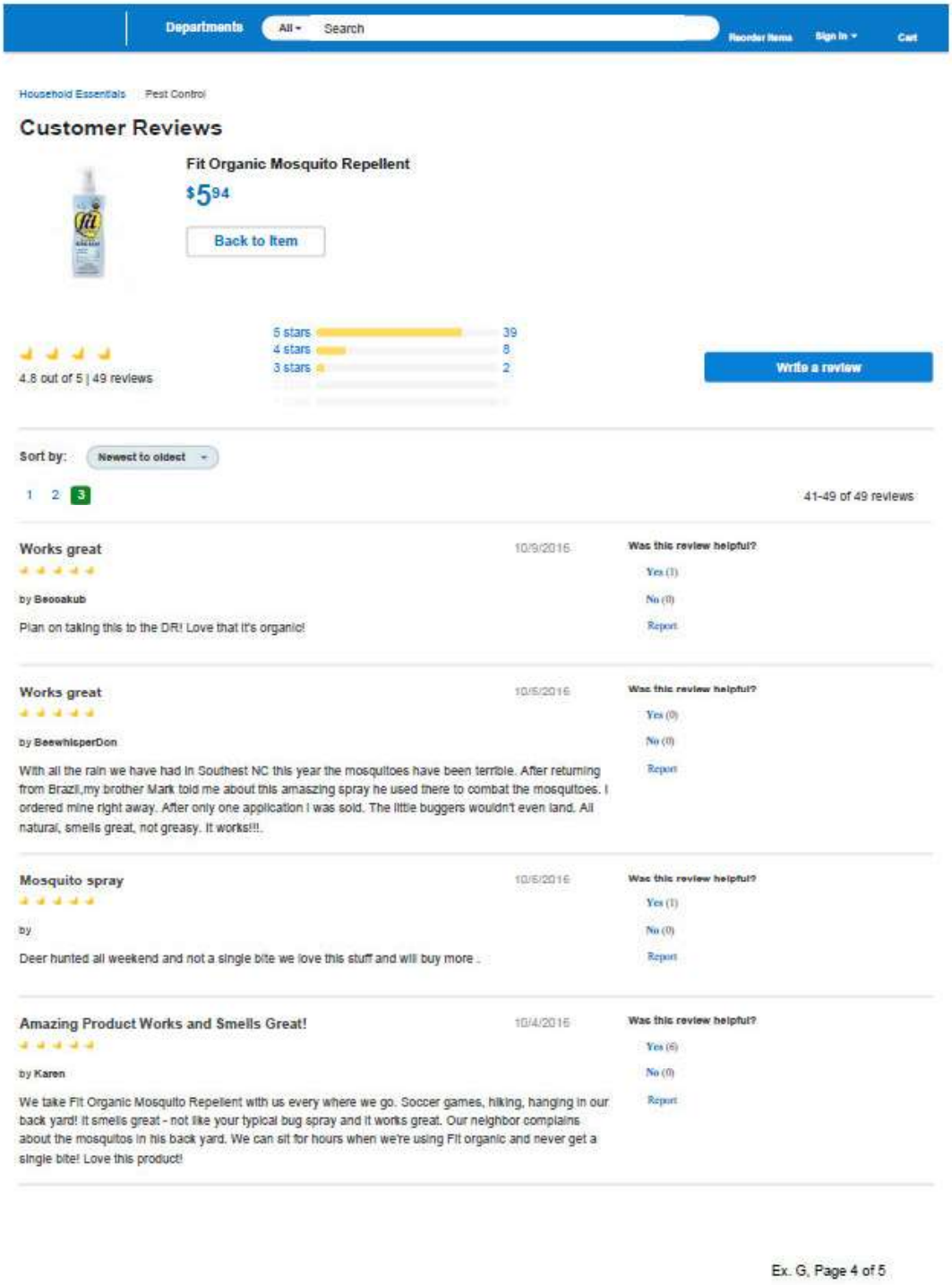
Ex. G, Page 2 of 5

Complaint



Ex. G, Page 3 of 5

Fit Organic Mosquito Repellent - Walmart.com Page 1 of 3

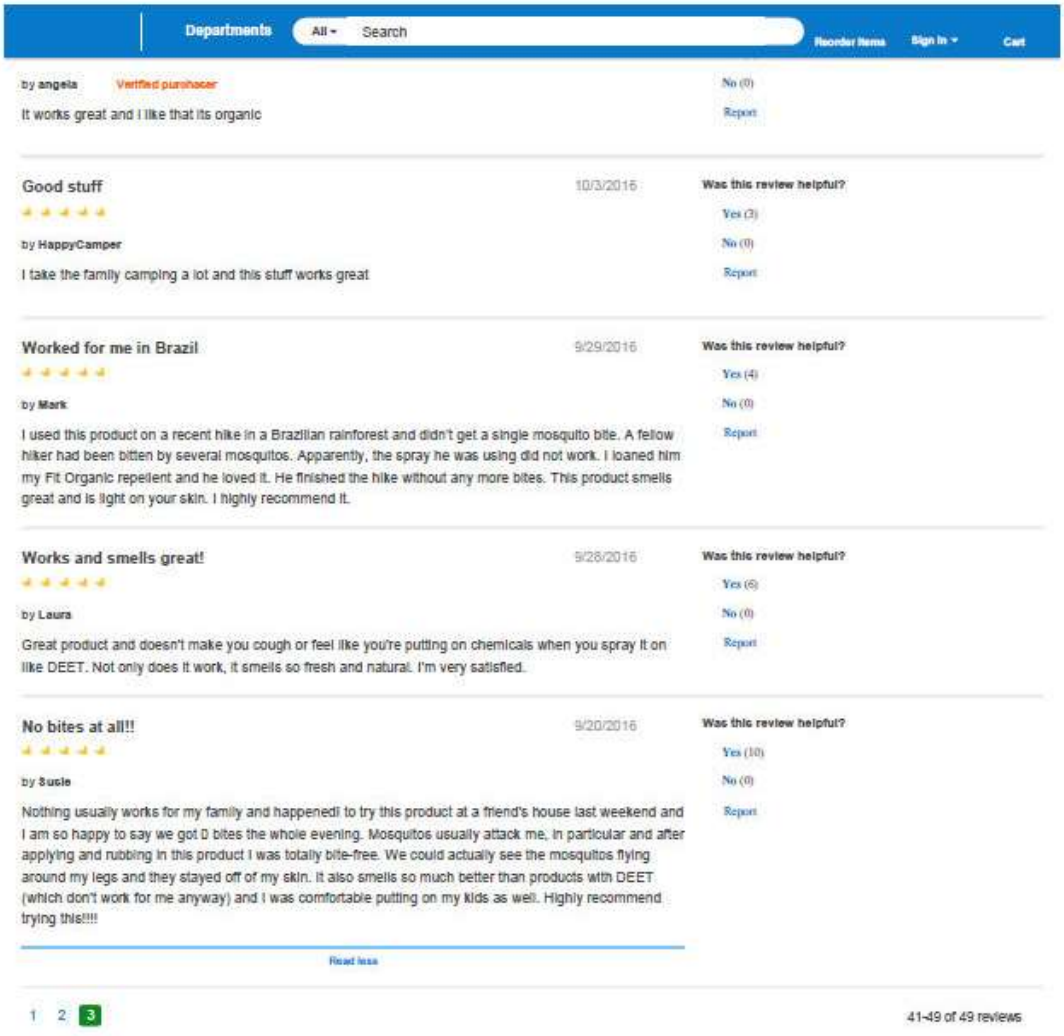


Ex. G, Page 4 of 5

https://www.walmart.com/reviews/product/140152436 10/25/2017

Complaint

Fit Organic Mosquito Repellent - Walmart.com Page 2 of 3



Ex. G, Page 5 of 5

https://www.walmart.com/reviews/product/140152436 10/25/2017

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 Creaxion Corporation and Mark Pettit and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents Creaxion Corporation and Mark Pettit 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 against Creaxion Corporation and Mark Pettit:

Findings

1. The Respondents are:

   a. Respondent Creaxion Corporation, a Delaware corporation with its principal office or place of business at 1080 Peachtree Street NE, Suite 1810, Atlanta, Georgia 30309.

   b. Respondent Mark Pettit, the Chief Executive Officer of Creaxion Corporation. Individually or in concert with others, he controlled, or had the authority to control, or participated in, the acts and practices alleged in the Complaint. His principal office or place of business is the same as that of Creaxion Corporation.

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. "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. 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. "Close proximity" means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.

C. "Including" means including but not limited to.

D. "Respondents" means Creaxion Corporation and Mark Pettit, individually or collectively.

1. "Corporate Respondent" means Creaxion Corporation, a corporation, and its successors and assigns.

2. "Individual Respondent" means Mark Pettit.

E. "Unexpected material connection" means any relationship that might materially affect the weight or credibility of a testimonial or endorsement and that would not reasonably be expected by consumers.

Provisions

I. Prohibited Misrepresentations – Endorsements

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 product or service are prohibited from making, or assisting others in making, any misrepresentation, expressly or by implication, about the status of any endorser or person providing a review of the product or service, including a misrepresentation that the endorser or reviewer is an independent user or ordinary consumer of the product or service.

II. Required Disclosures – Endorsements

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 advertising, promotion, offering for sale, or sale of any product or service are prohibited from making, or assisting others in making, any representation, expressly or by implication, about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection

between such endorser and (1) any Respondent or (2) any other individual or entity affiliated with the product or service.

III. Prohibited Misrepresentations – Deceptively Formatted Advertising

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 advertising, promotion, offering for sale, or sale of any product or service are prohibited from making, or assisting others in making, any misrepresentation, in any manner, expressly or by implication, that paid commercial advertising is a statement or opinion from an independent or objective publisher or source.

IV. Monitoring of Endorsers

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 advertising, promotion, offering for sale, or sale of any product or service by means of an endorsement by an endorser with a material connection to (1) any Respondent or (2) any other individual or entity affiliated with the product or service, must take steps sufficient to ensure compliance with Provisions I and II of this Order. Such steps shall include, at a minimum:

A. Providing each such endorser with a clear statement of their responsibilities to disclose clearly and conspicuously, and in close proximity to the endorsement, in any print, radio, television, online, or digital advertisement or communication, the endorser's unexpected material connection to any Respondent or any other individual or entity affiliated with the product or service, and obtaining from each such endorser a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it;

B. Establishing, implementing, and thereafter maintaining a system to monitor and review the representations and disclosures of endorsers with material connections to any Respondent or any other individual or entity affiliated with the product or service to ensure compliance with Provisions I and II of this Order. The system shall include, at a minimum, monitoring and reviewing the endorsers' print, radio, television, online or digital advertisement or communication;

C. Immediately terminating and ceasing payment to any endorser with a material connection to any Respondent or any other individual or entity affiliated with the product or service who Respondents reasonably conclude:

    1. Has misrepresented, in any manner, their independence or impartiality; or

2. Has failed to disclose, clearly and conspicuously, and in close proximity to the endorsement, an unexpected material connection between such endorser and any Respondent or any other individual or entity affiliated with the product or service.

Provided, however, that Respondents may provide an endorser with notice of failure to adequately disclose and an opportunity to cure the disclosure prior to terminating the endorsement relationship if Respondents reasonably conclude that the failure to adequately disclose was inadvertent. Respondents shall inform any endorser to whom they have provided a notice of a failure to adequately disclose an unexpected material connection that any subsequent failure to adequately disclose will result in immediate termination; and

D. Creating reports showing the results of the monitoring required by this Provision.

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. Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondents, 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, 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. Sixty days 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 over which Respondents have direct or indirect control; 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, 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 Creaxion Corp.*, C-4688.

VII. Recordkeeping

IT IS FURTHER ORDERED that Respondents 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, Corporate Respondent 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. 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;

B. A copy of each unique advertisement or other marketing material making a representation subject to this Order; and

C. 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 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).

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'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 as to Creaxion Corp. and Mark Pettit, and an agreement containing a consent order as to Inside Publications, LLC of Georgia and Christopher Korotky ("respondents").

The proposed consent orders ("orders") have been placed on the public record for 30 days for receipt of 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 orders and the comments received, and will decide whether it should withdraw the orders or make them final.

This matter involves the respondents' endorsement and advertising format practices with respect to the advertising and promotional campaign they created and implemented for FIT Organic Mosquito Repellent. The complaint alleges that the respondents violated Section 5(a) of the FTC Act by misrepresenting that certain endorsements reflected the independent experiences or opinions of impartial users, and by deceptively failing to disclose that certain endorsers had material connections with the endorsed product, namely that they were paid spokespersons, they were reimbursed for the cost of the product, or they owned or were employed by Creaxion, the public relations firm hired to promote the product. The complaint also alleges that the respondents violated Section 5(a) by misrepresenting that certain advertisements were independent statements and opinions of impartial publications when they actually were paid commercial advertising.

The orders include injunctive relief that prohibit these alleged violations and fences in similar and related conduct. The provisions apply to any product or service.

Part I prohibits misrepresenting the status of any endorser or person reviewing the product or service, including that he or she is an independent user or ordinary consumer of the product or service.

Part II prohibits any representation about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such endorser and any respondent, or other individual or entity affiliated with the product or service. Each order defines the terms "clearly and conspicuously" and "unexpected material connection."

Analysis to Aid Public Comment

Part III prohibits misrepresenting that paid commercial advertising is a statement or opinion from an independent or objective publisher or source.

Part IV requires the respondents, when they use endorsers to advertise or sell a product or service, to take certain steps to make sure the endorsements comply with Parts I and II of the order. Such steps include clearly notifying endorsers of their representation and disclosure responsibilities, creating a monitoring system to review endorsements and disclosures, and terminating any endorser who fails to comply with Parts I and II.

Part V requires the respondents to distribute the order to certain persons and submit signed acknowledgments of order receipt.

Part VI requires the respondents 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 VII contains recordkeeping requirements for personnel records, advertising and marketing materials, and all records necessary to demonstrate compliance with the order.

Part VIII contains other requirements related to the Commission's monitoring of the respondents' order compliance.

Part IX 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 orders, and it is not intended to constitute an official interpretation of the complaint or orders, or to modify the orders' terms in any way.

Complaint

IN THE MATTER OF

CREAXION CORPORATION, MARK PETTIT, INSIDE PUBLICATIONS, LLC OF GEORGIA, AND CHRISTOPHER KOROTKY

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

Docket No. C-4669; File No. 172 3067
Complaint, January 31, 2019 – Decision, January 31, 2019

This consent order addresses Inside Publications, LLC of Georgia's endorsement and advertising format practices with respect to the advertising and promotional campaign they created and implemented for FIT Organic Mosquito Repellent. The complaint alleges that the respondents violated Section 5(a) of the Federal Trade Commission Act by misrepresenting that certain endorsements reflected the independent experiences or opinions of impartial users, and by deceptively failing to disclose that certain endorsers had material connections with the endorsed product, namely that they were paid spokespersons, they were reimbursed for the cost of the product, or they owned or were employed by Creaxion, the public relations firm hired to promote the product. The complaint also alleges that the respondents violated Section 5(a) by misrepresenting that certain advertisements were independent statements and opinions of impartial publications when they actually were paid commercial advertising. The consent order prohibits misrepresenting the status of any endorser or person reviewing the product or service, including that he or she is an independent user or ordinary consumer of the product or service; and any representation about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such endorser and any respondent, or other individual or entity affiliated with the product or service.

Participants

For the *Commission*: *Karen Mandel* and *Shira Modell.*

For the *Respondents*: *H. Barber Boone, Butler Snow LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Creaxion Corporation, Mark Pettit, Inside Publications, LLC of Georgia, and Christopher Korotky (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 Creaxion Corporation ("Creaxion") is a Delaware corporation with its principal office or place of business at 1080 Peachtree Street NE, Suite 1810, Atlanta, Georgia 30309. Creaxion is a marketing and public relations company.

2. Respondent Mark Pettit is the Chief Executive Officer of Creaxion. Individually or in concert with others, he controls, or has the authority to control, or participated in, the acts

and practices alleged in this complaint. His principal office or place of business is the same as that of Creaxion.

3. Respondent Inside Publications, LLC of Georgia ("Inside Publications") is a Georgia limited liability company with its principal office or place of business at 1050 Crown Pointe Parkway, Atlanta, Georgia 30338. Inside Publications publishes specialty sports periodicals, including *Inside Gymnastics*, *Inside Cheerleading*, *Inside Dance*, *Inside Volleyball*, and *Cheer Biz*.

4. Respondent Christopher Korotky is the sole member and owner of Inside Publications. Individually or in concert with others, he controls, or has the authority to control, or participated in, the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Inside Publications.

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.

Course of Conduct

6. In April 2016, Creaxion was hired by HealthPro Brands Inc. ("HealthPro") to help launch and promote FIT Organic Mosquito Repellent to consumers, media, retailers, and others. The parties agreed that Creaxion would produce a strategic media campaign tied to the worldwide outbreak of the Zika Virus.

Promotional Agreements Related to the Zika Outbreak and the 2016 Summer Olympics in Brazil

7. In May 2016, Mr. Pettit (Creaxion) contacted Mr. Korotky (Inside Publications) to broker a partnership between HealthPro and Inside Publications, through which Inside Publications would distribute FIT Organic Mosquito Repellent to athletes and others attending the 2016 Summer Olympics in Brazil, the epicenter of the Zika outbreak.

8. HealthPro and Inside Publications subsequently entered a "Social and Digital Media Activation and Athlete Engagement" agreement for FIT Organic Mosquito Repellent [Ex. A], pursuant to which Inside Publications would be paid for providing the following services, among others:

a. Publishing two magazine articles featuring FIT Organic Mosquito Repellent, including a "feature article" on the product discussing its background, use, and benefits, and an "advertorial" that would denote the product as the "Official Mosquito Repellent" of Inside Publications;

b. Placing FIT Organic Mosquito Repellent in promotional "Good Luck" gift baskets from *Inside Gymnastics* to the top ten potential male and female athletes competing for spots on the U.S. Olympic Gymnastics team;

c. Procuring athlete endorsements for FIT Organic Mosquito Repellent – the proposal identified as a potential endorser Jake Dalton, a 2012 Olympian and World Champion gymnast, while the female athlete would be determined later;

d. Designating FIT Organic Mosquito Repellent as the "Official Mosquito Repellent" of Inside Publications and directing its employees to travel with, use, and promote the product before and during the Olympic Games; and

e. Promoting FIT Organic Mosquito Repellent on social media, specifically twenty-five posts by Inside Publications and fifteen or twenty posts by the athlete endorsers. The posts by Inside Publications would identify the product as the "Official Mosquito Repellent" of, as applicable, *Inside Gymnastics* or *Inside Volleyball* magazines. The proposal included an example post: "We've landed in Brazil and we're applying our Fit Organic Mosquito Repellent as we cover the 2016 Olympic Games! USDA-certified organic. The real deal, just like us!"

9. Mr. Pettit acted as an intermediary between Inside Publications and HealthPro, forwarding the Inside Publications proposal to each for signature.

10. Olympic gold medal gymnast Carly Patterson Caldwell agreed in May 2016 to become a paid spokesperson for FIT Organic Mosquito Repellent. Under the agreement, Ms. Patterson Caldwell received several thousand dollars for her promotional activities, including taking part in social media posts and a feature advertorial published in *Inside Gymnastics*.

11. Olympic gold medal gymnast Jake Dalton agreed in July 2016 to become a paid spokesperson for FIT Organic Mosquito Repellent. Mr. Pettit negotiated the terms of that agreement with Mr. Dalton's agent. Under the agreement, Mr. Dalton received several thousand dollars for his promotional activities, including promoting the product to his fans and social media followers in accordance with the Inside Publications proposal.

12. Creaxion's responsibilities with respect to the FIT Organic Mosquito Repellent launch included managing gymnastics sponsorships and promotions, coordinating and managing the Inside Publications and Jake Dalton sponsorships, and coordinating the Carly Patterson Caldwell sponsorship. In this capacity, Mr. Pettit and Creaxion drafted, reviewed, and monitored social media posts endorsing FIT Organic Mosquito Repellent, including those by Jake Dalton and Inside Publications.

Social Media Promotions of FIT Organic Mosquito Repellent

13. Pursuant to their respective endorsement agreements, spokespersons Ms. Patterson Caldwell and Mr. Dalton posted social media endorsements of FIT Organic Mosquito Repellent. In numerous instances, the endorsements did not disclose the spokespersons' paid promotional relationships with HealthPro. The posts include, but are not necessarily limited to,

those compiled in the attached Exhibits B and C. These materials contain the following statements and depictions:

a. Carly Patterson shared Inside Gymnastics's [sic] post
June 3 at 11:44am

I was definitely bummed to have to make the decision to not go to Rio for the summer Olympics because of the threat of the Zika virus, but working on starting a family and being safe and protecting myself was way more important to my husband and me! I am so thankful to have found a safe and organic product (FIT Organic) that will ease my worries as mosquito season approaches.

[Ex. B at 1 (Facebook post)]; and

b. **jake_dalton** Looking forward to the holiday weekend! And, of course, I'll be using my organic mosquito repellent from @fitorganicusa. You should too! #Organic #Safe

[Ex. C at 3 (Instagram post with a picture of Mr. Dalton holding a bottle of FIT Organic Mosquito Repellent)].

14. Inside Publications also posted and reposted statements on social media about FIT Organic Mosquito Repellent, primarily through its *Inside Gymnastics* accounts, including some featuring endorsements by Mr. Dalton and Ms. Patterson Caldwell. In numerous instances, Inside Publications did not disclose the spokespersons' paid promotional relationships with HealthPro or that its own statements were paid commercial advertising. The posts included, but were not necessarily limited to, those compiled in the attached Exhibit D. These materials contain the following statements and depictions:

a. **Inside Gymnastics** @InsideGym · 8 Jun 2016

Great choice champ! @Jake_Dalton will use @fitorganic mosquito repellent on the Road to Rio! #FightZika

[Ex. D at 1 (Twitter post with a picture of Mr. Dalton applying FIT Organic Mosquito Repellent to arm)];

b. **insidegym** With summer weather still making waves across the country, mosquitos are also still out and about! Make sure to throw @fitorganicusa in your backpack! #clean #organic #safe #indiansummer [emoji omitted]

[Ex. D at 2 (Instagram post showing a bottle of FIT repellent)];

c. **insidegym** 👍👍
#Repost @fitorganicusa

U.S. Olympian @jake_dalton Ready for Closing Ceremonies in Rio. Protected by Fit Organic Mosquito Repellent!

[Ex. D at 2 (Instagram post with a picture of Mr. Dalton applying FIT Organic Mosquito Repellent to arm)];

d. **insidegym** Yes! We'll be packing this for Brazil ourselves! 💯

#Repost @carlypatterson04 Thank you so much @fitorganicusa for the mosquito repellent! I love the smell & love that it's all organic & safe! I'm a buffet for mosquitoes so this is a game changer!

[Ex. D at 4 (Instagram post with a picture of Ms. Patterson Caldwell holding two bottles of FIT Organic Mosquito Repellent)].

Inside Gymnastics Magazine Print and Online Articles Promoting FIT Organic Mosquito Repellent

15. On June 1, 2016, Mr. Pettit emailed HealthPro the text of a draft Carly Patterson Caldwell advertorial for *Inside Gymnastics*, which he helped craft with Mr. Korotky and Inside Publications.

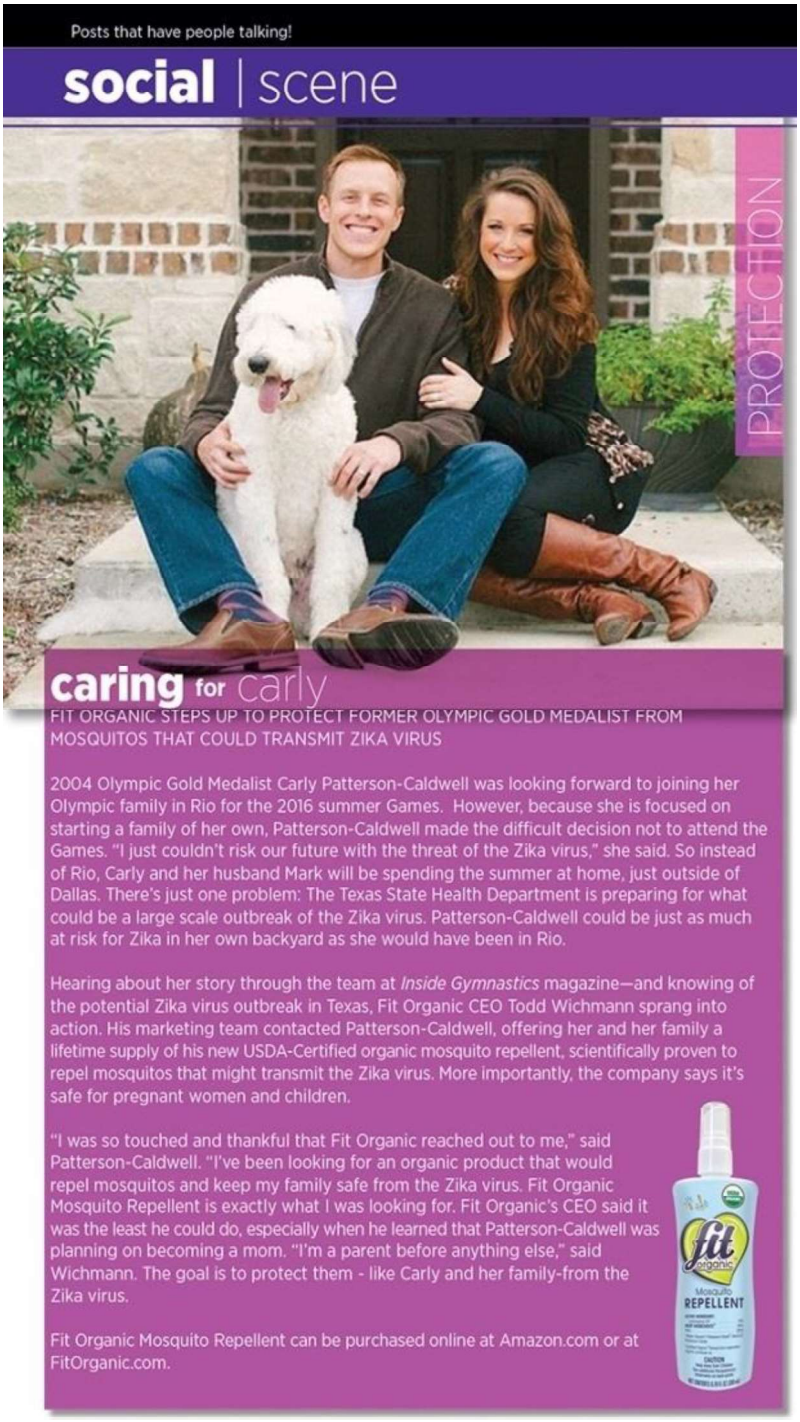
16. Later that day, Mr. Pettit emailed a substantially similar draft to which he added a reference to the donation of FIT Organic Mosquito Repellent to charities.

17. Inside Publications published an online version of the "Caring for Carly" article on June 2, 2016, on the *Inside Gymnastics* website, www.insidegymnastics.com. [*See* Ex. B at 3.]

18. Inside Publication posted a link to the online article on the *Inside Gymnastics* Facebook page on June 3, 2016, which Ms. Patterson Caldwell reposted on Facebook the same day. [Ex. B at 1, 3.]

Complaint

19. In July 2016, *Inside Gymnastics* magazine published its *Guide to the Games* print issue, which included the below "social scene" article [Ex. E at 5]:



Posts that have people talking!

social | scene

caring for carly

FIT ORGANIC STEPS UP TO PROTECT FORMER OLYMPIC GOLD MEDALIST FROM MOSQUITOS THAT COULD TRANSMIT ZIKA VIRUS

2004 Olympic Gold Medalist Carly Patterson-Caldwell was looking forward to joining her Olympic family in Rio for the 2016 summer Games. However, because she is focused on starting a family of her own, Patterson-Caldwell made the difficult decision not to attend the Games. "I just couldn't risk our future with the threat of the Zika virus," she said. So instead of Rio, Carly and her husband Mark will be spending the summer at home, just outside of Dallas. There's just one problem: The Texas State Health Department is preparing for what could be a large scale outbreak of the Zika virus. Patterson-Caldwell could be just as much at risk for Zika in her own backyard as she would have been in Rio.

Hearing about her story through the team at *Inside Gymnastics* magazine—and knowing of the potential Zika virus outbreak in Texas, Fit Organic CEO Todd Wichmann sprang into action. His marketing team contacted Patterson-Caldwell, offering her and her family a lifetime supply of his new USDA-Certified organic mosquito repellent, scientifically proven to repel mosquitos that might transmit the Zika virus. More importantly, the company says it's safe for pregnant women and children.

"I was so touched and thankful that Fit Organic reached out to me," said Patterson-Caldwell. "I've been looking for an organic product that would repel mosquitos and keep my family safe from the Zika virus. Fit Organic Mosquito Repellent is exactly what I was looking for. Fit Organic's CEO said it was the least he could do, especially when he learned that Patterson-Caldwell was planning on becoming a mom. "I'm a parent before anything else," said Wichmann. The goal is to protect them - like Carly and her family-from the Zika virus.

Fit Organic Mosquito Repellent can be purchased online at Amazon.com or at FitOrganic.com.

20. The *Guide to the Games* issue also included the following article [Ex. E at 6]:



the latest on
ZIKA

Many traveling to the Olympic Games are concerned about the Zika virus and its potential affects. Some, including former Olympic Champ Carly Patterson-Caldwell, even decided not to attend the Games because of Zika concerns (see story earlier in issue). Here is some information from the CDC on the disease.

"Zika virus disease (Zika) is a disease caused by the Zika virus, which is spread to people primarily through the bite of an infected Aedes species mosquito. The most common symptoms of Zika are fever, rash, joint pain, and conjunctivitis (red eyes). The illness is usually mild with symptoms lasting for several days to a week after being bitten by an infected mosquito. People usually don't get sick enough to go to the hospital, and they very rarely die of Zika. For this reason, many people might not realize they have been infected. However, Zika virus infection during pregnancy can cause a serious birth defect called microcephaly, as well as other severe fetal brain defects. Once a person has been infected, he or she is likely to be protected from future infections."

During the Games, the team at Inside Gymnastics will be using Fit Organic Mosquito Repellant Spray, the official mosquito repellant of Inside Gymnastics magazine. Five years in development, the new Fit Organic Mosquito Repellent Spray is a unique formula comprised of two key ingredients: organic lemongrass grown in Nepal and organic oleic acid derived from sunflowers in the United Kingdom. The company is providing product complimentary to a number of athletes, including U.S. gymnast Jake Dalton.

21. On or around August 17, 2016, Inside Publications also posted on the *Inside Gymnastics* website a third article referring to FIT Organic Mosquito Repellent [Ex. F]:

Move Over, Mosquitos!

A lot of headlines leading up to the Olympics have centered around Brazil's battle with Zika. Athletes are mindful of the situation and are taking precautions to ensure their

protection. U.S. Gymnast Jake Dalton recently became a Brand Ambassador for Fit Organic, a company that produces an organic mosquito repellent, which he uses daily in Rio. "I actually have Fit Organic right by the door and I use it right before we go out every day to protect ourselves. I use it if I want to go out and sit on the balcony because I like to be outdoors. It's just one less thing I have to worry about now. My family is also going to be using it here in Rio." The team at Inside Gymnastics is also using Fit Organic throughout our stay in Rio, and we thank them for supplying us with product!

22. The articles "Caring for Carly," "the latest on ZIKA," and "Move Over, Mosquitos!" did not disclose they were paid commercial advertising. [*See, e.g.,* Exs. E, F.]

Creaxion's Online Consumer Review Program

23. Creaxion also conducted an online consumer review program that reimbursed individuals, including Mr. Pettit and other Creaxion employees, for purchasing FIT Organic Mosquito Repellent and posting online reviews. Examples of such reviews are compiled in the attached Exhibit F. These materials contain the following statements and depictions:

a. **Worked for me in Brazil** 9/29/2016



by **Mark**

I used this product on a recent hike in a Brazilian rainforest and didn't get a single mosquito bite. A fellow hiker had been bitten by several mosquitos. Apparently, the spray he was using did not work. I loaned him my Fit Organic repellent and he loved it. He finished the hike without any more bites. This product smells great and is light on your skin. I highly recommend it;

b. **Works great** 10/5/2016



by **BeewhisperDon**

With all the rain we have had in Southest [sic] NC this year the mosquitoes have been terrible. After returning from Brazil,my [sic] brother Mark told me about this amaszing [sic] spray he used there to combat the mosquitoes. I ordered mine right away. After only one application I was sold. The little buggers wouldn't even land. All natural, smells great, not greasy. It works!!!;

c. **Works and smells great!** 9/28/2016



by **Laura**

Great product and doesn't make you cough or feel like you're putting on chemicals when you spray it on like DEET. Not only does it work, it smells so fresh and natural. I'm very satisfied; and

d. **Great Product!** 11/8/2016



by **PatyG Verified purchaser**

I recommend this product. I really like the smell of it and that [sic] is deet free. I am constantly at parks with my kids and I feel comfortable reapplying the product without compromissing [sic] my kids [sic] skin with chemicals. The lemongrass scent is awesome! I love this brand I was already using the vegetable wash.

[Ex. G at 1, 4-5.]

24. The reviews did not disclose that the reviewers were reimbursed for buying the product or the reviewers' relationships to the public relations and marketing company hired to promote the product. [*See, e.g.,* Ex. G.]

Count I
False or Misleading Endorsement Claims

25. Through the means described in Paragraphs 13, 14, 19, and 20, Respondents have represented, directly or indirectly, expressly or by implication, that the statements by and depictions of Ms. Patterson Caldwell and Mr. Dalton about FIT Organic Mosquito Repellent reflected the independent experiences or opinions of impartial users.

26. Through the means described in Paragraphs 23 and 24, Respondents Creaxion and Pettit have represented, directly or indirectly, expressly or by implication, that the statements about FIT Organic Mosquito Repellent by Respondent Pettit and other participants in Respondent Creaxion's online consumer review program reflected the independent experiences or opinions of impartial users.

27. In fact, the statements by Ms. Patterson Caldwell, Mr. Dalton, Respondent Pettit, and other participants in Respondent Creaxion's online consumer review program did not reflect the independent experiences or opinions of impartial users because (a) they were created as a part of an advertising campaign to promote FIT Organic Mosquito Repellent, and (b) the online consumer reviews were by individuals who were reimbursed for buying the product and included statements by the owner and employees of the public relations firm hired to promote the product. Therefore, the representations set forth in Paragraphs 25 and 26 are false or misleading.

Complaint

Count II
Deceptive Failure to Disclose Material Connections with Endorsers

28. Through the means described Paragraphs 13, 14, 19, and 20, Respondents have represented, directly or indirectly, expressly or by implication, that the statements by Ms. Patterson Caldwell and Mr. Dalton about FIT Organic Mosquito Repellent (and related depictions) reflected their experiences or opinions.

29. Through the means described in Paragraphs 23 and 24, Respondents Creaxion and Pettit have represented, directly or indirectly, expressly or by implication, that the statements about FIT Organic Mosquito Repellent by Respondent Pettit and other participants in Respondent Creaxion's online consumer review program reflected the experiences or opinions of individuals who had used the product.

30. In numerous instances in which Respondents made the representations set forth in Paragraphs 28 and 29, they failed to disclose, or disclose adequately, that (a) Ms. Patterson Caldwell and Mr. Dalton were paid to endorse FIT Organic Mosquito Repellent, and (b) the online consumer reviews were by individuals who were reimbursed for buying the product and included statements by the owner and employees of the public relations firm hired to promote the product. These facts would be material to consumers in evaluating the endorsements of FIT Organic Mosquito Repellent in connection with a purchase or use decision.

31. Respondents' failure to disclose the material information described in Paragraph 30, in light of the representations made in Paragraphs 28 and 29, is a deceptive act or practice.

Count III
Deceptively Formatted Advertising

32. Through the means described in Paragraphs 14 and 19 through 22, Respondents have represented, directly or indirectly, expressly or by implication, that the social media posts by *Inside Gymnastics* and other Inside Publications magazines about FIT Organic Mosquito Repellent, and the articles "Caring for Carly," "the latest on ZIKA," and "Move Over Mosquitos!" were independent statements and opinions of impartial publications regarding FIT Organic Mosquito Repellent.

33. In fact, those posts and articles were not independent statements and opinions of impartial publications regarding FIT Organic Mosquito Repellent; they were paid commercial advertising. Therefore, the representation set forth in Paragraph 32 is false or misleading.

Violations of Section 5

34. 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 thirty first day of January, 2019, has issued this Complaint against Respondents.

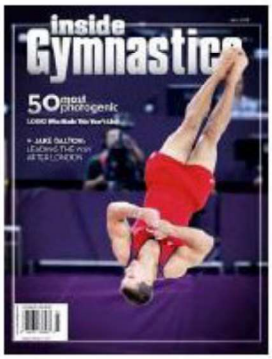
By the Commission.

Complaint

Exhibit A

inside publications

Inside Publications
Proposal Prepared For Fit Organic
Social and Digital Media Activation and Athlete Engagement



Inside Publications Brands
Inside Gymnastics, Inside Volleyball, Inside Cheerleading, Cheer Biz, Inside Dance

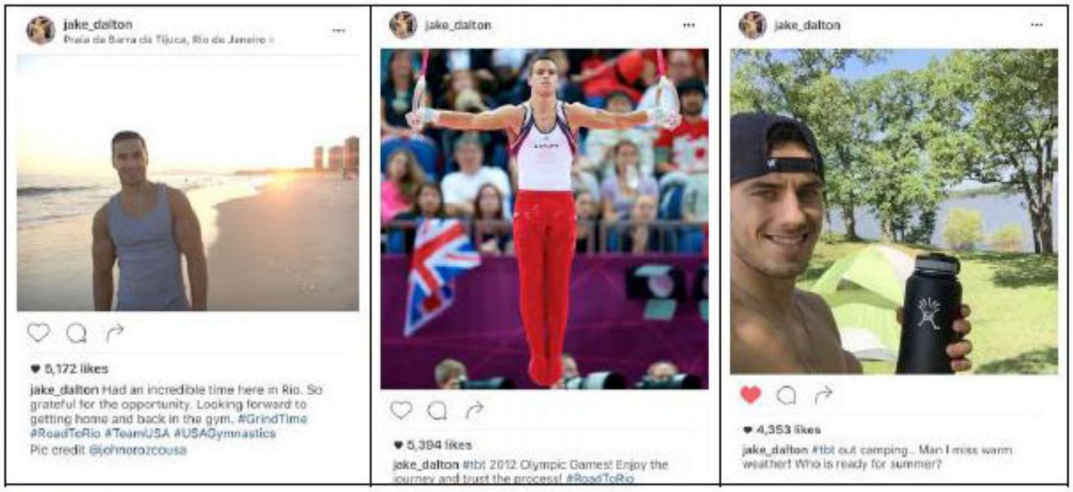
Educational / Feature Elements / Advertorial
Jul/Aug issue of *Inside Gymnastics*, Summer issue of *Inside Volleyball*

*Feature article on the product with background on development, explanation of use & benefits
*Advertorial will be tagged denoting that Fit Organic is the "Official Mosquito Repellent" of Inside Publications (see below)



Gift Basket Inclusion, Sampling
Inside Gymnastics will be sending "Good Luck" gift baskets to the top 10 potential U.S. women and top 10 potential U.S. men vying for spots on the team. Fit Organic will be included in each of the 20 gift baskets with a product and note.

Athlete Endorsement
Jake Dalton - 2012 Olympian, World Championship medalist, U.S. National Champion on Floor and Vault



Female Athlete - TBD

Official Mosquito Repellent of Inside Publications (in actual posts, product would be listed as Official Mosquito Repellent of Inside Gymnastics and Inside Volleyball magazines)
Fit Organic becomes the Official Mosquito Repellent of Inside Publications and the team will travel with, use and promote the product leading up to the Games and during the Games

Social Media
Inside Publications and Endorsed Athlete will promote Fit Organic through social media leading up to the Games and during the Games. The teams will travel with the product and show it in use in photo posts during the Games.
* 25 Social Media Posts from Inside Publications (700,000 Followers combined FB, Instagram, Twitter) now through the Games
* 20 Social Media posts from Jake Dalton now through the Games (300,000+ Followers)
* 15 Social Media posts from female athlete now through the Games (TBD)

Example post: "We've landed in Brazil and we're applying our Fit Organic Mosquito Repellent as we cover the 2016 Olympic Games! USDA-certified organic. The real deal, just like us!"

Note: In addition to our Olympic-oriented sports, *Inside Cheerleading* and *Inside Dance* also have target audiences that are outdoors quite frequently – for camps, practices, game day, etc where the product would be of interest and beneficial as well, particularly given that it is safe for children.

Packaged Program Fee:
- **$7,000 (Including Male Athlete Involvement)**
- **$9,500 (Including Female Athlete Involvement)**

Note: Male/Female Athletes to be approved by both parties.

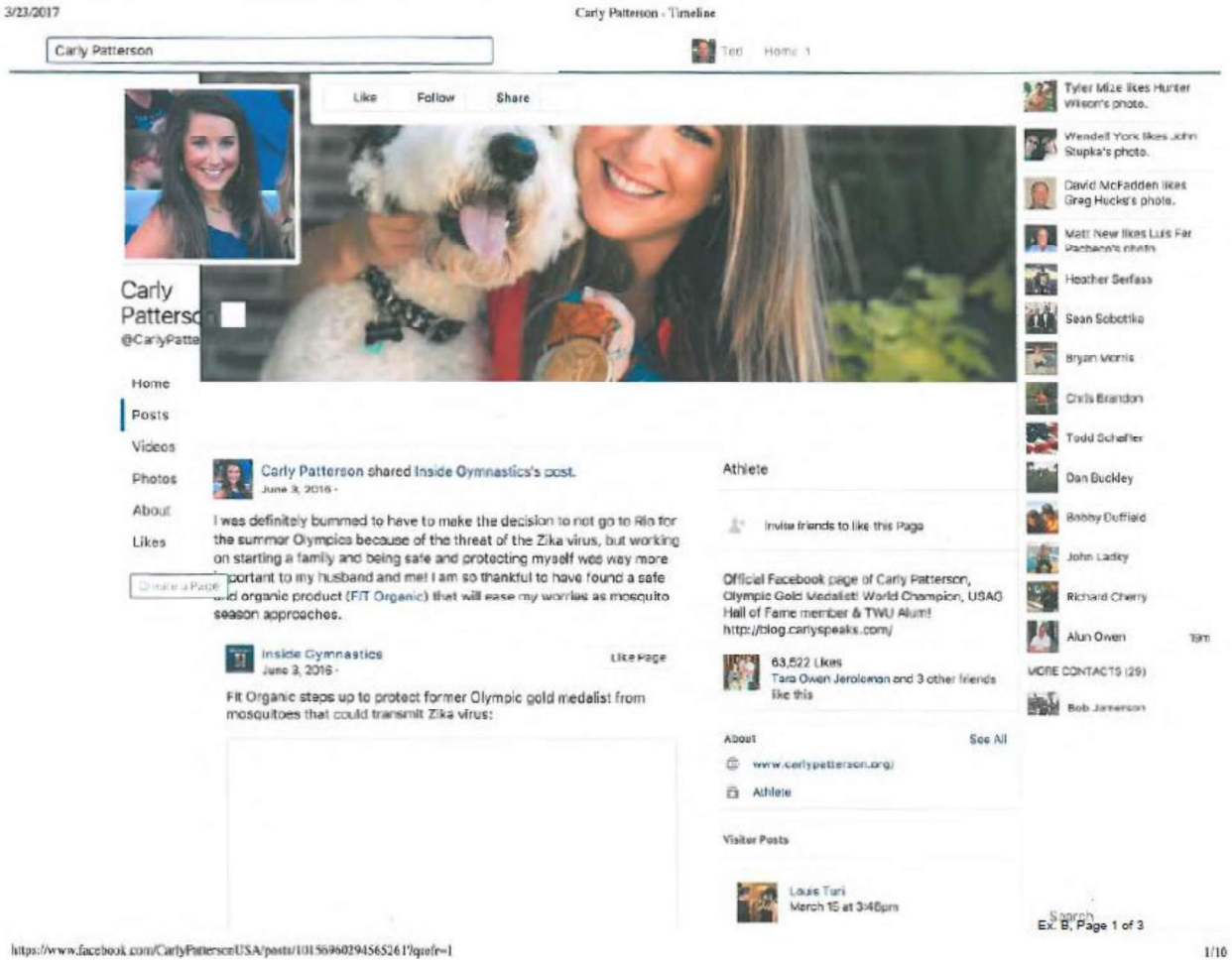
Agreed to,

_____	_____
Chris Korotky, Inside Publications	Todd Wichmann, Fit Organic

###

Complaint

Exhibit B



3/23/2017 Carly Patterson - Timeline



Timeline Photos Options Share Send Like

Carly Patterson
Like This Page · June 1, 2016 ·

Thank you so much FIT Organic for the mosquito repellent! I love the smell & love that it's all organic & safe! I'm a buffet for mosquitos so this is a game changer! — with Carly Patterson Caldwell.

Like Comment Share

Mark Pettit and 305 others Top Comments

237 shares 44 Comments

Carly Patterson Of course!! But I'm going to make you come to Dallas to get it;)
Like · Reply · June 1, 2016 at 9:23pm

Stacy Amador Does it really work?
Like · Reply · 1 · June 2, 2016 at 1:36am

Carly Patterson Yes! It's been tested and proven even on the mosquitos that carry Zika! And it smells good!
Like · Reply · 2 · June 2, 2016 at 10:50am

View more replies

Sarah Marquez Can it be used on toddlers and infants?
Like · Reply · June 2, 2016 at 11:42am

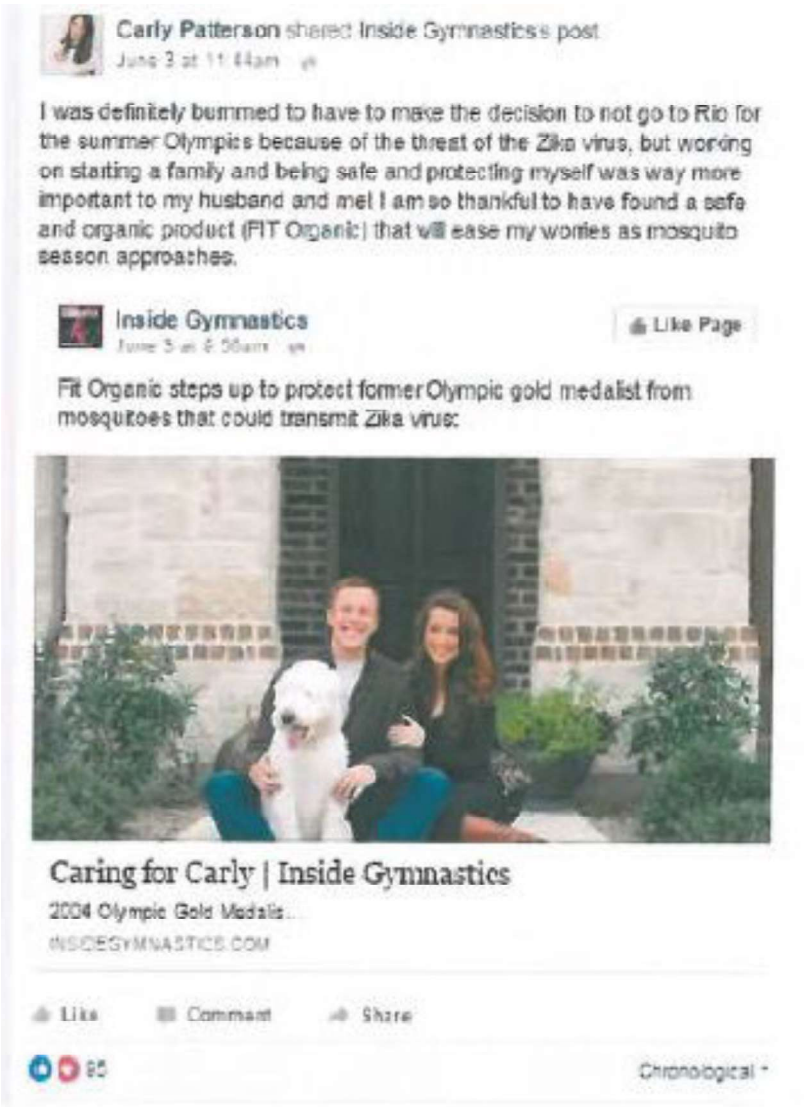
Write a comment...

Ex. B, Page 2 of 3

https://www.facebook.com/CarlyPattersonUSA/photos/a.10150749208602 61.715979.173643852 60/10156953768580261/?type=3&theater

1/1

Complaint


Carly Patterson shared Inside Gymnastics's post
June 3 at 11:44am
I was definitely bummed to have to make the decision to not go to Rio for the summer Olympics because of the threat of the Zika virus, but working on starting a family and being safe and protecting myself was way more important to my husband and me! I am so thankful to have found a safe and organic product (FIT Organic) that will ease my worries as mosquito season approaches.
Inside Gymnastics
Like Page
Fit Organic steps up to protect former Olympic gold medalist from mosquitoes that could transmit Zika virus:
Caring for Carly | Inside Gymnastics
2004 Olympic Gold Medalis...
INSIDEGYMNASTICS.COM
Like
Comment
Share
Chronological

Complaint

Exhibit C



Complaint



jake_dalton Following

26,823 likes 32w

jake_dalton Made it back to the US! Thanks @fitorganicusa for protecting me during my trip in Rio!!

view all 79 comments

priscillaa_12 @mralex43 the real daddy

Add a comment...

Youtube | Jake Dalton (@jake_dalton) • Instagram photos and videos 4/7/17, 4:26 PM



jake_dalton Following

20,900 likes 30w

jake_dalton Looking forward to the holiday weekend! And of course, I'll be using my organic mosquito repellent from @fitorganicusa. You should too! #Organic #Safe

Add a comment...

https://www.instagram.com/p/BJ32P-zDr60/?taken-by=jake_dalton Page 1 of 1

InsidePub-000098

Complaint

Exhibit D



Ex. D, Page 1 of 5

InsidePub-000019



InsidePub-000021





Ex. D, Page 2 of 5

InsidePub-000022



InsidePub-000025



insidegym

2,412 likes 31w

insidegym A big thank you to @fitorganicusa for providing their organic mosquito repellant to the team at Inside Gymnastics and also to gymnast @jake_dalton to use here in Rio! Love the

Add a comment...



insidegym

3,191 likes 41w

insidegym Gymnasts making news left and right!
#Repost @fitorganicusa She's big news! Carly Patterson appeared on CNN talking about the Zika virus and the difficult

Add a comment...

Ex. D, Page 3 of 5

InsidePub-000026

InsidePub-000030



insidegym

3,609 likes 42w

insidegym Yes! We'll be packing this for Brazil ourselves! 💯
#Repost @carlypattersonO4 Thank you so much @fitorganicusa for the mosquito repellent! I love the smell & love that it's all organic & safe! I'm a buffet for mosquitos so this is a game changer!

jennielartzt I have been using lemon/eucalyptus oil in a spray.

Add a comment...



insidegym

2,755 likes 43w

insidegym We'll be bringing this with us to Brazil!
#Repost @cleanwithfit It's here! Our certified USDA #organic Mosquito Repellent has been released! It has been

Add a comment...

Ex. D, Page 4 of 5

InsidePub-000033

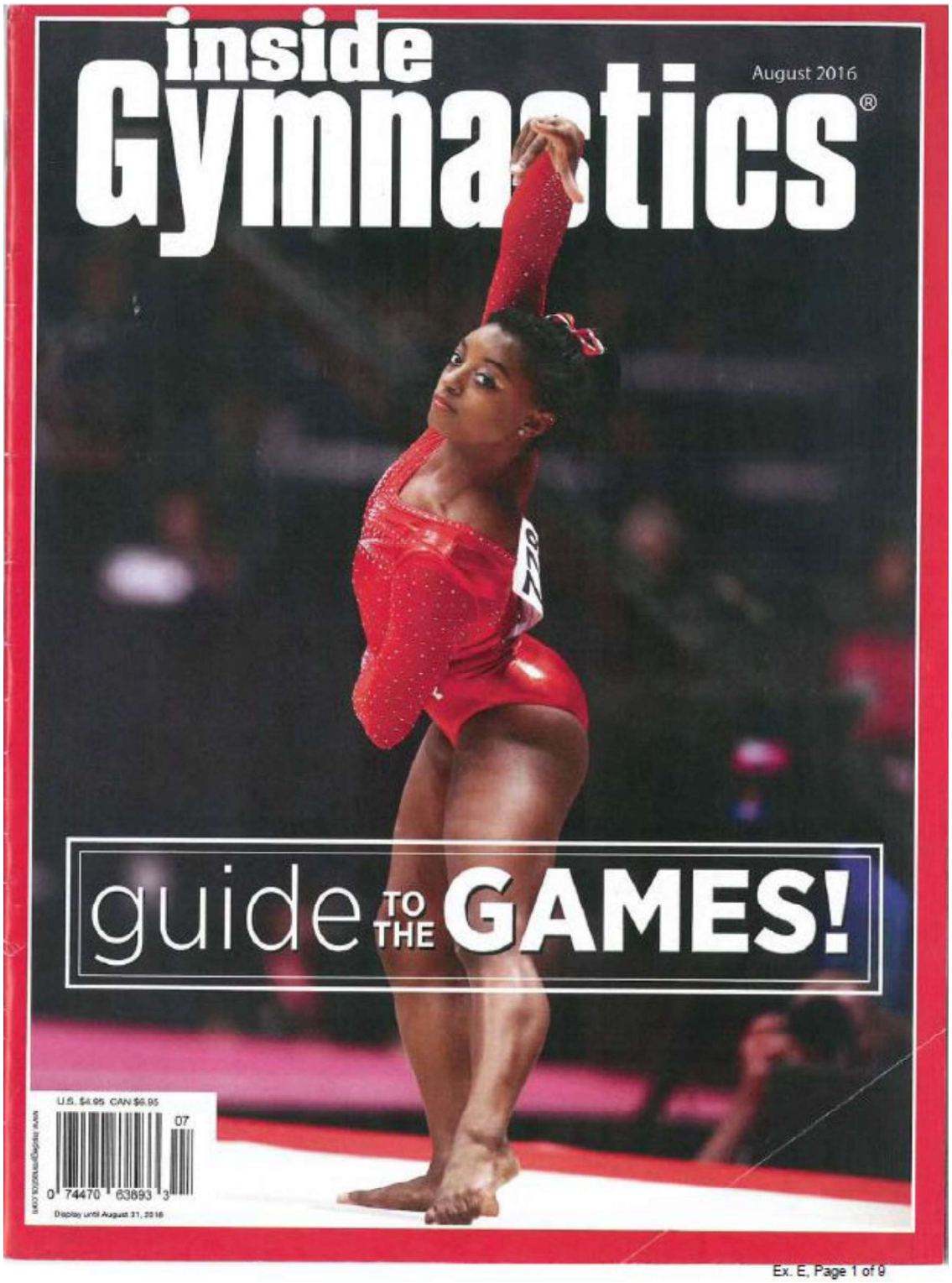
InsidePub-000034

Complaint



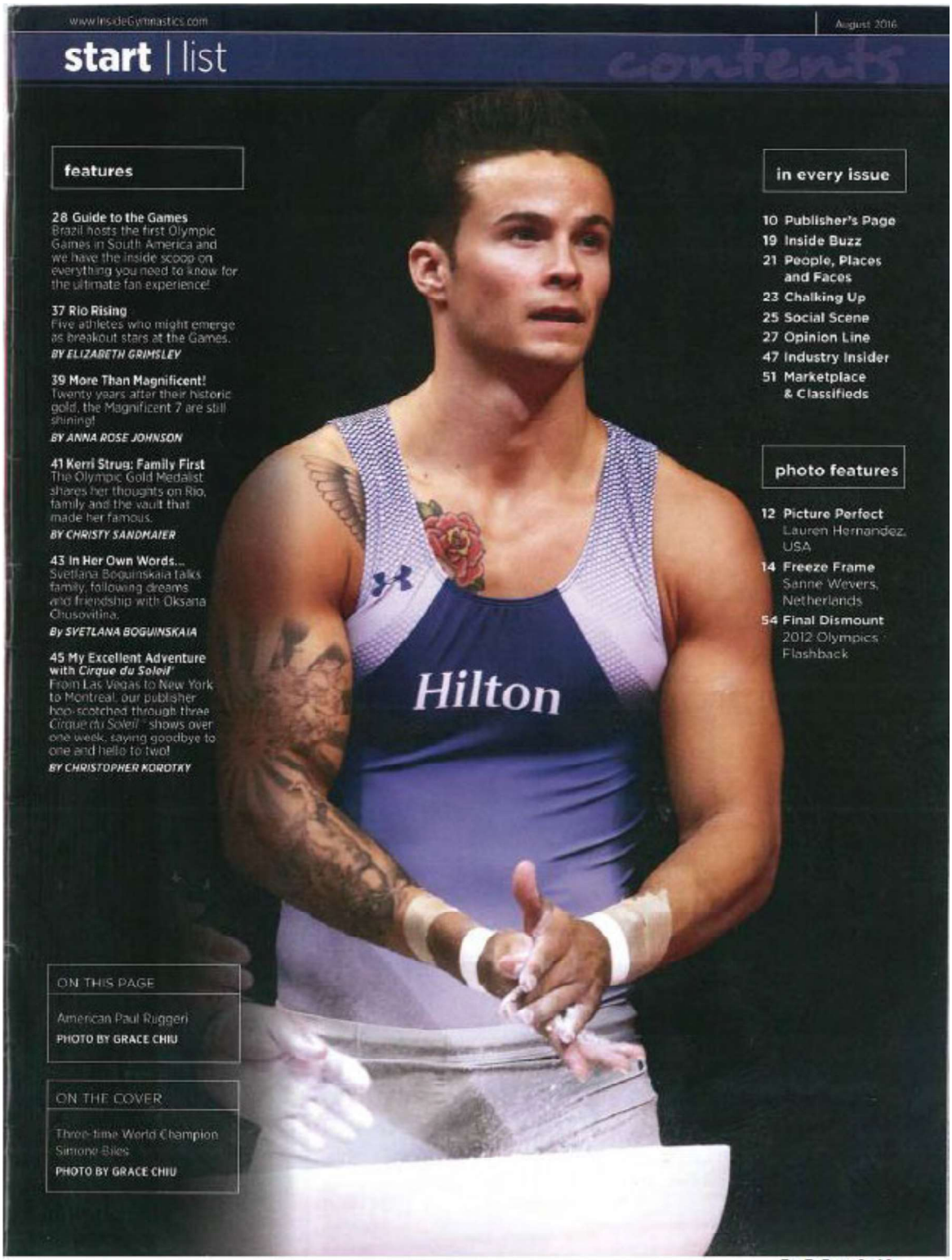
Ex. D, Page 5 of 5

Exhibit E



Ex. E, Page 1 of 9

Complaint



Ex. E, Page 2 of 9

My take | August 2016

publisher's | page



I've been to every Olympic Games since 1996, with the exception of Athens (we were launching a sister magazine at the time), and each one holds remarkable memories of incredible moments. In 1996, I remember being in awe of Alexei Nemov's incredible style and the personality he infused into the sport. And of course, the Magnificent 7 – who we look back on in this issue – were simply magical with a will and determination like no other. They charted a new course in history and hold a special place in the hearts and minds of fans of the sport. In 2000, my good friend Steve McCain represented the USA and I experienced that Games through the eyes of his family, whom I traveled with. I remember my heart racing with each set Team USA performed, knowing how much each had gone through to compete. I remember John Roethlisberger, now a columnist for the magazine, eating his first donut in years at the conclusion of competition, having dedicated himself to a nutrition plan for years that would give him the best shot for optimal performance. Though it was one sacrifice, that donut represented the greater sacrifices that all athletes make when they dedicate themselves to a lifelong dream. In 2008, I remember the overall pageantry of the Games. Beijing wanted to put forth the greatest display ever of Olympic force, so to speak, and they put on an event that is one for the ages. From the 2012 Games, I remember the Fierce Five and what a monumental moment and team effort it was reaching the top of the podium. I remember Gabby Douglas gently wiping a tear from her eye and the joy that was beaming from her face.



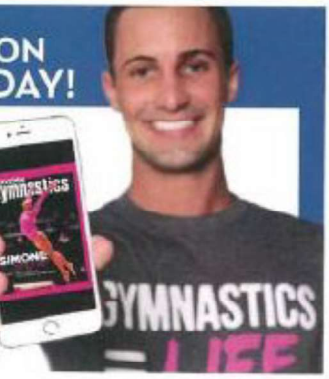
Grace Chiu

Gabby Douglas reacts to seeing her name at the top of the leader board in the Women's All-Around competition in London.

Though each Games was uniquely different, one thing all had in common was the unique sense of 'world community' and the incredible ability to bridge divides through sport. People set aside their differences and unify through an experience that is virtually indescribable. It's about so much more than sports. It's about pride of nation. It's about celebrating life. It's about finding common ground and camaraderie, even amongst the fiercest of competitors.

Walking through the Olympic grounds, people from hundreds of countries around the world are laughing together, smiling at each other and sharing stories while celebrating sport and life. Simply put, there is nothing like it. At each Games, I get goosebumps over and over and over, whether watching an incredible feat of sport or watching friendships develop, joined by this unbelievable experience called the Olympic Games.

As I prepare to head to Rio, I know I'll once again experience moments for a lifetime over a two-week span. Covering the sport, we get to know the athletes who will represent our country and have the opportunity to see first-hand all of the blood, sweat and tears that go into making a team. I remember asking U.S. Olympian Terin Humphrey what went through her head the moment an Olympic medal was being placed around her neck. She paused for a moment and then told me that both good times and tough times flashed through her mind and she realized at that moment that every sacrifice, every tough day she had endured was absolutely worth it. She told me that it was an accomplishment not only for herself, but for her country she was representing and how proud that made her. Something no one can ever take away. The Olympic spirit, defined.



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Submissions: Photo, content/story, letters to the editor and ad submissions are welcome. All submissions become property of Inside Gymnastics magazine. For return of materials, please include a self-addressed stamped envelope with adequate postage. Inside Gymnastics assumes no responsibility for unsolicited contributed material.
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inside Gymnastics MAGAZINE

Complaint


10 hot topics that have the gymnastics community buzzing!
First Rotation
inside | buzz
trending
Photo by Grace Chiu
{1}
{2}
Nice Made, Please! - We're loving the USA Gymnastics video series Made in America, available on their YouTube channel. Well done!
{3}
San Jose Sellout - Weeks before the Women's Olympic Trials in San Jose, USA Gymnastics announced that the event was officially sold out. We expect an absolutely electric atmosphere in the SAP Center!
Zika Confusion - A group of 150 health experts issued an open letter calling for the 2016 Olympics to be delayed or moved due to health concerns, but the World Health Organization responded that there was no public health justification for a change. Still, concerns about the virus understandably abound. Our team will be wearing Fit Organic insecto repellent during the Games.
{4}
Russian Revolution? - The Russian men's gymnastics program has worked for years to return to the glory of its golden age and continue to make strides, including a victory at the recent European Championships, edging Great Britain.
{5}
{6}
Noteworthy in the NCAA - The debate continues to rage regarding early commitments of athletes to NCAA programs. Which side of the debate are you on? Let us know @insideGym.
A Moment for Maddie - U.S. Gymnast Maddie Desch announced her retirement from elite gymnastics, having struggled for some time with a back injury. "I have decided to let my body heal and look forward to the amazing chapter I have ahead at the University of Alabama," she said.
{7}
{8}
Ninja Challenge - Got Skills? - How are your Ninja skills? Test them out at a USA Gymnastics premiere event this summer! (More in Chalking Up)
Coach Elise! - The University of Washington has a new women's head coach - 2000 Olympic medalist Elise Ray, who has served as the associate head coach since the beginning of last season. Congratulations, Elise!
{9}
{10}
Golden Viewing! - Gabby Douglas' docu-series, Douglas Family Gold, debuted last month on Oxygen and gives fans a glimpse into her life off of the competition floor.
Rio hosts the first-ever Olympics in South America this August, and Inside Gymnastics will be on the scene bringing you the latest and greatest from Brazil! Among the highlights will be the showdown between defending Olympic Champ Gabby Douglas and defending and three-time World Champ Simone Biles! Will the British women make the podium? Who will surprise the world? And can Kohei (pictured) continue his reign?
LONGINES
19


Posts that have people talking!
social | scene
PROTECTION
caring for Carly
FIT ORGANIC STEPS UP TO PROTECT FORMER OLYMPIC GOLD MEDALIST FROM MOSQUITOS THAT COULD TRANSMIT ZIKA VIRUS
2004 Olympic Gold Medalist Carly Patterson-Caldwell was looking forward to joining her Olympic family in Rio for the 2016 summer Games. However, because she is focused on starting a family of her own, Patterson-Caldwell made the difficult decision not to attend the Games. "I just couldn't risk our future with the threat of the Zika virus," she said. So instead of Rio, Carly and her husband Mark will be spending the summer at home, just outside of Dallas. There's just one problem: The Texas State Health Department is preparing for what could be a large scale outbreak of the Zika virus. Patterson-Caldwell could be just as much at risk for Zika in her own backyard as she would have been in Rio.
Hearing about her story through the team at Inside Gymnastics magazine—and knowing of the potential Zika virus outbreak in Texas, Fit Organic CEO Todd Wichmann sprang into action. His marketing team contacted Patterson-Caldwell, offering her and her family a lifetime supply of his new USDA-Certified organic mosquito repellent, scientifically proven to repel mosquitos that might transmit the Zika virus. More importantly, the company says it's safe for pregnant women and children.
"I was so touched and thankful that Fit Organic reached out to me," said Patterson-Caldwell. "I've been looking for an organic product that would repel mosquitos and keep my family safe from the Zika virus. Fit Organic Mosquito Repellent is exactly what I was looking for. Fit Organic's CEO said it was the least he could do, especially when he learned that Patterson-Caldwell was planning on becoming a mom. "I'm a parent before anything else," said Wichmann. The goal is to protect them - like Carly and her family-from the Zika virus.
Fit Organic Mosquito Repellent can be purchased online at Amazon.com or at FitOrganic.com.
fit
REPELLENT
Must-See!
SYTYCD!
We're loving the new season of the Emmy Award-winning FOX series, So You Think You Can Dance! Focusing on "the next generation" of dancers, this season pairs 10 young dancers (under 13-years-old) with All-Star favorites from past seasons to compete for the title of "America's Favorite Dancer." We had the opportunity to interview the top 10 recently, and we're so impressed with the incredible level of talent and mind-boggling maturity of the talented field!
BTW 200,000+ are Following Us on Instagram. Are you?!
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"CHEW ON A PAIR OF THESE"
NARROW
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Complaint

We're proponents of the U.S. gymnasts wearing red, white and blue leotards in Olympic team finals. Remember the Magnificent 7 in their beautiful patriotic leotard in Atlanta 1996? Yes, the Fierce Five were stunning in 2012 with red leotards (dazzling with crystals), but fans back home long for the celebrated, patriotic look. We can't wait to see what they step onto the competition floor wearing! U.S. Olympic gymnast Wendy Bruce Martin shares her perspective on the fashion front...

a return to PATRIOTIC LEOTARDS?

Whenever fans see our U.S. gymnasts wearing leotards that are not red, white and blue during the Olympics, it can cause a little uproar – as we've seen on social media! Some say that focusing on a leotard color rather than the athlete's accomplishment is ridiculous. I do agree that leotard color does not take away from a gymnast's accomplishment, whatsoever. I also understand why it bothers coaches, athletes, and fans. Instead of sending congratulatory tweets, we've seen many cases of fans debating leotard colors after a competition. Personally, I do feel leotard selection does matter, and it has nothing to do with gymnastics.

Every four years, a select few earn the opportunity to represent their country at the Olympics, the world's greatest sports stage. But competing in the Olympics is a representation of so much more. The United States of America chooses their most qualified athletes and supports them in their battle. The people of the United States sit at home, watching with pride. For two weeks, Americans put their religious, political, and racial differences aside and the entire country comes together to bestow love and support upon their athletes. *Their* athletes, representing *their* nation.

These athletes are not only competing for themselves. They are competing for their coach, their gym, their state, their country and the people of that country. They are not alone in their fight. They represent all the people of the United States. They are symbols of what the United States stands for. Our athletes are the image of strength, compassion, acceptance, diversity and power. They represent freedom and opportunity.

Wearing the colors that represent the United States is a symbol that shows pride, honor, and fellowship among all Americans. The red, white and blue, and the stars and stripes are unmistakably American. It is an honor to be able to wear them.

I was a member of the 1992 Olympic team and our leotards were red, white and blue, and our warm-up suits were red, white and blue with huge stars and stripes. When we received our apparel, we felt pride in being a part of TEAM USA, and the apparel symbolized that. When we put on our leotards we felt it, we felt it with pride. We felt the patriotism.

To me, it mattered. Not everyone is given the opportunity to represent their country. I wanted to be in our colors. When standing on the awards stand, I was proud to be in red, white and blue. I was proud to represent the country that gave me the opportunity to achieve my dreams, and I was proud to be an American.



Wendy Bruce Martin was a member of the 1992 Olympic team and has been involved in gymnastics for 36 years, including coaching for 22. She received a degree in psychology and is a certified mental toughness coach, who owns the Mental Toughness Company, GET PSYCHED! and is co-owner of Gold Medal Moms. You can visit Wendy at www.WendyBruceMartin.com







the latest on ZIKA

Many traveling to the Olympic Games are concerned about the Zika virus and its potential affects. Some, including former Olympic Champ Carly Patterson-Caldwell, even decided not to attend the Games because of Zika concerns (see story earlier in issue). Here is some information from the CDC on the disease.

"Zika virus disease (Zika) is a disease caused by the Zika virus, which is spread to people primarily through the bite of an infected Aedes species mosquito. The most common symptoms of Zika are fever, rash, joint pain, and conjunctivitis (red eyes). The illness is usually mild with symptoms lasting for several days to a week after being bitten by an infected mosquito. People usually don't get sick enough to go to the hospital, and they very rarely die of Zika. For this reason, many people might not realize they have been infected. However, Zika virus infection during pregnancy can cause a serious birth defect called microcephaly, as well as other severe fetal brain defects. Once a person has been infected, he or she is likely to be protected from future infections."

During the Games, the team at Inside Gymnastics will be using Fit Organic Mosquito Repellant Spray, the official mosquito repellant of Inside Gymnastics magazine. Five years in development, the new Fit Organic Mosquito Repellent Spray is a unique formula comprised of two key ingredients: organic lemongrass grown in Nepal and organic oleic acid derived from sunflowers in the United Kingdom. The company is providing product complimentary to a number of athletes, including U.S. gymnast Jake Dalton.



guide TO THE GAMES! Rio2016

ADVERTORIAL

in the SPOTLIGHT: #REBELLEVEL



Rebel Gymnastics

Gordon Steinecke, Vice President of Design for Rebel Gymnastics, talks about the company's line of products, its innovative design and quality, and Olympic-year trends.





Rebel Gymnastics is relatively new to the gymnastics market. How has the reception been?
Overwhelmingly positive! People are so excited about our new line and there is a lot of interest and buzz in the gymnastics world. We are looking forward to having Rebel in every gym across America. Gymnastics is a special sport where the girl's leotard accentuates their beautiful movements. Gymnasts want to pair their hard work with a leotard that shows off those hard-earned skills.

What are some of the characteristics that make Rebel Gymnastics leotards unique?
It's more than just the uniqueness of design; it's the Rebel attitude behind it. We are the first company to bring the fashion-industry's design style to competitive gymnasts. We aim to provide an increased level of product choice, customization, design intricacy, service and value to our customers.

Karen Noseff Aldridge, the founder of the company, has a background in mainstream fashion that she infused into the leotard designs. Talk a little about that...
Because of her background, Karen was able to see where there was something missing in the cheer world... the couture, stylish, designer cheer uniform. Now, there are many more design options than just an old boring cheer uniform. With that same vision, we want to fill the gap for gymnasts and revolutionize the gymnastics world. Innovating designs have helped raise the bar and bridge that gap between being just a leotard, but having a leotard that elevates a gymnast's performance to a whole new level. It's not just about designing a leotard that fits the same mold; it's about shattering that mold and pushing boundaries.

With this being an Olympic year, red, white and blue or patriotic themed leotards are a big hit. Is this a big initiative for Rebel Gymnastics this year as well?
What's great about Rebel is that we strive to give our customers what their heart desires and, with it being an Olympic year, red, white and blue leos are definitely on trend. We are thrilled to create looks that incorporate the patriotism customers are feeling, and add a flair only Rebel can offer. Taking things to #RebelLevel is what we do.

What are some of the other trends we can expect in leotards over the next year?
At Rebel it's not just about what's trendy, it's also about creating the best. The best design, the best fabrics, the best fits, and getting it all with the best value. Our designs are one-of-a-kind, show stopping pieces that are only limited by what you can dream up. With Rebel, anything is possible!

For companies interested in learning more about Rebel Gymnastics and its line of products, what are the best ways for them to connect?
Call our corporate office at 855.Rebel68 to begin designing a custom leotard. We also have an active Social Media presence. Make sure you are following it all and be some of the first to see everything new with Rebel Gymnastics!



@rebelgymnastics
@rebelgymnastics
/rebelgymnasticsleos

Images by Rebel Gymnastics

View the most recent Lookbook at
www.rebel-gymnastics.com

Complaint

ADVERTORIAL

EQUIPMENT: latest & greatest

With the 2016 Olympic games just around the corner, and some serious U.S. hardware in sight, gym enrollment numbers are sure to soar after the games. Be sure your gym is ready for the surge with the BEST and NEWEST equipment on the market!

MANCINO MANUFACTURING CO., INC.
Mini Foam Vault Table
Mancinomats.com



AMERICAN ATHLETIC, INC.
AirTrack Training Set by AAI
AmericanAthletic.com/airtrak



NORBERT'S ATHLETIC PRODUCTS, INC.
Ninja Challenge Course
Norberts.net



AMERICAN GYMNAST
Parallel Blocks Set
American-Gymnast.com



RESILITE
Incline Skill Development System
Resilite.com



DEARY'S GYM SUPPLY (DGS)
Workstation and Multi Bar
GymSupply.com



ROSS ATHLETIC SUPPLY
Ross Athletic 7' x 14' Competition Trampoline
RossAthletic.com



EXTREME ATHLETIC SUPPLY
X-Factor Floor Bars
EASupply.net



SPIETH AMERICA
New Inflatable Line by Spieth America
SpiethAmerica.com



GMR
By GMR Alumaflex Competition Balance Beam
ByGMR.com



TUMBL TRAK
Hurdle Helper
TumblTrak.com

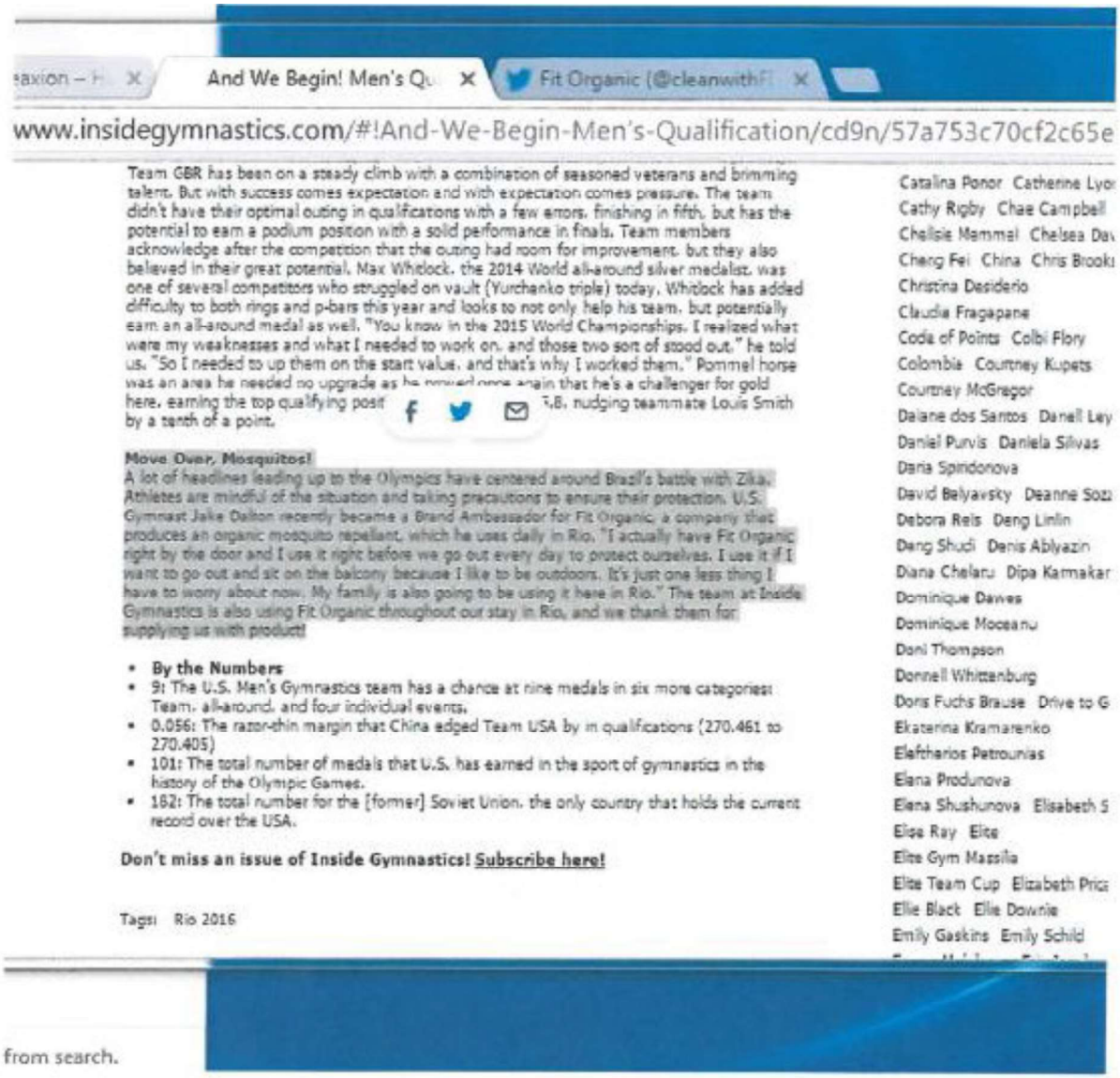




Ex. E, Page 9 of 9

Complaint

Exhibit F



eaxion – H | And We Begin! Men's Qu | Fit Organic (@cleanwithFI

www.insidegymnastics.com/#!And-We-Begin-Men's-Qualification/cd9n/57a753c70cf2c65e

Team GBR has been on a steady climb with a combination of seasoned veterans and brimming talent. But with success comes expectation and with expectation comes pressure. The team didn't have their optimal outing in qualifications with a few errors, finishing in fifth, but has the potential to earn a podium position with a solid performance in finals. Team members acknowledge after the competition that the outing had room for improvement, but they also believed in their great potential. Max Whitlock, the 2014 World all-around silver medalist, was one of several competitors who struggled on vault (Yurchenko triple) today. Whitlock has added difficulty to both rings and p-bars this year and looks to not only help his team, but potentially earn an all-around medal as well. "You know in the 2015 World Championships, I realized what were my weaknesses and what I needed to work on, and those two sort of stood out," he told us. "So I needed to up them on the start value, and that's why I worked them." Pommel horse was an area he needed no upgrade as he proved once again that he's a challenger for gold here, earning the top qualifying posit T.B. nudging teammate Louis Smith by a tenth of a point.

Move Over, Mosquitos!

A lot of headlines leading up to the Olympics have centered around Brazil's battle with Zika. Athletes are mindful of the situation and taking precautions to ensure their protection. U.S. Gymnast Jake Dalton recently became a Brand Ambassador for Fit Organic, a company that produces an organic mosquito repellant, which he uses daily in Rio. "I actually have Fit Organic right by the door and I use it right before we go out every day to protect ourselves. I use it if I want to go out and sit on the balcony because I like to be outdoors. It's just one less thing I have to worry about now. My family is also going to be using it here in Rio." The team at Inside Gymnastics is also using Fit Organic throughout our stay in Rio, and we thank them for supplying us with product!

- **By the Numbers**
- 9: The U.S. Men's Gymnastics team has a chance at nine medals in six more categories: Team, all-around, and four individual events.
- 0.056: The razor-thin margin that China edged Team USA by in qualifications (270.461 to 270.405)
- 101: The total number of medals that U.S. has earned in the sport of gymnastics in the history of the Olympic Games.
- 182: The total number for the [former] Soviet Union, the only country that holds the current record over the USA.

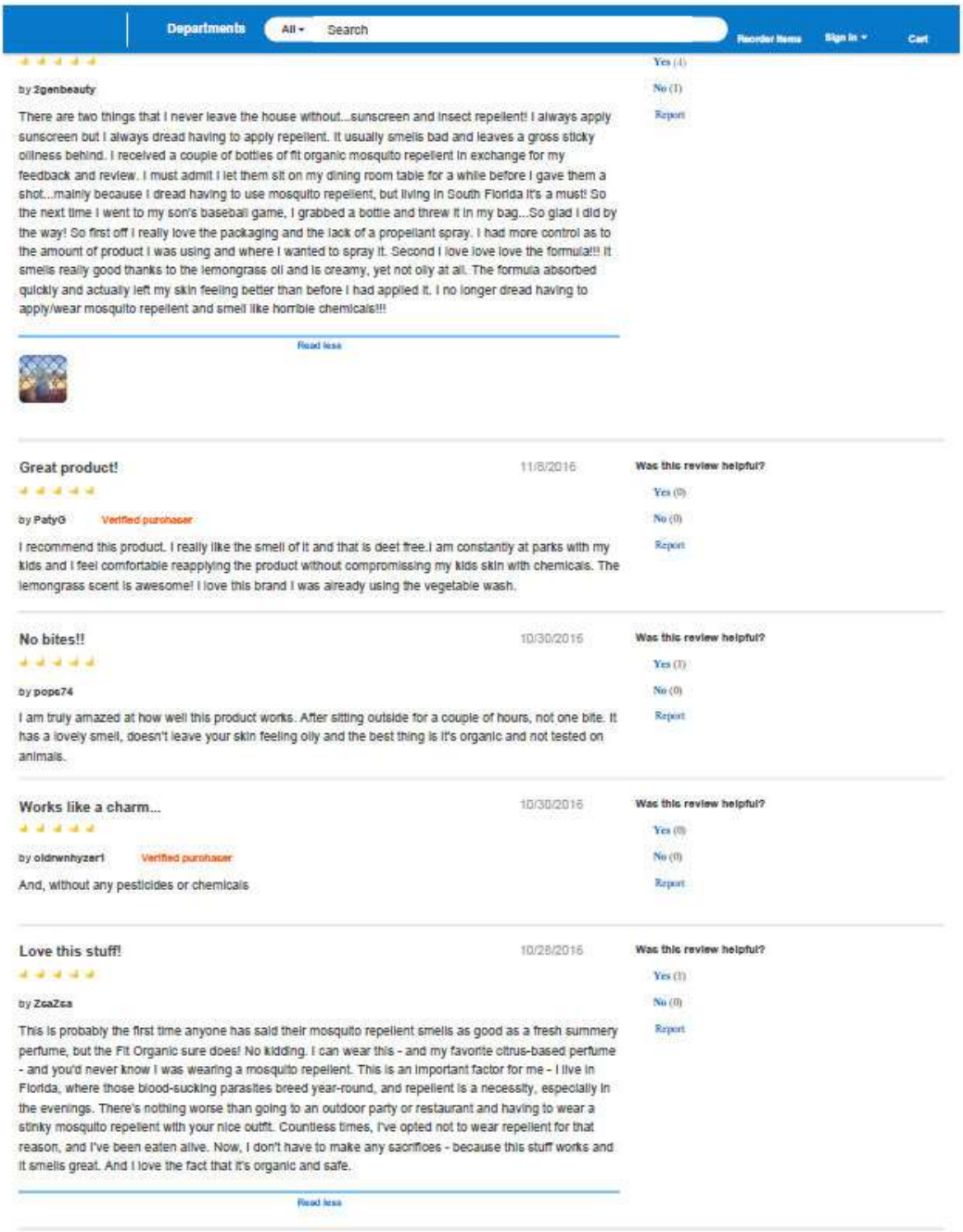
Don't miss an issue of Inside Gymnastics! Subscribe here!

Tags: Rio 2016

Catalina Ponor Catherine Lyo
Cathy Rigby Chae Campbell
Chellsie Memmel Chelsea Da
Cheng Fei China Chris Brook
Christina Desiderio
Claudia Fragapane
Code of Points Colbi Flory
Colombia Courtney Kupets
Courtney McGregor
Daiane dos Santos Danell Ley
Daniel Purvis Daniela Silvas
Daria Spiridonova
David Belyavsky Deanne Sozz
Debora Reis Deng Linlin
Deng Shudi Denis Ablyazin
Diana Chelaru Dipa Karmakar
Dominique Dawes
Dominique Moceanu
Doni Thompson
Donnell Whittenburg
Doris Fuchs Brause Drive to G
Ekaterina Kramarenko
Eleftherios Petrounias
Elena Produnova
Elena Shushunova Elisabeth S
Elise Ray Elite
Elite Gym Massila
Elite Team Cup Elizabeth Price
Ellie Black Ellie Downie
Emily Gaskins Emily Schild

from search.

Exhibit G



Departments All Search Reorder Items Sign In Cart

by 2genbeauty

There are two things that I never leave the house without...sunscreen and insect repellent! I always apply sunscreen but I always dread having to apply repellent. It usually smells bad and leaves a gross sticky oiliness behind. I received a couple of bottles of fit organic mosquito repellent in exchange for my feedback and review. I must admit I let them sit on my dining room table for a while before I gave them a shot...mainly because I dread having to use mosquito repellent, but living in South Florida it's a must! So the next time I went to my son's baseball game, I grabbed a bottle and threw it in my bag...So glad I did by the way! So first off I really love the packaging and the lack of a propellant spray. I had more control as to the amount of product I was using and where I wanted to spray it. Second I love love love the formula!!! It smells really good thanks to the lemongrass oil and is creamy, yet not oily at all. The formula absorbed quickly and actually left my skin feeling better than before I had applied it. I no longer dread having to apply/wear mosquito repellent and smell like horrible chemicals!!!

Read less

Yes (1) No (1) Report

Great product! 11/6/2016

by PatyG Verified purchaser

I recommend this product. I really like the smell of it and that is deet free.I am constantly at parks with my kids and I feel comfortable reapplying the product without compromissing my kids skin with chemicals. The lemongrass scent is awesome! I love this brand I was already using the vegetable wash.

Was this review helpful? Yes (0) No (0) Report

No bites!! 10/30/2016

by pope74

I am truly amazed at how well this product works. After sitting outside for a couple of hours, not one bite. It has a lovely smell, doesn't leave your skin feeling oily and the best thing is it's organic and not tested on animals.

Was this review helpful? Yes (1) No (0) Report

Works like a charm... 10/30/2016

by oldrwnhyzer1 Verified purchaser

And, without any pesticides or chemicals

Was this review helpful? Yes (0) No (0) Report

Love this stuff! 10/28/2016

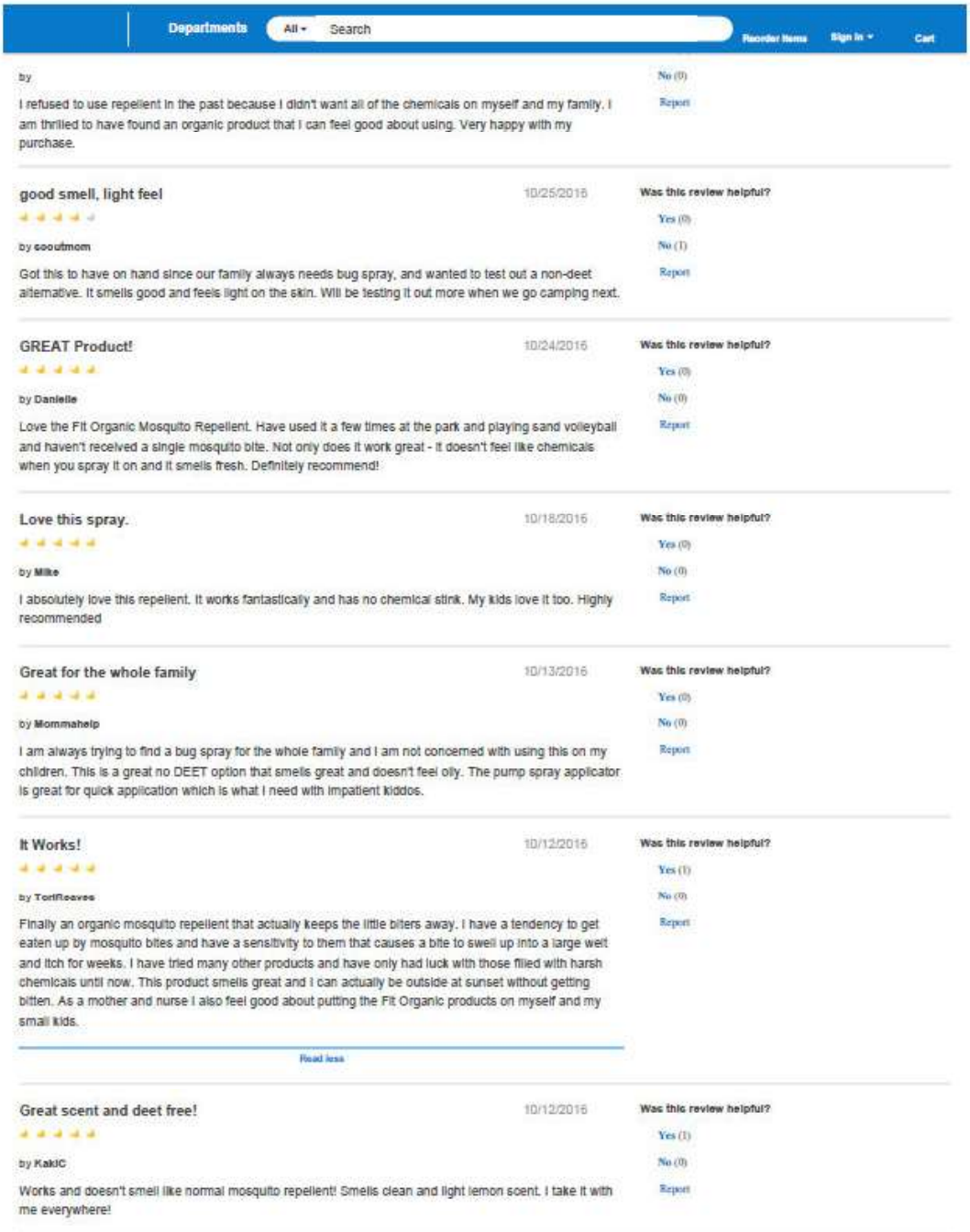
by ZcaZca

This is probably the first time anyone has said their mosquito repellent smells as good as a fresh summery perfume, but the Fit Organic sure does! No kidding. I can wear this - and my favorite citrus-based perfume - and you'd never know I was wearing a mosquito repellent. This is an important factor for me - I live in Florida, where those blood-sucking parasites breed year-round, and repellent is a necessity, especially in the evenings. There's nothing worse than going to an outdoor party or restaurant and having to wear a stinky mosquito repellent with your nice outfit. Countless times, I've opted not to wear repellent for that reason, and I've been eaten alive. Now, I don't have to make any sacrifices - because this stuff works and it smells great. And I love the fact that it's organic and safe.

Read less

Was this review helpful? Yes (1) No (0) Report

Complaint



Departments All Search Reorder Items Sign In Cart

by

I refused to use repellent in the past because I didn't want all of the chemicals on myself and my family. I am thrilled to have found an organic product that I can feel good about using. Very happy with my purchase.

No (0)
Report

good smell, light feel 10/25/2016

by **scoutmom**

Got this to have on hand since our family always needs bug spray, and wanted to test out a non-deet alternative. It smells good and feels light on the skin. Will be testing it out more when we go camping next.

Was this review helpful?
Yes (0)
No (1)
Report

GREAT Product! 10/24/2016

by **Danielle**

Love the Fit Organic Mosquito Repellent. Have used it a few times at the park and playing sand volleyball and haven't received a single mosquito bite. Not only does it work great - it doesn't feel like chemicals when you spray it on and it smells fresh. Definitely recommend!

Was this review helpful?
Yes (0)
No (0)
Report

Love this spray. 10/18/2016

by **Mike**

I absolutely love this repellent. It works fantastically and has no chemical stink. My kids love it too. Highly recommended

Was this review helpful?
Yes (0)
No (0)
Report

Great for the whole family 10/13/2016

by **Mommahelp**

I am always trying to find a bug spray for the whole family and I am not concerned with using this on my children. This is a great no DEET option that smells great and doesn't feel oily. The pump spray applicator is great for quick application which is what I need with impatient kiddos.

Was this review helpful?
Yes (0)
No (0)
Report

It Works! 10/12/2016

by **TorlReaves**

Finally an organic mosquito repellent that actually keeps the little biters away. I have a tendency to get eaten up by mosquito bites and have a sensitivity to them that causes a bite to swell up into a large welt and itch for weeks. I have tried many other products and have only had luck with those filled with harsh chemicals until now. This product smells great and I can actually be outside at sunset without getting bitten. As a mother and nurse I also feel good about putting the Fit Organic products on myself and my small kids.

Read less

Was this review helpful?
Yes (1)
No (0)
Report

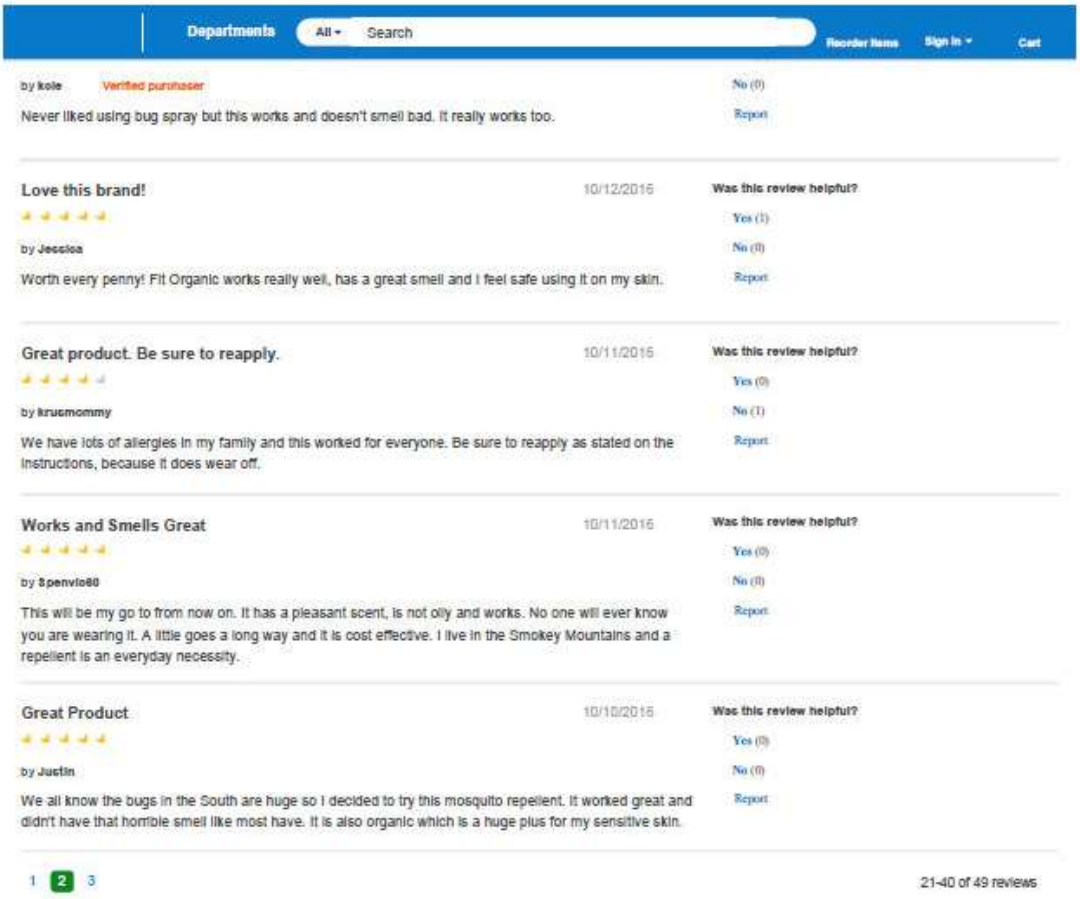
Great scent and deet free! 10/12/2016

by **KakiC**

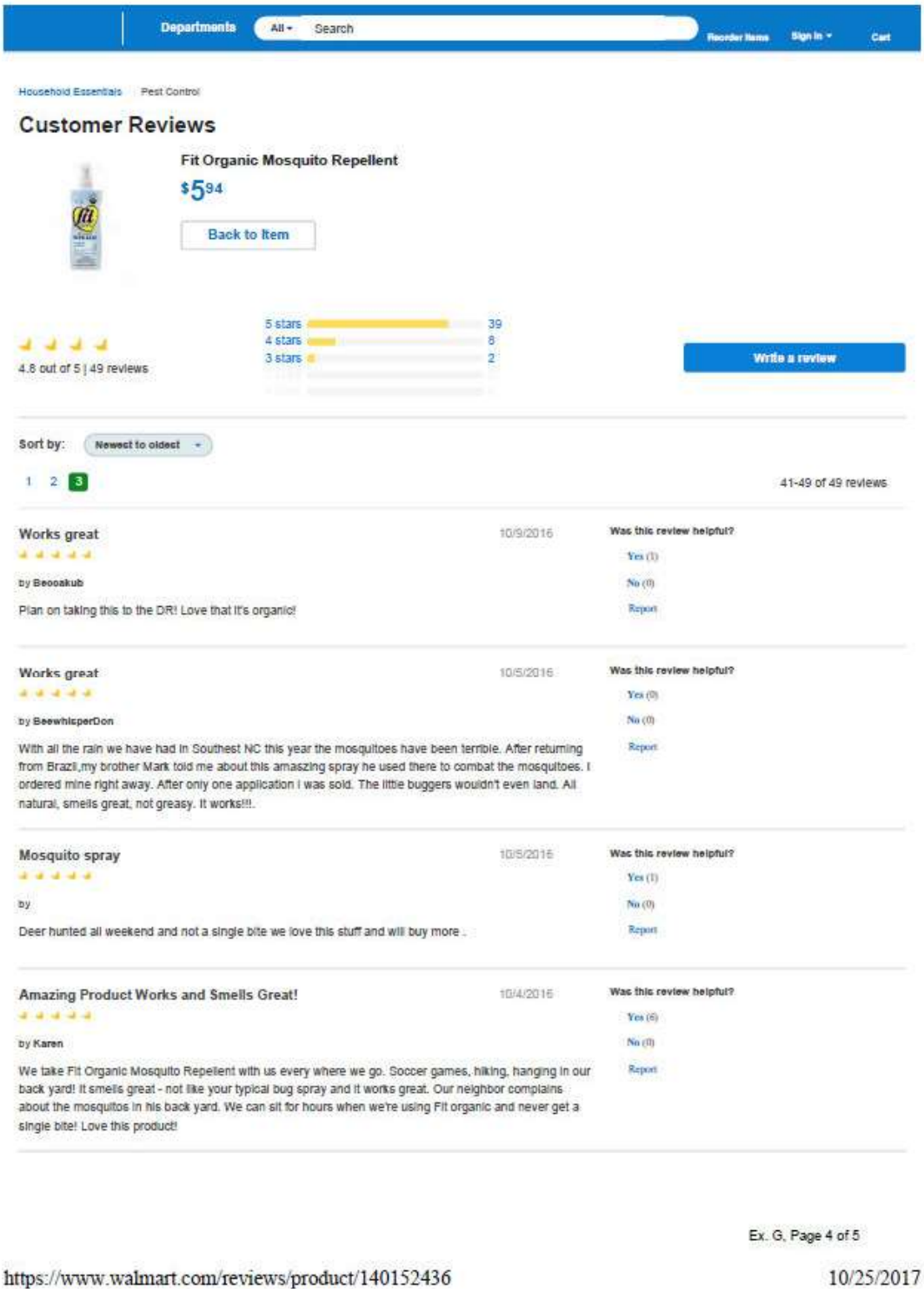
Works and doesn't smell like normal mosquito repellent! Smells clean and light lemon scent. I take it with me everywhere!

Was this review helpful?
Yes (1)
No (0)
Report

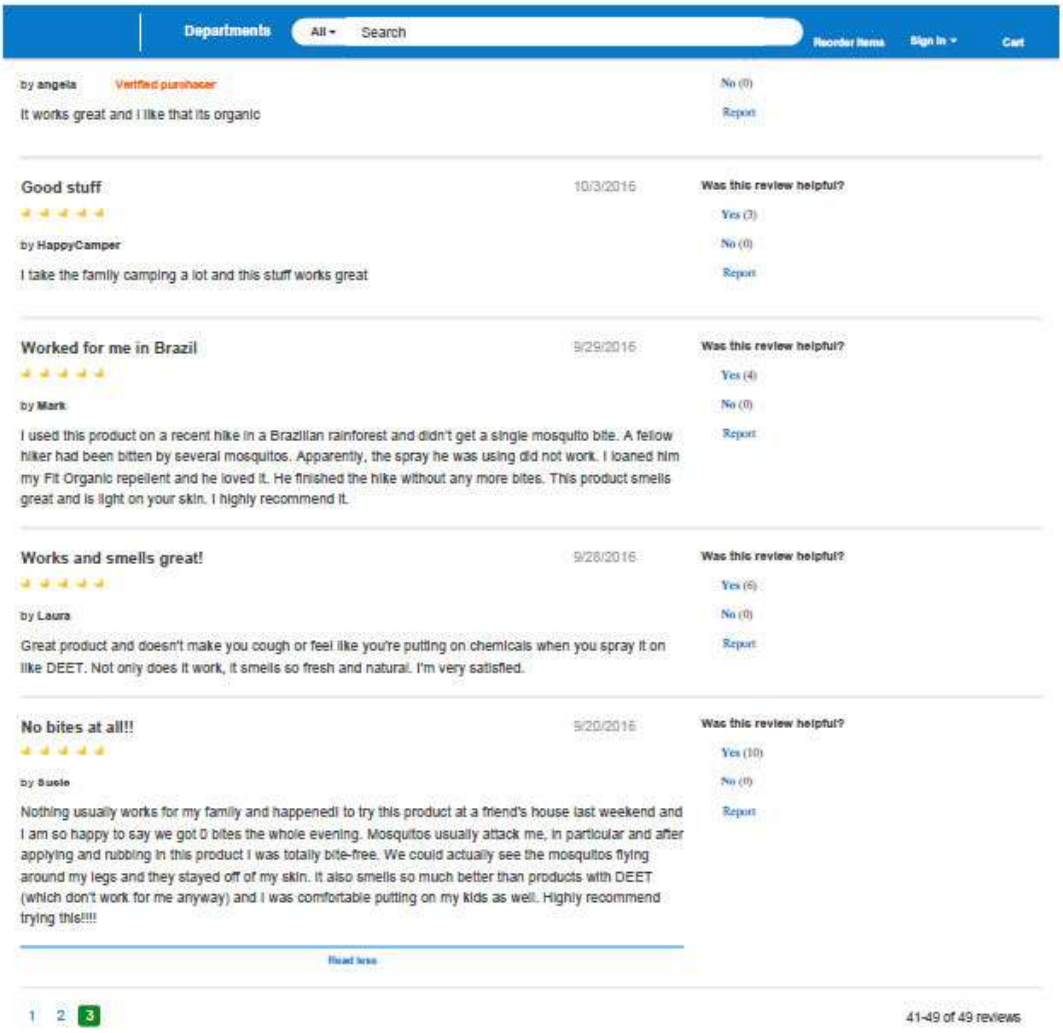
Ex. G, Page 2 of 5


Departments
All
Search
Reorder Items
Sign In
Cart
by kole
Verified purchaser
Never liked using bug spray but this works and doesn't smell bad. It really works too.
No (0)
Report
Love this brand!
10/12/2016
Was this review helpful?
Yes (1)
by Jessica
No (0)
Worth every penny! Fit Organic works really well, has a great smell and I feel safe using it on my skin.
Report
Great product. Be sure to reapply.
10/11/2016
Was this review helpful?
Yes (0)
by krusmommy
No (1)
We have lots of allergies in my family and this worked for everyone. Be sure to reapply as stated on the instructions, because it does wear off.
Report
Works and Smells Great
10/11/2016
Was this review helpful?
Yes (0)
by 8penvlo80
No (0)
This will be my go to from now on. It has a pleasant scent, is not oily and works. No one will ever know you are wearing it. A little goes a long way and it is cost effective. I live in the Smokey Mountains and a repellent is an everyday necessity.
Report
Great Product
10/10/2016
Was this review helpful?
Yes (0)
by Justin
No (0)
We all know the bugs in the South are huge so I decided to try this mosquito repellent. It worked great and didn't have that horrible smell like most have. It is also organic which is a huge plus for my sensitive skin.
Report
1 2 3
21-40 of 49 reviews

Complaint


Departments
All
Search
Reorder Items
Sign In
Cart
Household Essentials
Pest Control
Customer Reviews
Fit Organic Mosquito Repellent
$5.94
Back to Item
5 stars 39
4 stars 8
3 stars 2
4.8 out of 5 | 49 reviews
Write a review
Sort by:
Newest to oldest
1 2 3
41-49 of 49 reviews
Works great
10/9/2016
by Beooakub
Plan on taking this to the DR! Love that it's organic!
Was this review helpful?
Yes (1)
No (0)
Report
Works great
10/5/2016
by BeewhisperDon
With all the rain we have had in Southest NC this year the mosquitoes have been terrible. After returning from Brazil,my brother Mark told me about this amaszing spray he used there to combat the mosquitoes. I ordered mine right away. After only one application i was sold. The little buggers wouldn't even land. All natural, smells great, not greasy. It works!!!.
Was this review helpful?
Yes (0)
No (0)
Report
Mosquito spray
10/5/2016
by
Deer hunted all weekend and not a single bite we love this stuff and will buy more .
Was this review helpful?
Yes (1)
No (0)
Report
Amazing Product Works and Smells Great!
10/4/2016
by Karen
We take Fit Organic Mosquito Repellent with us every where we go. Soccer games, hiking, hanging in our back yard! It smells great - not like your typical bug spray and it works great. Our neighbor complains about the mosquitos in his back yard. We can sit for hours when we're using Fit organic and never get a single bite! Love this product!
Was this review helpful?
Yes (6)
No (0)
Report

Fit Organic Mosquito Repellent - Walmart.com Page 2 of 3



Departments All Search Reorder Items Sign In Cart

by angela Verified purchaser

It works great and I like that its organic

No (0)

Report

Good stuff 10/3/2016

by HappyCamper

I take the family camping a lot and this stuff works great

Was this review helpful?

Yes (3)

No (0)

Report

Worked for me in Brazil 9/29/2016

by Mark

I used this product on a recent hike in a Brazilian rainforest and didn't get a single mosquito bite. A fellow hiker had been bitten by several mosquitos. Apparently, the spray he was using did not work. I loaned him my Fit Organic repellent and he loved it. He finished the hike without any more bites. This product smells great and is light on your skin. I highly recommend it.

Was this review helpful?

Yes (4)

No (0)

Report

Works and smells great! 9/28/2016

by Laura

Great product and doesn't make you cough or feel like you're putting on chemicals when you spray it on like DEET. Not only does it work, it smells so fresh and natural. I'm very satisfied.

Was this review helpful?

Yes (6)

No (0)

Report

No bites at all!! 9/20/2016

by Susie

Nothing usually works for my family and happenedl to try this product at a friend's house last weekend and I am so happy to say we got 0 bites the whole evening. Mosquitos usually attack me, in particular and after applying and rubbing in this product I was totally bite-free. We could actually see the mosquitos flying around my legs and they stayed off of my skin. It also smells so much better than products with DEET (which don't work for me anyway) and I was comfortable putting on my kids as well. Highly recommend trying this!!!!

Read less

Was this review helpful?

Yes (10)

No (0)

Report

1 2 3 41-49 of 49 reviews

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 Inside Publications, LLC of Georgia and Christopher Korotky and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: 1) statements by Respondents Inside Publications, LLC of Georgia and Christopher Korotky 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 against Inside Publications, LLC of Georgia and Christopher Korotky:

Findings

1. The Respondents are:

   a. Respondent Inside Publications, LLC of Georgia, a Georgia limited liability company with its principal office or place of business at 1050 Crown Pointe Parkway, Atlanta, Georgia 30338; and

   b. Respondent Christopher Korotky, the sole owner and member of Inside Publications, LLC of Georgia. Individually or in concert with others, he controlled, or had the authority to control, or participated in, the acts and practices alleged in the Complaint. His principal office or place of business is the same as that of Inside Publications, LLC of Georgia.

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. "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. 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. "Close proximity" means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.

C. "Including" means including but not limited to.

D. "Respondents" means Inside Publications, LLC of Georgia and Christopher Korotky, individually or collectively.

1. "Corporate Respondent" means Inside Publications, LLC of Georgia, a limited liability company, and its successors and assigns.

2. "Individual Respondent" means Christopher Korotky.

E. "Unexpected material connection" means any relationship that might materially affect the weight or credibility of a testimonial or endorsement and that would not reasonably be expected by consumers.

Provisions

I. Prohibited Misrepresentations – Endorsements

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 product or service are prohibited from making, or assisting others in making, any misrepresentation, expressly or by implication, about the status of any endorser or person providing a review of the product or service, including a misrepresentation that the endorser or reviewer is an independent user or ordinary consumer of the product or service.

II. Required Disclosures – Endorsements

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 advertising, promotion, offering for sale, or sale of any product or service are prohibited from making, or assisting others in making, any representation, expressly or by implication, about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection

between such endorser and (1) any Respondent or (2) any other individual or entity affiliated with the product or service.

III. Prohibited Misrepresentations – Deceptively Formatted Advertising

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 advertising, promotion, offering for sale, or sale of any product or service are prohibited from making, or assisting others in making, any misrepresentation, in any manner, expressly or by implication, that paid commercial advertising is a statement or opinion from an independent or objective publisher or source.

IV. Monitoring of Endorsers

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 advertising, promotion, offering for sale, or sale of any product or service by means of an endorsement by an endorser with a material connection to (1) any Respondent or (2) any other individual or entity affiliated with the product or service, must take steps sufficient to ensure compliance with Provisions I and II of this Order. Such steps shall include, at a minimum:

A. Providing each such endorser with a clear statement of their responsibilities to disclose clearly and conspicuously, and in close proximity to the endorsement, in any print, radio, television, online, or digital advertisement or communication, the endorser's unexpected material connection to any Respondent or any other individual or entity affiliated with the product or service, and obtaining from each such endorser a signed and dated statement acknowledging receipt of that statement and expressly agreeing to comply with it;

B. Establishing, implementing, and thereafter maintaining a system to monitor and review the representations and disclosures of endorsers with material connections to any Respondent or any other individual or entity affiliated with the product or service to ensure compliance with Provisions I and II of this Order. The system shall include, at a minimum, monitoring and reviewing the endorsers' print, radio, television, online or digital advertisement or communication;

C. Immediately terminating and ceasing payment to any endorser with a material connection to any Respondent or any other individual or entity affiliated with the product or service who Respondents reasonably conclude:

1. Has misrepresented, in any manner, their independence or impartiality; or

2. Has failed to disclose, clearly and conspicuously, and in close proximity to the endorsement, an unexpected material connection between such

endorser and any Respondent or any other individual or entity affiliated with the product or service.

Provided, however, that Respondents may provide an endorser with notice of failure to adequately disclose and an opportunity to cure the disclosure prior to terminating the endorsement relationship if Respondents reasonably conclude that the failure to adequately disclose was inadvertent. Respondents shall inform any endorser to whom they have provided a notice of a failure to adequately disclose an unexpected material connection that any subsequent failure to adequately disclose will result in immediate termination; and

D. Creating reports showing the results of the monitoring required by this Provision.

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. Individual Respondent, for any business that such Respondent, individually or collectively with any other Respondents, 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, 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. Sixty days 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 over which Respondents have direct or indirect control; 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, 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 Inside Publications LLC of Georgia*, C-4669.

VII. Recordkeeping

IT IS FURTHER ORDERED that Respondents 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, Corporate Respondent 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. 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;

B. A copy of each unique advertisement or other marketing material making a representation subject to this Order; and

C. 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 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).

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'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 as to Creaxion Corp. and Mark Pettit, and an agreement containing a consent order as to Inside Publications, LLC of Georgia and Christopher Korotky ("respondents").

The proposed consent orders ("orders") have been placed on the public record for 30 days for receipt of 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 orders and the comments received, and will decide whether it should withdraw the orders or make them final.

This matter involves the respondents' endorsement and advertising format practices with respect to the advertising and promotional campaign they created and implemented for FIT Organic Mosquito Repellent. The complaint alleges that the respondents violated Section 5(a) of the FTC Act by misrepresenting that certain endorsements reflected the independent experiences or opinions of impartial users, and by deceptively failing to disclose that certain endorsers had material connections with the endorsed product, namely that they were paid spokespersons, they were reimbursed for the cost of the product, or they owned or were employed by Creaxion, the public relations firm hired to promote the product. The complaint also alleges that the respondents violated Section 5(a) by misrepresenting that certain advertisements were independent statements and opinions of impartial publications when they actually were paid commercial advertising.

The orders include injunctive relief that prohibit these alleged violations and fences in similar and related conduct. The provisions apply to any product or service.

Part I prohibits misrepresenting the status of any endorser or person reviewing the product or service, including that he or she is an independent user or ordinary consumer of the product or service.

Part II prohibits any representation about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such endorser and any respondent, or other individual or entity affiliated with the product or service. Each order defines the terms "clearly and conspicuously" and "unexpected material connection."

Part III prohibits misrepresenting that paid commercial advertising is a statement or opinion from an independent or objective publisher or source.

Part IV requires the respondents, when they use endorsers to advertise or sell a product or service, to take certain steps to make sure the endorsements comply with Parts I and II of the order. Such steps include clearly notifying endorsers of their representation and disclosure responsibilities, creating a monitoring system to review endorsements and disclosures, and terminating any endorser who fails to comply with Parts I and II.

Part V requires the respondents to distribute the order to certain persons and submit signed acknowledgments of order receipt.

Part VI requires the respondents 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 VII contains recordkeeping requirements for personnel records, advertising and marketing materials, and all records necessary to demonstrate compliance with the order.

Part VIII contains other requirements related to the Commission's monitoring of the respondents' order compliance.

Part IX 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 orders, and it is not intended to constitute an official interpretation of the complaint or orders, or to modify the orders' terms in any way.

Complaint

IN THE MATTER OF

MARATHON PETROLEUM CORPORATION, EXPRESS MART FRANCHISING CORP., PETR-ALL PETROLEUM CONSULTING CORPORATION, AND REROB, 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-4661; File No. 181 0152
Complaint, October 23, 2018 – Decision, February 4, 2019

This consent order addresses the $255 million acquisition by Marathon Petroleum Corporation of certain assets of Petr-All Petroleum Consulting Corporation, Express Mart Franchising Corp., and REROB, LLC. The complaint alleges that the transaction 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 and the retail sale of diesel in five local markets within the following cities: Farmington, Fayetteville, Johnson City, Rochester, and Whitney Point in New York. The consent order requires Marathon to divest certain Speedway and Express Mart retail fuel outlets and related assets to Sunoco in the five local markets.

Participants

For the *Commission*: *Helder Agostinho, Catharine Bill,* and *Carrie Isaac.*

For the *Respondents*: *Peter Love, Jones Day; Grayson T. Walter, Bond, Schoeneck & King, PLLC.*

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 Marathon Petroleum Corporation has, through its wholly owned subsidiary Speedway LLC, entered into an agreement to acquire retail fuel outlets and other interests from Express Mart Franchising Corp., Petr-All Petroleum Consulting Corporation, and REROB, LLC (collectively "Express Mart"), 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 Federal Trade Commission 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

Marathon Petroleum Corporation

1. Respondent Marathon Petroleum Corporation ("Marathon") is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of

Delaware, with its office and principal place of business located at 539 South Main Street, Findlay, Ohio, 45840. Speedway LLC ("Speedway") is a wholly owned subsidiary of Marathon.

2. Respondent Marathon, through its wholly owned subsidiary Speedway, 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 Marathon and the corporate entities under its control are, and at all times relevant herein have 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.

Express Mart

4. Express Mart is comprised of three affiliated entities:

a. Respondent Express Mart Franchising Corp. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York, 13212;

b. Respondent Petr-All Petroleum Consulting Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212; and

c. Respondent REROB, LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212.

5. Express Mart 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.

6. Express Mart 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

7. Pursuant to an Asset Purchase Agreement dated April 13, 2018, Marathon proposes to acquire, through its wholly owned subsidiary Speedway, retail outlets and other interests from Express Mart (the "Acquisition"). Marathon proposes to acquire the interests of the following Express Mart affiliated entities, each of which was a New York corporation or company at the time the Asset Purchase Agreement was signed: Express Mart Franchising Corp.; Petr-All Petroleum Consulting Corporation; and REROB, LLC.

8. The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

III. THE RELEVANT MARKET

9. Relevant product markets in which to analyze the effects of the Acquisition are the retail sale of gasoline and the retail sale of diesel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Consumers require diesel 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 exists.

10. Relevant geographic markets in which to analyze the effects of the Acquisition include five local markets within the following cities: Farmington, Fayetteville, Johnson City, Rochester, and Whitney Point in New York.

11. The relevant geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting such features as 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

12. With regard to the retail sale of gasoline, the Acquisition, if consummated, would reduce the number of competitively constraining independent market participants from three to two in four local markets, and from four to three in one local market. The Acquisition would result in a highly concentrated market in each of these five markets.

13. With regard to the retail sale of diesel, the Acquisition, if consummated, would create a merger to monopoly in three markets, and reduce the number of competitively constraining independent market participants from three to two in one local market, and from four to three in one local market. The Acquisition would result in a highly concentrated market in each of these five markets.

V. BARRIERS TO ENTRY

14. 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

15. 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 Respondents Marathon and Express Mart 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

16. 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.

17. The Asset Purchase Agreement entered into by Marathon, through its wholly owned subsidiary Speedway, and Express Mart 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 twenty-third day of October, 2018, 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 Marathon Petroleum Corporation, through its wholly owned subsidiary, Speedway LLC (collectively "Marathon"), of retail fuel outlets and other interests from Respondent REROB, LLC, Petr-All Petroleum Consulting Corporation, and Express Mart Franchising Corp. (collectively "Express Mart"). 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 ("Agreement Containing Consent Orders" or "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 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 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 issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Marathon Petroleum Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 539 South Main Street, Findlay, Ohio 45840.

2. Speedway, 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 office and principal place of business located at 500 Speedway Drive, Enon, Ohio 45323. Speedway LLC is a wholly-owned subsidiary of Respondent Marathon Petroleum Corporation.

3. Respondent Express Mart Franchising Corp. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212.

4. Respondent Petr-All Petroleum Consulting Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212.

5. Respondent REROB, LLC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212.

6. Sunoco LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 8111 Westchester Drive, Suite 600, Dallas, Texas 75225.

7. 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.

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, and Appendix A, which is attached to the Decision and Order and identifies the Retail Fuel Assets, are incorporated herein by reference and made a part hereof, shall apply:

A. "Marathon" means Marathon Petroleum Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Marathon (including Speedway, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Express Mart" means Express Mart Franchising Corp., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by Express Mart, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Petr-All Petroleum Consulting Corporation" means Petr-All Petroleum Consulting Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by Petr-All Consulting Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "REROB" means REROB, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by REROB, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Respondents" means Marathon, Express Mart, Petr-All Petroleum Consulting Corporation, and REROB, individually and collectively.

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

G. "Commission Agent" means a Person who enters into an agreement with Sunoco to operate a Retail Fuel Outlet Business at any Retail Fuel Location identified on Appendix A of the Decision and Order.

H. "Confidential Wholesale Information" means any confidential information that Sunoco obtains as a wholesaler of Fuel Products to the Retail Fuel Location identified as OPIS No. 156396, including wholesale price and wholesale volume information, and any discounts or rebates applied to Sunoco's provision of Fuel Products to the Retail Fuel Location identified as OPIS No. 156396.

I. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain and to the extent that it is related to or used in connection with the Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). The term "Confidential Business Information" excludes the following:

1. Information that is contained in documents, books, or records of Respondents that is provided to an Acquirer that is unrelated to the Retail Fuel Assets or that is exclusively related to the Respondents' retained businesses; and

2. Information that (a) is or becomes generally available to the public other than as a result of disclosure in breach of the prohibitions of this Order; (b) is or was developed independently of, and without reference to, any Confidential Business Information; (c) is necessary to be included in Respondents' mandatory regulatory filings; (d) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Order; (g) the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Governmental Entities; or (h) is disclosed in obtaining legal advice.

J. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.

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

L. "Firewalled Employees" means any Sunoco employee(s) that are designated by Sunoco to be officially and directly responsible for establishing, setting, or changing the retail prices of Fuel Products at Speedway 7653, identified in Appendix A of the Decision and Order.

M. "Inventories" means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out of date products and items

held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.

N. "Monitor" means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph V. of the Decision and Order and Paragraph V. of this Order to Maintain Assets.

O. "Orders" means the Decision and Order in this matter and this Order to Maintain Assets.

P. "Transfer Date" means the date on which the operation of the Retail Fuel Outlet Business at each Retail Fuel Location is transferred to Sunoco or a Commission Agent. The Transfer Date may be after the Divestiture Date.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final and effective until the Transfer Date:

A. Respondents shall maintain the viability, marketability, and competitiveness of the Retail Fuel Assets, and shall not cause the wasting or deterioration of any of the Retail Fuel Assets. Respondents shall not cause the Retail Fuel Assets to be operated in a manner inconsistent with applicable laws, nor shall it sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Retail Fuel Assets.

B. Respondents shall conduct the business of the Retail Fuel Assets in the regular and ordinary course of business, in accordance with past practice (including regular repair and maintenance efforts), and otherwise direct and ensure this result, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Retail Fuel Assets in the regular and ordinary course of business, in accordance with past practice.

C. Respondents shall not terminate the operation of any of the Retail Fuel Assets, and shall continue to maintain the Inventories of each of the Retail Fuel Assets at levels and selections in the regular and ordinary course of business, in accordance with past practice.

D. Respondents shall maintain the organization and properties of each of the Retail Fuel Assets, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each of the Retail Fuel Assets. Among other actions as may be necessary to comply with these obligations, Respondents shall, without limitation:

Order to Maintain Assets

1. Maintain all operations at each of the Retail Fuel Assets in the regular and ordinary course of business, in accordance with past practice, including maintaining customary hours of operation and departments;

2. Use best efforts to retain employees at each of the Retail Fuel Assets; when vacancies occur, replace the employees in the regular and ordinary course of business, in accordance with past practice; and not transfer any employees from any of the Retail Fuel Assets;

3. Provide each employee of the Retail Fuel Assets with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Retail Fuel Assets;

4. Not transfer Inventories from any Retail Fuel Asset, other than in the ordinary course of business, in accordance with past practice;

5. Make all payments required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each of the Retail Fuel Assets, in each case in a manner in accordance with past practice;

6. Maintain the Books and Records of each of the Retail Fuel Assets;

7. Not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that Respondents are moving operations at any Retail Fuel Asset to another location, or that indicates a Retail Fuel Asset will close;

8. Not conduct any "going out of business," "close-out," "liquidation," or similar sales or promotions at or relating to any Retail Fuel Asset;

9. Not materially change or modify the existing pricing or advertising practices, marketing, or merchandising programs and policies, or price zones for or applicable to any of the Retail Fuel Assets, other than changes or modifications in the regular and ordinary course of business, in accordance with past practices and business strategy;

10. Provide each of the Retail Fuel Assets with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such businesses, and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for each of the Retail Fuel Assets;

11. Continue, at least at their scheduled pace, any additional expenditures for each of the Retail Fuel Assets authorized prior to the date the Consent

Agreement was signed by Respondents including, but not limited to, all repairs, renovations, distribution, marketing, and sales expenditures;

12. Provide such resources as may be necessary to respond to competition and to prevent any diminution in sales at each of the Retail Fuel Assets;

13. Make available for use by each of the Retail Fuel Assets funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, any assets related to the operation of the Retail Fuel Assets;

14. Provide support services to each of the Retail Fuel Assets at least at the level as were being provided to such Retail Fuel Assets by Respondents as of the date the Consent Agreement was signed by Respondents; and

15. Maintain, and not terminate or permit the lapse of, any Governmental Permits necessary for the operation of any Retail Fuel Asset.

E. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Retail Fuel Assets as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that Respondents obtain no Confidential Business Information relating to the Retail Fuel Assets, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with and assist the Acquirer or the respective Commission Agents, when applicable, to evaluate and retain any and all Retail Fuel Employee necessary to operate the Retail Fuel Assets in substantially the same manner as Respondents prior to the divestiture, including but not limited to:

1. Not later than 20 days after Respondents sign the Consent Agreement, Respondents shall (i) identify all Retail Fuel Employees (ii) allow the Acquirer or Commission Agent to inspect the personnel files and other documentation of all Retail Fuel Employees, to the extent permissible under applicable laws, and (iii) allow the Acquirer or Commission Agent an opportunity to interview any Retail Fuel Employee;

2. Respondents shall (i) not offer any incentive to any Retail Fuel Employee to decline employment with the Acquirer or Commission Agent, (ii) remove any contractual impediments that may deter any Retail Fuel Employee from accepting employment with the Acquirer or Commission

Agent, including but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondent that would affect the ability of such employee to be employed by the Acquirer or Commission Agent, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Retail Fuel Employee by the Acquirer or Commission Agent; and

3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer or Commission Agent for any Retail Fuel Employee who accepts an offer of employment from the Acquirer or Commission Agent and (ii) provide each Retail Fuel Employee with reasonable financial incentive as necessary to accept offers of employment with the Acquirer or Commission Agent.

B. For a period of 2 years after the Divestiture Date, Respondents shall not solicit or induce any Retail Fuel Employee who has accepted an offer of employment with an Acquirer or Commission Agent to terminate such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Retail Fuel Employees; (ii) hire Retail Fuel Employees if employment has been terminated by an Acquirer or a Commission Agent, or who apply for employment with Respondents, so long as such Retail Fuel Employees were not solicited by Respondents in violation of this paragraph; or (iii) hire any Retail Fuel Employees if the Acquirer or Commission Agent has notified Respondents in writing that the Acquirer or Commission Agent does not intend to make an offer of employment to that Retail Fuel Employee, or where such an offer has been made and the Retail Fuel Employee has declined the offer.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose, directly or indirectly, (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents relating to the Retail Fuel Assets, Retail Fuel Outlet Business, and the post-divestiture Retail Fuel Outlet Business; *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 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 Retail Fuel Assets, Retail Fuel Outlet

Business or the post-divestiture Retail Fuel Outlet Business, or as required by law.

B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) 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 Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

V.

IT IS FURTHER ORDERED that:

A. Robert E. Ogle shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix C ("Monitor Agreement") and Non-Public Appendix D ("Monitor Compensation") of the Decision and Order. The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders.

B. No later than one day after the Acquisition Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Orders and consistent with the purposes of the Orders.

C. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in the Orders and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in the Orders and (ii) 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 the Respondent or of the Commission.

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order and the Decision and Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to the Orders;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

D. The Monitor shall report in writing to the Commission (i) every 30 days after this Order to Maintain Assets is issued, and (ii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with the Orders.

E. The Commission may require the Monitor and each of the Monitor'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 Monitor's duties.

F. The Monitor's power and duties shall terminate when this Order to Maintain Assets terminates at which time the Monitor's power and duties shall continue pursuant to the Decision and Order, or at such other time as directed by the Commission.

G. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the

Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order to Maintain Assets on the same terms and conditions as provided in this Paragraph V.

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.

VI.

IT IS FURTHER ORDERED that Sunoco shall:

A. Prior to the Divestiture Date, institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to, or disclosure, or use, of Confidential Wholesale Information by any Firewalled Employees except as is expressly permitted or required by the Orders or by the Divestiture Agreement, where such measures shall include, but not be limited to, prohibiting any of its Firewalled Employees from receiving, having access to, using, or continuing to use or disclose any Confidential Wholesale Information.

B. Within thirty (30) days after the Divestiture Date and every 30 days thereafter until the Decision and Order becomes final, file with the Commission and submit to the Monitor a verified written report setting forth in detail the manner and form in which it has complied and is complying with the provisions of Paragraph VI.A. of this Order to Maintain Assets. After the Decision and Order becomes final, the reporting obligations under this Order to Maintain Assets shall cease and the reporting obligations contained in the Decision and Order shall control, including therein that Sunoco's annual reports due pursuant to the Decision and Order may be consolidated and filed with the Commission on the same timing as the reports of compliance required to be submitted by Respondent Sunoco pursuant to the Decision and Order issued in *In the Matter of Seven & i Holdings Co., Ltd., 7-Eleven, Inc., and Sunoco LP*, FTC Docket No. C-4641.

VII.

IT IS FURTHER ORDERED that within 30 days after the date this Order to Maintain Assets is issued by the Commission, and every 30 days thereafter until Respondents have fully complied with this Order to Maintain Assets, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all the provisions of this Order to Maintain Assets; *provided, however*, that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the reports required to be submitted by Respondents pursuant the Decision and Order. Respondents shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor. Respondents shall include in its reports, among other things that are required from time to time, a full description of the efforts to comply with this Order.

VIII.

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

A. Any proposed dissolution of the Respondents;

B. Any proposed acquisition, merger, or consolidation of the Respondents;

C. Any other change in Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, with respect to any matter contained in this Order to Maintain Assets, 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.

X.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later of:

A. Three days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34;

B. The day after Respondents or a Divestiture Trustee completes the divestiture required by Paragraph II.A. of the Decision and Order; *provided, however*, that if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate the day after the Decision and Order becomes final;

C. The day after Respondents, with the concurrence of the Acquirer, certifies in writing to the Commission as to the completion of all Transition Services provided by Respondents to the Acquirer pursuant to any Transition Services Agreement approved by the Commission; or

D. The day the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Marathon Petroleum Corporation, through its wholly owned subsidiary, Speedway LLC (collectively "Marathon"), of retail fuel outlets and other interests from Respondents REROB, LLC, Petr-All Petroleum Consulting Corporation, and Express Mart Franchising Corp. (collectively "Express Mart"). 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 ("Agreement Containing Consent Order" or "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 Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Marathon Petroleum Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 539 South Main Street, Findlay, Ohio 45840.

2. Speedway, 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 office and principal place of business located at 500 Speedway Drive, Enon, Ohio 45323. Speedway LLC is a wholly-owned subsidiary of Respondent Marathon Petroleum Corporation.

3. Respondent Express Mart Franchising Corp. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212.

4. Respondent Petr-All Petroleum Consulting Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212.

5. Respondent REROB, LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at 7401 Round Pond Road, Syracuse, New York 13212.

6. Sunoco LP is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 8111 Westchester Drive, Suite 600, Dallas, Texas 75225.

7. 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.

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

A. "Marathon" means Marathon Petroleum Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Marathon (including Speedway, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Express Mart" means Express Mart Franchising Corp., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by Express Mart, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Petr-All Petroleum Consulting Corporation" means Petr-All Petroleum Consulting Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by Petr-All Consulting Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "REROB" means REROB, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by REROB, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Respondents" means Marathon, Express Mart, Petr-All Petroleum Consulting Corporation, and REROB, individually and collectively.

F. "Commission" means the Federal Trade Commission.

G. "Acquirer" means: (i) Sunoco or (ii) any other Person that acquires the Retail Fuel Assets pursuant to this Order.

H. "Acquisition" means the proposed acquisition described in the Asset Purchase Agreement by and between Petr-All Petroleum Consulting Corporation, Express

Mart Franchising Corp., REROB, LLC, and Speedway, LLC, dated as of April 13, 2018.

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

J. "Books and Records" means all originals and all copies of any operating, financial, environmental, governmental compliance, regulatory, or other information, documents, data, databases, printouts, computer files (including files stored on a computer's hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located, stored, or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, relating to the Retail Fuel Assets, including, but not limited to, real estate files; environmental reports; environmental liability claims and reimbursement data, information, and materials; underground storage tank (UST) system registrations and reports; registrations, licenses, and permits (to the extent transferable); regulatory compliance records, data, and files; applications, filings, submissions, communications, and correspondence with Governmental Entities; inventory data, records, and information; purchase order information and records; supplier, vendor, and procurement files, lists, and related data and information; credit records and information; account information; marketing analyses and research data; service and warranty records; warranties and guarantees; equipment logs, operating guides and manuals; employee lists and contracts, salary and benefits information, and personnel files and records (to the extent permitted by law); financial statements and records; accounting records and documents; telephone numbers and fax numbers; and all other documents, information, and files of any kind that are necessary for an Acquirer to operate the Retail Fuel Outlet Business(es) in a manner consistent with the purposes of this Order.

K. "Commission Agent" means a Person who enters into an agreement with Sunoco to operate a Retail Fuel Outlet Business at any Retail Fuel Location identified on Appendix A.

L. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain and to the extent that it is related to or used in connection with the Retail Fuel Assets or the conduct of the Retail Fuel Outlet Business(es). The term "Confidential Business Information" excludes the following:

1. Information that is contained in documents, books, or records of Respondents that is provided to an Acquirer that is unrelated to the Retail Fuel Assets or that is exclusively related to the Respondents' retained businesses; and

2. Information that (a) is or becomes generally available to the public other than as a result of disclosure in breach of the prohibitions of this Order; (b)

is or was developed independently of, and without reference to, any Confidential Business Information; (c) is necessary to be included in Respondents' mandatory regulatory filings; (d) the disclosure of which is consented to by an Acquirer; (e) is necessary to be exchanged in the course of consummating the Acquisition or transactions pursuant to the Divestiture Agreement; (f) is disclosed in complying with the Order; (g) the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Governmental Entities; or (h) is disclosed in obtaining legal advice.

M. "Confidential Wholesale Information" means any confidential information that Sunoco obtains or has access to as a wholesaler of Fuel Products to the Retail Fuel Location identified as OPIS No. 156396, including wholesale price and wholesale volume information, and any discounts or rebates applied to Sunoco's provision of Fuel Products to the Retail Fuel Location identified as OPIS No. 156396.

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

O. "Contract(s)" means all agreements, contracts, licenses, leases (including, but not limited to, ground leases and subleases), consensual obligations, binding commitments, promises and undertakings (whether written or oral and whether express or implied), whether or not legally binding.

P. "Cost" means costs not to exceed the actual cost of labor, goods and material, travel, third-party vendors, and other expenditures that are directly incurred by Respondents to provide and fulfill any Transition Services; *provided, however*, that with respect to the transitional supply of Fuel Products, Fuel Products Cost shall be calculated net of any rebates, RIN sharing, or other discounts or allowances and shall not include any mark-up, profit, overhead, minimum volume penalties, or other upward adjustments by Respondents.

Q. "Divestiture Agreement" means (i) the Sunoco Acquisition Agreement or (ii) any other agreement between Respondents (or a Divestiture Trustee) and an Acquirer that receives the prior approval of the Commission to divest the Retail Fuel Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto that have received the Commission's prior approval.

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

S. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.

T. "Equipment" means all tangible personal property (other than Inventories) of every kind owned or leased by Respondents in connection with the operation of the Retail Fuel Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order, 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 the Retail Fuel Outlet Business associated with the Retail Fuel Assets at each of the locations specified in Appendix A to this Order, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof, to the extent such warranty is transferrable, and all maintenance records and other documents relating thereto.

U. "Firewalled Employees" means any Sunoco employee(s) that are designated by Sunoco to be officially and directly responsible for establishing, setting, or changing the retail prices of Fuel Products at Speedway 7653, identified in Appendix A of this Order.

V. "Fuel Products" means refined petroleum gasoline and diesel products.

W. "Governmental Entity" means any federal, state, local, or non-U.S. government, or any court, legislature, governmental agency or commission, or any judicial or regulatory authority of any government.

X. "Governmental Permit(s)" means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any Governmental Entity(ies) necessary to effect the complete transfer and divestiture of the Retail Fuel Assets to an Acquirer and for such Acquirer to operate any aspect of a Retail Fuel Outlet Business.

Y. "Inventories" means all inventories of every kind and nature for retail sale associated with the Retail Fuel Assets, including: (1) all Fuel Products, kerosene, and other petroleum-based motor fuels stored in bulk and held for sale to the public; and (2) all usable, non-damaged and non-out of date products and items held for sale to the public, including, without limitation, all food-related items requiring further processing, packaging, or preparation and ingredients from which prepared foods are made to be sold.

Z. "Monitor" means any Person appointed by the Commission to serve as a Monitor pursuant to Paragraph V. of this Order or Paragraph V. of the Order to Maintain Assets.

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

BB. "Person" means any individual, or any partnership, joint venture, firm, corporation, limited liability company, limited liability partnership, joint stock company, association, trust, unincorporated organization, or other business entity.

CC. "Prior Notice Outlet" means (i) the Retail Fuel Assets and (ii) any existing retail fuel facility (including any successors) identified in Non-Public Appendix B.

DD. "Products" means any Fuel Products or merchandise products relating to the Retail Fuel Outlet Business(es).

EE. "Respondents' Brands" means all of Respondents' trademarks, trade dress, logos, service marks, trade names, brand names, and all associated intellectual property rights, including rights to the names "Speedway" and "Express Mart."

FF. "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, relating to, used in, or reserved for use in, each Retail Fuel Outlet Business location identified in Appendix A of this Order, including, but not limited to:

1. All real property interests (including fee simple interests and real property leases and leasehold interests), including all easements and rights-of-way, together with all buildings and other structures, facilities, appurtenances, and improvements located thereon or affixed thereto (including all attached machinery, fixtures, and heating, plumbing, electrical, lighting, ventilating and air-conditioning equipment), whether owned, leased, or otherwise held;

2. All Equipment, including any Equipment removed from any location of the Retail Fuel Outlet Business since the date of the announcement of the Acquisition and not replaced;

3. All Inventories;

4. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto, to the extent transferable, and at the Acquirer's option;

5. All Governmental Permits, and all pending applications therefor or renewals thereof, to the extent transferable;

6. All intangible rights and property, including intellectual property, owned or licensed (as licensor or licensee) by Respondents (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings; and

7. Books and Records; *provided, however,* that in cases in which Books and Records included in the Retail Fuel Assets contain information: (a) that relates both to the Retail Fuel Assets and 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 (b) where Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies of the materials containing such information with appropriate redactions to the Acquirer. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes;

Provided, however, that the Retail Fuel Assets need not include the Retained Assets.

GG. "Retail Fuel Employee" means any full-time, part-time, or contract individual employed by Speedway or Express Mart, as applicable, at their respective locations identified in Appendix A of this Order, as of April 13, 2018, or by Respondents at the time of the divestiture required by Paragraph II. of this Order and whose job responsibilities primarily relate or related to the Retail Fuel Outlet Business.

HH. "Retail Fuel Location" means: (1) any facility engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services; and (2) any property site where construction of a retail facility to be engaged in the retail sale, promotion, marketing, and provision of Fuel Products and other fuels, automotive services, and related services is planned or underway.

II. "Retail Fuel Outlet Business" means all business activities conducted by Speedway or Express Mart, as applicable, prior to the Acquisition Date at or relating to each of Speedway's or Express Mart's respective locations identified in Appendix A of this Order, including, but not limited to: (1) the retail sale, promotion, marketing, and provision of Fuel Products, and other fuels, automotive products, and related services; and (2) the operation of associated convenience stores and related businesses and services, including, but not limited to the retail sale, promotion, marketing and provision of food and grocery products (including

dairy and bakery items, snacks, gum, and candy), foodservice and quick-serve restaurant items, beverages (including alcoholic beverages), tobacco products, general merchandise, ATM services, gaming and lottery tickets and services, money order services, car wash services, and all other businesses and services associated with the business operated or to be operated at each location identified in Appendix A of this Order.

JJ. "Retained Assets" means Respondents' assets other than the Retail Fuel Assets to be divested pursuant to this Order, and assets excluded from the Divestiture Agreement approved by the Commission, including but not limited to, the following assets excluded from the Sunoco Acquisition Agreement:

1. Any government permit, license or similar right that is not legally transferable to Acquirer;

2. All claims and rights of Respondents to federal, state and local income tax refunds, credits and benefits;

3. Books and Records of Respondents not relating to the interests transferred to Acquirer under the Sunoco Acquisition Agreement;

4. Respondents' receivables regardless of when accrued;

5. Cash on hand and any bank account of Respondents other than Speedway Store Cash, as defined in the Sunoco Acquisition Agreement;

6. Trucks, vehicles and other rolling stock;

7. Assets, property improvements, equipment or goods located at the locations identified in Appendix A of this Order which are not owned by Respondents and which are identified on Schedule 1.1(b)(vii) of the Sunoco Acquisition Agreement;

8. All rights or obligations under all agreements, leases, licenses, contracts, notes, mortgages, indentures, arrangements or other obligations of Respondents, other than the Speedway Assumed Contracts and the Real Property Lease, as defined in the Sunoco Acquisition Agreement, including, without limitation: (ii) any employment agreements, employee plans or other employment related contracts or arrangements; and (ii) any contract representing any indebtedness;

9. Proceeds from any underground storage tank fund or private insurance claim that are payable to Respondents for investigations, corrective action and/or remediation performed by Respondents at the locations listed in Appendix A of this Order prior to or after the Acquisition Date;

10. Inventories or any supplies such as coffee cups, napkins, motor oil, sandwiches and other inventory or supplies bearing the "Speedway" name, or other proprietary name and/or logos;

11. All lottery tickets located at the locations listed in Appendix A of this Order as of the Acquisition Date;

12. All intellectual property rights of Respondents;

13. All Respondents' employees, including all such employees employed at the locations listed in Appendix A of this Order, unless otherwise required by this Order; and

14. Any computers and point of sale equipment listed on the Excluded Speedway Equipment portion of Schedule 1.1(a)(iii) of the Sunoco Acquisition Agreement.

KK. "Sunoco" means Sunoco LP, its partners, directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, partnerships, subsidiaries, divisions, groups, and affiliates, in each case controlled by Sunoco LP, including, but not limited to, Susser Petroleum Property Company LLC, Sunoco Retail LLC, Stripes LLC, Town & Country Food Stores, Inc., MACS Retail LLC, Sunoco Finance Corp., and Sunoco LLC, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

LL. "Sunoco Acquisition Agreement" means the asset purchase agreement between Sunoco and Speedway LLC, dated October 5, 2018, including related ancillary agreements, amendments, schedules, exhibits, and attachments, thereto, that have been approved by the Commission to accomplish the requirements of this Order, attached as Non-Public Appendix E.

MM. "Third Party(ies)" means any Person other than the Respondents or an Acquirer.

NN. "Transition Services" means technical services, personnel, assistance, training, the supply of Products, and other logistical, administrative, and other transitional support as required by an Acquirer and approved by the Commission to facilitate the transfer of the Retail Fuel Assets from the Respondents to an 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, sales and marketing, customer service, and supply chain management and customer transfer logistics.

OO. "Transition Services Agreement(s)" means any agreements that receive the prior approval of the Commission between Respondents and an Acquirer to provide, at the option of the Acquirer, Transition Services (or training for an Acquirer to provide services for itself), necessary to transfer the Retail Fuel Assets to the Acquirer and to operate the Retail Fuel Outlet Businesses in a manner consistent with the purposes of this Order.

II.

IT IS FURTHER ORDERED that:

A. No later than 90 days after the Acquisition Date, Respondents shall divest the Retail Fuel Assets, absolutely and in good faith, at no minimum price, as an on-going business, to Sunoco pursuant to the Sunoco Acquisition Agreement.

B. If Respondents have divested the Retail Fuel Assets to Sunoco 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. Sunoco is not acceptable as the acquirer of the Retail Fuel Assets, then Respondents shall immediately rescind the Sunoco Acquisition Agreement, and shall divest the Retail Fuel 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 Retail Fuel Assets to Sunoco 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 Retail Fuel Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. No later than the Divestiture Date, Respondents shall obtain, 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 Retail Fuel Assets to the Acquirer and for the Acquirer to operate any aspect of a Retail Fuel Outlet Business;

Provided, however, that:

1. Respondents may satisfy the requirement to obtain all Consents from Third Party(ies) by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant Third Party(ies) that are acceptable to the Commission, or has otherwise obtained all necessary consents and waivers; and

2. With respect to any Governmental Permits relating to the Retail Fuel Assets that are not transferable, allow the Acquirer to operate the Retail Fuel Assets under Respondents' Governmental Permits pending the Acquirer's receipt of its own Governmental Permits, and provide such assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Permits.

D. Respondents shall:

1. At the option of the Acquirer, and pursuant to a Transition Services Agreement or provisions in a Divestiture Agreement and in a manner that receives the prior approval of the Commission, provide Transition Services to the Acquirer for a period of 12 months from the Divestiture Date;

2. Provide the Transition Services at a price not to exceed Cost and of a quality and quantity sufficient for the Acquirer to operate the Retail Fuel Outlet Business(es) in substantially the same manner as Speedway or Express Mart, as applicable, at their respective locations identified in Appendix A of this Order, prior to the Acquisition Date (including the ability to develop new services and products and increase sales of current services and products);

Provided, however, that Respondents shall give priority to the Acquirer's requirements for Transition Services over Respondents' own requirements and take all actions that are reasonably necessary to ensure uninterrupted Transition Services;

Provided further that (i) Acquirer may terminate any Transition Services at any time upon commercially reasonable notice to the Respondents and without cost or penalty to the Acquirer and (ii) at Acquirer's request, Respondents shall file with the Commission any request for prior approval to extend the term of any Transition Services needed to achieve the purposes of this Order, so long as the total duration of any Transition Services does not exceed eighteen 18 months (including the initial 12-month term); and

Provided further that Respondents shall not seek to limit the damages (such as indirect, special, and consequential damages) that Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transition Services.

E. The purpose of the divestiture of the Retail Fuel Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with and assist the Acquirer or the Commission Agent, as applicable, to evaluate and retain any and all Retail Fuel Employee necessary to operate the Retail Fuel Assets in substantially the same manner as Respondents prior to the divestiture, including but not limited to:

1. Not later than 20 days after Respondents sign the Consent Agreement, Respondents shall (i) identify all Retail Fuel Employees (ii) allow the Acquirer or Commission Agent to inspect the personnel files and other documentation of all Retail Fuel Employees, to the extent permissible under applicable laws, and (iii) allow the Acquirer or Commission Agent an opportunity to interview any Retail Fuel Employee outside the presence or hearing of Respondents, and to make an offer of employment;

2. Respondents shall (i) not offer any incentive to any Retail Fuel Employee to decline employment with the Acquirer or Commission Agent, (ii) remove any contractual impediments that may deter any Retail Fuel Employee from accepting employment with the Acquirer or Commission Agent, including but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondent that would affect the ability of such employee to be employed by the Acquirer or Commission Agent, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Retail Fuel Employee by the Acquirer or Commission Agent; and

3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer or Commission Agent for any Retail Fuel Employee who accepts an offer of employment from the Acquirer or Commission Agent and (ii) provide each Retail Fuel Employee with reasonable financial incentive as necessary to accept offers of employment with the Acquirer or Commission Agent.

B. For a period of 2 years after the Divestiture Date, Respondents shall not solicit or induce any Retail Fuel Employee who has accepted an offer of employment with an Acquirer or Commission Agent to terminate such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Retail Fuel Employees; (ii) hire Retail Fuel Employees if employment has been terminated by an Acquirer or Commission Agent, or who apply for employment with Respondents, so long as such Retail Fuel Employees were not solicited by Respondents in violation of this paragraph; or (iii) hire any Retail Fuel Employees if the Acquirer or Commission Agent has notified Respondents in writing that the Acquirer or Commission Agent does not intend to make an offer of employment

to that Retail Fuel Employee, or where such an offer has been made and the Retail Fuel Employee has declined the offer.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents relating to the Retail Fuel Assets, Retail Fuel Outlet Business, and the post-divestiture Retail Fuel Outlet Business, *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 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 Retail Fuel Assets, Retail Fuel Outlet Business or the post-divestiture Retail Fuel Outlet Business, or as required by law.

B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) 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 Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

V.

IT IS FURTHER ORDERED that:

A. Robert Ogle shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix C ("Monitor Agreement") and Non-Public Appendix D ("Monitor Compensation"). The Monitor is

appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.

B. No later than one day after the Acquisition Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order.

C. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order and (ii) 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 the Respondent or of the Commission.

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order and the Order to Maintain Assets or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order and the Order to Maintain Assets;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and

assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

D. The Monitor shall report in writing to the Commission (i) every 30 days after this Order is issued, (ii) no later than 10 days after Respondents have completed their obligations as required by Paragraph II. of this Order ("Final Report"), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order and/or the Order to Maintain Assets.

E. The Commission may require the Monitor and each of the Monitor'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 Monitor's duties.

F. The Monitor's power and duties shall terminate 10 business days after the Monitor has completed his final report pursuant to Paragraph V.D.(ii) of this Order, or at such other time as directed by the Commission.

G. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph V.

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.

VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.

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 divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*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. Within ten 10 days after 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 this Order, 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 relevant assets that are required by this Order to be assigned, granted, licensed, divested,

transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Retail Fuel Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;

2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trustee 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 12-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. 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 as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity 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 and, in the case of a court-appointed Divestiture Trustee, by the court, 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. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order;

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 60 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,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may 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 Paragraph VI.

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.

VII.

IT IS FURTHERED ORDERED that:

A. For a period of 10 years from the date this Order is issued, Respondents shall not, without providing advance written notification to the Commission ("Notification") in the manner described in this paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any Prior Notice Outlet.

B. With respect to the Notification:

1. The prior notification required by this Paragraph VII. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction.

2. Respondents shall include a description of the proposed acquisition and provide:

a. A map showing all retail fuel outlets by ownership (*e.g.*, OPIS Corporate Brand) within 5 driving miles of the relevant Prior Notice Outlet;

b. For each retail fuel outlet owned by Respondents within 5 driving miles of the relevant Prior Notice Outlet, a list of the retail fuel outlets that Respondents monitored at any time within the preceding 12-month period (to the extent such information is available); and

c. Respondents' pricing strategy in relation to each monitored retail fuel outlet identified in response to Paragraph VII.B.2.(b) of this Order.

3. Respondents shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 30 days after submitting such additional information or documentary material.

4. Early termination of the waiting periods in this Paragraph VII. may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

5. Respondent shall provide a copy of each Notification described in Paragraph VII.B. of this Order to the State of New York at the same time that such Notification is transmitted to the Commission.

VIII.

IT IS FURTHERED ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and Respondents shall comply with all terms of the Divestiture Agreement. Any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order. In the event of a conflict between the terms of this Order and a Divestiture Agreement, or any ambiguity in the language used in a Divestiture Agreement, the terms of this Order shall govern to resolve such conflict or ambiguity.

B. Respondents shall not modify, replace, or extend the terms of the 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).

IX.

IT IS FURTHER ORDERED that Sunoco shall:

A. Prior to the Divestiture Date, institute all measures and take all actions as are necessary and appropriate to prevent the direct or indirect access to, or disclosure, or use, of Confidential Wholesale Information by any Firewalled Employees except as is expressly permitted or required by the Orders or by the Divestiture Agreement, where such measures shall include, but not be limited to, prohibiting any of its Firewalled Employees from receiving, having access to, using, or continuing to use or disclose any Confidential Wholesale Information.

B. Within thirty (30) days after the Divestiture Date, one (1) year from the date this Order is issued, annually for the next 9 years on the anniversary of the date this Order is issued, and at other times as the Commission may require, file with the Commission and submit to the Monitor a verified written report setting forth in detail the manner and form in which it has complied and is complying with the provisions of Paragraph IX.A. of this Order. Sunoco's annual reports due pursuant to this Order may be consolidated and filed with the Commission on the same timing as the reports of compliance required to be submitted by Respondent Sunoco pursuant to the Decision and Order issued in *In the Matter of Seven & i Holdings Co., Ltd., 7-Eleven, Inc., and Sunoco LP*, FTC Docket No. C-4641.

X.

IT IS FURTHER ORDERED that:

A. Respondents 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 shall submit verified written reports ("compliance reports") in accordance with the following:

1. An interim compliance report 30 days after the Order is issued, and every 30 days thereafter until Respondents have fully complied with the provisions of Paragraph II of this Order;

2. An annual compliance report one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and

3. Additional compliance reports as the Commission or its staff may request.

C. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order. 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 the Order, and a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted. Respondents shall retain copies of all material written communications to and from such parties, as well as all non-privileged internal memoranda, reports, and recommendations concerning completing their obligations under the Order for a period of 3 years, and shall provide copies of those records to Commission staff upon request.

D. Each compliance report shall be verified 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. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XI.

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

A. Any proposed dissolution of the Respondents;

B. Any proposed acquisition, merger, or consolidation of the Respondents; or

C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XII.

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.

XIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 4, 2029.

By the Commission.

Appendix A

Retail Fuel and Convenience Store Properties To Be Divested

Owner	State	Area	Property Name & Address
Speedway 7653	New York	Rochester	3000 S. Winton Road, Rochester, NY 14623
Express Mart 306	New York	Johnson City	719 Main Street, Johnson City, NY 13790
Speedway 7728	New York	Whitney Point	2811 US-11, Whitney Point, NY 13862

Owner	State	Area	Property Name & Address
Speedway 7733	New York	Farmington	1429 NY-332, Farmington, NY 14425
Speedway 7899	New York	Fayetteville	407 East Genesee Street, Fayetteville, NY 13066

Non-Public Appendix B

Prior Notice Outlets

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

Appendix C

Monitor Agreement

Non-Public Appendix D

Monitor Compensation

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

Analysis to Aid Public Comment

Non-Public Appendix E

Sunoco Acquisition Agreement

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

ANALYSIS OF CONSENT ORDERS 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 Marathon Petroleum Corporation ("Marathon") and Express Mart Franchising Corp., Petr-All Petroleum Consulting Corporation, and REROB, LLC ("Express Mart" and collectively, the "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from Marathon's proposed acquisition of retail fuel outlets and other interests from Express Mart.

Under the terms of the proposed Consent Agreement, Marathon must divest to the upfront buyer Sunoco LP ("Sunoco") retail fuel outlets and related assets in five local markets in New York. Marathon must complete the divestiture within 90 days after the closing of Marathon's acquisition of Express Mart. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date Sunoco acquires the outlet.

The Commission has placed the proposed 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 proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent Marathon, a publicly traded company headquartered in Findlay, Ohio, operates a vertically integrated refining, marketing, retail, and transportation system. Marathon's wholly owned subsidiary, Speedway LLC ("Speedway"), owns and operates 2,740 convenience stores located in 21 states, making it the second-largest chain of company-owned and -operated gasoline and convenience stores in the United States. In addition, independent entrepreneurs own and operate 5,600 Marathon-branded retail fuel outlets in 20 states and the District of Columbia.

Respondent Express Mart is a collection of closely held New York State S Corporations and limited liability companies headquartered in Syracuse, New York. Express Mart owns and operates convenience stores and retail fuel outlets stations primarily along the I-90 corridor in the Syracuse-Rochester-Buffalo region of upstate New York. Express Mart's network includes 77 convenience stores with attached fuel stations, as well as 11 franchise locations owned by independent contract dealers operating under the Express Mart banner. Express Mart's convenience stores operate under the Express Mart name, while its retail fuel stations operate primarily under the Sunoco banner.

III. The Proposed Acquisition

On April 13, 2018, Marathon, through its wholly owned subsidiary Speedway, entered into an agreement to acquire certain retail fuel outlets and other interests, from Express Mart (the "Transaction"). The Transaction would expand Speedway's presence across upstate New York.

The Commission's Complaint alleges that the Transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the Transaction 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 and the retail sale of diesel in five local markets in New York.

IV. The Retail Sales of Gasoline and Diesel

The Commission's Complaint alleges that the relevant product markets in which to analyze the Transaction are the retail sale of gasoline and the retail sale of diesel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel constitute separate relevant markets because the two are not interchangeable – vehicles that run on gasoline cannot run on diesel and vehicles that run on diesel cannot run on gasoline.

The Commission's Complaint alleges the relevant geographic markets in which to assess the competitive effects of the Transaction include five local markets within the following cities: Farmington, Fayetteville, Johnson City, Rochester, and Whitney Point in New York.

The geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting a number of 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 may be similar to the corresponding geographic markets for retail gasoline as many diesel consumers exhibit the same preferences and behaviors as gasoline consumers.

The Transaction would substantially increase the market concentration in each of the five local markets, resulting in five highly concentrated markets for the retail sale of gasoline and the retail sale of diesel. In four of the five local gasoline retail markets, the Transaction would

reduce the number of competitively constraining independent market participants from three to two. In the fifth local gasoline retail market, the Transaction would reduce the number of competitively constraining independent participants from four the three. In three of the five retail diesel markets, the Transaction would result in a merger to monopoly. In the fourth diesel market, the Transaction would reduce the number of competitively constraining independent participants from three to two. In the fifth diesel market, the Transaction would reduce the number of competitively constraining independent participants from four to three.

The Transaction would substantially lessen competition for the retail sale of gasoline and the retail sale of diesel in these local markets. 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. The combined entity would be able to raise prices unilaterally in markets where Marathon and Express Mart are close competitors. Absent the Transaction, Marathon and Express Mart would continue to compete head to head in these local markets.

Moreover, the Transaction 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 observe each other's fuel prices without difficulty. 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 their 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 associated with obtaining necessary permits and approvals.

V. The Proposed Consent Agreement

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring Marathon to divest certain Speedway and Express Mart retail fuel outlets and related assets to Sunoco in five local markets.

The proposed Consent Agreement requires that the divestiture be completed no later than 90 days after Marathon consummates the Acquisition. This Agreement protects the Commission's ability to obtain complete and effective relief given the small number of outlets to be divested. The proposed Consent Agreement further requires Marathon and Express Mart to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestiture to Sunoco is complete. For up to twelve months following the divestiture, Marathon and Express Mart must make available transitional services, as needed, to assist the buyer of each divestiture asset.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires Respondents to provide the Commission notice before acquiring designated outlets in the five local areas for ten years. The prior notice provision is necessary because acquisitions of the designated outlets likely raise competitive concerns and may fall below the HSR Act premerger notification thresholds.

Presently, in Rochester, New York, one local market of concern, Sunoco serves as the wholesale supplier to a retail fuel outlet that is an independent competitor to Speedway and Express Mart. By purchasing the Speedway outlet, Sunoco will also become a competitor to the outlet for which it is currently a wholesale supplier. To address this concern, Sunoco has agreed to implement a firewall between its wholesale and retail fuel pricing businesses in that local market. The firewall will restrict Sunoco retail pricing personnel's access to wholesale information, prohibiting Sunoco retail from knowing, among other information, how its pricing decisions affect the competing location's volumes.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed 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 divestiture of the outlet. During this period, and until such time as the buyer no longer requires transitional assistance, the Order to Maintain Assets authorizes the Commission to appoint an independent third party as a Monitor to oversee the Respondents' compliance with the requirements of the proposed Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

A & O ENTERPRISES INC
D/B/A IV BARS INCORPORATED AND IV BARS,
AND
AARON K. ROBERTS, A/K/A AARON KEITH

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

Docket No. C-4670; File No. 172 3016
Complaint, February 13, 2019 – Decision, February 13, 2019

This consent order addresses A & O Enterprises Inc.'s advertising, promotion and sale of intravenous drip cocktails ("iV Cocktails"), including the Myers Cocktail, which contain a mixture of water, vitamins, minerals and amino acids. The complaint alleges that the respondents violated Sections 5(a) and 12 of the Federal Trade Commission Act by representing that their iV Cocktails are effective treatments for cancer, angina, cardiovascular disease, congestive heart failure, myocardial infarction, multiple sclerosis, diabetes, fibromyalgia and neurodegenerative disorders, and that their cocktails produce fast, lasting results, are safe for all ages and cause no side effects. The complaint also alleges that respondents falsely represented that their iV Cocktails are clinically or scientifically proven to effectively treat the enumerated diseases and produce fast, lasting results. The consent order prohibits express or implied health benefit, efficacy, safety, or side effects claims for any covered product, unless the representation is non-misleading, and, at the time the representation is made, proposed respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity to support the claim, based on standards generally accepted by experts in the area.

Participants

For the *Commission*: *Thomas B. Carter* and *James R. Golder.*

For the *Respondents*: *Ryan J. Meyer* and *Barrett R. Howell, Bracewell LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that A & O Enterprises Inc, a corporation, and Aaron K. Roberts, individually and as owner and operating manager of A & O Enterprises Inc. (collectively, "Respondents"), have violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent A & O Enterprises Inc ("iV Bars"), also doing business as iV Bars Incorporated and iV Bars, is a Wyoming corporation with its principal office or place of business at 4101 Centurion Way, Addison, Texas 75001.

2. Respondent Aaron K. Roberts, also known as Aaron Keith, is the owner and operating manager of iV Bars. Individually or in concert with others, he controlled or had the authority to control, or participated in the acts and practices of iV Bars, including the acts and

practices alleged in this Complaint. His principal office or place of business is the same as that of iV Bars.

3. Respondents have advertised, offered for sale, sold, and administered at least 10 different intravenous cocktails ("iV Cocktails") to consumers, including the Myers Cocktail and Immune Booster. Respondents' iV Cocktails or "bags" contain mixtures of water, vitamins, minerals, and amino acids infused directly into the bloodstream through an intravenous drip, typically through a vein in the arm. These iV Cocktails cost $100.00 or more per session. Respondents refer to these treatments, among other things, as "Intravenous Micro-Nutrient Therapy," "Intravenous Vitamin Therapy," "Hydration Therapy," or simply "iV Therapy." Respondents claimed that their iV Cocktails could be used to treat consumers suffering from serious diseases, including cancer, congestive heart failure, multiple sclerosis, diabetes, fibromyalgia, and neurodegenerative disorders. Respondents further claimed that their iV Cocktails produced fast, lasting results and, in many instances, were more effective and better tolerated than conventional medical therapies. Respondents also touted their iV Cocktails as hangover cures and a way to replenish fluids and essential vitamins and minerals. In addition, Respondents offered several intramuscular treatments that directly inject mixtures into human muscle. Respondents' iV Cocktails and intramuscular treatments are "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

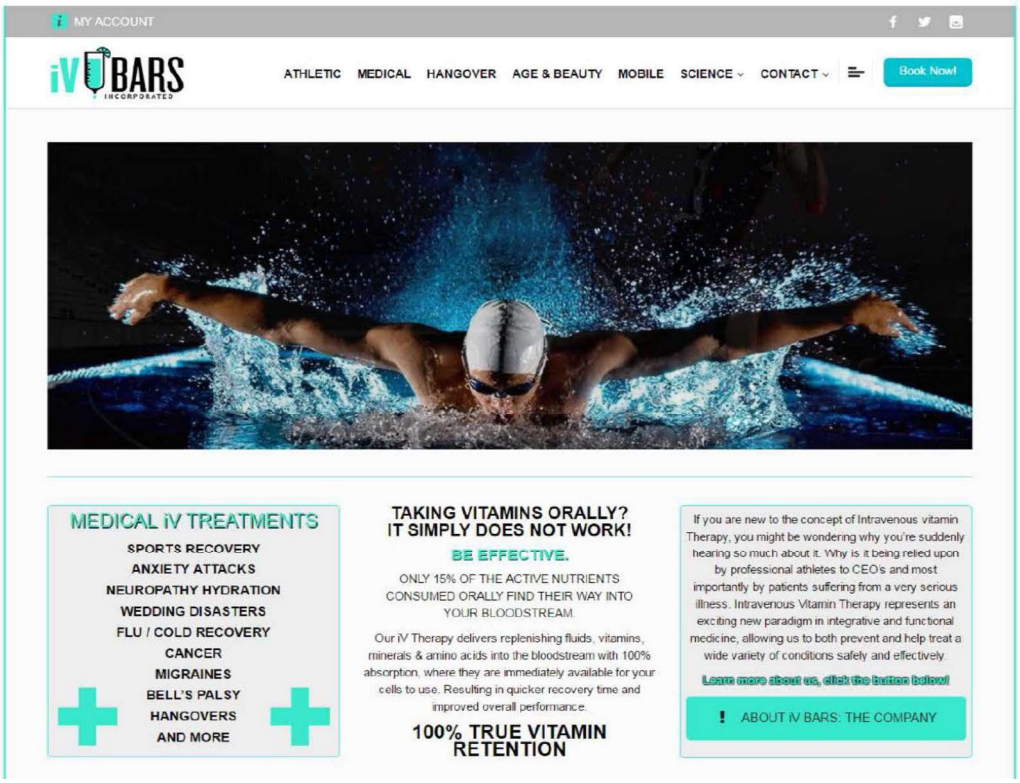
4. Respondents' first and primary iV Bars location is housed in a NextGen Wellness Center, an upscale gym and clinic that independently offers chiropractic care, pain management therapy, physical therapy, medical massages, and counseling. New iV Bars customers create an online account and complete a short health assessment questionnaire when making their first appointment. Respondents have an arrangement with a doctor who does a quick, online review of all health assessment questionnaires that customers submit to iV Bars. Respondents pay the doctor a flat fee of $250 per month for this service. Shortly before the customer arrives, an iV Bars employee takes about five minutes to mix ingredients obtained from a local compounding pharmacy into the customer's requested iV Cocktail. Once at iV Bars, the customer is asked to sign a release form that discloses risks and releases Respondents from liability. Thereafter an iV Bars nurse seats the customer in one of five oversized reclining chairs and administers the iV Cocktail to them over a 25-45 minute period. Respondents also maintain a "full service mobile vehicle" that allows them to "come right to your door to deliver the treatment of your needs."

5. The acts or 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.

iV Bars Efficacy Claims

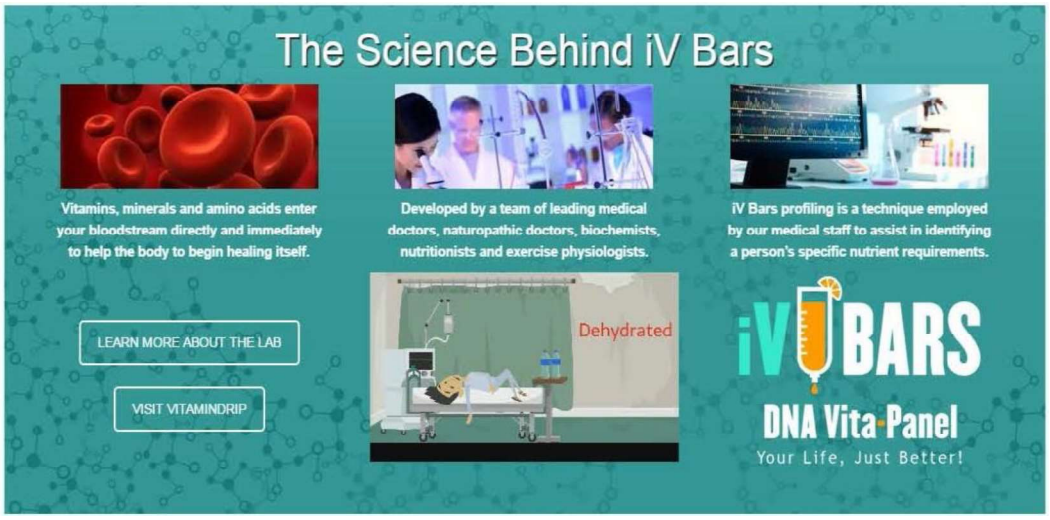
6. Beginning at least as early as August 2015, Respondents have disseminated, or caused to be disseminated, advertisements for their iV Cocktails, including through company Facebook, Twitter, and Instagram accounts and company websites, including the *ivbars.com* website (imaged on January 27, 2017), attached as Exhibit A ("iV Bars Website" or "Website"). As described below, the iV Bars Website contained the following statements and depictions, among others:

a. On the top section of the Website homepage, Respondents prominently offered "MEDICAL iV TREATMENTS" for, among other things, "CANCER." They also stated, "If you are new to the concept of Intravenous vitamin Therapy, you might be wondering why you're suddenly hearing so much about it. Why [it is] being relied upon by . . . patients suffering from a very serious illness. [It] represents an exciting new paradigm in integrative and functional medicine, allowing us to both prevent and help treat a wide variety of conditions safely and effectively":



(Exhibit A-1)

b. The middle section of the Website homepage titled "The Science Behind iV Bars" stated, "Vitamins, minerals and amino acids enter your bloodstream directly and immediately to help the body to begin healing itself" and claimed that iV Bars treatments were, "Developed by a team of leading medical doctors, naturopathic doctors, biochemists, nutritionists and exercise physiologists":



(Exhibit A-1)

c. The bottom section of the Website homepage titled "Our Success Stories" contained brief endorsements of iV Bars by two sports figures and an international model and a link titled "READ MORE STORIES":



(Exhibit A-1)

Clicking the "READ MORE STORIES" link took consumers to pages titled "SUCCESS STORIES" that described "case studies about different disorders and the effects that iV therapy has had on these conditions":

Complaint



(Exhibit A-3)

These case study success stories included the following purported results:

Case #3: Multiple Sclerosis

A 65 year-old male with progressive multiple sclerosis presents to the clinic wheel chair bound. The patient has tried medications, physical therapy and speech therapy. However, there have been little noticeable benefits with regards to his leg strength and neurological function . . . . The patient received an intravenous infusion of glutathione. After the first infusion, he reported increased strength in his legs. His physical therapist and caretaker also reported noticing an improvement in his leg strength and ability to walk.

* * *

Case#4: Diabetic peripheral neuropathy/Restless leg syndrome

A 65 year-old male presents to the clinic with a ten plus year history of rheumatoid arthritis, diabetes, high blood pressure, neuropathy and restless leg syndrome . . . . The patient was started on intravenous vitamin C and glutathione therapy. After the fourth treatment, the patient's restless symptoms and joint pain was [sic] completely resolved . . . . Although the symptoms have returned, they were not of the same intensity.

* * *

More Success Stories

* * *

Fibromyalgia

Case #3: A 48-year-old woman presented with a six-year history of fairly constant myalgias and arthraigias, with pain in the neck, back, and hip . . . . She was diagnosed by a rheumatologist as possibly having polymyalgia rheumatic, [or] fibromyalgia . . . . The patient was given [a Myers Cocktail]. At the end of the injection, she got off the table and, with a look of amazement, announced her muscle aches and joint pains were gone for the first time in six years. . . . The author has given the Myers' to approximately 30 patients with fibromyalgia, half have experienced significant improvement, in a few cases after the first injection, but more often after three or four treatments.

* * *

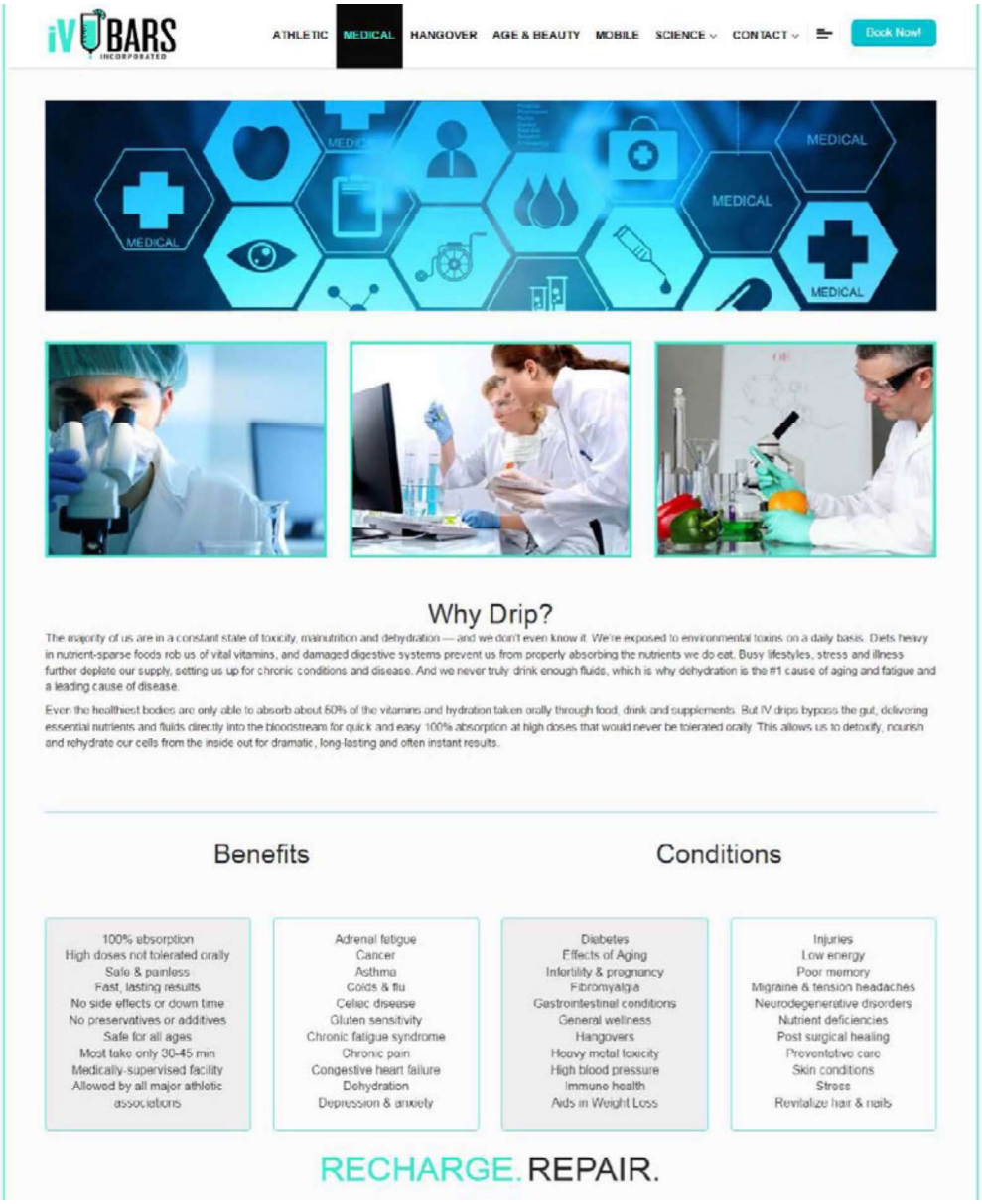
Cardiovascular Disease

Case #5: A 79-year-old man was seen at home in end-stage heart failure, after having suffered four myocardial infarctions. . . . A peripheral angiogram revealed complete occlusion of both femoralpopliteal arteries, with no detectable blood flow to the distal extremities. . . . [T]he cardiologist advised the patient that his heart would not last more than another month . . . . He was treated with weekly [intramuscular] injections . . . . After eight weeks, the IM injections were replaced by weekly IV injections [of Myers Cocktail]. . . . The patient lived for eight years and died at age 87 from multiple organ failure. Of the handful of other patients with angina or heart failure who received IV or IM injections . . . all showed significant improvement.

(Exhibit A-3 to 6)

d. The Website homepage also contained tabs across the top that linked to other pages within the Website, including a tab titled "MEDICAL." On the Medical page, under the heading "Why Drip?," Respondents proclaimed: "IV drips bypass the gut, delivering essential nutrients and fluids directly into the bloodstream . . . . This allows us to detoxify, nourish and rehydrate our cells from the inside out for dramatic, long-lasting and often instant results." Under the Medical page subheadings "Benefits" and "Conditions," Respondents listed numerous diseases and conditions, including "Cancer," "Congestive heart failure," "Diabetes," "Fibromyalgia," and "Neurodegenerative disorders," and claimed that Respondents' iV treatments produce "Fast, lasting results":

Complaint

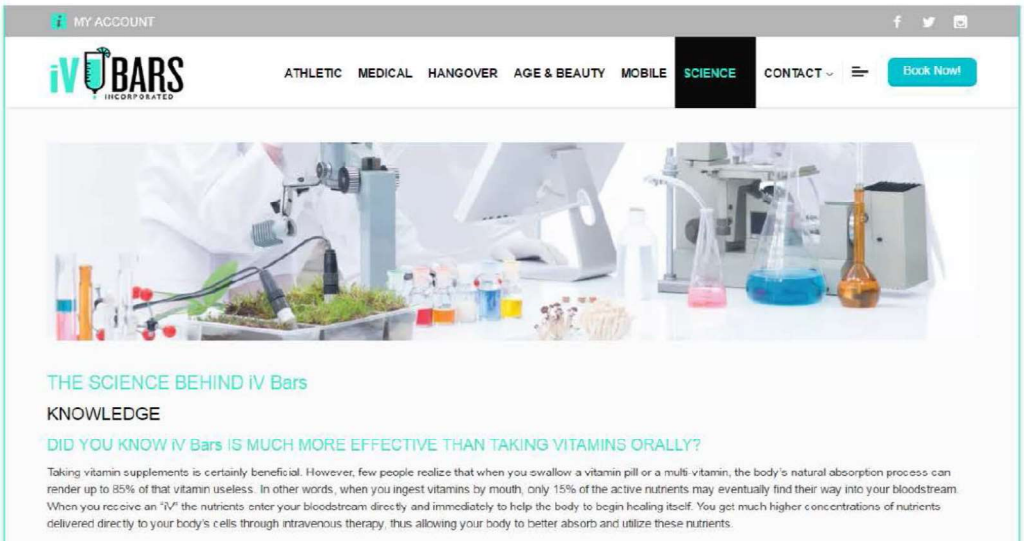


(Exhibit A-7)

e. The iV Bars Website homepage also contained a tab titled “MOBILE” that linked consumers to a page that described Respondents’ “full service mobile vehicle” and proclaimed: “We Are Mobile. We Come To You!” The Mobile page contained the same disease claims as the Medical page, listing among the conditions that can be treated “Cancer,” “Congestive heart failure,” “Diabetes,” “Fibromyalgia,” and “Neurodegenerative disorders.”

(Exhibit A-10)

f. The iV Bars Website homepage also contained a tab titled "SCIENCE" that linked consumers to multiple pages, the first of which was titled "THE SCIENCE BEHIND iV Bars." It stated, "[F]ew people realize that when you swallow a vitamin pill or a multi-vitamin, the body's natural absorption process can render up to 85% of that vitamin useless . . . . When you receive an "iV" the nutrients enter your bloodstream directly and immediately to help the body to begin healing itself":



(Exhibit A-11)

g. The second page of the Science section began with the question, "ARE YOU GETTING THE NUTRIENTS YOU NEED?" and stated:

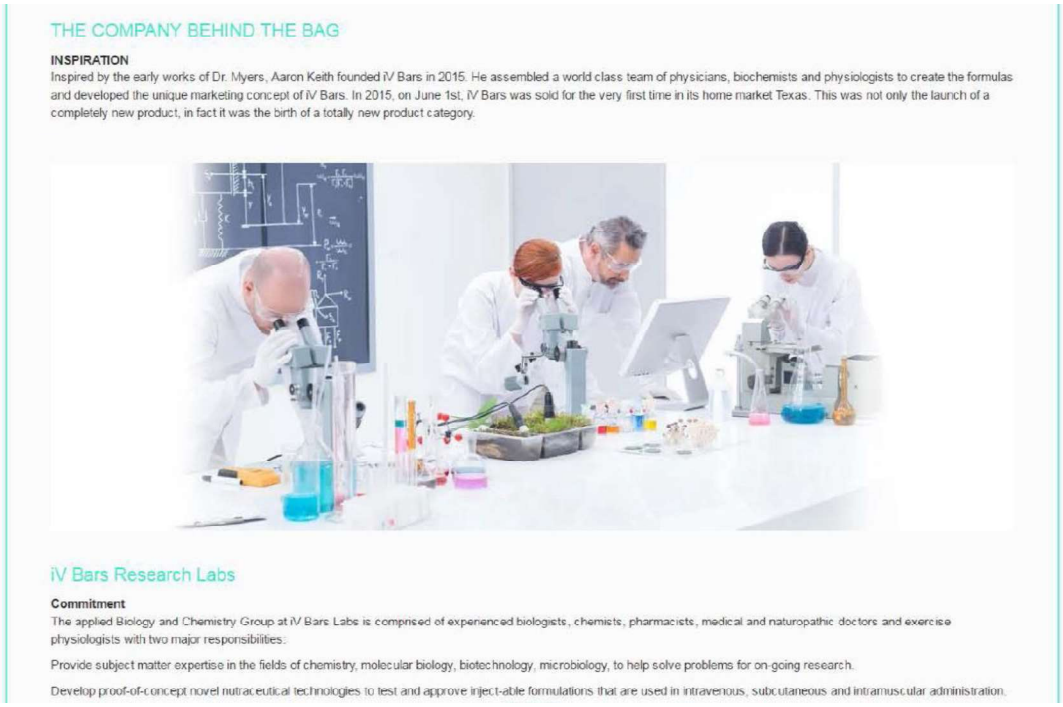
Overwhelming scientific evidence confirms that vitamin deficiencies are associated with disease processes and the overall condition of one's health. Vitamin, mineral and antioxidant deficiencies has [sic] been shown to suppress immune function and contribute to chronic degenerative processes such as arthritis, cancer, Alzheimer's, cardiovascular disease and diabetes. This body of research has been reaffirmed by the journal of the American Medical Association (June 19, 2002-Vol 287, No-23).

(Exhibit A-12)

iV Bars Establishment Claims

h. In addition to the "The Science Behind iV Bars" section of the iV Bars Website homepage (discussed in Part 5.B., above), the Website homepage contained a link titled "ABOUT iV BARS: THE COMPANY" that linked consumers to a page titled "THE COMPANY BEHIND THE BAG." That page contained depictions of men and women dressed in white lab coats

looking at test tubes and through microscopes. It declared, "Inspired by the early works of Dr. Myers, Aaron Keith founded iV Bars in 2015. He assembled a world class team of physicians, biochemists and physiologists to create the formulas . . . of iV Bars." Thereafter, under the subtitle "iV Bars Research Labs," Respondents claimed to have an "applied Biology and Chemistry Group" at a purported "iV Bars Labs" comprised of "experienced biologists, chemists, pharmacists, medical and naturopathic doctors and exercise physiologists" to, among other things, "test and approve inject-able formulations that are used in intravenous, subcutaneous and intramuscular administration":



THE COMPANY BEHIND THE BAG

INSPIRATION

Inspired by the early works of Dr. Myers, Aaron Keith founded iV Bars in 2015. He assembled a world class team of physicians, biochemists and physiologists to create the formulas and developed the unique marketing concept of iV Bars. In 2015, on June 1st, iV Bars was sold for the very first time in its home market Texas. This was not only the launch of a completely new product, in fact it was the birth of a totally new product category.

iV Bars Research Labs

Commitment

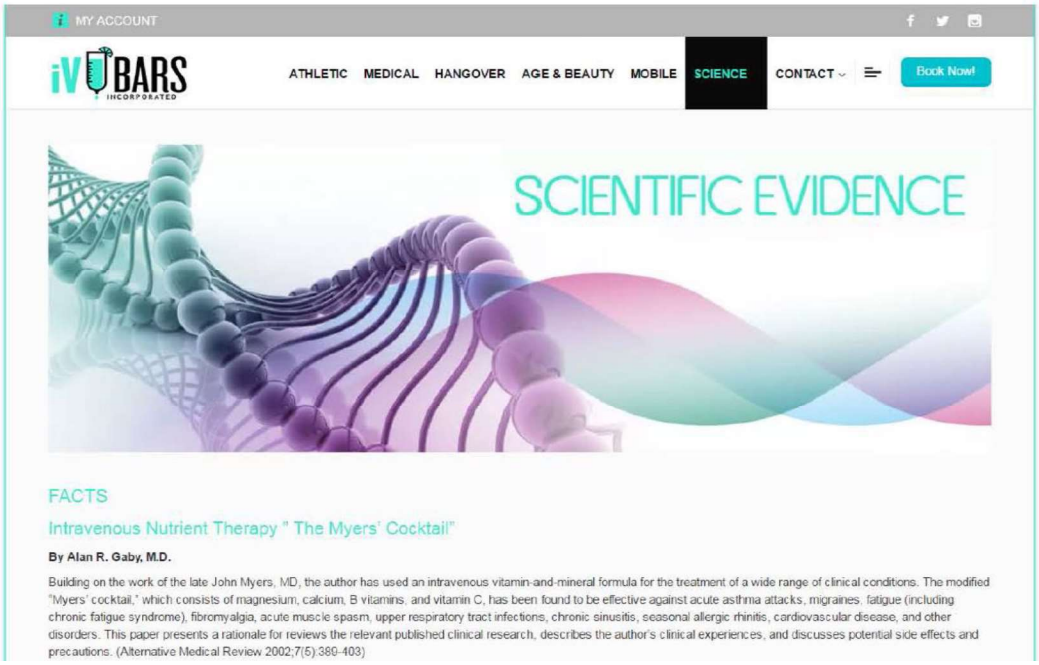
The applied Biology and Chemistry Group at iV Bars Labs is comprised of experienced biologists, chemists, pharmacists, medical and naturopathic doctors and exercise physiologists with two major responsibilities:

Provide subject matter expertise in the fields of chemistry, molecular biology, biotechnology, microbiology, to help solve problems for on-going research.

Develop proof-of-concept novel nutraceutical technologies to test and approve inject-able formulations that are used in intravenous, subcutaneous and intramuscular administration.

(Exhibit A-2)

i. The Website Science pages also included a group of pages that began with a depiction of a DNA double helix and the title "SCIENTIFIC EVIDENCE." These pages then described the "FACTS" about the Myers Cocktail, including "published clinical research," and claimed that the Myers Cocktail "has been found to be effective" against a variety of diseases and conditions, including "fibromyalgia" and "cardiovascular disease":



(Exhibit A-14)

j. The Scientific Evidence pages continued claiming:

> The author took over the care of [Dr.] Myers' patients, using a modified version of his iV regimen . . . in order to approximate the doses reported to be safe and effective for the treatment of cardiovascular disease. . . . [T]he modified Myers' cocktail . . . was helpful for a wide range of clinical conditions, often producing dramatic results. . . . Conditions that frequently responded included . . . fibromyalgia . . . . A small number of patients with congestive heart failure [and] angina . . . were also treated with the Myers' and most showed marked improvement. . . . This paper presents a rationale for the use of IV nutrient therapy, reviews the relevant published clinical research, describes personal clinical experiences using the Myers', and discusses potential side effects and precautions.

(Exhibit A-14)

k. The Scientific Evidence pages thereafter described purported clinical experiences of patients given a Myers Cocktail, including case studies of patients with Fibromyalgia and Cardiovascular Disease (that used the same text as contained in the "Success Stories" section of the Website discussed in Part 5.C., above). The Scientific Evidence pages "Conclusion" section stated, "The Myers' has been found by the author and hundreds of other practitioners to be a safe and effective treatment for a wide range of clinical conditions. In many instances this treatment is more effective and better tolerated than conventional medical therapies." (Exhibit A-17)

Complaint

iV Bars Disclaimers

l. At the bottom of almost all of the iV Bars Website pages, Respondents included the following statement in grayed-out, difficult to read type, "FDA DISCLAIMER THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THESE PRODUCTS ARE NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.":



(*See, e.g.,* Exhibit A-1)

m. A number of the iV Bars Website pages also contained the following statement:

Disclaimer: You should consult your physician before taking vitamins, minerals, nutritional supplements or herbal products. Our vitamins and nutritional supplement products on this site are not intended to diagnose, treat, cure or prevent any disease. Final product ingredients and dosages may vary depending on personal requirements and availability. Statements made here have not been evaluated by FDA.

(Exhibit A-20 to 32)

iV Bars Safety Claims

n. The iV Bars homepage stated, "Intravenous Vitamin Therapy [can be used] to both prevent and help treat a wide variety of conditions safely and effectively." The Website homepage did not contain a disclaimer or disclosure related to this unqualified safety claim.

(Exhibit A-1)

o. The Website's Medical page and its Mobile page prominently claimed that Respondents' iV treatments are "Safe for all ages" and that they cause "No side effects or down time." The website's Medical page and its Mobile page did not contain disclaimers or disclosures related to these unqualified safety claims.

(Exhibit A-7 & 10)

p. Buried in the Website's multiple Science pages was a disclosure that:

> Small risks are associated with the intravenous injection process, which may include bruising around the injection site, and are similar to the risks of having your blood drawn for lab tests. Side Effects of treatment can include bruising around the site of the needle stick. Some patients may have a tendency to vascular fragility, and can suffer a phenomenon known as "infiltration", in which the walls of the vein rupture and the iV fluid leaks into the surrounding tissue causing local burning.
>
> (Exhibit A-11)

q. The Science pages also contained a lengthy discussion of "Side Effects and Precautions" for the Myers Cocktail that revealed a number of safety concerns, including the following statements:

> Too rapid administration of magnesium can cause hypo-tension, which can lead to light-headedness or even syncope [temporary loss of consciousness].
>
> * * *
>
> The shift of potassium from the serum to the intracellular space can trigger hypokalemia [low level of potassium in the blood serum]. The author has seen two patients develop severe muscle cramps several hours after receiving a Myers'; both patients had been taking medications known to deplete potassium. Hypokalemia also increases the risk of digoxin-induced cardiac arrhythmias. [One patient] developed an arrhythmia, which required short-term treatment in the intensive care unit.
>
> * * *
>
> For elderly or frail individuals, it may be advisable to start with lower doses[.]
>
> * * *
>
> [H]ypercalcemia can cause cardiac arrhythmias. For that reason, the author has tended to leave calcium out of the Myers' when treating patients with cardiac disease . . . . Anaphylactic reactions to IV thiamine have been reported on rare occasions. Only three such reactions have been identified in the U.S. literature since 1946. However, in the world literature, a total of nine deaths attributed to thiamine administration were reported between 1965 and 1985.
>
> (Exhibit A-16 & 17)

r. The Science pages' ultimate "Conclusion" stated, "The Myers' has been found by the author and hundreds of other practitioners to be a safe and effective treatment for a wide range of clinical conditions."

(Exhibit A-17)

7. After arriving at iV Bars, but before being given an iV treatment, consumers are required to sign a two-page "Consent and Authorization for Intravenous Therapy Procedures" form releasing Respondents from liability ("Release Form"). An example of the Release Form is attached as Exhibit B. This Release Form disclosed that there are "risks" and "potentially dangerous side effects" involved with Respondents' iV treatments and contained the following statements, among others:

> Risks: I understand there is risk of mild diarrhea, upset stomach, nausea, a feeling of pain and a warm sensation at the site of the injection, a feeling, or a sense, of being swollen over the entire body, headache and joint pain.
>
> * * *
>
> Uncommon side effects are much more serious than the common side effects of Vitamin injections, and such side effects should be reported to a physician to be evaluated for seriousness. Uncommon and dangerous side effects include:
>
> • Headache • Nausea • Diarrhea • Bloating • Constipation • Indigestion or heartburn • Abnormal bleeding • Gastrointestinal hyperactivity • Chest pain • Flushed face • Chills • Fever • upset stomach • Kidney stones • Fingernail weakening • Hair loss • Rapid heartbeat heart palpitations • Restlessness • Muscle cramps and weakness • Dizziness
>
> * * *
>
> I understand the possibility of having an allergic reaction to any of the ingredients found within the Vitamin injection is quite plausible . . . . If I experience any of these following signs of allergic reactions I should immediately consult my primary health care Physician and discontinue further use of the product. Signs of allergic reactions include, but [sic] not limited to:
>
> • Itching of skin • Hives • Rashes • Wheezing • Difficulty breathing • Swelling of mouth or throat
>
> * * *
>
> When medications are taken in conjunction with the Vitamin Injection, drug interactions could occur. These interactions can either increase your risk of bleeding or block the absorption of the Vitamins into the body.

(Exhibit B-1 & 2)

Falsity and Lack of Substantiation

8. Although Respondents' Website was replete with depictions of men and women dressed in white lab coats looking through microscopes and Respondents claimed to operate an "iV Bars Research Lab" with experienced biologists, chemists, pharmacists, medical doctors, naturopathic doctors and exercise physiologists, no such iV Bars Research Lab exists. In addition, neither Respondents, nor any third party commissioned by Respondents, conducted clinical research, tests, or studies of the safety or efficacy of Respondents' iV Cocktails.

9. There has been only one randomized and controlled human clinical trial of an iV Cocktail advertised by Respondents. That pilot study was of the Myers Cocktail given to patients with fibromyalgia. Although the study found a strong placebo effect, it found no statistically significant differences between subjects given the Myers Cocktail and those given a placebo, in any outcome measure, at 8 and 16 weeks. (*See* Intravenous Micronutrient Therapy (Myers' Cocktail) for Fibromyalgia: A Placebo-Controlled Pilot Study. Journal of Alternative and Complementary Medicine (March 2009)).

10. The purported substantiation relied on by Respondents for their disease treatment claims consists of anecdotal stories of iV therapy patients and studies and articles regarding individual active ingredients given to animals or humans in significantly different doses, formulations, routes of administration, or regimens than those advertised by Respondents.

11. The safety risks and potential complications from Respondents' iV treatments include infection, hypersensitivity and other allergic reactions, drug interactions, infiltration of iV fluid into the soft tissue outside the vain, hematoma, air embolism causing air to enter the vain, blood clots, phlebitis, and cellulitis. Potential side effects include diarrhea, upset stomach, nausea, bloating, constipation, headache, and joint pain. In addition, elderly consumers may be more susceptible to some of these risks and side effects. Respondents' own Website and Release Forms acknowledge many of these risks and side effects.

Count I
False or Unsubstantiated Safety and Efficacy Claims

12. In connection with the advertising, promotion, offering for sale, or sale of iV Cocktails, Respondents have represented, directly or indirectly, expressly or by implication, that their iV Cocktails:

a. are an effective treatment for cancer;

b. are an effective treatment for angina, cardiovascular disease, congestive heart failure, and myocardial infarction;

c. are an effective treatment for multiple sclerosis;

d. are an effective treatment for diabetes;

e. are an effective treatment for fibromyalgia;

f. are an effective treatment for neurodegenerative disorders;

g. produce fast, lasting results;

h. are safe for all ages; and

i. cause no side effects.

13. The representations set forth in Paragraph 12 are false or misleading, or were not substantiated at the time the representations were made.

Count II
False Establishment Claims

14. In connection with the advertising, promotion, offering for sale, or sale of iV Cocktails, Respondents have represented, directly or indirectly, expressly or by implication, that Respondents' iV Cocktails are clinically or scientifically proven to:

a. treat cancer;

b. treat angina, cardiovascular disease, congestive heart failure, and myocardial infarction;

c. treat multiple sclerosis;

d. treat diabetes;

e. treat fibromyalgia;

f. treat neurodegenerative disorders; and

g. produce fast, lasting results.

15. In fact Respondents' iV Cocktails are not clinically or scientifically proven to:

a. treat cancer;

b. treat angina, cardiovascular disease, congestive heart failure, and myocardial infarction;

c. treat multiple sclerosis;

d. treat diabetes;

e. treat fibromyalgia;

f. treat neurodegenerative disorders; and

g. produce fast, lasting results.

16. Therefore, the representations set forth in Paragraph 14 are false or misleading.

Violations of Sections 5 and 12

17. 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.

THEREFORE, the Federal Trade Commission this thirteenth day of February 2019, has issued this Complaint against Respondents.

By the Commission. Commissioner Wilson not participating.

Complaint

Exhibit A



EXHIBIT A - 1


BOOK APPOINTMENT
iV BARS
ATHLETIC MEDICAL HANGOVER AGE & BEAUTY MOBILE SCIENCE CONTACT
WHAT IF OUR BODIES COULD PERFORM AT 100% ULTIMUM LEVELS?
THE COMPANY BEHIND THE BAG
INSPIRATION
IV Bars Research Labs
Commitment

EXHIBIT A - 2

Complaint

MY ACCOUNT

iV BARS

ATHLETIC MEDICAL HANGOVER AGE & BEAUTY MOBILE SCIENCE CONTACT Book Now!

BOOK APPOINTMENT

SUCCESS STORIES

A majority of ill patients have significant underlying nutritional deficiencies. Food intolerances, allergies, and sensitivities can lead to gastrointestinal absorption problems. Additionally, oral supplementation can be incomplete or minimally absorbed. The use of intravenous (IV) therapy has the ability to work instantaneously. The following are case studies about different disorders and the effects that IV therapy has had on these conditions.



Case #1: Muscle spasms

A 62 year-old female suffered from unexplained leg cramps and muscle spasms for a period of more than two years. Blood work, diagnostic and imaging tests had been unremarkable. Oral magnesium therapy and other electrolyte therapy replacement provided little benefit. The patient decided to proceed with a modified Myer's intravenous (IV) push. After the first IV push, the patient was free of leg cramps and muscle spasms for a period of approximately two months. There were no adverse reactions or side effects reported.

Case #2: Migraine headaches

A 58 year-old female suffers from daily frequent migraine headaches, which appeared to be triggered by environmental exposure to chemicals, food and stress. The headaches were occurring one to two times per week. Medications and other conservative measures have provided very little relief. The patient started receiving intravenous pushes with magnesium and other forms of b-vitamins. At the end of her initial push, the patient felt her headache improving. The patient received two more IV pushes of the same formula over the next two weeks. The migraine headaches are now occurring once every two weeks compared to once or twice every week and we expect as her deficiency status improves they should become more infrequent.

The benefits of IV magnesium as a treatment for migraine headaches has been demonstrated in clinical trials. In one study, patients with acute attack of migraine headache and low serum level of ionized magnesium were tested. Of the 40 patients enrolled, 35 patients had a reduction in pain of 50% or more 15 minutes after the infusion. This included nine patients who had complete relief. In 21 of these 35 patients, the same degree of improvement or complete relief lasted for 24 hours or more with a positive response.

Case #3: Multiple Sclerosis

A 65 year-old male with progressive multiple sclerosis presents to the clinic wheel chair bound. The patient has tried medications, physical therapy and speech therapy. However, there have been little noticeable benefits with regards to his leg strength and neurological function. The patient reported no problems with bowel or bladder control. The patient received an intravenous infusion of glutathione. After the first infusion, he reported increased strength in his legs. His physical therapist and caretaker also reported noticing an improvement in his leg strength and ability to walk. After the second glutathione infusion, the patient reported that the feeling in his hands has returned. The patient's increase in leg strength and hand sensation has continued without any reported decline. There were also no reported adverse reactions.

Case#4: Diabetic peripheral neuropathy/Restless leg syndrome

A 68 year-old male presents to the clinic with a ten plus year history of rheumatoid arthritis, diabetes, high blood pressure, neuropathy and restless leg syndrome. The patient is taking blood pressure and anti-hypertensive medications. His blood sugar and blood pressure is well maintained with his current medication regimen. However, he continues to have joint pain and leg pain. The leg pain is worst at night and occasionally wakes him up. The patient was started on intravenous vitamin C and glutathione therapy. After the fourth treatment, the patient's restless symptoms and joint pain was completely resolved. The patient took a two-month break from therapy and some of his leg symptoms returned. Although the symptoms have returned, they were not of the same intensity. He was re-started on vitamin C and glutathione therapy. His symptoms started to improve after the first IV. He is currently on a maintenance protocol.

Glutathione (GSH) has a crucial role in cellular signaling and antioxidant defenses. Glutathione is responsible for the detoxification of reactive oxygen and nitrogen species and electrophiles produced by xenobiotics. Adequate levels of GSH are essential for the optimal functioning of the immune system, brain function, regulation of energy production and mitochondrial survival. A depletion of GSH can lead to damage by oxidative stress, increased levels of pro-inflammatory mediators, dysfunctions of intracellular signaling networks, decreased cell proliferation and DNA synthesis.

Glutathione has been used to reduce toxicity of chemotherapeutic agents. It has also been shown to improve pain free walking distance in patients with peripheral obstructive arterial disease, reduce lipoperoxidative damage in early septic shock, reverse some adverse effects of diabetes (peripheral neuropathy), improve anemia of patients with chronic renal failure, and boost the immune system.

Glutathione has been well studied over the years. There's even a YouTube video by Dr. Oz discussing the importance of glutathione and the role it plays in the treatment of diabetes, cancer, autism and arthritis.

Article By: Dr. Sana Eang, ND

More Success Stories

Asthma

EXHIBIT A - 3

Case #1: A five-year-old boy presented with a two-year history of asthma. During the previous 12 months he had suffered 20 asthma attacks severe enough to require a visit to the hospital emergency department. His symptoms appeared to be exacerbated by several foods, and skin tests had been positive for 23 of 26 inhalants tested. His initial treatment consisted of identification and avoidance of allergenic foods, as well as daily oral supplementation with pyridoxine (50 mg), vitamin C (1,000 mg), calcium (200 mg), magnesium (100 mg), and pantothenic acid (100 mg), in two divided doses with meals. On this regimen, he experienced marked improvement, and had no asthma attacks requiring medical care until nearly 11 months after his initial visit.At that time the child, now six years old, presented for an emergency visit with mild but persistent wheezing and difficulty breathing. He was given a slow IV infusion containing 8 mL vitamin C, 1.4 mL magnesium, and 0.5 mL each of calcium, B12, B6, B5, and B complex. The symptoms resolved within two minutes and did not recur.Over the ensuing eight years and three months, he received a total of 63 IV treatments for acute exacerbations of asthma. In most instances, a single injection resulted in marked improvement or complete relief within two minutes, and the acute symptoms did not recur. Occasionally, a second injection was needed after a period of 12 hours to two days, and during one episode three treatments were required over a four-day period. As the patient grew, the nutrient doses were gradually increased; by age 10 he was receiving 10 mL vitamin C, 3 mL magnesium, 1.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex.The treatment was unsuccessful only once, on that occasion the patient presented with generalized urticaria, angioedema, and unusually severe asthma, after the inadvertent ingestion of an artificial food coloring (FD&C red #40) and other potential allergens. Three separate injections given over a 60-minute period produced transient improvement each time. However, the symptoms returned, and he was taken to the emergency room and hospitalized. Despite that single treatment failure, the patient and his parents reported that IV nutrient therapy worked faster, produced a more sustained improvement, and caused considerably fewer side effects than the conventional therapies he had received previously in the emergency room.The author has treated approximately a dozen asthmatics (mainly adults) with the Myers' for acute asthma attacks; in most instances, marked improvement or complete relief occurred within minutes. A few patients received maintenance injections once weekly or every other week during difficult times and reported the treatments kept their asthma under better control.Intravenous magnesium is now well documented as an effective treatment for acute asthma. In one study, 38 patients with an acute exacerbation of moderate-to-severe asthma that had failed to respond to conventional beta- agonist therapy were randomly assigned to receive, in double-blind fashion, IV infusions of either magnesium sulfate (1.2 g over a 20-minute period) or placebo (saline). 13 Peak expiratory flow rate improved to a significantly greater extent in the magnesium group (225 to 297 L/min) than the placebo group (208 to 216 L/min). In addition, the hospitalization rate was significantly lower in the magnesium group than in the placebo group (37% vs. 79%, $p < 0.01$). No patient had a significant drop in blood pressure or change in heart rate after receiving magnesium.In a second double-blind study, 149 patients with acute asthma who were being treated with inhaled beta-agonists and IV steroids were randomly assigned to receive an IV infusion of magnesium sulfate (2 g over 20 minutes) or saline placebo, beginning 30 minutes after presentation. 14 Among patients with severe asthma (defined as forced expiratory volume in 1 second [FEV1] less than 25 percent of predicted value) compared with placebo, magnesium significantly reduced the hospitalization rate (33.3% vs. 78.6%; $p < 0.01$) and significantly improved FEV1. However, magnesium treatment was of no benefit to patients with moderate asthma (defined as baseline FEV1 between 25 and 75 percent of predicted value).In two placebo-controlled studies of asthmatic children, IV magnesium sulfate significantly improved pulmonary function and significantly reduced hospitalization rates during acute exacerbation's that had failed to respond to conventional therapy.15,16 A dose of 40 mg per kg body weight (maximum dose, 2 g) given over a 20-minute period appeared to be more effective than 25 mg per kg. Higher doses of IV magnesium sulfate (10-20 g over 1 hour, followed by 0.4 g per hour for 24 hours) have been used successfully in the treatment of life-threatening status asthmatics. In a few studies, IV magnesium failed to improve pulmonary function or to reduce the need for hospitalization. 17,18 However, a meta-analysis of seven randomized trials concluded that IV magnesium reduced the need for hospitalization by 90 percent among patients with severe asthma, although the treatment was not beneficial for patients with moderate asthma. Calcium is the only other component of the Myers' that has been studied as a treatment for acute exacerbation's of asthma. In an early report, a series of IV infusions of calcium chloride relieved asthma symptoms in three consecutive patients, with relief occurring almost immediately after some injections.20 Intravenous and IM administration of an unspecified calcium salt temporarily inhibited severe anaphylactic reactions in two other patients.Nutrients other than magnesium and calcium may have contributed to the beneficial effect observed in asthma patients. Oral vitamins C22 and B622,24 and IM vitamin B1225 have each been used with some success against asthma, although none of these nutrients has been tested as a treatment for acute attacks. Intramuscular administration of niacinamide has been shown to reduce the severity of experimentally induced asthma in guinea pigs. 26 and pantothenic acid appears to have an anti-allergy effect in humans.27On one occasion, a patient's asthma attack was treated with IV magnesium alone. Although the symptoms resolved rapidly, they returned within 10-15 minutes. The remaining constituents of the Myers' (without additional magnesium) were then administered, and the symptoms disappeared almost immediately and did not return. Thus, it seems the Myers' is more effective than magnesium alone in the treatment of asthma attacks.

Migraine

Case #2: A [redacted]-old female suffered from frequent migraines, which appeared to be triggered in many instances by exposure to environmental chemicals or, occasionally, to ingestion of foods to which she was allergic. Allergy desensitization therapy had provided little benefit. Over a six-year period, the patient was given IV therapy on approximately 70 occasions for migraines. Nearly all of these injections resulted in considerable improvement or complete relief within several minutes, although a few treatments were ineffective. Through trial and error, it was determined her most effective regimen was 16 mL vitamin C, 8 mL magnesium, 4 mL calcium, 2 mL B6, and 1 mL each of B12, B5, and B complex. The 4-mL dose of calcium was found to provide better relief than lower calcium doses.Over the years, a half dozen other patients have presented one or more times with an acute migraine. In almost every instance, the Myers' produced a gratifying response within a few minutes.The beneficial effect of IV magnesium as a treatment for migraine has been demonstrated in recent clinical trials. In one study, 40 patients with an acute migraine received 1 g magnesium sulfate over a five-minute period.28 Fifteen minutes after the infusion, 36 patients (87.5%) reported at least a 50-percent reduction of pain, and nine patients (22.5%) experienced complete relief. In 21 of 36 patients who benefited, the improvement persisted for 24 hours or more. Patients with an initially low serum ionized magnesium concentration (less than 0.54 mMol/L) were significantly more likely to experience long-lasting improvement than were patients with initially higher serum ionized magnesium levels. In a single-blind trial that included 30 patients with an acute migraine, IV administration of magnesium sulfate (1 g over 15 minutes) completely and permanently relieved pain in 13 of 15 patients (86.6%), whereas no patients in the placebo group became pain free ($p < 0.001$ for difference between groups).29 In addition, magnesium treatment resulted in rapid disappearance of nausea, vomiting, and photophobia in all 14 patients who had experienced those symptoms.A single 1-g dose of magnesium sulfate has also been reported to abort an episode of cluster headaches in seven of 22 patients (32%), and a series of three to five injections provided sustained relief in an additional two patients (9%). It is not clear whether the Myers' is more effective than magnesium alone for migraines; however, one patient did experience noticeable benefit from IV calcium.

Fatigue

Many patients [redacted] unexplained fatigue have responded to the Myers', with results lasting only a few days or as long as several months. Patients who benefited often returned at their own discretion for another treatment when the

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effect had worn off. One patient with fatigue associated with chronic hepatitis B experienced marked and progressive improvement in energy levels with weekly or twice-monthly injections.Approximately 10 patients with chronic fatigue syndrome (CFS) received a minimum of four treatments (usually once weekly for four weeks), with more than half showing clear improvement. One patient experienced dramatic benefit after the first injection, whereas in other cases three or four injections were given before improvement was evident. A few patients became progressively healthier with continued injections and were eventually able to stop treatment. Several others did not overcome their illness, but periodic injections helped them function better.There is some research support for the use of parenteral magnesium in patients with fatigue. One study found magnesium deficiency, demonstrated by an IV magnesium-load test, in 47 percent of 92 patients with unexplained chronic fatigue, including 50 with CFS. In a second study, the mean erythrocyte magnesium concentration was significantly lower in 20 patients with CFS than in healthy controls. One arm of the second study, 32 patients with CFS were randomly assigned to receive, in double-blind fashion, 1 g magnesium sulfate IM or placebo, once weekly for six weeks. Twelve (80%) of 15 patients given magnesium reported improvement (e.g., more energy, a better emotional state, and less pain) and fatigue was eliminated completely in seven cases. In contrast, only three (18%) of 17 placebo-treated patients improved (p=0.0015 for difference between groups), and in no case was the fatigue completely eliminated. According to one report, at least half of CFS patients with magnesium deficiency benefited from oral magnesium supplementation; however, some patients needed IM injections. Other investigators, using the IV magnesium-load test, found no evidence of magnesium deficiency in patients with CFS, and observed no improvement in symptoms following a single infusion of magnesium sulfate (5 g in one hour).Vitamin B12, given IM, has been reported to be helpful for patients with unexplained fatigue, as well as those with CFS. While the results obtained with the Myers' may be attributable in part to vitamin B12, many patients who responded to IV therapy obtained little or no benefit from IM vitamin B12 alone.

Fibromyalgia

Case #3: A 46-year-old woman presented with a six-year history of fairly constant myalgias and arthralgias, with pain in the neck, back, and hip, and tightness in the left arm. six months previously she was found to have an elevated sedimentation rate (50 mm/hr). She was diagnosed by a rheumatologist as possibly having polymyalgia rheumatic, although the diagnosis of fibromyalgia was also considered. Her history was also significant for migraines about eight times per year and chronic nasal congestion. Physical examination revealed extremely stiff muscles, with decreased range of motion in many areas of her body.The patient was given a therapeutic trial consisting of 6 mL vitamin C, 4 mL magnesium, 2.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. At the end of the injection, she got off the table and, with a look of amazement, announced her muscle aches and joint pains were gone for the first time in six years. This treatment was repeated after a week (at which time her symptoms had not returned), followed by every other week for several months, then once monthly for three years. Her initial regimen also included the identification and avoidance of allergenic foods and treatment with low-dose desiccated thyroid (eventually stabilized at 60 mg per day). She discovered that eating refined sugar caused myalgias and arthralgias, and that thyroid hormone improved her energy level, mood, and overall well being. During the three years of monthly maintenance injections she reported symptoms would begin to recur if she went much longer than a month between treatments. However, they were never as severe as they were before she began receiving IV therapy.The author has given the Myers' to approximately 30 patients with fibromyalgia; half have experienced significant improvement, in a few cases after the first injection, but more often after three or four treatments.The beneficial effect of parenteral nutrient therapy has been confirmed by one study published only as an abstract. Eighty-six patients with chronic muscular complaints, including myofascial pain, relapsing soft tissue injuries, and fibromyalgia, received IM or IV injections of magnesium, either alone or in combination with calcium, B vitamins, and vitamin C.37 Improvement occurred in 74 percent of the patients; of those, 64 percent required four or fewer injections for optimal results. A minority of patients required long-term oral or parenteral magnesium to maintain improvement. The positive response to parenteral magnesium is consistent with the observation that nearly half of patients with fibromyalgia have intracellular magnesium deficiency, despite having normal serum levels of the mineral.38

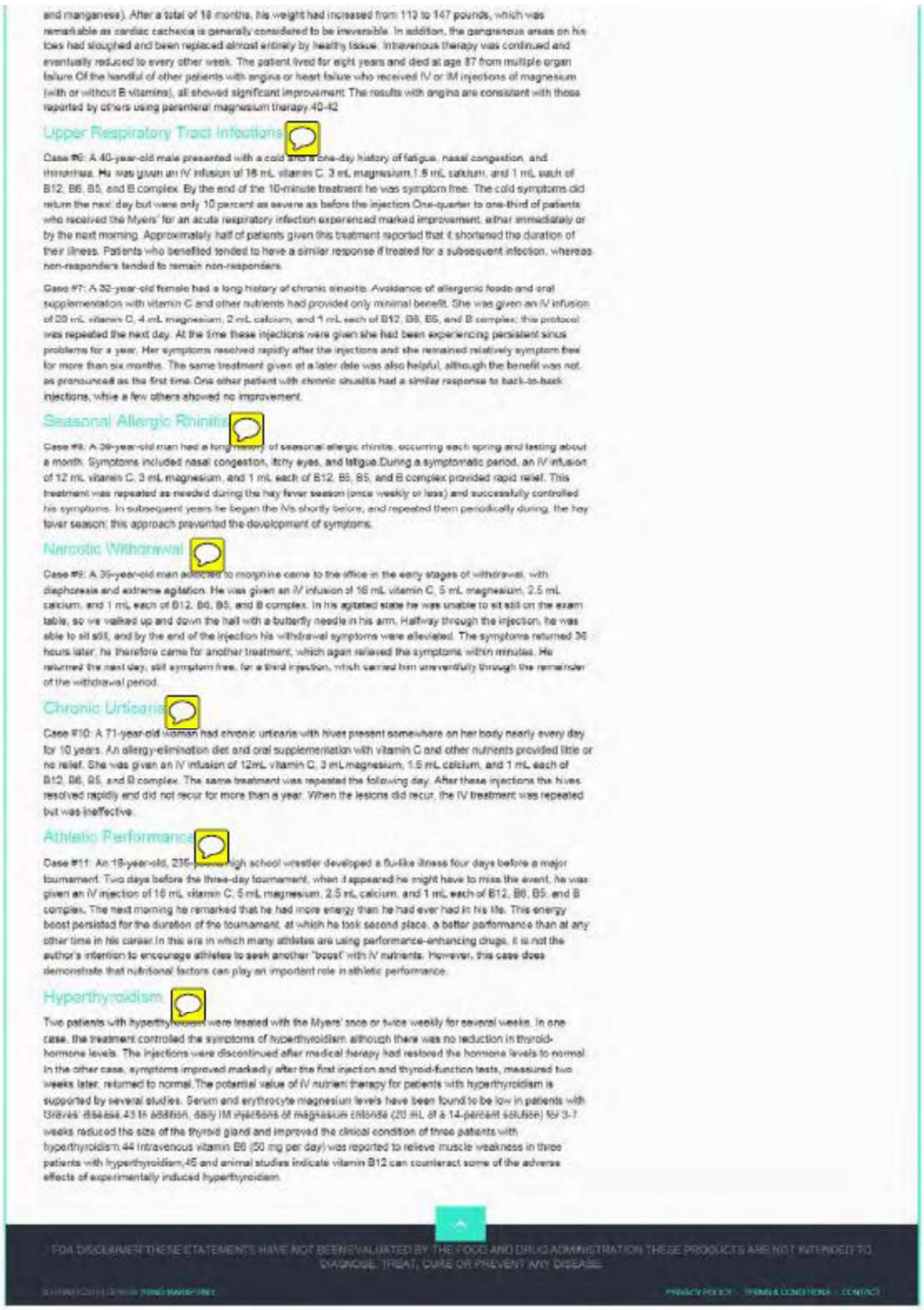
Depression

Case #4: A 46-year-[illegible]n presented with a history of depression and anxiety since childhood. He had been in psychoanalysis for the past eight years. A therapeutic trial with IV nutrients was considered because the patient reported that consumption of alcohol (known to deplete magnesium) aggravated his symptoms, and because he was taking a magnesium-depleting thiazide diuretic for hypertension. He was initially given 1 mL each of magnesium, B12, B6, B5, and B complex, which resulted in a 70-80 percent reduction in his symptoms for one week. A second injection produced a similar response that lasted two weeks. Through trial and error it was determined the most effective treatment was 5 mL magnesium, 3 mL B complex, and 1 mL each of B12, B6, and B5. The addition of calcium to the injection appeared to block some of the benefit. Both oral and IM administration of the same nutrients were tried but found to be ineffective. Weekly injections provided almost complete relief from symptoms and allowed him to discontinue psychotherapy. The patient noted that rapidly administered injections provided longer-lasting relief than did slower injections. The infusion rate was therefore carefully and progressively increased, without causing any adverse side effects or changes in blood pressure or heart rate. The patient reported that when the treatment was given over a one-minute period, the effect would last approximately two weeks, whereas a slower injection (such as five minutes) would last only a week. Approximately four years after initial treatment, he was able to reduce the frequency of injections to once monthly or less.Many other patients with depression and/or anxiety have shown a positive response to the Myers'. However, this treatment should not be considered first-line therapy for major depression.It seems to be helpful only for certain subsets of depressed individuals, such as those who also suffer from fibromyalgia, migraines, excessive stress, or alcohol-induced exacerbations. Shealy et al have observed an antidepressant effect of IV magnesium in some patients with chronic pain.39

Cardiovascular Disease

Case #5: A 79-year-old man was seen at home in end-stage heart failure, after having suffered four myocardial infarctions. During the previous 12 months, spent mostly in the hospital, he had become progressively worse; his ejection fraction had fallen to 19 percent and his body weight had declined from 171 pounds to a severely cachectic 113 pounds. He was confined to bed and required supplemental oxygen much of the time. He also had severe peripheral occlusive arterial disease, which had resulted in the development of gangrene of six toes. A peripheral angiogram revealed complete occlusion of both femoralpopliteal arteries, with no detectable blood flow to the distal extremities. Two independent vascular surgeons had recommended bilateral above-the- knee amputations to prevent development of septicemia. However, the cardiologist advised the patient that his heart would not last more than another month, so the patient declined the amputations.He was treated with weekly IM injections of magnesium sulfate (1 g) for eight weeks, and prescribed oral supplementation with vitamins C and E, B complex, folic acid, and zinc. The magnesium injections appeared to reduce the pain in his gangrenous toes considerably, with the benefit lasting about five days each time. Six weeks after the first injection, his ejection fraction had increased from 19 percent to 38 percent and he no longer requiredsupplemental oxygen. After eight weeks, the IM injections were replaced by weekly IV injections, consisting of 5 mL magnesium, 1 mL each of B12, B6, B5, and B complex, and a low-dose (0.2 mL) trace mineral preparation (MTE-5 containing: zinc, copper, chromium, selenium,

EXHIBIT A - 5



and manganese). After a total of 18 months, his weight had increased from 112 to 147 pounds, which was remarkable as cardiac cachexia is generally considered to be irreversible. In addition, the gangrenous areas on his toes had sloughed and been replaced almost entirely by healthy tissue. Intravenous therapy was continued and eventually reduced to every other week. The patient lived for eight years and died at age 87 from multiple organ failure.Of the handful of other patients with angina or heart failure who received IV or IM injections of magnesium (with or without B vitamins), all showed significant improvement. The results with angina are consistent with those reported by others using parenteral magnesium therapy.40-42

Upper Respiratory Tract Infections

Case #6: A 40-year-old male presented with a cold and a one-day history of fatigue, nasal congestion, and rhinorrhea. He was given an IV infusion of 18 mL vitamin C, 3 mL magnesium,1.8 mL calcium, and 1 mL each of B12, B6, B5, and B complex. By the end of the 10-minute treatment he was symptom free. The cold symptoms did return the next day but were only 10 percent as severe as before the injection.One-quarter to one-third of patients who received the Myers' for an acute respiratory infection experienced marked improvement, either immediately or by the next morning. Approximately half of patients given this treatment reported that it shortened the duration of their illness. Patients who benefited tended to have a similar response if treated for a subsequent infection, whereas non-responders tended to remain non-responders.

Case #7: A 32-year-old female had a long history of chronic sinusitis. Avoidance of allergenic foods and oral supplementation with vitamin C and other nutrients had provided only minimal benefit. She was given an IV infusion of 20 mL vitamin C, 4 mL magnesium, 2 mL calcium, and 1 mL each of B12, B6, B5, and B complex; this protocol was repeated the next day. At the time these injections were given she had been experiencing persistent sinus problems for a year. Her symptoms resolved rapidly after the injections and she remained relatively symptom free for more than six months. The same treatment given at a later date was also helpful, although the benefit was not as pronounced as the first time.One other patient with chronic sinusitis had a similar response to back-to-back injections, while a few others showed no improvement.

Seasonal Allergic Rhinitis

Case #8: A 39-year-old man had a long history of seasonal allergic rhinitis, occurring each spring and lasting about a month. Symptoms included nasal congestion, itchy eyes, and fatigue.During a symptomatic period, an IV infusion of 12 mL vitamin C, 3 mL magnesium, and 1 mL each of B12, B6, B5, and B complex provided rapid relief. This treatment was repeated as needed during the hay fever season (once weekly or less) and successfully controlled his symptoms. In subsequent years he began the IVs shortly before, and repeated them periodically during, the hay fever season; this approach prevented the development of symptoms.

Narcotic Withdrawal

Case #9: A 35-year-old man addicted to morphine came to the office in the early stages of withdrawal, with diaphoresis and extreme agitation. He was given an IV infusion of 18 mL vitamin C, 5 mL magnesium, 2.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. In his agitated state he was unable to sit still on the exam table, so we walked up and down the hall with a butterfly needle in his arm. Halfway through the injection, he was able to sit still, and by the end of the injection his withdrawal symptoms were alleviated. The symptoms returned 36 hours later; he therefore came for another treatment, which again relieved the symptoms within minutes. He returned the next day, still symptom free, for a third injection, which carried him uneventfully through the remainder of the withdrawal period.

Chronic Urticaria

Case #10: A 71-year-old woman had chronic urticaria with hives present somewhere on her body nearly every day for 10 years. An allergy-elimination diet and oral supplementation with vitamin C and other nutrients provided little or no relief. She was given an IV infusion of 12mL vitamin C, 3 mL magnesium, 1.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. The same treatment was repeated the following day. After these injections the hives resolved rapidly and did not recur for more than a year. When the lesions did recur, the IV treatment was repeated but was ineffective.

Athletic Performance

Case #11: An 18-year-old, 235-pound high school wrestler developed a flu-like illness four days before a major tournament. Two days before the three-day tournament, when it appeared he might have to miss the event, he was given an IV injection of 18 mL vitamin C, 5 mL magnesium, 2.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. The next morning he remarked that he had more energy than he had ever had in his life. This energy boost persisted for the duration of the tournament, at which he took second place, a better performance than at any other time in his career.In this era in which many athletes are using performance-enhancing drugs, it is not the author's intention to encourage athletes to seek another "boost" with IV nutrients. However, this case does demonstrate that nutritional factors can play an important role in athletic performance.

Hyperthyroidism

Two patients with hyperthyroidism were treated with the Myers' once or twice weekly for several weeks. In one case, the treatment controlled the symptoms of hyperthyroidism although there was no reduction in thyroid-hormone levels. The injections were discontinued after medical therapy had restored the hormone levels to normal. In the other case, symptoms improved markedly after the first injection and thyroid-function tests, measured two weeks later, returned to normal.The potential value of IV nutrient therapy for patients with hyperthyroidism is supported by several studies. Serum and erythrocyte magnesium levels have been found to be low in patients with Graves' disease.43,44 In addition, daily IM injections of magnesium chloride (20 mL of a 14-percent solution) for 3-7 weeks reduced the size of the thyroid gland and improved the clinical condition of three patients with hyperthyroidism.44 Intravenous vitamin B6 (50 mg per day) was reported to relieve muscle weakness in three patients with hyperthyroidism,45 and animal studies indicate vitamin B12 can counteract some of the adverse effects of experimentally induced hyperthyroidism.

FDA DISCLAIMER:THESE STATEMENTS HAVE NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION.THESE PRODUCTS ARE NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.

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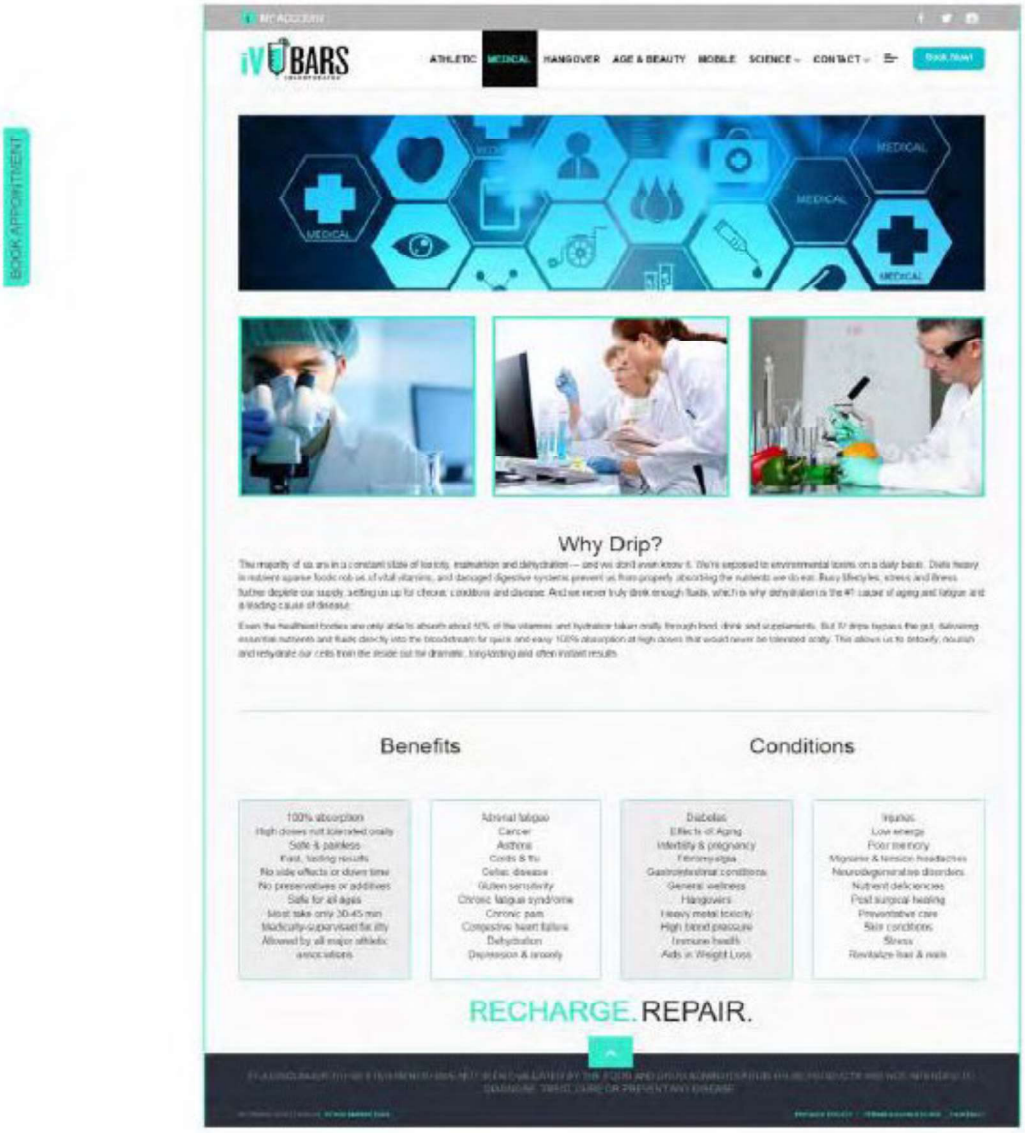


EXHIBIT A - 7

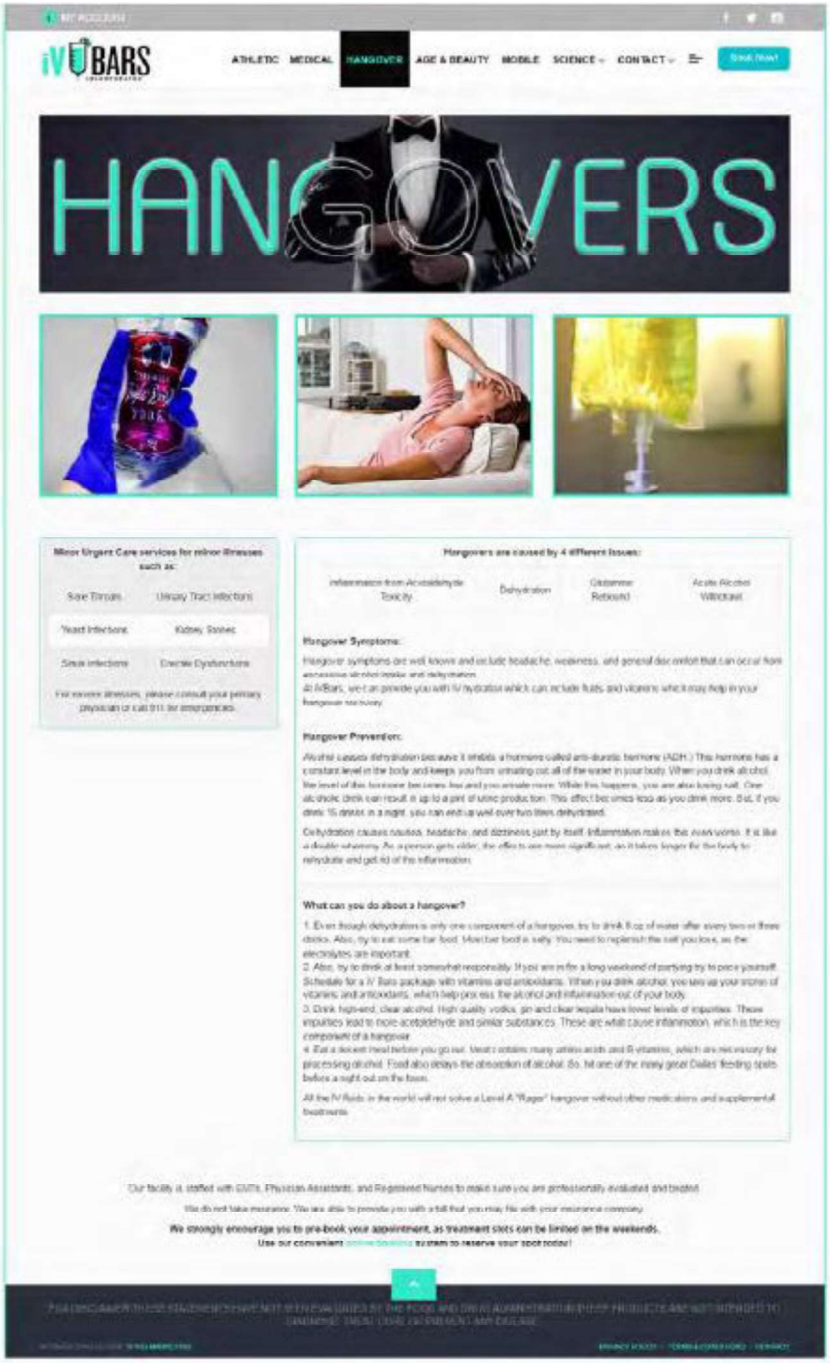

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Urinary Tract Infections
Yeast Infections
Kidney Stones
Sinus Infections
Exercise Dysfunctions
For severe illnesses, please consult your primary physician or call 911 for emergencies.
Hangovers are caused by 4 different issues:
Inflammation from Acetaldehyde Toxicity
Dehydration
Glutamine Rebound
Acute Alcohol Withdrawal
Hangover Symptoms:
Hangover symptoms are well known and include headache, weakness, and general discomfort that can occur from excessive alcohol intake and dehydration.
At iVBars, we can provide you with IV hydration which can include fluids and vitamins which may help in your hangover recovery.
Hangover Prevention:
Alcohol causes dehydration because it inhibits a hormone called anti-diuretic hormone (ADH.) This hormone has a constant level in the body and keeps you from urinating out all of the water in your body. When you drink alcohol, the level of this hormone becomes low and you urinate more. While this happens, you are also losing salt. One alcoholic drink can result in up to a pint of urine production. This effect becomes less as you drink more. But, if you drink 15 drinks in a night, you can end up well over two liters dehydrated.
Dehydration causes nausea, headache, and dizziness just by itself. Inflammation makes the even worse. It is like a double whammy. As a person gets older, the effect is even more significant, as it takes longer for the body to rehydrate and get rid of the inflammation.
What can you do about a hangover?
1. Even though dehydration is only one component of a hangover, try to drink 8 oz of water after every two or three drinks. Also, try to eat some bar food. Most bar food is salty. You need to replenish the salt you lose, as the electrolytes are important.
2. Also, try to drink at least somewhat responsibly. If you are in for a long weekend of partying try to pace yourself. Schedule for a IV Bars package with vitamins and antioxidants. When you drink alcohol, you use up your stores of vitamins and antioxidants, which help process the alcohol and inflammation out of your body.
3. Drink high-end, clear alcohol. High quality vodka, gin and clear tequila have lower levels of impurities. These impurities lead to more acetaldehyde and similar substances. These are what cause inflammation, which is the key component of a hangover.
4. Eat a decent meal before you go out. Meat contains many amino acids and B-vitamins, which are necessary for processing alcohol. Food also delays the absorption of alcohol. So, hit one of the many great Dallas feeding spots before a night out on the town.
All the IV fluids in the world will not solve a Level A "Rager" hangover without other medications and supplemental treatments.
Our facility is staffed with RN's, Physician Assistants, and Registered Nurses to make sure you are professionally evaluated and treated.
We do not take insurance. We are able to provide you with a bill that you may file with your insurance company.
We strongly encourage you to pre-book your appointment, as treatment slots can be limited on the weekends.
Use our convenient online booking system to reserve your spot today!

EXHIBIT A - 8

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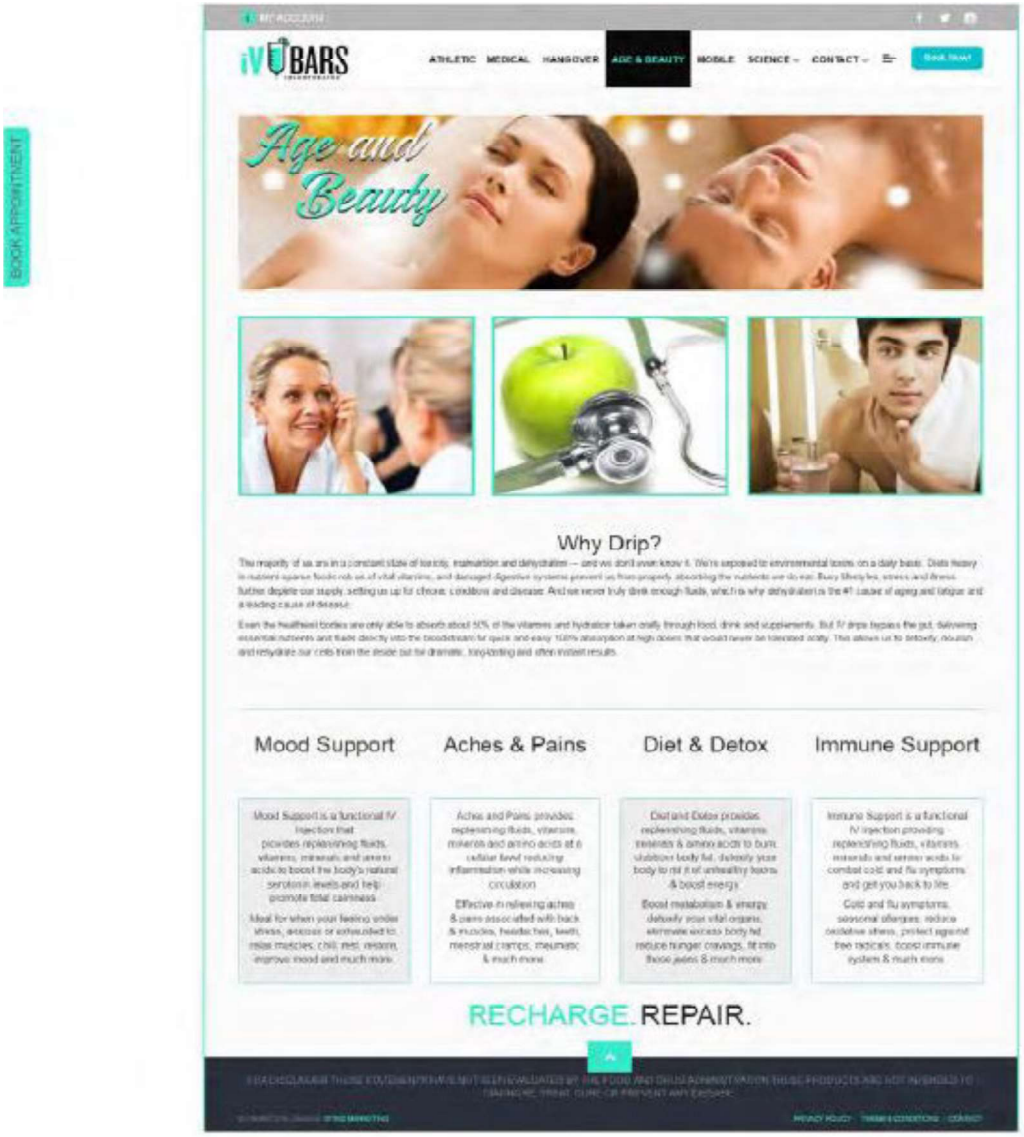


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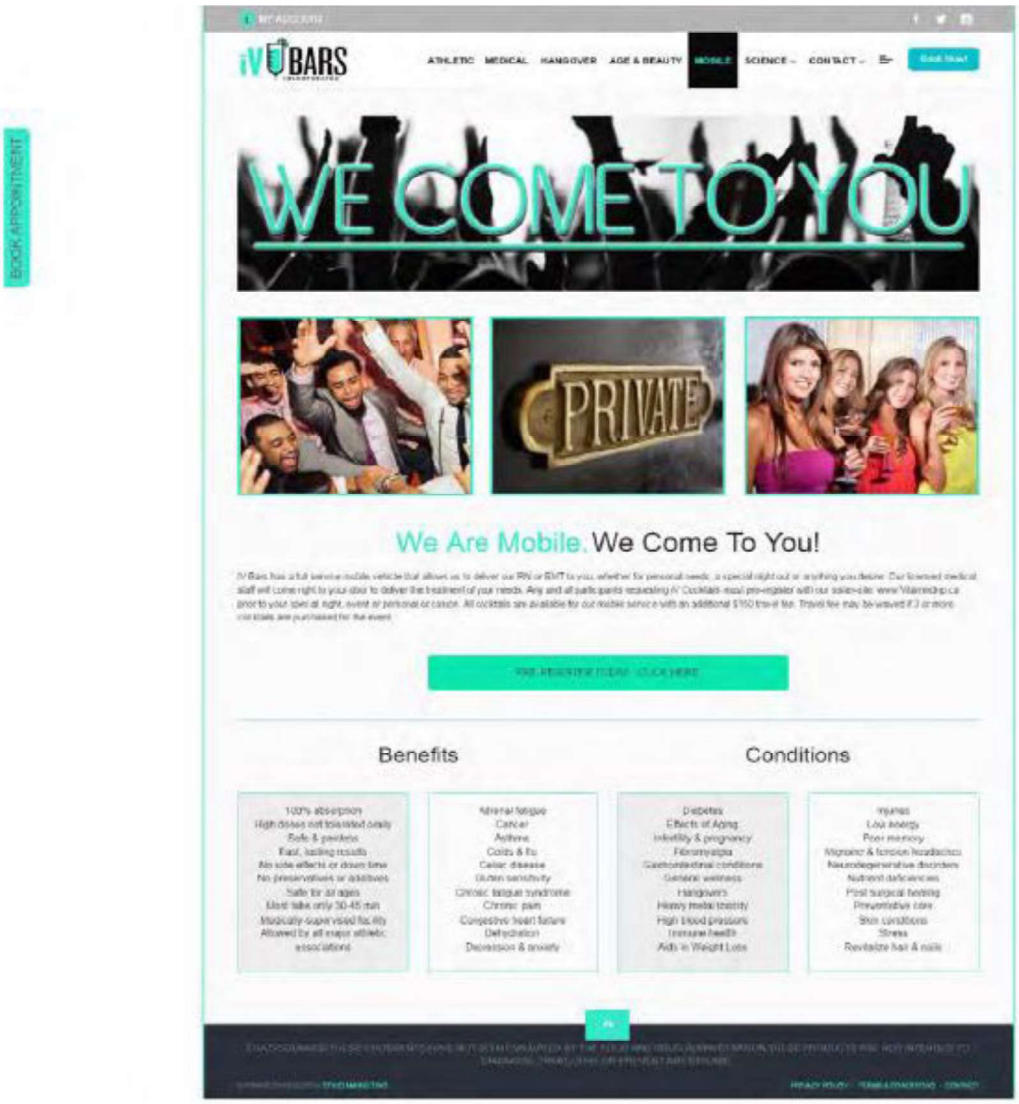

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EXHIBIT A - 10

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EXHIBIT A - 11

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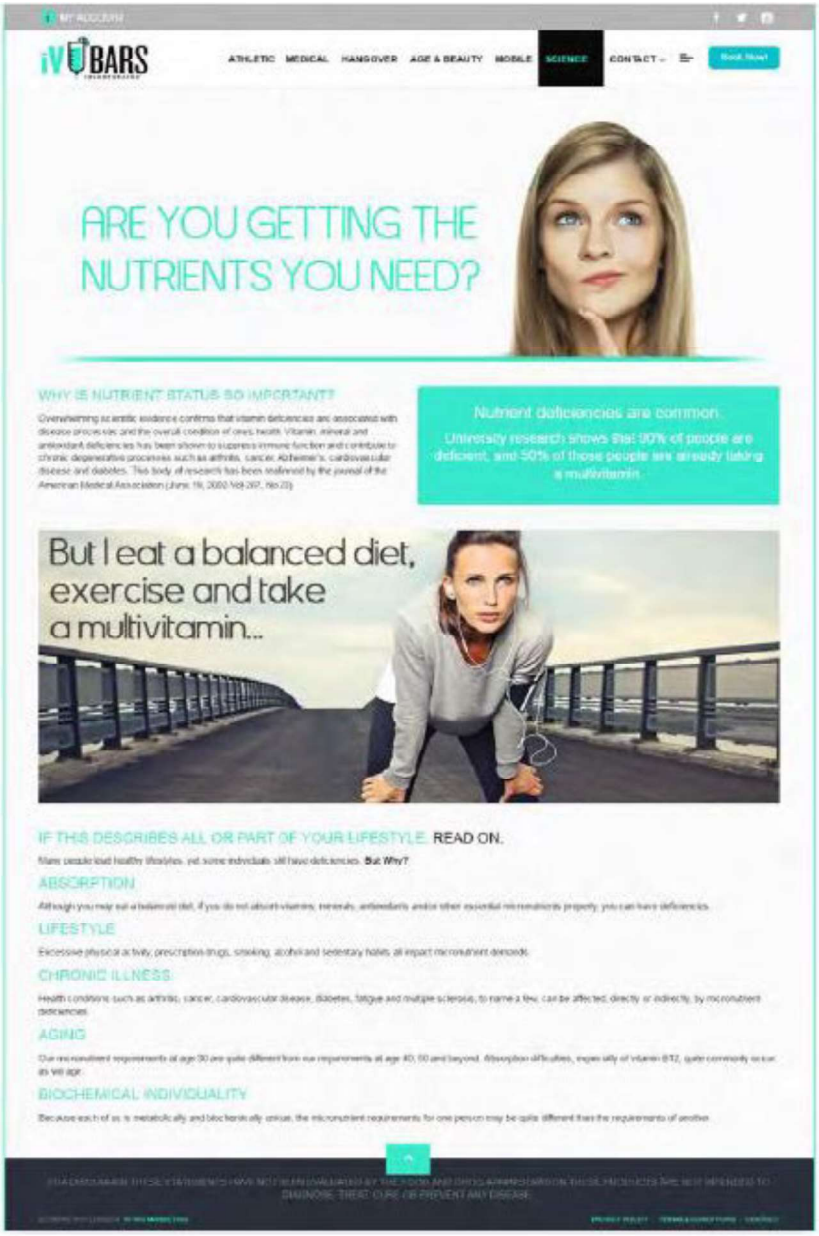


EXHIBIT A - 12

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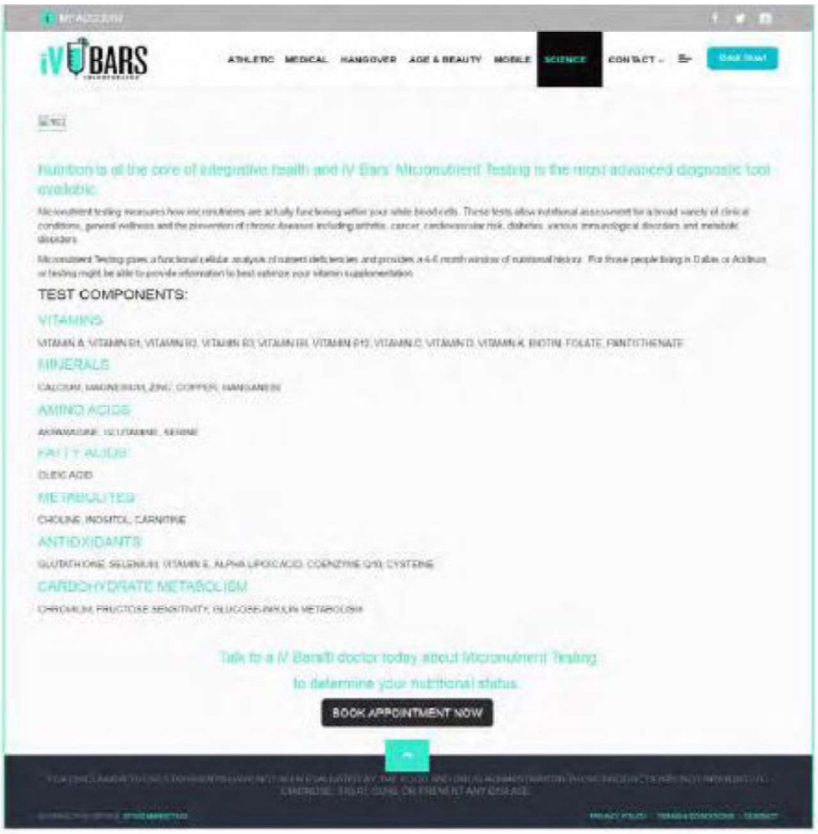


EXHIBIT A - 13


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SCIENTIFIC EVIDENCE
FACTS
Intravenous Nutrient Therapy " The Myers' Cocktail"
By Alan R. Gaby, M.D.
Introduction
Theoretical Basis For IV Therapy
The Modified Myers Cocktail
Nutrients in the Myers Cocktail

EXHIBIT A - 14

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Asthma

Case #1: A five-year-old boy presented with a two-year history of asthma. During the previous 12 months he had suffered 20 asthma attacks severe enough to require a visit to the hospital emergency department. His sensitivity appeared to be exacerbated by several foods, and skin tests had been positive for 23 of 25 inhalants tested. His initial treatment consisted of identification and avoidance of allergenic foods, as well as daily oral supplementation with pyridoxine (50 mg), vitamin C (1,000 mg), calcium (200 mg), magnesium (100 mg), and pantothenic acid (100 mg), in two divided doses with meals. On this regimen, he experienced marked improvement, and had no asthma attacks requiring medical care until nearly 11 months after his initial visit. At that time, this child, now six years old, presented for an emergency visit with mild but persistent wheezing and difficulty breathing. He was given a slow IV infusion containing 5 mL vitamin C, 1.4 mL magnesium, and 0.5 mL each of calcium, B12, B6, B5, and B complex. The symptoms resolved within two minutes and did not recur. Over the ensuing eight years and three months, he received a total of 63 IV treatments for acute exacerbations of asthma. In most instances, a single injection resulted in marked improvement or complete relief within two minutes, and the acute symptoms did not recur. Occasionally, a second injection was needed after a period of 12 hours to two days, and during one episode three treatments were required over a four-day period. As the patient grew, the nutrient doses were gradually increased; by age 10 he was receiving 10 mL vitamin C, 3 mL magnesium, 1.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. 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In two placebo-controlled studies of asthmatic children, IV magnesium sulfate significantly improved pulmonary function and significantly reduced hospitalization rates during acute exacerbations that had failed to respond to conventional therapy.15, 16 A dose of 40 mg per kg body weight (maximum dose, 2 g) given over a 20-minute period appeared to be more effective than 25 mg per kg. Higher doses of IV magnesium sulfate (10-20 g over 1 hour, followed by 0.4 g per hour for 24 hours) have been used successfully in the treatment of life-threatening status asthmaticus.4 In a few studies, IV magnesium failed to improve pulmonary function or to reduce the need for hospitalization. 17,18 However, a meta-analysis of seven randomized trials concluded that IV magnesium reduced the need for hospitalization by 90 percent among patients with severe asthma, although the treatment was not beneficial for patients with moderate asthma.19Calcium is the only other component of the Myers' that has been studied as a treatment for acute exacerbations of asthma. In an early report, a series of IV infusions of calcium chloride relieved asthma symptoms in three consecutive patients, with relief occurring almost immediately after some injections.20 Intravenous and IM administration of an unspecified calcium salt temporarily inhibited severe anaphylactic reactions in two other patients.21 4 mL 1.3 mL 1 mL 1 mL 1 mL 1 mL 1 mL 6.25 mL21Moreover, other than magnesium and calcium may have contributed to the beneficial effect observed in asthma patients. Oral vitamin C22 and B6[23,24 and IM vitamin B12[25 have each been used with some success against asthma, although none of these nutrients has been tested as a treatment for acute attacks. Intramuscular administration of niacinamide has been shown to reduce the severity of experimentally induced asthma in guinea pigs. 26 and pantothenic acid appears to have an anti-allergy effect in humans.27On one occasion, a patient's asthma attack was treated with IV magnesium alone. Although the symptoms resolved rapidly, they returned within 10-15 minutes. The remaining constituents of the Myers' (without additional magnesium) were then administered, and the symptoms disappeared almost immediately and did not return. Thus, it seems the Myers' is more effective than magnesium alone in the treatment of asthma attacks.

Migraine

Case #2: A 44-year-old female suffered from frequent migraines, which appeared to be triggered in many instances by exposure to environmental chemicals or occasionally by ingestion of foods to which she was allergic. Allergy desensitization therapy had provided little benefit. Over a six-year period, the patient was given IV therapy on approximately 70 occasions for migraines. Nearly all of these injections resulted in considerable improvement or complete relief within several minutes, although a few treatments were ineffective. Through trial and error, it was determined her most effective regimen was 10 mL vitamin C, 5 mL magnesium, 4 mL calcium, 2 mL B6, and 1 mL each of B12, B5, and B complex. The 4-mL dose of calcium was found to provide better relief than lower calcium doses.Over the years, a half dozen other patients have presented one or more times with an acute migraine. In almost every instance, the Myers' produced a gratifying response within a few minutes.The beneficial effect of IV magnesium as a treatment for migraine has been demonstrated in recent clinical trials. In one study, 40 patients with an acute migraine received 1 g magnesium sulfate over a five-minute period.28 Fifteen minutes after the infusion, 35 patients (87.5%) reported at least a 50 percent reduction of pain, and nine patients (22.5%) experienced complete relief. In 21 of 35 patients who benefited, the improvement persisted for 24 hours or more. Patients with an initially low serum ionized magnesium concentration (less than 0.43 mMol/L) were significantly more likely to experience long-lasting improvement than were patients with initially higher serum ionized magnesium levels. In a single-blind trial that included 20 patients with an acute migraine, IV administration of magnesium sulfate (1 g over 15 minutes) completely and permanently relieved pain in 13 of 17 patients (80.0%), whereas no patients in the placebo group became pain free (p < 0.001 for difference between groups).29 In addition, magnesium treatment resulted in rapid disappearance of nausea, vomiting, and photophobia in all 14 patients who had experienced those symptoms.A single 1-g dose of magnesium sulfate has also been reported to abort an episode of cluster headaches in seven of 22 patients (32%), and a series of three to five injections provided sustained relief in an additional two patients (9%).30It is not clear whether the Myers' is more effective than magnesium alone for migraines, however one patient did express a noticeable benefit from IV calcium.

Fatigue

Many patients with unexplained fatigue have responded to the Myers', with results lasting only a few days or as long as several months. Patients who benefited often returned at their own discretion for another treatment when the effect had worn off. One patient with fatigue associated with chronic hepatitis B experienced marked and progressive improvement in energy levels with weekly or twice-monthly injections.Approximately 10 patients with chronic fatigue syndrome (CFS) have received a minimum of four treatments (usually once weekly for four weeks), with more than half showing clear improvement. One patient experienced dramatic benefit after the first injection, whereas in other cases three or four injections were given before improvement was evident. A few patients became progressively healthier with continued injections and were eventually able to stop treatment. Several others did not experience these dramatic, but periodic injections helped them function better.There is some research support for the use of parenteral magnesium in patients with fatigue. One study found magnesium deficiency demonstrated by an IV magnesium-load test, in 47 percent of 53 patients with unexplained chronic fatigue, including 50 with CFS.31In a six-year study, the mean erythrocyte magnesium concentration was significantly lower in 20 patients with CFS than in healthy controls.32In one arm of the second study, 32 patients with CFS were randomly assigned to receive, in double-blind fashion, 1 g magnesium sulfate IM or placebo once weekly for six weeks. Twelve (80%) of 15 patients given magnesium reported improvement (e.g., more energy, a better emotional state, and less pain) and fatigue was eliminated completely in seven cases. In contrast, only three (18%) of 17 placebo-treated patients improved (p<0.001 for difference between groups), and in no case was the fatigue completely eliminated. According to one report, at least half of CFS patients with magnesium deficiency benefited from oral magnesium supplementation; however, some patients needed IM injections.33 Other investigators, using the IV magnesium-load test, found no evidence of magnesium deficiency in patients with CFS, and observed no improvement in symptoms following a single infusion of magnesium sulfate (6 g in one hour).34Vitamin B12, given IM, has been reported to be helpful for patients with unexplained fatigue,35 as well as those with CFS.36 While the results obtained with the Myers' may be attributable in part to vitamin B12, many patients who responded to IV therapy obtained little or no benefit from IM vitamin B12 alone.

Fibromyalgia

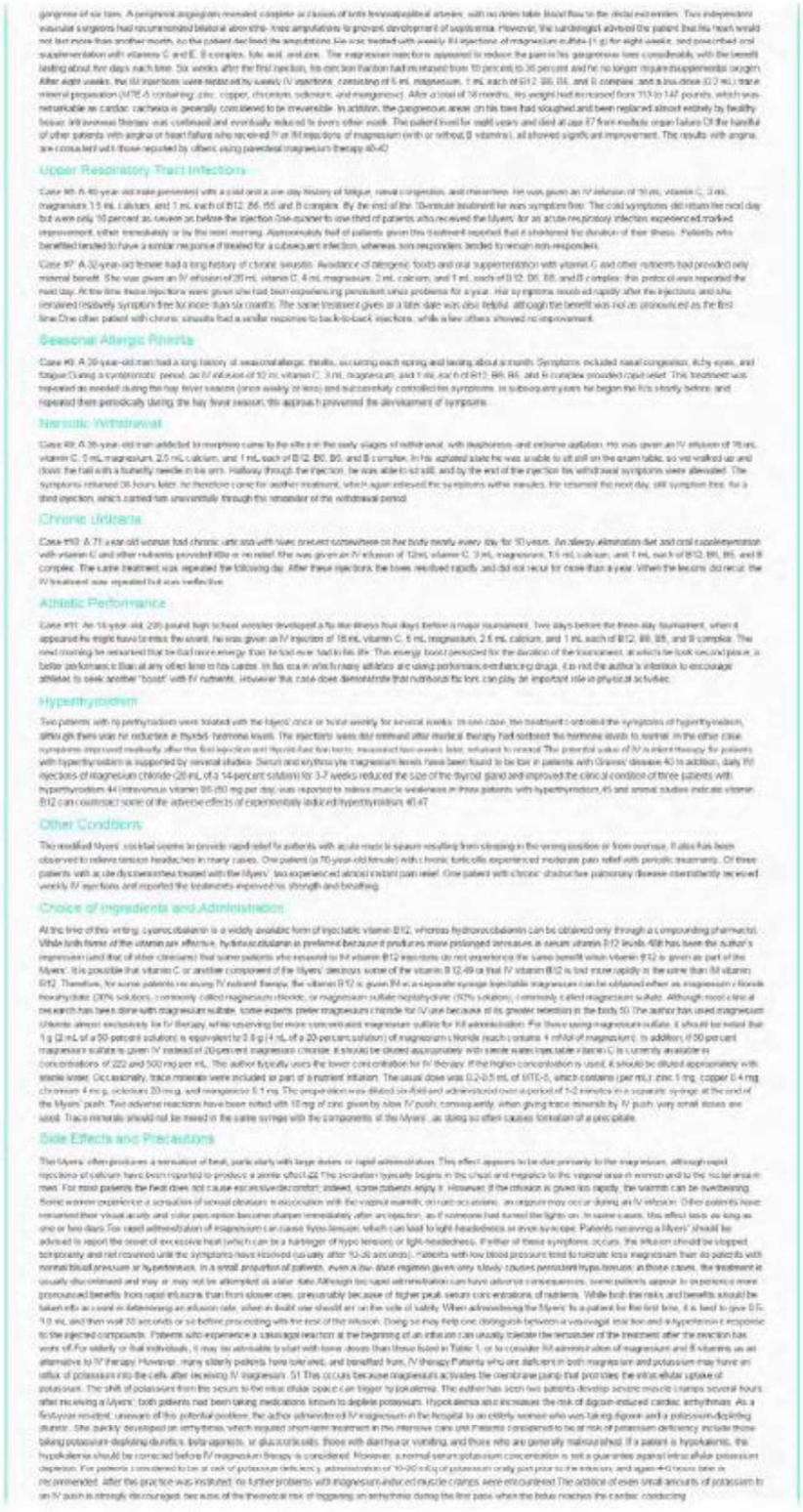
Case #3: A 46-year-old woman presented with a six-year history of daily constant myalgias and arthralgias, with pain in the neck, back, and hip, and tightness in the left arm. Six months previously she was found to have an elevated sedimentation rate (50 mm/hr). She was diagnosed by a rheumatologist as possibly having polymyalgia rheumatic, although the diagnosis of fibromyalgia was also considered. Her history was also significant for migraines about eight times per year and chronic nasal congestion. Physical examination revealed extremely stiff muscles, with decreased range of motion in many areas of her body.The patient was given a therapeutic trial consisting of 6 mL vitamin C, 4 mL magnesium, 2.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. At the end of the injection, she got off the table and, with a look of amazement, announced her muscle aches and joint pains were gone for the first time in six years. This treatment was repeated after a week (at which time her symptoms had not returned), followed by every other week for several months, then once monthly for three years. Her initial regimen also included the identification and avoidance of allergenic foods and treatment with low-dose desiccated thyroid (eventually stabilized at 60 mg per day). She also owned that eating refined sugar caused myalgias and arthralgias, and that thyroid hormone improved her energy level, mood, and overall well-being. During the three years of monthly maintenance injections she reported symptoms would begin to recur if she went much longer than a month between treatments. However, they were never as severe as they were before she began receiving IV therapy.The author has given the Myers' to approximately 20 patients with fibromyalgia; half have experienced significant improvement, in a few cases after the first injection, but more often after three or four treatments.The beneficial effect of parenteral nutrient therapy has been confirmed by one study published only as an abstract. Eighty-six patients with chronic, muscular complaints, including myofascial pain, relapsing soft tissue injuries, and fibromyalgia, received IM or IV injections of magnesium, either alone or in combination with calcium, B vitamins, and vitamin C.37 Improvement occurred in 74 percent of the patients, of those, 64 percent required four or fewer applications for optimal results. A minority of patients required long-term oral or parenteral magnesium to maintain improvement. The positive response to parenteral magnesium is consistent with the observation that nearly half of patients with fibromyalgia have intracellular magnesium deficiency, despite having normal serum levels of the mineral.38

Depression

Case #4: A 46-year-old man presented with a history of depression and anxiety since childhood. He had been in psychoanalysis for the past eight years. A therapeutic trial with IV nutrients was considered because the patient reported that consumption of alcohol (known to deplete magnesium) aggravated his symptoms, and because he was taking a magnesium-depleting diuretic for hypertension. He was initially given 1 mL each of magnesium, B12, B6, B5, and B complex, which resulted in a 70-80 percent reduction in his symptoms for one week. A second injection produced a similar response that lasted two weeks. Through trial and error it was determined the most effective treatment was 5 mL magnesium, 3 mL B complex, and 1 mL each of B12, B6, and B5. The addition of calcium to the injection appeared to block some of the benefit. Both oral and IM administration of the same nutrients were tried but found to be ineffective. Weekly injections provided almost complete relief from symptoms and allowed him to discontinue psychotherapy. The patient noted that rapidly administered injections provided longer-lasting relief than did slower injections. The infusion rate was therefore carefully and progressively increased, without causing any adverse side effects or changes in blood pressure or heart rate. The patient reported that when the treatment was given over a one-minute period, the effect would last approximately two weeks, whereas a slower injection (such as five minutes) would last only a week. Approximately four years after initial treatment, he was able to reduce the frequency of injections to once monthly or less. Many other patients with depression and/or anxiety have shown a positive response to the Myers' cocktail, this treatment should not be considered a first-line therapy for major depression.It seems to be helpful only for certain subsets of depressed individuals, such as those who also suffer from fibromyalgia, migraines, excessive stress, or alcohol-induced exacerbations. Shealy et al have observed an antidepressant effect of IV magnesium in some patients with chronic pain.39

Cardiovascular Disease

Case #5: A 79-year-old man was seen at home in end-stage heart failure, after having suffered four myocardial infarctions. During the previous 12 months, spent mostly in the hospital, he had become progressively worse; his ejection fraction had fallen to 15 percent and his body weight had declined from 171 pounds to a severely cachectic 113 pounds. He was confined to bed and required supplemental oxygen much of the time. He also had severe peripheral occlusive arterial disease, which had resulted in the development of



gangrene of six toes. A peripheral angiogram revealed complete occlusion of both femoropoplitteal arteries, with no distal blood flow to the distal extremities. Two independent vascular surgeons had recommended bilateral above-the-knee amputations to prevent development of septicemia. However, the cardiologist advised the patient that his heart would not last more than another month, so the patient declined the amputations. He was treated with weekly IM injections of magnesium sulfate (1 g) for eight weeks, and prescribed oral supplementation with vitamins C and E, B complex, folic acid, and zinc. The magnesium injections appeared to reduce the pain in his gangrenous toes considerably, with the benefit lasting about five days each time. Six weeks after the first injection, his ejection fraction had increased from 10 percent to 30 percent and he no longer required supplemental oxygen. After eight weeks, the IM injections were replaced by weekly IV injections, consisting of 5 mL magnesium, 1 mL each of B12, B6, B5, and B complex, and a 5-mL dose (0.2 mL) of trace mineral preparation (MTE-5 containing: zinc, copper, chromium, selenium, and manganese). After a total of 16 months, his weight had increased from 113 to 147 pounds, which was remarkable as cardiac cachexia is generally considered to be irreversible. In addition, the gangrenous areas on his toes had sloughed and been replaced almost entirely by healthy tissue. IM/IV magnesium therapy was continued and eventually reduced to every other week. The patient lived for eight years and died at age 87 from multiple organ failure. Of the handful of other patients with angina or heart failure who received IV or IM injections of magnesium (with or without B vitamins), all showed significant improvement. The results with angina are consistent with those reported by others using parenteral magnesium therapy.40-42

Upper Respiratory Tract Infections

Case #6: A 40-year-old male paramedic with a cold and a one-day history of fatigue, nasal congestion, and rhinorrhea. He was given an IV infusion of 10 mL vitamin C, 2 mL magnesium, 1.5 mL calcium, and 1 mL each of B12, B6, B5 and B complex. By the end of the 10-minute treatment he was symptom free. The cold symptoms did return the next day but were only 10 percent as severe as before the injection. One-quarter to one-third of patients who received the Myers' for an acute respiratory infection experienced marked improvement, either immediately or by the next morning. Approximately half of patients given this treatment reported that it shortened the duration of their illness. Patients who benefitted tended to have a similar response if treated for a subsequent infection, whereas non-responders tended to remain non-responders.

Case #7: A 32-year-old farmer had a long history of chronic sinusitis. Avoidance of allergenic foods and oral supplementation with vitamin C and other nutrients had provided only minimal benefit. She was given an IV infusion of 25 mL vitamin C, 4 mL magnesium, 2 mL calcium, and 1 mL each of B12, B6, B5, and B complex; this protocol was repeated the next day. At the time these injections were given she had been experiencing persistent sinus problems for a year. Her symptoms would abruptly alter the injections, and she remained relatively symptom free for more than six months. The same treatment given at a later date was also helpful, although the benefit was not as pronounced as the first time. One other patient with chronic sinusitis had a similar response to back-to-back injections, while a few others showed no improvement.

Seasonal Allergic Rhinitis

Case #8: A 39-year-old man had a long history of seasonal allergic rhinitis, occurring each spring and lasting about a month. Symptoms included nasal congestion, itchy eyes, and fatigue. During a symptomatic period, an IV infusion of 10 mL vitamin C, 3 mL magnesium, and 1 mL each of B12, B6, B5, and B complex provided rapid relief. This treatment was repeated as needed during the hay fever season (once weekly or less) and successfully controlled his symptoms. In subsequent years he began the IVs shortly before, and repeated them periodically during the hay fever season; this approach prevented the development of symptoms.

Narcotic Withdrawal

Case #9: A 36-year-old man addicted to morphine came to the office in the early stages of withdrawal, with diaphoresis and extreme agitation. He was given an IV infusion of 15 mL vitamin C, 5 mL magnesium, 2.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. In his agitated state he was unable to sit still on the exam table, so we walked up and down the hall with a butterfly needle in his arm. Halfway through the injection, he was able to sit still, and by the end of the injection his withdrawal symptoms were alleviated. The symptoms returned 36 hours later; he therefore came for another treatment, which again relieved the symptoms within minutes. He returned the next day, still symptom free, for a third injection, which carried him uneventfully through the remainder of the withdrawal period.

Chronic Urticaria

Case #10: A 71-year-old woman had chronic urticaria with hives present somewhere on her body nearly every day for 10 years. An allergy elimination diet and oral supplementation with vitamin C and other nutrients provided little or no relief. She was given an IV infusion of 12mL vitamin C, 3 mL magnesium, 1.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. The same treatment was repeated the following day. After these injections, the hives resolved rapidly and did not recur for more than a year. When the lesions did recur, the IV treatment was repeated but was ineffective.

Athletic Performance

Case #11: An 18-year-old, 230-pound high school wrestler developed a flu-like illness four days before a major tournament. Two days before the three-day tournament, when it appeared he might have to miss the event, he was given an IV injection of 15 mL vitamin C, 5 mL magnesium, 2.5 mL calcium, and 1 mL each of B12, B6, B5, and B complex. The next morning he remarked that he had more energy than he had ever had in his life. This energy boost persisted for the duration of the tournament, at which he took second place, a better performance than at any other time in his career. In this era in which many athletes are using performance-enhancing drugs, it is not the author's intention to encourage athletes to seek another "boost" with IV nutrients. However this case does demonstrate that nutritional factors can play an important role in physical activities.

Hyperthyroidism

Two patients with hyperthyroidism were treated with the Myers' cocktail weekly for several weeks. In one case, the treatment controlled the symptoms of hyperthyroidism, although there was no reduction in thyroid hormone levels. The injections were discontinued after medical therapy had restored the hormone levels to normal. In the other case, symptoms improved markedly after the first injection and thyroid function tests, measured two weeks later, returned to normal. The potential value of IV nutrient therapy for patients with hyperthyroidism is supported by several studies. Serum and erythrocyte magnesium levels have been found to be low in patients with Graves' disease.43 In addition, daily IV injections of magnesium chloride (26 mL of a 14-percent solution) for 3-7 weeks reduced the size of the thyroid gland and improved the clinical condition of three patients with hyperthyroidism.44 Intravenous vitamin B6 (50 mg per day) was reported to relieve muscle weakness in three patients with hyperthyroidism,45 and animal studies indicate vitamin B12 can counteract some of the adverse effects of experimentally induced hyperthyroidism.46,47

Other Conditions

The modified Myers' cocktail seems to provide rapid relief for patients with acute muscle spasm resulting from sleeping in the wrong position or from overuse. It also has been observed to relieve tension headaches in many cases. One patient (a 70-year-old female) with chronic tonic cells experienced moderate pain relief with periodic treatments. Of three patients with acute dysmenorrhea treated with the Myers' two experienced almost instant pain relief. One patient with chronic obstructive pulmonary disease intermittently received weekly IV injections and reported the treatments improved his strength and breathing.

Choice of Ingredients and Administration

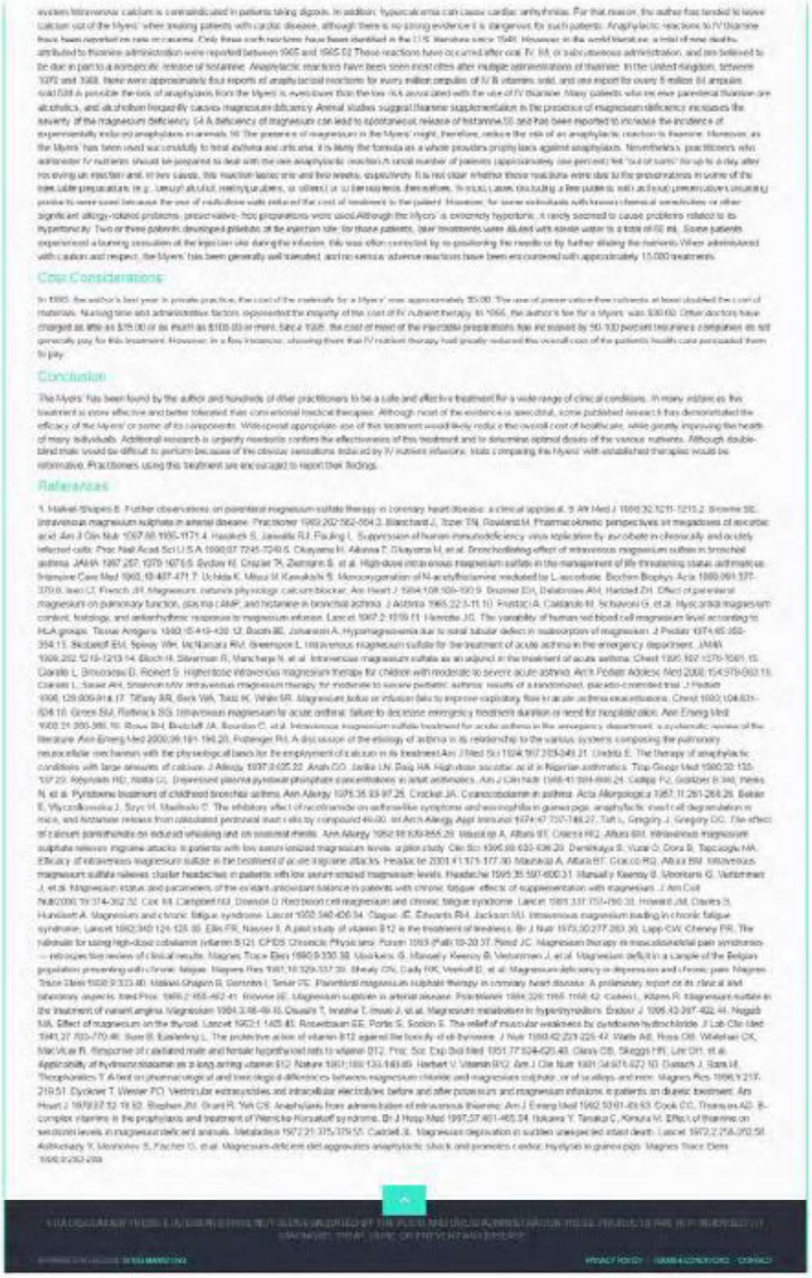
At the time of this writing, cyanocobalamin is a widely available form of injectable vitamin B12, whereas hydroxocobalamin can be obtained only through a compounding pharmacist. While both forms of the vitamin are effective, hydroxocobalamin is preferred because it produces more prolonged increases in serum vitamin B12 levels. We has been the author's impression (and that of other clinicians) that some patients who respond to IM vitamin B12 injections do not experience the same benefit when vitamin B12 is given as part of the Myers'. It is possible that vitamin C or another component of the Myers' cocktail, some of the vitamin B12 is lost more rapidly in the urine than IM vitamin B12. Therefore, for some patients receiving IV nutrient therapy, the vitamin B12 is given IM in a separate syringe. Injectable magnesium can be obtained either as magnesium chloride hexahydrate (30% solution, commonly called magnesium chloride, or magnesium sulfate heptahydrate (50% solution), commonly called magnesium sulfate. Although most clinical research has been done with magnesium sulfate, some experts prefer magnesium chloride for IV use because of its greater retention in the body.50 The author has used magnesium chloride almost exclusively for IV therapy, while reserving the more concentrated magnesium sulfate for IM administration. For those using magnesium sulfate, it should be noted that 1 g (2 mL of a 50-percent solution) is equivalent to 0.8 g (4 mL of a 20-percent solution) of magnesium chloride (each contains 4 mMol of magnesium). In addition, if 50 percent magnesium sulfate is given IV instead of 20-percent magnesium chloride, it should be diluted appropriately with sterile water. Injectable vitamin C is currently available in concentrations of 222 and 500 mg per mL. The author typically uses the lower concentration for IV therapy. If the higher concentration is used, it should be diluted appropriately with sterile water. Occasionally, trace minerals were included as part of a nutrient infusion. The usual dose was 0.2-0.5 mL of MTE-5, which contains (per mL): zinc 1 mg, copper 0.4 mg, chromium 4 mcg, selenium 20 mcg, and manganese 0.1 mg. The preparation was diluted six-fold and administered over a period of 1-2 minutes in a separate syringe at the end of the Myers' push. Two adverse reactions have been noted with 10 mg of zinc given by slow IV push; consequently, when giving trace minerals by IV push, very small doses are used. Trace minerals should not be mixed in the same syringe with the components of the Myers', as doing so often causes formation of a precipitate.

Side Effects and Precautions

The Myers' often produces a sensation of heat, particularly with large doses or rapid administration. This effect appears to be due primarily to the magnesium, although rapid injections of calcium have been reported to produce a similar effect.51 The sensation typically begins in the chest and migrates to the vaginal area in women and to the rectal area in men. For most patients the heat does not cause excessive discomfort; indeed, some patients enjoy it. However, if the infusion is given too rapidly, the warmth can be overbearing. Some women experience a sensation of sexual pleasure. In association with the vaginal warmth, on rare occasions, an orgasm may occur during an IV infusion. Other patients have remarked their visual acuity and color perception became sharper immediately after an injection, as if someone had turned the lights on. In some cases, this effect lasts as long as one or two days. For rapid administration of magnesium can cause hypotension, which can lead to light-headedness or even syncope. Patients receiving a Myers' should be advised to report the onset of excessive heat (which can be a harbinger of hypotension) or light-headedness. If either of these symptoms occurs, the infusion should be stopped temporarily and not resumed until the symptoms have resolved (usually after 10-30 seconds). Patients with low blood pressure tend to tolerate less magnesium than do patients with normal blood pressure or hypertension. In a small proportion of patients, even a low dose regimen given very slowly causes persistent hypotension; in those cases, the treatment is usually discontinued and may or may not be attempted at a later date. Although too rapid administration can have adverse consequences, some patients appear to experience more pronounced benefits from rapid infusions than from slower ones, presumably because of higher peak serum concentrations of nutrients. While both the risks and benefits should be taken into account in determining an infusion rate, when in doubt one should err on the side of safety. When administering the Myers' to a patient for the first time, it is best to give 0.5-1.0 mL and then wait 30 seconds or so before proceeding with the rest of the infusion. Doing so may help one distinguish between a vasovagal reaction and a hypertensive response to the injected compounds. Patients who experience a vasovagal reaction at the beginning of an infusion can usually tolerate the remainder of the treatment after the reaction has worn off. For elderly or frail individuals, it may be advisable to start with some doses than those listed in Table 1, or to consider IM administration of magnesium and B vitamins as an alternative to IV therapy. However, many elderly patients have tolerated, and benefited from, IV therapy.Patients who are deficient in both magnesium and potassium may have an influx of potassium into the cells after receiving IV magnesium.51 This occurs because magnesium activates the membrane pump that promotes the intracellular uptake of potassium. The shift of potassium from the serum to the intracellular space can trigger hypokalemia. The author has seen two patients develop severe muscle cramps several hours after receiving a Myers'; both patients had been taking medications known to deplete potassium. Hypokalemia also increases the risk of digoxin-induced cardiac arrhythmias. As a first-year resident, unaware of this potential problem, the author administered IV magnesium in the hospital to an elderly woman who was taking digoxin and a potassium-depleting diuretic. She quickly developed an arrhythmia, which required short-term treatment in the intensive care unit.Patients considered to be at risk of potassium deficiency include those taking potassium-depleting diuretics, beta-agonists, or glucocorticoids; those with diarrhea or vomiting; and those who are generally malnourished. If a patient is hypokalemic, the hypokalemia should be corrected before IV magnesium therapy is considered. However, a normal serum potassium concentration is not a guarantee against intracellular potassium depletion. For patients considered to be at risk of potassium deficiency, administration of 10-20 mEq of potassium orally just prior to the infusion, and again 4-6 hours later, is recommended. After this practice was instituted, no further problems with magnesium-induced muscle cramps were encountered.The addition of even small amounts of potassium to an IV push is strongly discouraged, because of the theoretical risk of triggering an arrhythmia during the first pass, when the bolus reaches the cardiac conducting

EXHIBIT A - 16

Complaint



system Intravenous calcium is contraindicated in patients taking digoxin. In addition, hypercalcemia can cause cardiac arrhythmias. For that reason, the author has tended to leave calcium out of the Myers' when treating patients with cardiac disease, although there is no strong evidence it is dangerous for such patients. Anaphylactic reactions to IV thiamine have been reported on rare occasions. Only three such reactions have been identified in the U.S. literature since 1940. However, in the world literature, a total of nine deaths attributed to thiamine administration were reported between 1965 and 1985.[3] These reactions have occurred after oral, IV, IM, or subcutaneous administration, and are believed to be due in part to a nonspecific release of histamine. Anaphylactic reactions have been seen most often after multiple administrations of thiamine. In the United Kingdom, between 1970 and 1988, there were approximately four reports of anaphylactoid reactions for every million ampules of IV B vitamins sold, and one report for every 5 million IM ampules sold.[3] A possible theory of anaphylaxis from the Myers' is even lower than the low risk associated with the use of IV thiamine. Many patients who receive parenteral thiamine are alcoholics, and alcoholism frequently causes magnesium deficiency. Animal studies suggest thiamine supplementation in the presence of magnesium deficiency increases the severity of the magnesium deficiency.[4] A deficiency of magnesium can lead to spontaneous release of histamine,[5] and has been reported to increase the incidence of experimentally induced anaphylaxis in animals.[6] The presence of magnesium in the Myers' might, therefore, reduce the risk of an anaphylactic reaction to thiamine. Moreover, as the Myers' has been used successfully to treat asthma and other atopic allergies, it is likely the formula as a whole provides protection against anaphylaxis. Nevertheless, practitioners who administer IV nutrients should be prepared to deal with the rare anaphylactic reaction.A small number of patients (approximately one percent) felt "out of sorts" for up to a day after receiving an injection and, in two cases, this reaction lasted one and two weeks, respectively. It is not clear whether these reactions were due to the preservatives in some of the new, safer preparations (e.g., benzyl alcohol, methylparabens, or sulfites) or to the nutrients themselves. In most cases, including a few patients with asthma and pneumonitis, treating practitioners were convinced that the use of multivitamins was critical for the patient. However, for some individuals with known chemical sensitivities or other significant allergy-related problems, preservative- free preparations were used.Although the Myers' is extremely hypertonic, it rarely seemed to cause problems related to its hypertonicity. Two or three patients developed phlebitis at the injection site; for those patients, later treatments were diluted with sterile water to a total of 50 mL. Some patients experienced a burning sensation at the injection site during the infusion; this was often corrected by repositioning the needle or by further diluting the nutrients.When administered with caution and respect, the Myers' has been generally well tolerated, and no serious adverse reactions have been encountered with approximately 10,000 treatments.

Cost Considerations

In 1985, the author's last year in private practice, the cost of the materials for a Myers' was approximately $5.00. The use of preservative-free nutrients at least doubled the cost of materials. Nursing time and administrative factors represented the majority of the cost of IV nutrient therapy. In 1985, the author's fee for a Myers' was $30.00. Other doctors have charged as little as $15.00 or as much as $100.00 or more. Since 1985, the cost of most of the injectable preparations has increased by 50-100 percent.Insurance companies do not generally pay for this treatment. However, in a few instances, showing them that IV nutrient therapy had greatly reduced the overall cost of the patient's health care persuaded them to pay.

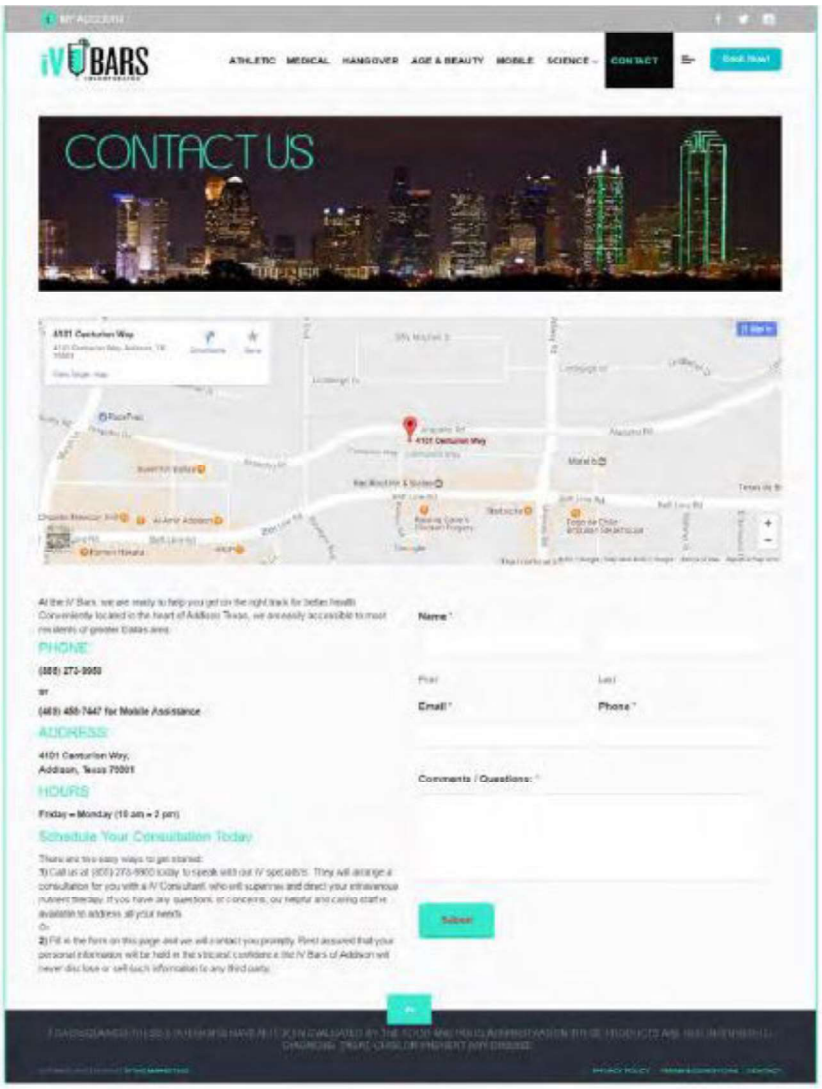
Conclusion

The Myers' has been found by the author and hundreds of other practitioners to be a safe and effective treatment for a wide range of clinical conditions. In many instances, this treatment is more effective and better tolerated than conventional medical therapies. Although most of the evidence is anecdotal, some published research has demonstrated the efficacy of the Myers' or some of its components. Widespread appropriate use of this treatment would likely reduce the overall cost of healthcare, while greatly improving the health of many individuals. Additional research is urgently needed to confirm the effectiveness of this treatment and to determine optimal doses of the various nutrients. Although double-blind trials would be difficult to perform because of the obvious sensations induced by IV nutrient infusions, trials comparing the Myers' with established therapies would be informative. Practitioners using this treatment are encouraged to report their findings.

References

1. Malkiel-Shapiro B. Further observations on parenteral magnesium sulfate therapy in coronary heart disease: a clinical appraisal. S Afr Med J. 1966;32:1211-1215.2. Browne SE. Intravenous magnesium sulphate in arterial disease. Practitioner. 1982;292:562-564.3. Blanchard J, Tozer TN, Rowland M. Pharmacokinetic perspectives on megadoses of ascorbic acid. Am J Clin Nutr. 1976;29:1195-1171.4. Hasokeh S, Jaiswalla RJ, Pauling L. Suppression of human immunodeficiency virus replication by ascorbate in chronically and acutely infected cells. Proc Natl Acad Sci U S A. 1990;87:7245-7249.5. Okayama H, Akenna T, Okayama M, et al. Bronchodilating effect of intravenous magnesium sulfate in bronchial asthma. JAMA. 1987;257:1079-1076.6. Bydon M, Crozier TA, Ziemann S, et al. High-dose intravenous magnesium sulfate in the management of life-threatening status asthmaticus. Intensive Care Med. 1995;19:407-471.7. Uchida K, Mitsui M, Kawakishi S. Monooxygenation of N-acetylhistamine mediated by L-ascorbate. Biochim Biophys Acta. 1989;991:377-379.8. Iseri LT, French JH. Magnesium: nature's physiologic calcium blocker. Am Heart J. 1984;108:188-193.9. Brunner EH, Delabrowa AM, Hatcher ZH. Effect of parenteral magnesium on pulmonary function, plasma cAMP, and histamine in bronchial asthma. J Asthma. 1985;22:3-15.10. Frustaci A, Caldarulo M, Schiavoni G, et al. Myocardial magnesium content, histology, and antiarrhythmic response to magnesium infusion. Lancet. 1987;2:1109-11. Hamelle JC. The variability of human red blood cell magnesium level according to HLA groups. Tissue Antigens. 1980;15:419-420.12. Booth BE, Johanson A. Hypomagnesemia due to renal tubular defect in malabsorption of magnesium. J Pediatr. 1974;85:350-354.13. Bedzhoff BM, Spivey WH, McNamara RM, Greenspon L. Intravenous magnesium sulfate for the treatment of acute asthma in the emergency department. JAMA. 1986;252:1210-1213.14. Bloch H, Silverman R, Mancherje N, et al. Intravenous magnesium sulfate as an adjunct in the treatment of acute asthma. Chest. 1995;107:1076-1081.15. Ciarallo L, Brousseau D, Rickert S. High-dose intravenous magnesium therapy for children with moderate to severe acute asthma. Arch Pediatr Adolesc Med. 2000;154:979-983.16. Cassier L, Sasser AH, Shannon MW. Intravenous magnesium therapy for moderate to severe pediatric asthma: results of a randomized, placebo-controlled trial. J Pediatr. 1996;129:809-814.17. Tiffany BR, Berk WA, Tasto W, White SR. Magnesium bolus or infusion fails to improve respiratory flow in acute asthma exacerbations. Chest. 1992;104:631-634.18. Green SM, Rothrock SG. Intravenous magnesium for acute asthma: failure to decrease emergency treatment duration or need for hospitalization. Ann Emerg Med. 1992;21:260-266.19. Rowe BH, Bretzlaff JA, Bourdon C, et al. Intravenous magnesium sulfate treatment for acute asthma in the emergency department: a systematic review of the literature. Ann Emerg Med. 2000;36:181-190.20. Pottenger RS. A quantitative approach to the etiology of asthma in its relationship to the various systems composing the pulmonary neurocellular mechanism with the physiological basis for the employment of calcium in its treatment.Ann J Med Sci. 1924;167:205-249.21. Diebitz E. The therapy of anaphylactic conditions with large amounts of calcium. J Allergy. 1937;8:405.22. Anah CO, Jaiike LN, Baig HA. High-dose ascorbic acid in Nigerian asthmatics. Trop Geogr Med. 1990;50:155-157.23. Reynolds RD, Natta CL. Depressed plasma pyridoxal phosphate concentrations in adult asthmatics. Am J Clin Nutr. 1985;41:884-888.24. Gallop PJ, Goldzieh B.(M), Hanes N, et al. Pyridoxine treatment of childhood bronchial asthma. Ann Allergy. 1975;35:93-97.25. Crocker JA. Cyanocobalamin in asthma. Acta Allergologica. 1957;11:261-264.26. Bakke E, Wyczolkowska J, Szyc H, Madlinski T. The inhibitory effect of nicotinamide on asthma-like symptoms and eosinophilia in guinea pigs: anaphylactic mast cell degeneration in mice, and histamine release from dissociated peritoneal mast cells by compound 48/80. Int Arch Allergy Appl Immunol. 1974;47:737-748.27. Toft L, Gregory J, Gregory DC. The effect of calcium pantothenate on induced wheezing and on sustained inertia. Ann Allergy. 1952;10:850-855.28. Masoli M, Attara BT, Cooke RG, Attara BM. Intravenous magnesium sulphate relieves migraine attacks in patients with low serum ionized magnesium levels: a pilot study. Clin Sci. 1995;89:633-636.29. Demirkaya S, Vural O, Dora B, Topcuoglu MA. Efficacy of intravenous magnesium sulfate in the treatment of acute migraine attacks. Headache. 2001;41:171-177.30. Mauskop A, Attara BT, Cooke RG, Attara BM. Intravenous magnesium sulfate relieves cluster headaches in patients with low serum ionized magnesium levels. Headache. 1995;35:597-600.31. Manuaily Keersy B, Vleminckx G, Vertommen J, et al. Magnesium status and parameters of the oxidant-antioxidant balance in patients with chronic fatigue: effects of supplementation with magnesium. J Am Coll Nutr.2000;19:374-382.32. Cox IM, Campbell MJ, Dowson D. Red blood cell magnesium and chronic fatigue syndrome. Lancet. 1991;337:757-760.33. Howard JM, Davies S, Hunnisett A. Magnesium and chronic fatigue syndrome. Lancet. 1992;340:406-34. Clague JE, Edwards RH, Jackson MJ. Intravenous magnesium loading in chronic fatigue syndrome. Lancet. 1992;340:124-125.35. Ellis FR, Nasser S. A pilot study of vitamin B12 in the treatment of tiredness. Br J Nutr. 1975;33:277-283.36. Lapp CW, Cheney PR. The rationale for using high-dose cobalamin (vitamin B12). CFIDS Chronic Physicians Forum. 1993 (Fall):19-20.37. Reid JC. Magnesium therapy in musculoskeletal pain syndromes -- retrospective review of clinical results. Magnes Trace Elem. 1990;9:350-58. Vlooskens G, Manuaily Keersy B, Vertommen J, et al. Magnesium deficit in a sample of the Belgian population presenting with chronic fatigue. Magnes Res. 1997;10:329-337.39. Bhasky CN, Daily RK, Verkoff D, et al. Magnesium deficiency in depression and chronic pain. Magnes Trace Elem. 1988;9:333-40. Malkiel-Shapiro B, Gorodeis I, Tenair PE. Parenteral magnesium sulphate therapy in coronary heart disease. A preliminary report on its clinical and laboratory aspects. Med Proc. 1966;2:458-462.41. Browne SE. Magnesium sulphate in arterial disease. Practitioner. 1984;228:1165-1168.42. Cobert L, Adams R. Magnesium sulfate in the treatment of variant angina. Magnesium. 1984;3:48-49.43. Otsuka T, Imaiha T, Imuio J, et al. Magnesium metabolism in hyperthyroidism. Endocr J. 1996;43:397-402.44. Nagadi MA. Effect of magnesium on the thyroid. Lancet. 1962;1:1405.45. Rosenbaum EE, Portis S, Sodon S. The relief of muscular weakness by cyclobarbital hydrochloride. J Lab Clin Med. 1941;27:703-770.46. Sure B, Easterling L. The protective action of vitamin B12 against the toxicity of all thyroxine. J Nutr. 1960;42:201-220.47. Watts AB, Ross OB, Whitehair CK, MacVicar R. Response of castrated male and female hypothyroid rats to vitamin B12. Proc Soc Exp Biol Med. 1951;77:624-626.48. Davis GB, Skeggs HR, Lee DH, et al. Appropriate, of hydroxocobalamin as a long-acting vitamin B12. Nature. 1961;189:733-163.49. Herbert V. Vitamin B12. Am J Clin Nutr. 1981;34:671-672.50. Dastach J, Bara M. Theophylline.5 A.Med on pharmacological and toxicological differences between magnesium chloride and magnesium sulphate, or of sulfates and more. Magnes Res. 1996;9:217-219.51. Dyckner T, Wester PO. Ventricular extrasystoles and intracellular electrolytes before and after potassium and magnesium infusions in patients on diuretic treatment. Am Heart J. 1979;97:12-18.52. Stephen JM, Grant R, Yeh CK. Anaphylaxis from adverse action of intravenous thiamine. Am J Emerg Med. 1992;10:61-63.53. Cook CC, Thomas AD. B-complex vitamins in the prophylaxis and treatment of Wernicke-Korsakoff syndrome. Br J Hosp Med. 1997;57:461-465.54. Itokawa Y, Tanaka C, Kimura M. Effect of thiamine on serotonin levels in magnesium-deficient animals. Metabolism. 1977;26:375-379.55. Cadrell, E. Magnesium deprivation in sudden unexpected infant death. Lancet. 1972;2:754-0[illegible].58. Ashkenazy Y, Mordovev S, Pacher O, et al. Magnesium-deficient diet aggravates anaphylactic shock and promotes cardiac hydrolysis in guinea pigs. Magnes Trace Elem. 1990;9:282-288.

EXHIBIT A - 17


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Complaint

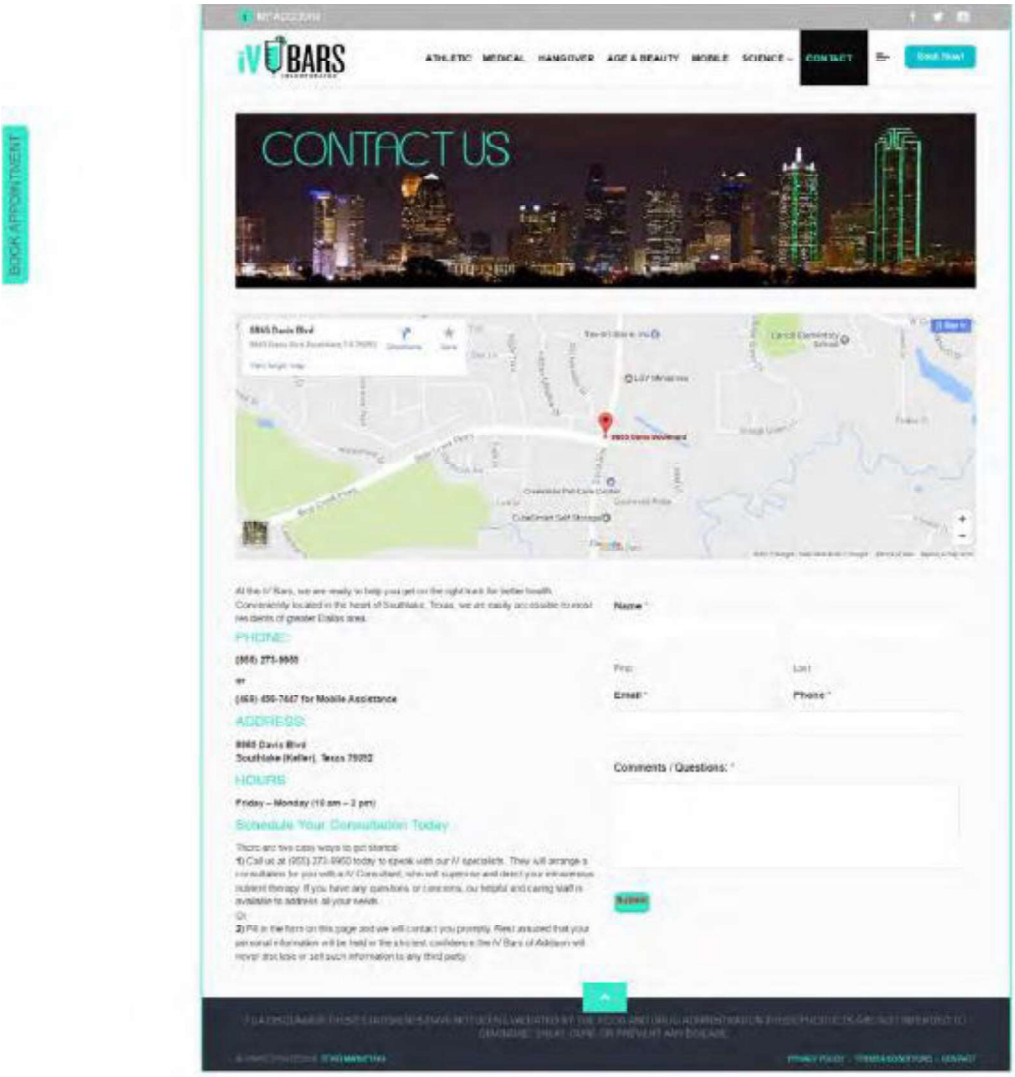


EXHIBIT A - 19

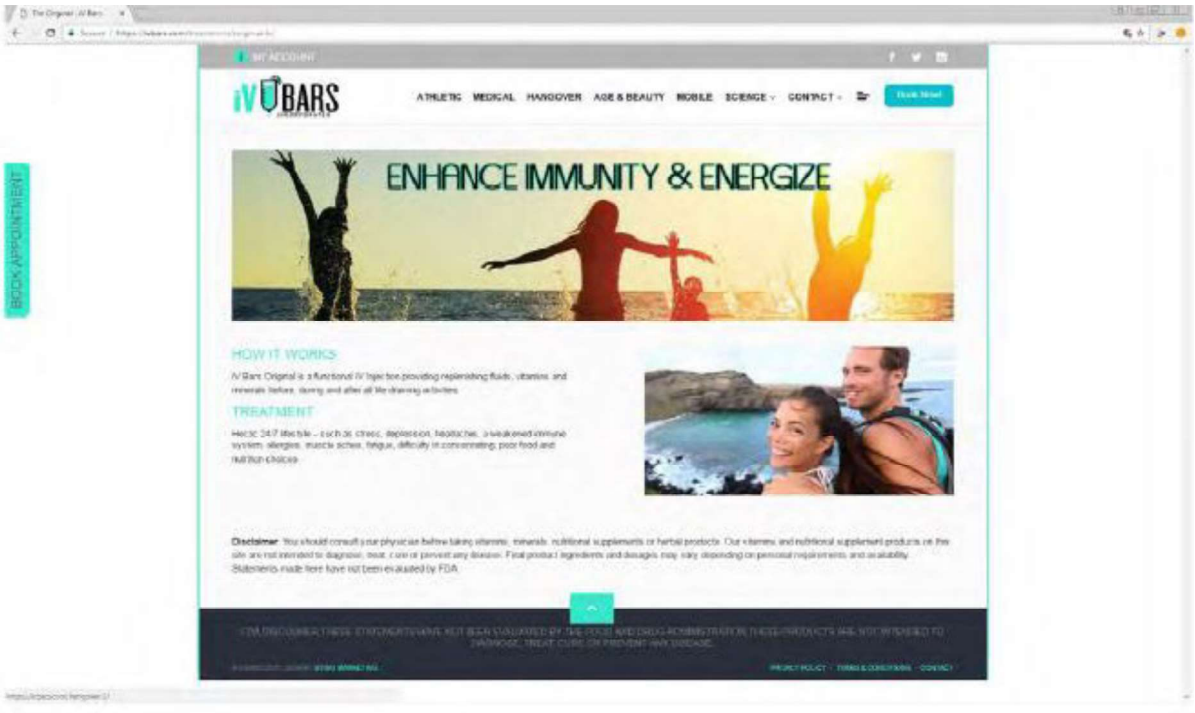

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EXHIBIT A - 20

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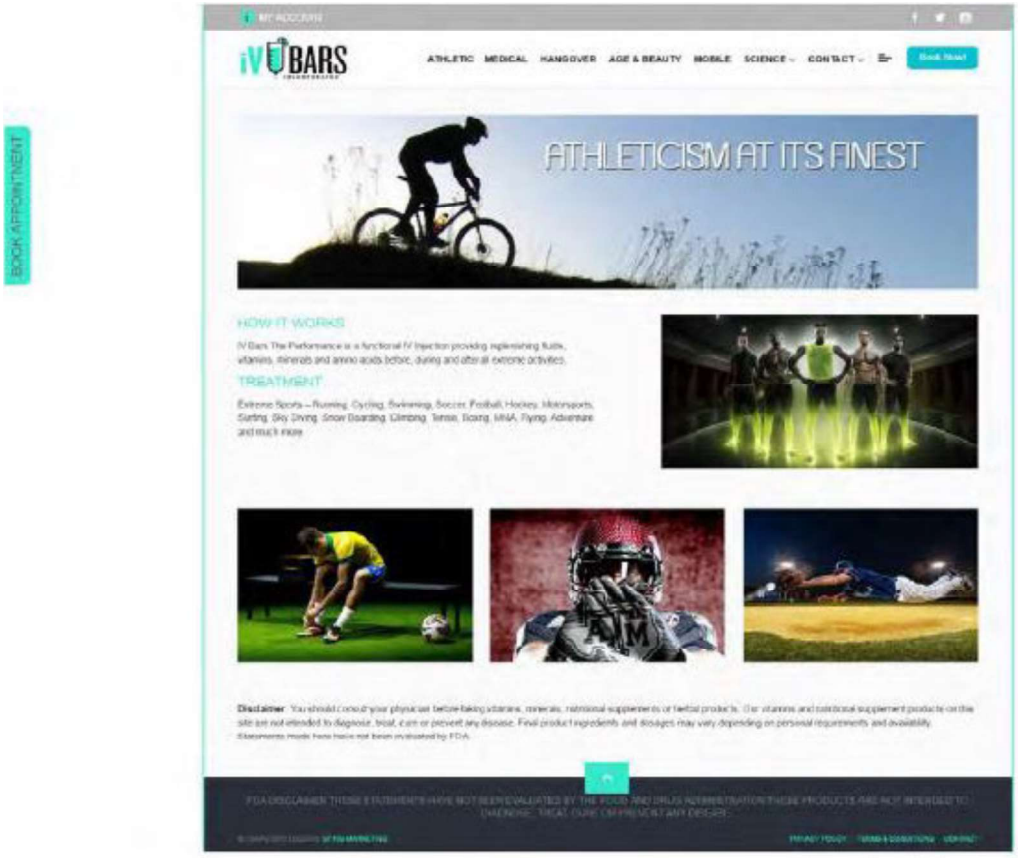


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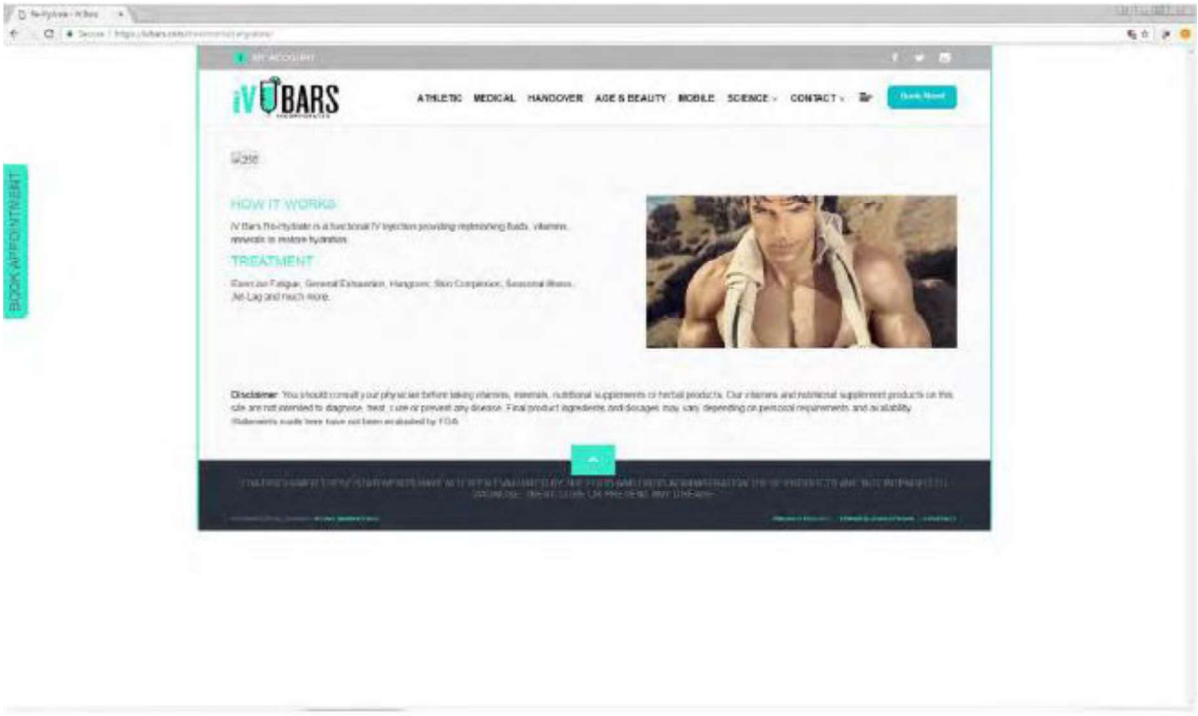

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Complaint

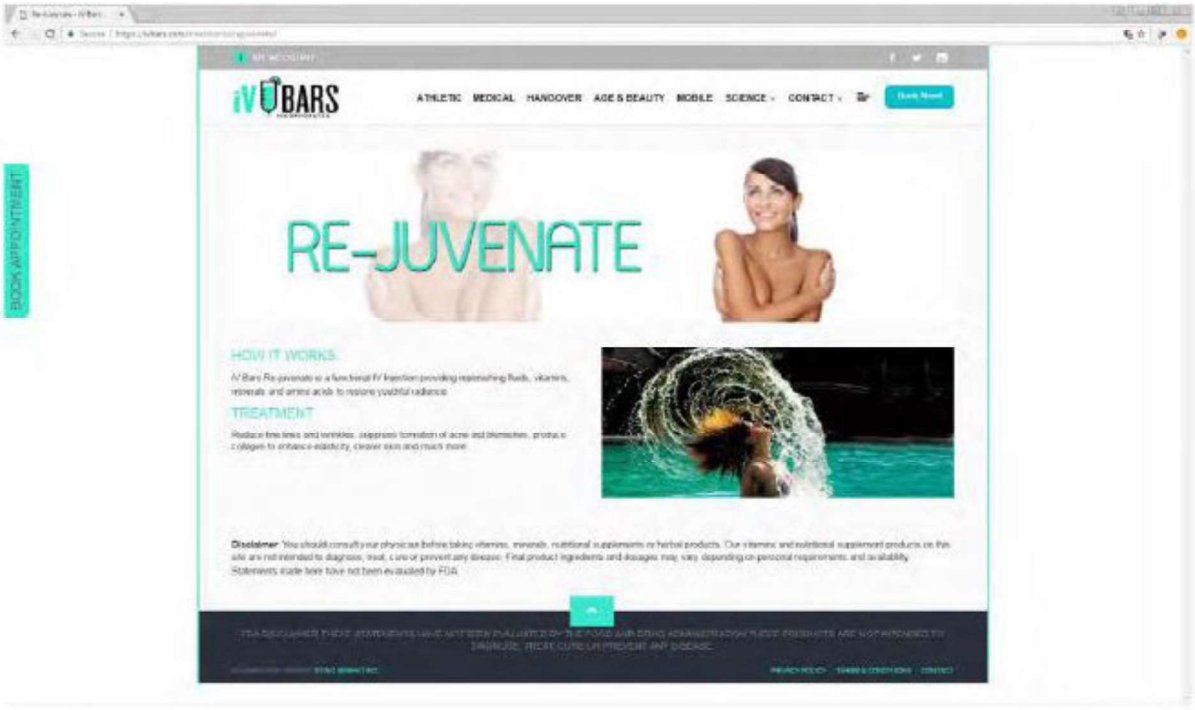


EXHIBIT A - 23


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Diet & Detox
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EXHIBIT A - 24

Complaint



EXHIBIT A - 25

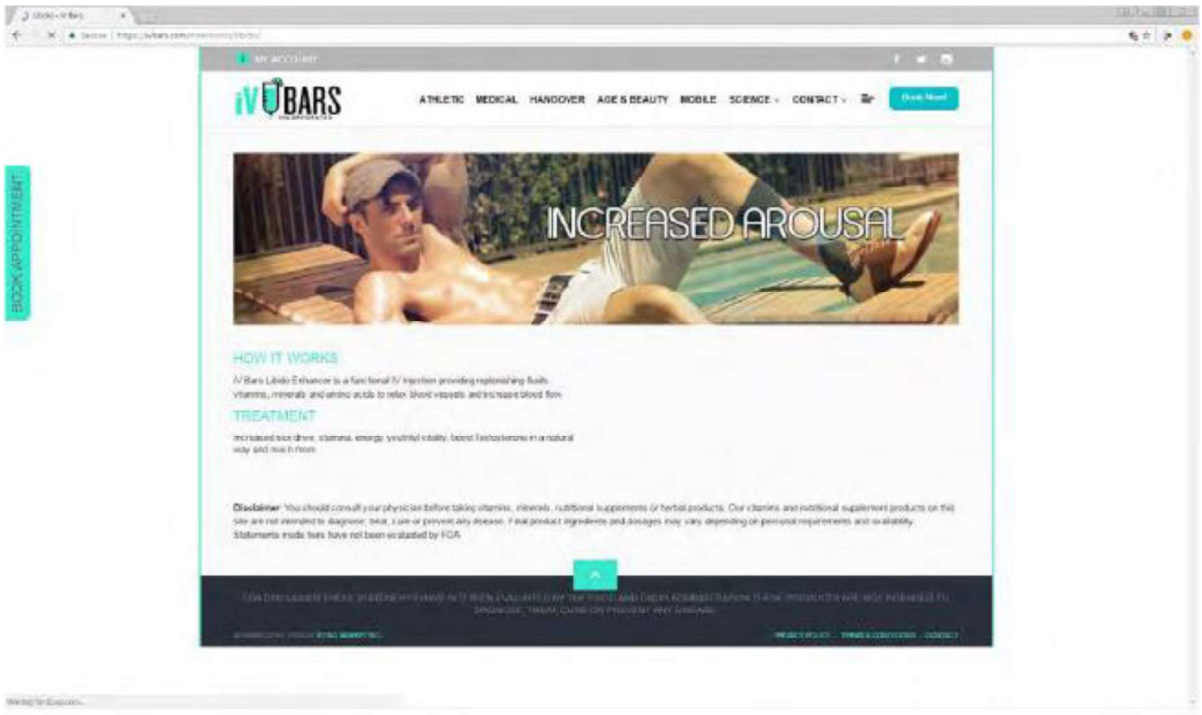

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EXHIBIT A - 26

Complaint

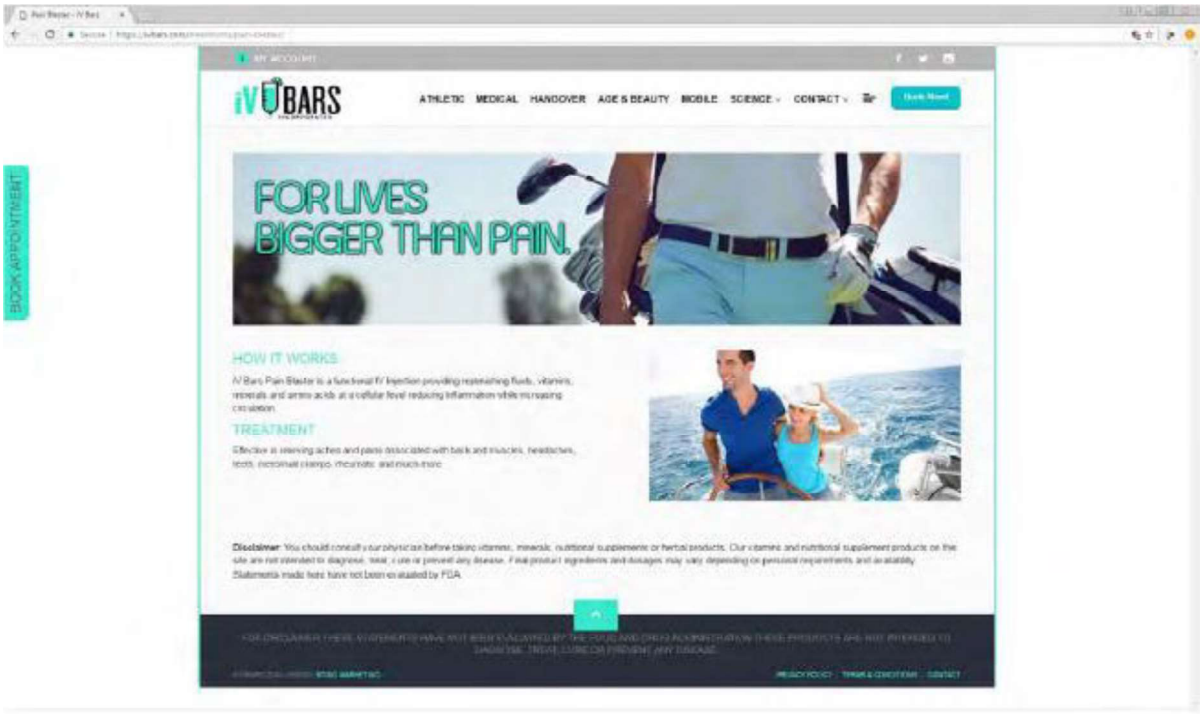


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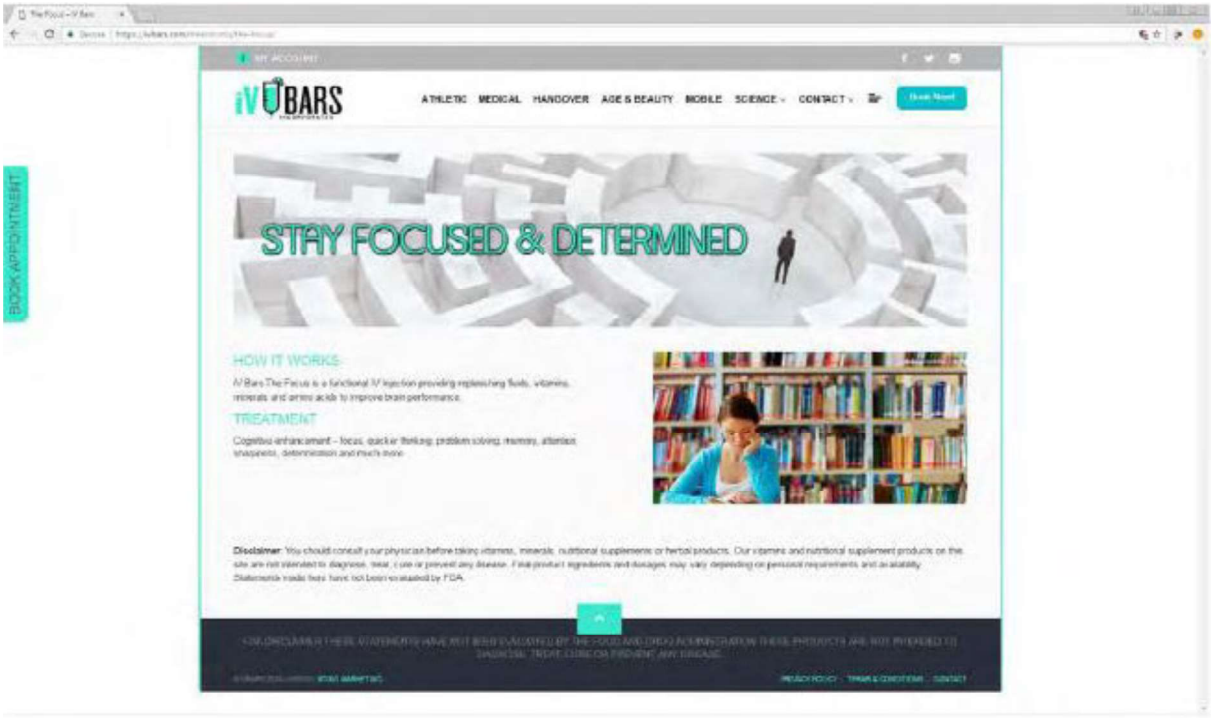

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CONTACT
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EXHIBIT A - 28

Complaint

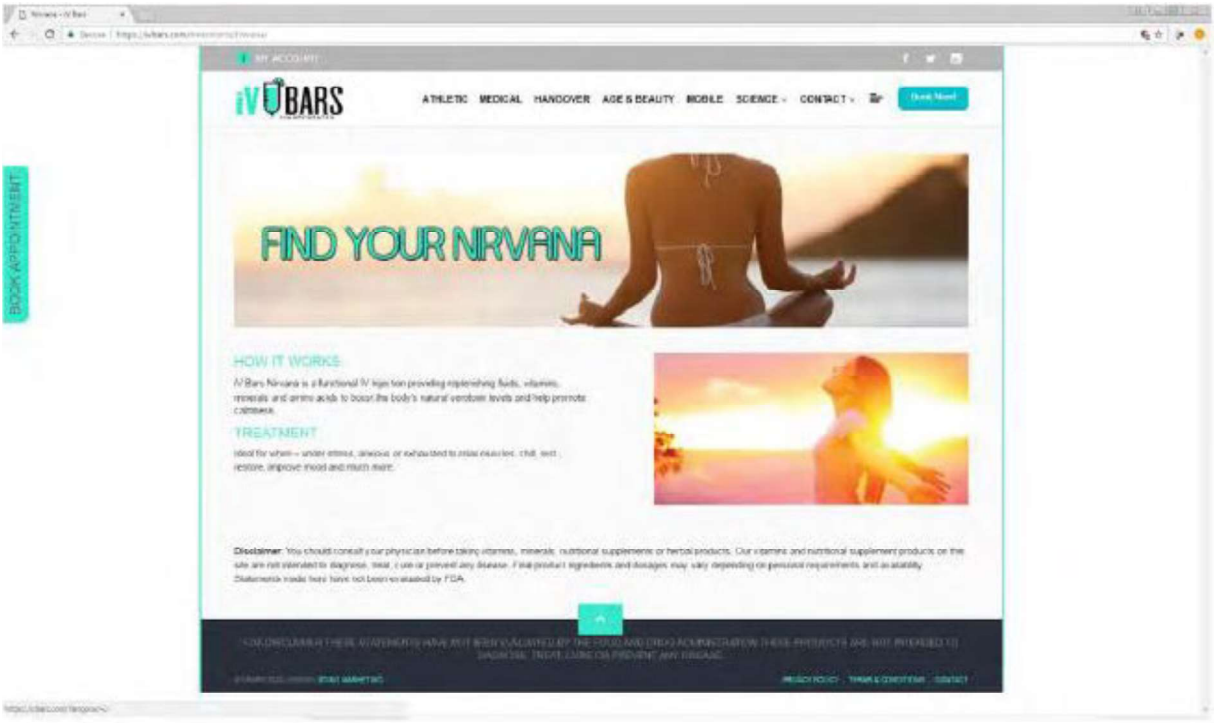


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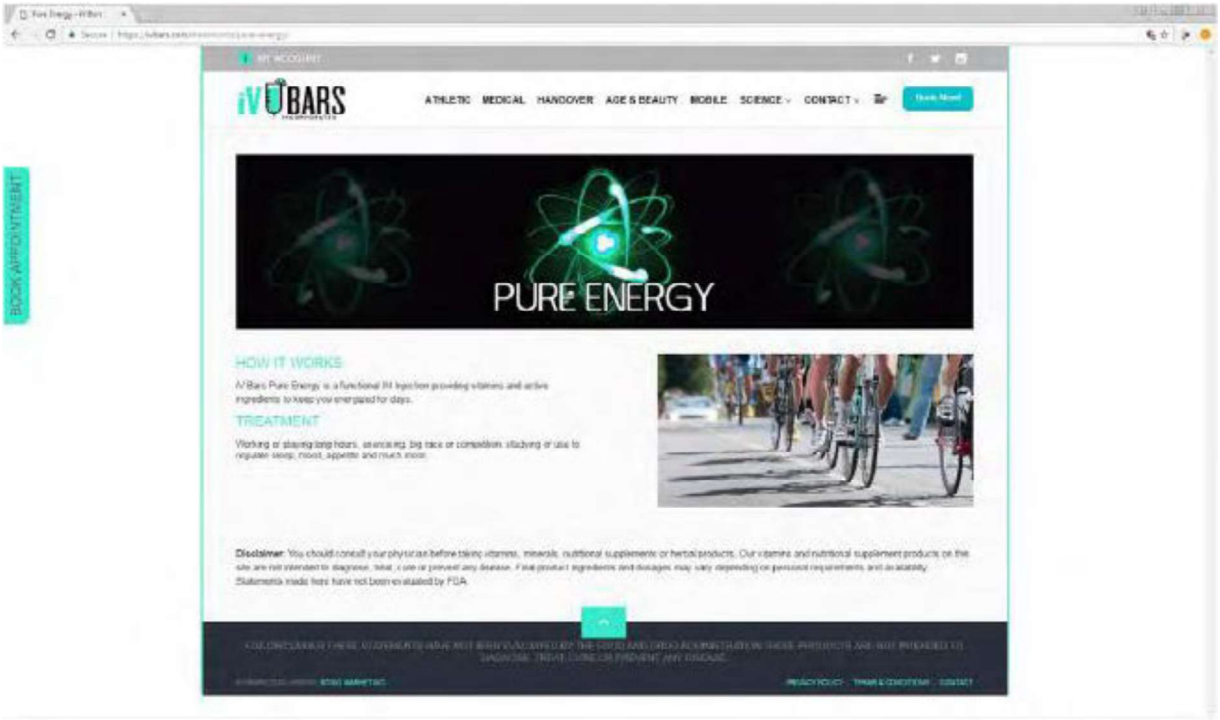

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EXHIBIT A - 30

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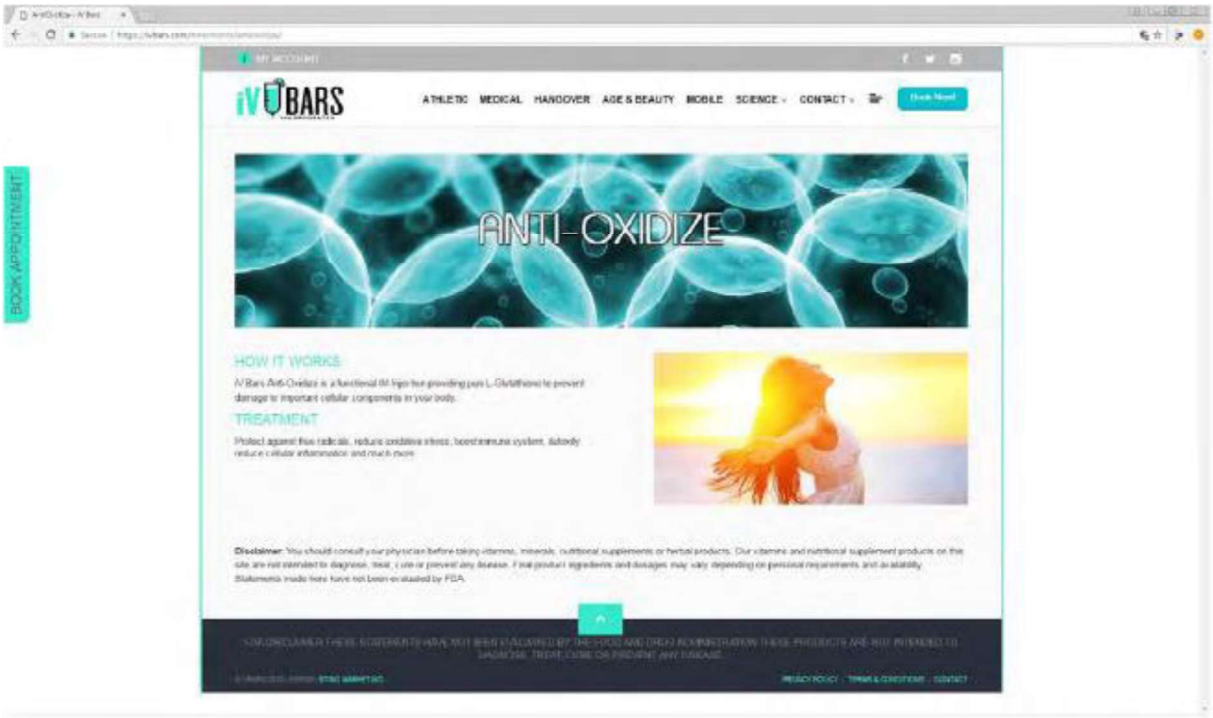


EXHIBIT A - 31


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Complaint



iV BARS

ATHLETIC MEDICAL HANGOVER AGE & BEAUTY MOBILE SCIENCE CONTACT

BOOK APPOINTMENT

PRIVACY POLICY

The Effective Date of this Privacy Policy is June 1, 2013.

SUMMARY AND GENERAL CONTACT INFORMATION

This Privacy Policy describes how IV BARS® handles information we learn about you from our web site. The information we collect depends on what you do when you visit our site. If you have questions about this policy, or wish to contact us, our online address is as follows: IV DRIPS® LOGIN. (less)

COLLECTION AND USE OF INFORMATION

For each visitor to our web site, we collect and store the following information about your computer hardware and software: your IP address, your browser software, your operating system, and the Internet address of the web site from which you linked directly to our site. We collect and store this information on an individual basis and in aggregate, or combined, form. We also collect both user-specific and aggregate information on what pages visitors access or visit. This information allows us to deliver any information you request from us, such as product information or training materials. We also use the information to measure the number of visitors to our site, to understand which service providers our visitors want to improve the content of our web pages, and to customize the content and layout of our pages. All of this is done with the intention of making our site more useful to visitors. Our web site uses session cookies to record session information, such as which web pages a user has visited, and to track user activity on the site. We do not collect any personal data through the use of cookies, and all cookies expire when you leave our site. Our web site does not use persistent cookies. We do not collect personally identifying information about you, including your email address, telephone number or postal address, when you visit our site, unless you choose to provide such information to us. If at any time you do provide us with such information, we will collect it. Areas in which we may collect this type of information include, but are not limited to, requests for information regarding our products and services and web site account registration. We will use personally identifying information in connection with the purpose for which you provided it (e.g., to contact you with a response to a request for information). Additional ways in which we may use this information are as follows: If you provide us with your email address, you may receive periodic promotional emails from us with information regarding special offers or new products or services. You may also receive informational emails from us related to any user accounts you have set up with us, as well as administrative notices regarding the operation of the web site. If you supply us with your postal address online, you may receive periodic mailings from us with information on new products and services. If you provide us with your telephone number, you may receive telephone contact from us with information regarding new products and services. We do not rent or sell email addresses, postal addresses or telephone contact information to third parties or otherwise share any personally identifying information we collect with any third parties, except that IV BARS® reserves the right to share personally identifying information with an agent, contractor or partner working on behalf of IV BARS® to serve our customers, to transfer personally identifying information to a third party in conjunction with the sale or similar transfer of the company or a business unit, and to disclose personally identifying information to a third party in connection with legal proceedings and investigations of crimes or other emergencies. If IV BARS® does share personally identifying information with an agent working on behalf of IV BARS®, we will employ commercially appropriate procedures to help ensure that the disclosed information is used only for authorized purposes by authorized persons, and that safeguards are in place to help maintain the security, integrity and privacy of the information. Finally, we may keep any information you voluntarily provide, such as survey information and/or site registrations, both in aggregate and personally identifiable ways.

THIRD PARTY SITES

From time to time, this web site may link you to other sites on the Internet ("Linked Sites"). The Linked Sites are not under IV BARS®'s control, and IV BARS® does not control the collection or use of any information, including personally identifying information, that occurs during your visit to the Linked Sites. Further, IV BARS® makes no representations about the privacy policies or practices of the Linked Sites.

OPT OUT PROCEDURES

If you do not wish to receive promotional emails from us, please let us know by using the opt-out response device that can be found at the bottom of every email we deliver to by calling IV BARS® at the telephone number indicated in the email. (please include sufficient information to allow us to identify you in our records.) Please allow a reasonable time for us to process your request. Note that although you can opt not to receive promotional emails, IV BARS® retains the right to send registered users of its web sites informational email messages about the user's account or administrative notices regarding the site, as permitted under Texas State Law.

INFORMATION ACCESS

Upon request we provide site visitors with access to their own personally identifying contact information (e.g., name, address, phone number) that we maintain about them. You can access this information by sending your request to: IV BARS®, Dallas, Texas. To help us process your request, please provide sufficient information to allow us to identify you in our records. If you have a user account with us, we ask that you provide your user name and password in your request. We reserve the right to ask for information verifying your identity prior to disclosing any information to you. Should we ask for verification, the information you provide to verify your identity will be used only for that purpose, and all copies of this information in our possession will be destroyed when the process is complete. We also offer visitors the opportunity to have inaccuracies corrected in all information we maintain about them. You can have your information corrected by sending your request to: IV BARS®, Attention: Customer Service, Dallas, Texas. To help us process your request, please provide sufficient information to allow us to identify you in our records.

SECURITY

We have appropriate security measures in place in our physical facilities to protect against the loss, misuse or alteration of information that we have collected from you at our site, and we employ security features generally accepted in the industry to protect the security of transactions made on our site. Commercial transactions are protected via Secure Sockets Layer (SSL) technology.

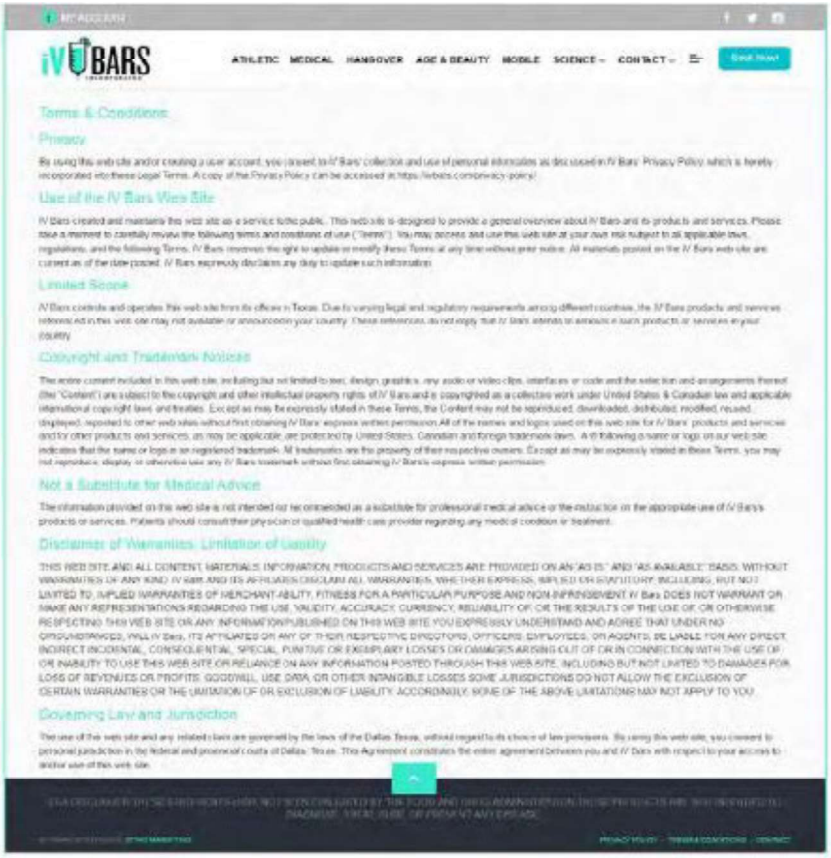
CHANGES TO THIS POLICY

From time to time, we may use customer information for new, unanticipated uses not previously disclosed in our privacy notice. If our information practices change materially at some time in the future, we will post the policy changes to our web site. If we have collected personally identifying contact information from you, we will notify you about the changes prior to making use of your information in new ways, and will provide you with a reasonable opportunity to opt out of the new procedures before they are implemented. We will also honor opt-out requests made following implementation of the new procedures, as discussed above. If you believe that this site is not following its stated information policy, you may contact us at the above address, or contact state or local chapters of the Better Bus

THIS STATEMENT HAS NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.

PRIVACY POLICY - TERMS & CONDITIONS - CONTACT

EXHIBIT A - 33


iV BARS
ATHLETIC MEDICAL HANGOVER AGE & BEAUTY MOBILE SCIENCE CONTACT
BOOK APPOINTMENT
Terms & Conditions
Privacy
Use of the IV Bars Web Site
Limited Scope
Copyright and Trademark Notices
Not a Substitute for Medical Advice
Disclaimer of Warranties; Limitation of Liability
Governing Law and Jurisdiction

Complaint

Exhibit B



27 Main Street
Suite C 104E
Edwards, Colorado
Website: iVBarsVail.com
email: info@ivbars.com

Consent and Authorization for
Intravenous Therapy Procedures

Client's name Date_____

Vitamins are vital for our body's normal function and are absolutely necessary for our growth, general well-being, and vitality. Except for a few exceptions, vitamins cannot be manufactured or synthesized by the body and their absence or improper absorption results in specific deficiency diseases. Therefore it is important for our body to obtain vitamins from outside sources to battle against the chance for a deficiency. Latest researches indicate that many vitamins taken in large doses can have miraculous healing effects in a wide range of common complaints and illnesses. Proper vitamin injections can supply the much needed nutrients your body needs to maintain and enhance normal bodily functions.

Vitamin Injections are better absorbed by the body since they go directly into the blood stream. Alternatives to these injections are Oral Vitamins, Capsules, Liquid drinks, Lotions, Topical Creams, and Mouth Sprays.

Vitamin Injections common side effects include but are not limited to:

1. Risks: I understand there is risk of mild diarrhea, upset stomach, nausea, a feeling of pain and a warm sensation at the site of the injection, a feeling, or a sense, of being swollen over the entire body, headache and joint pain.

2. If any of these side effects become severe or troublesome I will contact my physician immediately.

3. I understand that although rare Vitamin injections can result in serious side effects. Although this is a relatively rare occurrence, anyone taking Vitamin injections should be aware of the possibility. Uncommon side effects are much more serious than the common side effects of Vitamin injections, and such side effects should be reported to a physician to be evaluated for seriousness. Uncommon and dangerous side effects include:

• Headache • Nausea • Diarrhea • Bloating • Constipation • Indigestion or heartburn
• Abnormal bleeding • Gastrointestinal hyperactivity • Chest pain • Flushed face • Chills
• Fever • upset stomach • Kidney stones • Fingernail weakening • Hair loss
• Rapid heartbeat heart palpitations • Restlessness • Muscle cramps and weakness • Dizziness

4. I understand the possibility of having an allergic reaction to any of the ingredients found within the Vitamin injection is quite plausible and that I should communicate with my Physician if I have any known allergic reactions to foods, dyes, preservatives, or any other substances. If I experience any of these following signs of allergic reactions I should immediately consult my primary health care Physician and discontinue further use of the product. Signs of allergic reactions include, but not limited to:

• Itching of skin • Hives • Rashes • Wheezing • Difficulty breathing • Swelling of mouth or throat

5. When medications are taken in conjunction with the Vitamin Injection, drug interactions could occur. These interactions can either increase your risk of bleeding or block the absorption of the Vitamins into the body. These medications at the time of your injection should either be discontinued or be consulted with by a Physician. Some of the medications that may cause drug interactions include, but are not limited to:

• Heparin (Fragmin, Lovenox, Innohep...ect.) • Antithrombin (A Tryn, Thrombate III)
• Argatroban • Aspirin • Ibuprofen • Dipyridamole (Persantine) • Bivalirudin (Angiomax)
• Clopidogrel (Plavix) • Warfarin (Coumadin, Jantoven)
• Nonsteroidal anti-inflammatory drugs (Ibuprofen, etc.)

6. Before starting the Vitamin injections I will make sure to tell my Physician if I am pregnant, lactating or have any of the following conditions.

• Leber's Disease • Kidney disease • History of Kidney stones • Liver disease • Hormonal disease
• Cardiovascular disease • History of ulcers • History of gastrointestinal problems
• Bipolar disorder (manic depression) • Attention Deficit Hyperactivity Disorder (ADHD)
• Muscular Dystrophy • Elliptic seizures • Hypoglycemia • Schizophrenia
• Benign prostatic hypertrophy (BPH) • Acetaminophen poisoning • Hypertension (high blood pressure)
• History of seizures • Under-active thyroid (hypothyroidism) • Osteoporosis
• Receiving treatment or taking any medication that might "thin" the blood
• Receiving treatment or taking medication that has an effect on bone marrow
• An infection • Iron deficiency • Folic acid deficiency
• Dependent on intravenous nutrition (TPN) or liquid nutrition products for food • Diabetes, mellitus, or high blood sugar levels
• An unusual or allergic reaction other medicines, foods, dyes, or preservatives

7. I understand that certain herbal products, vitamins, minerals, nutritional supplements, prescription and non-prescription medications may result in side effects when they interact with the Vitamin Injection.

8. Treatments: Will be determined by the provider. I understand and agree that all services rendered to me are charged directly to me and that I am personally responsible for payment. I further agree in the event of nonpayment, to bear the cost of collection, and/or Court cost and reasonable legal fees, should this be required. By signing below, I acknowledge that I have read the foregoing informed consent and agree to the treatment with its associated risks. I hereby give consent to perform this and all subsequent Vitamin Injections with the above understood. I hereby release the doctor, the person injecting the Vitamin Injection, and the facility from liability associated with this procedure.

Print Name: _____
Contact No: _____
Date: _____ Time: _____
Patient Signature: _____

Nurse/EMT Print Name: _____
Signature: _____
Date: _____ Time: _____
Nurse/EMT Signature: _____

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 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:

Findings

1. The Respondents are:

    a. Respondent A & O Enterprises Inc, a Wyoming corporation, also doing business as iV Bars Incorporated and iV Bars, with its principal office or place of business at 4101 Centurion Way, Addison, Texas 75001.

    b. Respondent Aaron K. Roberts, also known as Aaron Keith, the owner and operating manager of A & O Enterprises Inc. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of A & O Enterprises Inc. His principal office or place of business is the same as that of A & O Enterprises Inc.

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 intravenous therapy, including Respondents' iV Cocktails, and any intramuscular injection.

B. "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., intravenous), 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.

C. "Intramuscular injection" means the injection of substances, including mixtures of water, vitamins, minerals, amino acids, or other active ingredients, directly into human muscle.

D. "Intravenous therapy" means the infusion of substances, including mixtures of water, vitamins, minerals, amino acids, or other ingredients, directly into the human bloodstream.

E. "iV Cocktail" means any intravenous therapy, advertised, promoted, offered for sale, or sold by Respondents, including the Myers Cocktail and the Immune Booster.

F. "Respondents" means the Corporate Respondent and the Individual Respondent, individually, collectively, or in any combination.

1. "Corporate Respondent" means A & O Enterprises Inc, also doing business as iV Bars Incorporated and iV Bars, and its successors and assigns.

2. "Individual Respondent" means Aaron K. Roberts, also known as Aaron Keith.

Provisions

I. Prohibited Disease 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 advertising, promotion, offering for sale, or sale of any covered product must not make any

representation, or assist others in making any representation, expressly or by implication, that such product:

A. Is an effective treatment for cancer;

B. Is an effective treatment for angina, cardiovascular disease, congestive heart failure, or myocardial infarction;

C. Is an effective treatment for multiple sclerosis;

D. Is an effective treatment for diabetes;

E. Is an effective treatment for fibromyalgia;

F. Is an effective treatment for neurodegenerative disorders;

G. Produces fast, lasting results; or

H. Cures, mitigates, or treats any disease;

unless the representation is non-misleading, including that, at the time such representation is made, they 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 human clinical testing of the covered product or of an essentially equivalent product that is sufficient in quality and quantity, based on standards generally accepted by experts in the relevant disease, 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. Such testing must (1) be randomized, double-blind, and placebo-controlled; and (2) be conducted by researchers qualified by training and experience to conduct such testing. In addition, all underlying or supporting data and documents generally accepted by experts in the relevant field as relevant to an assessment of such testing as described in the Provision titled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Respondents will have the burden of proving that a product satisfies the definition of an essentially equivalent product.

II. Prohibited Health Benefit and Safety Claims

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 advertising, promotion, offering for sale, or sale of any covered product must not make any representation, or assist others in making any representation, other than representations covered under the Provision titled Prohibited Disease Claims, expressly or by implication, about the health benefits, efficacy, safety, or side effects of such product, unless the representation is non-misleading, including that, at the time such representation is made, 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 disease, 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 disease, 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 described in the Provision of this Order titled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to the Commission. Respondents will have the burden of proving that a product satisfies the definition of an essentially equivalent product.

III. Prohibited Misrepresentations Regarding an iV Bars Research Lab

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 advertising, promotion, offering for sale, or sale of any covered product must not make any misrepresentation, or assist others in making any misrepresentation, expressly or by implication that Respondents:

A. Assembled physicians, biochemists, or physiologists to create the formulas for their products;

B. Employ biologists, chemists, pharmacists, medical doctors, naturopathic doctors, or exercise physiologists to test or approve their products; or

C. Maintain a research facility, including an iV Bars Research Lab.

IV. Prohibited Misrepresentations Regarding Tests, Studies, or Other Research

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 advertising, promotion, offering for sale, or sale of any product or service must not make any misrepresentation, or assist others in making any misrepresentation, expressly or by implication:

A. About the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research, including that studies, research, or trials prove that such product or service is an effective treatment for cancer, angina, cardiovascular disease, congestive heart failure, myocardial infarction, multiple

sclerosis, diabetes, fibromyalgia, or neurodegenerative disorders or produces fast, lasting results; or

B. That any benefit of such product or service is scientifically or clinically proven or otherwise established.

V. Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies

IT IS FURTHER ORDERED that, with regard to any human clinical test or study ("test") upon which Respondents rely to substantiate any claim covered by this Order, 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 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. FDA Approved Claims

IT IS FURTHER ORDERED that nothing in this Order prohibits Respondents, or Respondents' officers, agents, employees, and attorneys, or all other persons in active concert or participation with any of them, from making a representation for any drug that is approved in labeling for such drug under any tentative final or final monograph promulgated by the Food and Drug Administration ("FDA"), or under any new drug application approved by the FDA.

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. For 10 years after the issuance date of this Order, Individual Respondent for any business that such Respondent, individually or collectively with any other Respondents, 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 Report 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 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; 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 the Respondent performs services whether as an employee or otherwise and any entity in which the Respondent has any ownership interest; and (c) describe in detail the Respondent's involvement in each the 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 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 the Respondent performs services whether as an employee or otherwise and (ii) any entity in which the 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 A & O Enterprises Inc.

IX. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 10 years after the issuance date of this Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Corporate Respondent and the 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. a copy of each unique advertisement or other marketing material making a representation subject to this Order;

E. 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 Respondent's possession, custody, or control that contradicts, qualifies, or otherwise calls into question the representation, or the basis relied upon for the representation; and

F. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

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 on February 13, 2039, 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, Commissioner Wilson not participating.

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 A & O Enterprises Inc, a corporation, doing business as iV Bars Incorporated and iV Bars, and Aaron K. Roberts, also known as Aaron Keith ("respondents"). The proposed consent order ("order") has been placed on the public record for 30 days for receipt of 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 respondents' advertising, promotion and sale of intravenous drip cocktails ("iV Cocktails"), including the Myers Cocktail, which contain a mixture of water, vitamins, minerals and amino acids. According to the FTC complaint, respondents made false or unsubstantiated representations that their iV Cocktails are effective treatments for cancer, angina, cardiovascular disease, congestive heart failure, myocardial infarction, multiple sclerosis, diabetes, fibromyalgia and neurodegenerative disorders, and that their cocktails produce fast, lasting results, are safe for all ages and cause no side effects. The FTC also alleges that respondents falsely represented that their iV Cocktails are clinically or scientifically proven to effectively treat the enumerated diseases and produce fast, lasting results. The complaint alleges that respondents' actions constitute unfair or deceptive acts or practices and the making of false advertisements, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Analysis to Aid Public Comment

The order is designed to prevent respondents from engaging in similar acts or practices in the future. It includes injunctive relief to address these alleged violations and to prohibit similar and related conduct.

- The order defines "covered product" to mean any intravenous therapy, including all of respondents' iV Cocktails, and any intramuscular injection.

- Part I of the order prohibits express or implied claims that any covered product: (1) is an effective treatment for cancer, angina, cardiovascular disease, congestive heart failure, myocardial infarction, multiple sclerosis, diabetes, fibromyalgia, or neurodegenerative disorders, (2) produces fast, lasting results, or (3) cures, mitigates, or treats any disease, unless the claim is supported by competent and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally accepted by experts in the relevant area. It further requires that such substantiation include a randomized, double-blind, and placebo-controlled human clinical trial.

- Part II of the order prohibits express or implied health benefit, efficacy, safety, or side effects claims for any covered product, unless the representation is non-misleading, and, at the time the representation is made, proposed respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity to support the claim, based on standards generally accepted by experts in the area. It further provides that such substantiation must include a randomized, double-blind, and placebo-controlled human clinical trial, when experts generally require such human clinical testing to substantiate the representation.

- Part III of the order prohibits respondents, in connection with the advertising, promotion, offering for sale, or sale of any covered product, from misrepresenting, expressly or by implication, that they assembled physicians, biochemists, or physiologists to create, test or approve the products, or that they maintain a research facility, including an iV Bars Research Lab.

- Part IV of the order prohibits respondents, in connection with the advertising, promotion, offering for sale, or sale of any product or service, from making any misrepresentation about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or other research, or that any product or service is scientifically or clinically proven to produce any benefit.

- Part V of the order requires that respondents, with regard to any human clinical test or study upon which they rely to substantiate any claim covered by the order, must preserve all underlying data and documents generally accepted by experts in the field as relevant to an assessment of the test.

- Part VI of the order provides that nothing in the order prohibits respondents from making a representation for any drug that is approved in labeling for such drug under any tentative final or final monograph promulgated by the Food and Drug Administration, or under any new drug application approved by the FDA.

Parts VII through XI are reporting and compliance provisions. Part VII mandates that respondents acknowledge receipt of the order and, for 10 years, distribute the order to certain employees and agents and secure acknowledgments from recipients of the order. Part VIII requires that respondents submit compliance reports to the FTC one year after the order's issuance and submit additional reports when certain events occur. Part IX requires that, for 10 years, respondents create certain records and retain them for at least 5 years. Part X provides for the FTC's continued compliance monitoring of respondents' activity during the order's effective dates. Part XI is a provision "sunsetting" the order after 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 order, or to modify in any way the order's terms.

Complaint

IN THE MATTER OF

CORPUS CHRISTI POLYMERS LLC, ALFA S.A.B. DE C.V., INDORAMA VENTURES PLC, FAR EASTERN NEW CENTURY CORPORATION, ALOKE LOHIA AND SUCHITRA LOHIA

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-4672; File No. 181 0030
Complaint, February 20, 2019 – Decision, February 20, 2019

This consent order addresses the $1.1 billion acquisition by Corpus Christi Polymers LLC of certain assets of M&G Chemicals S.A. The complaint alleges that the joint venture of Alfa, S.A.B. de C.V. (DAK), Indorama Ventures Plc (Indorama), and Far Eastern New Century Corporation (FENC) would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the production of polyethylene terephthalate resin (PET). The consent order prohibits each joint venture member from owning more than a one-third equity interest in CCP and from owning tolling rights to more than one-third of the Corpus Christi plant's PET and PTA capacity, without prior approval from the Commission.

Participants

For the *Commission*: *Michael E. Blaisdell, Nicholas Bush, Mary Casale, Keitha Clopper, Clarke Edwards, Eric Olson, Marc Schneider,* and *Julia Zhang.*

For the *Respondents*: *Jeff L. White, Weil, Gotshal & Manges LLP; Michael Perry* and *Stephen Weissman, Baker Botts LLP; Edward Biester, Duane Morris LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Corpus Christi Polymers LLC ("CCP"), a joint venture between corporate entities under the control of Respondents Alfa S.A.B. de C.V. ("DAK"), Indorama Ventures Plc ("Indorama"), controlled by Aloke and Suchitra Lohia, and Far Eastern New Century Corporation ("FENC"), intends to acquire certain assets from M&G Resins USA LLC and its affiliates ("M&G") in bankruptcy, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and which, if the acquisition is consummated, may substantially lessen competition in violation of Section 7 of the Clayton Act, 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. RESPONDENTS

1. Respondent Corpus Christi Polymers 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 7001 Joe Fulton International Trade Corridor, Corpus Christi, TX 78409. CCP is a joint venture entity formed by the corporate subsidiaries of Respondents DAK, Indorama, and FENC.

2. Respondent Alfa S.A.B. de C.V. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Mexico, with its executive offices and principal place of business located at Ave. Gómez Morin Sur No. 1111, Col. Carrizalejo, San Pedro Garza Garcia, N.L., Mexico C.P. 66250.

3. Respondent Indorama Ventures Plc is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Thailand, with its executive offices and principal place of business located at 37th Floor, Ocean Tower 2, Soi Sukhumvit 19, Wattana, Bangkok, Thailand.

4. Respondents Aloke Lohia, Executive Director, Vice Chairman of the Board, and Group Chief Executive Officer of Indorama; and Suchitra Lohia, Executive Director and Chairperson of the Corporate Social Responsibility Committee of Indorama, are natural persons and the ultimate parent entities of Indorama, with their executive offices and principal place of business located at 37th Floor, Ocean Tower 2, Soi Sukhumvit 19, Wattana, Bangkok, Thailand.

5. Respondent Far Eastern New Century Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Taiwan, with its executive offices and principal place of business located at 36F, Taipei Metro Tower 207, Tun Hwa South Road, Sec. 2, Taipei, Taiwan.

II. JURISDICTION

6. Respondents, either directly or through corporate entities under their control, 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.

III. PROPOSED ACQUISITION

7. Pursuant to an Asset Purchase Agreement dated March 28, 2018, CCP proposes to acquire from M&G an under-construction polyethylene terephthalate resin ("PET") and purified terephthalic acid ("PTA") production facility in Corpus Christi, Texas and related assets (the "Corpus Christi Assets"), for $1.1 billion (the "Acquisition").

8. M&G and its affiliates filed for Chapter 11 bankruptcy in October 2017, pursuant to which M&G endeavored to sell certain assets. Respondents DAK, Indorama, and FENC formed CCP and submitted a joint bid in the bankruptcy proceeding to acquire the Corpus Christi Assets. On March 29, 2018, the bankruptcy court approved the sale of the Corpus Christi Assets to CCP.

9. Through CCP, Respondents DAK, Indorama, and FENC intend to complete construction of the Corpus Christi Assets. Upon completion of the plant, CCP will serve as a toll manufacturing entity. DAK, Indorama, and FENC will each have rights to one-third of the PET capacity at the plant and will pay a tolling fee to CCP for each unit they produce. Each joint venture member will independently procure its own raw materials and will independently sell and distribute the corresponding PET.

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

IV. THE RELEVANT MARKET

11. PET is a plastic polymer used to make packaging for consumer goods, primarily plastic water and soda bottles and packaging for food and other products. Articles made with PET are strong, lightweight, clear, transparent, and sterile. PTA is the primary input in making PET.

12. A relevant market in which to assess the effects of the Acquisition is the manufacture and sale of PET. Customers cannot switch to other products without incurring significant costs, as customers have large investments in production lines that can use only PET as an input. Furthermore, in many applications, end users disfavor potential substitutes such as glass, aluminum, and polypropylene, because these materials can be heavier, bulkier, and more expensive. Customers thus have no viable or economic substitute for PET.

13. A relevant geographic market in which to assess the effects of the Acquisition is no larger than North America. Imported PET, which accounts for approximately 15% of North American sales, primarily serves customers located close to the coasts and does not constrain prices throughout North America. Duties on imported PET have made many foreign PET sources uncompetitive even for North American customers who might otherwise have competitive freight logistics from coastal ports.

V. MARKET STRUCTURE

14. The market for the manufacture and sale of PET in North America is highly concentrated.

15. DAK, Indorama, and FENC are three of only four North American PET producers. Together, these three Respondents control nearly 90% of North American PET capacity. Upon completion, the Corpus Christi plant will be the largest PET plant in North America and will account for roughly 20% of North American PET capacity.

16. DAK and Indorama are two of only three significant North American PTA producers. Vertical integration into the PTA market gives DAK and Indorama an advantage over other, non-integrated PET producers.

VI. ENTRY CONDITIONS

17. Entry, repositioning, or fringe firm growth would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. Significant barriers to entry or expansion include the time and cost of either constructing a new PET plant or converting an existing plant into PET use. Two-tier entry in both the PET and PTA markets would likely be necessary for an entrant to become truly competitive.

VII. EFFECTS OF THE ACQUISITION

18. Absent relief, the Acquisition may substantially lessen competition or tend to create a monopoly in the relevant market, by:

a. facilitating or increasing the likelihood of collusive or coordinated interaction between and among any of the Respondents; and

b. increasing the likelihood that DAK, Indorama, and FENC, acting alone or in concert, will exercise market power in the relevant market.

19. Absent relief, CCP lacks adequate safeguards to prevent DAK, Indorama, and FENC from using the relationships occasioned by their joint ownership of CCP, and by CCP's acquisition of the Corpus Christi Assets, to transmit competitively sensitive information beyond the minimum degree reasonably necessary to accomplish CCP's legitimate purposes.

VIII. VIOLATIONS CHARGED

20. 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. 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of February, 2019, issues its complaint against Respondents.

By the Commission.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition of M&G Resins USA LLC's unfinished polyethylene terephthalate resin production facility in Corpus Christi, Texas and related assets, by Alfa S.A.B. de C.V. ("DAK") and Indorama Ventures Plc ("Indorama"), controlled by Aloke and Suchitra Lohia ("Lohias"), through Corpus Christi Polymers LLC ("CCP"), a planned production joint venture. The Commission continued the investigation after the parties revised the proposed acquisition to include Far Eastern New Century Corporation ("FENC") as a third equal-part joint venture partner. The Commission's Bureau of Competition prepared and furnished to CCP, DAK, Lohias, Indorama, and FENC (collectively "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 ("Agreement Containing Consent Order" or "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.

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. 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 issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Alfa S.A.B. de C.V. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Mexico with its executive offices and principal place of business located at Ave. Gómez Morin Sur No. 1111, Col. Carrizalejo, San Pedro Garza Garcia, N.L., Mexico C.P. 66250. Alfa S.A.B. de C.V.'s United States address for service of process in this matter is DAK Americas LLC, 7621 Little Ave., Charlotte, NC 28226 (attention: Veronica Ramirez, Esq.).

2. Respondent Far Eastern New Century Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Taiwan with its executive offices and principal place of business located at 36F, Taipei Metro

Tower 207, Tun Hwa South Road, Sec. 2, Taipei, Taiwan. FENC's United States address for service of process in this matter is APG Polytech USA Holdings, Inc., 27610 Huntington Road, Apple Grove, West Virginia 25502.

3. Respondents Aloke Lohia, Executive Director, Vice Chairman of the Board, and Group Chief Executive Officer of Indorama, and Suchitra Lohia, Executive Director, and Chairperson of the Corporate Social Responsibility Committee of Indorama are natural persons and the ultimate parent entities of Indorama with their executive offices and principal place of business located at 37th Floor, Ocean Tower 2, Soi Sukhumvit 19, Wattana, Bangkok, Thailand.

4. Respondent Indorama Ventures Plc is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Thailand with its executive offices and principal place of business located at 37th Floor, Ocean Tower 2, Soi Sukhumvit 19, Wattana, Bangkok, Thailand. Indorama's United States address for service of process in this matter is Indorama Ventures Corpus Christi Holdings LLC, 251 Little Falls Drive, Wilmington, DE 19808.

5. Respondent Corpus Christi Polymers 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 7001 Joe Fulton International Trade Corridor, Corpus Christi, TX 78409.

6. 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

THE PURPOSE OF THIS ORDER is to ensure that CCP is operated as a toll manufacturing PET and PTA production plant, independently of each Respondent Member, and to remedy the lessening of competition alleged in the Commission's Complaint.

I. Definitions

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

A. "DAK" means Alfa S.A.B. de C.V, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by DAK, including but not limited to DAK Americas LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "FENC" means Far Eastern New Century Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by

FENC, including but not limited to APG Polytech USA Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Indorama" means Indorama Ventures Plc and Aloke and Suchitra Lohia, their directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Indorama, including but not limited to Indorama Ventures Corpus Christi Holdings LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "CCP" means Corpus Christi Polymers LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by CCP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Base PET Production" means the actual production quantity of PET produced at the Corpus Christi Plant, as defined in the CCP Joint Venture Agreement, *provided, however*, Base PET Production does not include any production quantity from any expansion of PET capacity pursuant to the CCP Joint Venture Agreement.

F. "Base PTA Production" means the actual production quantity of PTA produced at the Corpus Christi Plant, as defined in the CCP Joint Venture Agreement, *provided, however*, Base PTA Production does not include any production quantity from any expansion of PTA capacity pursuant to the CCP Joint Venture Agreement.

G. "CCP Joint Venture Agreement" means the Second Amended and Restated Limited Liability Agreement of Corpus Christi Polymers LLC, dated November 29, 2018, and all ancillary agreements, exhibits and schedules thereto, including but not limited to the Form of Tolling Contract between Corpus Christi Polymers LLC and DAK Americas, LLC, APG Polytech USA Holdings, and Indorama Ventures Corpus Christi Holdings LLC, which are attached as Confidential Appendix A.

H. "CCP Joint Venture Business" means the business conducted by CCP related to the toll manufacture and sale of PET and PTA at the Corpus Christi Plant.

I. "CCP Joint Venture Agreement Date" means the date Respondent Members sign the CCP Joint Venture Agreement.

J. "Corpus Christi Assets" means the Corpus Christi Plant, and certain additional assets as defined in the Asset Purchase Agreement between M&G Resins USA LLC and CCP, dated March 28, 2018 and attached as Exhibit 1 to the court's

Order Approving the Sale of Certain Assets, ECF No. 1300, in *In re M&G USA Corp.*, Case No. 17-12307 (Bankr. D. Del. Mar. 29, 2018).

K. "Corpus Christi Plant" means the PET and PTA facility, located at Joe Fulton International Trade Corridor, Corpus Christi, TX 78409.

L. "Confidential Information" means all information relating to the operation of the CCP Joint Venture Business that is not in the public domain, including but not limited to customer lists, customer locations, price lists, plans, contracts, utilization rate, production volumes, production grades, capacity expansions, cost information, marketing methods, and competitively sensitive data or information.

M. "Construction Phase" means the construction of the Corpus Christi Plant, including the construction of assets related to both PET and PTA, as defined and referred to in the CCP Joint Venture Agreement.

N. "Commission" means the Federal Trade Commission.

O. "FENC Appointed Manager" means the fifth manager appointed by FENC in accordance with the CCP Joint Venture Agreement.

P. "Independent Manager" means any person nominated by a Respondent Member and selected by FENC (or nominated by one or more of the Independent Managers in the case of the Fourth Independent Manager) to manage, oversee, or operate CCP in accordance with the CCP Joint Venture Agreement including, but not limited to, the First Independent Manager, the Second Independent Manager, the Third Independent Manager, and the Fourth Independent Manager, as those terms are referred to and defined in the CCP Joint Venture Agreement.

Q. "Initial Independent Manager" means any person selected by Member Managers to work with Member Managers to manage, oversee, or operate CCP during the Construction Phase, as defined and delineated in the CCP Joint Venture Agreement.

R. "PET" means polyethylene terephthalate.

S. "PTA" means purified terephthalic acid.

T. "PET or PTA Production Asset" means any manufacturing facility that produces, or within the last 10 years has produced, virgin PET or PTA.

U. "Respondent Member(s)" means DAK, FENC, and Indorama, individually and collectively.

V. "Respondents" means CCP and Respondent Members.

W. "Member Managers" means any person appointed by any Respondent Member to manage, oversee, or operate CCP during the Construction Phase.

X. "Restricted Employee" means any employee of CCP, any former employee of CCP, and any CCP Secondee.

Y. "Secondee" means any individual that is seconded by a Respondent Member to CCP or that is otherwise made available to CCP (through an employee lease, consulting, or other similar arrangement) by a Respondent Member.

Z. "Separation Date" means (1) the date of termination of any employee or former employee of CCP, and (2) with respect to any Secondee, the date that such person has both ended its relationship with CCP and has ceased providing any services to CCP.

II. Acquisition and Operation

IT IS FURTHER ORDERED that:

A. On and after the CCP Joint Venture Agreement Date, and subject to Paragraph II.C., each Respondent Member shall not acquire, own, or hold more than one-third equity interest in the Corpus Christi Assets owned by CCP.

B. Each Respondent Member shall not acquire, own, or hold tolling rights to more than one-third of the Base PET Production or the Base PTA Production.

Provided, however, if notified by CCP pursuant to the CCP Joint Venture Agreement that a Respondent Member does not claim the entirety of its one-third tolling rights, the other two Respondent Members have a right to the unused capacity, and, if no Respondent Member claims the unused capacity, CCP shall market the available capacity to third parties, in accordance with and as delineated in the CCP Joint Venture Agreement.

C. Each Respondent Member shall not, without the prior approval of the Commission, increase or decrease, directly or indirectly, its one-third equity interest in CCP, as long as CCP is the owner and operator of the Corpus Christi Plant.

III. Confidential Information and Selection of Member Managers

IT IS FURTHER ORDERED that:

A. A Respondent Member shall not receive, or attempt to receive, directly or indirectly, Confidential Information from any person, including but not limited to any Independent Manager, Initial Independent Manager, Member Manager, or other Respondent Member, and shall not use or share any Confidential

Information. Any employee of a Respondent Member who receives Confidential Information shall sign a non-disclosure or equivalent agreement providing written acknowledgement of his/her/their responsibilities regarding the restrictions on the use and dissemination of Confidential Information, and a statement attesting that he or she has received a copy of this Order, will comply with its terms, and will take all reasonable steps to assure that employees that report to him or her will comply with its terms;

Provided, however, Respondent Members may receive summary aged and aggregated information and other information necessary for certain reporting obligations and for certain material decisions affecting CCP, or for the Respondent Members and CCP to implement and perform the Form of Tolling Contract between such Respondent Member and CCP, as delineated and permitted in the CCP Joint Venture Agreement. The receipt of such information shall be overseen by the Monitor, and subject to firewalls designed in consultation with the Monitor protecting any Confidential Information from being shared by CCP or the Respondent Members with persons who manufacture and sell PTA and PET for the Respondent Members.

B. A Respondent Member shall not influence, or attempt to influence, directly or indirectly, any Initial Independent Manager, Independent Manager, or FENC Appointed Manager regarding the operation of CCP, including, but not limited to, decisions concerning production grades, production quantities, tolling fees, capacity expansions, the marketing of unused capacity to third parties, the licensing or sale of any intellectual property, or employee or manager hiring or retention.

Provided, however, Respondent Members may provide notice or input to Managers as expressly permitted in the CCP Joint Venture Agreement and may make the decisions requiring the approval of Respondent Members as permitted and delineated in the CCP Joint Venture Agreement.

Provided, further, however, nothing in this provision prohibits Respondent FENC from influencing or communicating with any FENC Appointed Manager.

C. A Respondent Member shall not hire, or enter into negotiations or discussions regarding hiring, an Independent Manager for a period of 12 months after expiration or termination of his or her term as an Independent Manager.

D. Respondent Members shall retain, and identify and describe in a log, all communications with any other Respondent Member relating to the operation and management of CCP (not including communications discussing the construction of the Corpus Christi Plant), or the production and sale of PET and PTA from CCP.

IV. CCP Joint Venture Agreement

IT IS FURTHER ORDERED that:

A. The CCP Joint Venture 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 CCP Joint Venture Agreement shall constitute a violation of this Order; *provided, however*, that the CCP Joint Venture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the CCP Joint Venture 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, replace, or extend the terms of the CCP Joint Venture Agreement, or reach any other agreement that would have such an effect, 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).

V. Employees

IT IS FURTHER ORDERED that for a period of 20 years from the date this Order becomes final:

A. Each Respondent Member, so long as it retains ownership interest in CCP and for a period of 12 months from the date that such Respondent Member ceases to be a member of the CCP, shall not:

1. solicit, recruit, or induce any CCP employee to become affiliated with, directly or indirectly, any Respondent Member;

2. assist in the hiring of any such CCP employee by any other Respondent Member; or

3. encourage any CCP employee to terminate his or her employment with CCP.

Provided, however, a Respondent Member may place general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at CCP's employees; and may also utilize an independent employment agency or search firm whose efforts are not specifically directed at employees of CCP; *Provided further, however*, a Respondent Member may hire CCP employees who apply for employment with a Respondent Member, as long as such employees were not solicited by the Respondent Member in violation of this Paragraph.

B, If a Respondent Member hires or engages any Restricted Employee, the Respondent Member shall ensure that the Restricted Employee does not have any sales, marketing, pricing, or production decision-making authority for PET or PTA sales in North America, and is not otherwise involved in any such decisions, prior to the first anniversary of such Restricted Employee's Separation Date from the CCP.

VI. Monitor

IT IS FURTHER ORDERED that:

A. Jeffrey W. Brennan shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B ("Monitor Agreement") and Non-Public Appendix C ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.

B. No later than one day after the CCP Joint Venture Agreement Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order.

C. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order and (ii) 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 any Respondent or of the Commission.

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

D. The Monitor shall report in writing to the Commission (i) every 60 days until the expiration of the Construction Phase, (ii) every 90 days after the expiration of the Construction Phase for a period of 3 years, (iii) annually thereafter until the expiration of this Order, and (iv) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

E. The Commission may require the Monitor and each of the Monitor'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 Monitor's duties.

F. The Monitor's power and duties shall terminate 10 business days after the Monitor has completed his final report pursuant to Paragraph VI.D. of this Order, or at such other time as directed by the Commission.

G. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities

pursuant to this Order on the same terms and conditions as provided in this Paragraph VI.

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. Prior Notice

IT IS FURTHER ORDERED that for a period of 20 years from the date this Order becomes final:

A. Respondents shall not, without providing advance written notification to the Commission in the manner described in this paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any PET or PTA Production Asset located in North America.

B. With respect to the Notification:

1. The prior notification required by this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, and the Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction.

2. Respondent shall include a detailed description of the proposed acquisition, including but not limited to:

a. a description of the asset(s) being acquired;

b. identifying from whom the assets are purchased;

c. a description of the type of ownership interest being acquired; and

d. identifying whether the asset is a PET or PTA production asset.

3. Respondent shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material to the parties to the transaction (within the meaning of 16 C.F.R. § 803.20), Respondent

shall not consummate the transaction until 30 days after all parties to the transaction submit such additional information or documentary material.

4. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VIII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall submit the complete CCP Joint Venture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the date the Commission issues this Order, and any other agreements 30 days from being finalized and signed by Respondents.

B. Each Respondent Member and CCP shall submit verified written reports ("compliance reports") in accordance with the following:

1. An interim compliance report 30 days after the Order is issued, every 60 days thereafter until the expiration of the Construction Phase, and every 90 days after the expiration of the Construction Phase for a period of 3 years;

2. Annual compliance reports one year after the date this Order is issued, and annually for the next 19 years on the anniversary of that date; and

3. Additional compliance reports as the Commission or its staff may request.

Provided, however, for purposes of this Paragraph VIII, Respondent Indorama and Respondent Lohias may submit combined compliance reports.

C. Each compliance report shall set forth in detail the manner and form in which each Respondent intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether each Respondent is in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Each Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures each Respondent has implemented or plans to implement to ensure that they have complied or will comply with each paragraph of the Order, including the following information:

1. Each month in which Respondent Members took other than one-third of the Corpus Christi Plant's Base PET Production or Base PTA Production output, including how much PET and PTA each Respondent Member used, and any steps CCP took to offer unused capacity to third parties;

2. Each instance in which a Respondent Member requested that the Corpus Christi Plant change a particular grade of PET, the resolution of that request, and CCP's efforts to accommodate those requests;

3. Each instance in which a Respondent Member requested to expand PET, PTA, or feedstock capacity at the Corpus Christi Plant, the resolution of that request, and CCP's efforts to accommodate those requests;

4. Each instance in which any person requested to license or acquire intellectual property owned by CCP, and CCP's response;

5. A detailed description of any Confidential Information received by any Respondent Member; and

6. The log required by Paragraph III.D.

D. Each compliance report shall be verified 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. Each Respondent 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. In addition, each Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

IX. Change in Respondent

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

A. Its proposed dissolution;

B. Its proposed acquisition, merger or consolidation; or

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

X. 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.

XI. Term

IT IS FURTHER ORDERED that this Order shall terminate on February 20, 2039.

By the Commission.

Confidential/Non-Public Appendix A

CCP Joint Venture Agreement

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

Appendix B

Monitor Agreement

Confidential/ Non-Public Appendix C

Monitor Compensation

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

ANALYSIS OF CONSENT ORDERS 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 Corpus Christi Polymers LLC ("CCP"); Alfa, S.A.B. de C.V. ("DAK"); Indorama Ventures Plc ("Indorama"); Aloke Lohia and Suchitra Lohia; and Far Eastern New Century Corporation ("FENC") (collectively, the "Respondents"). CCP is a joint venture entity owned by corporate subsidiaries of DAK, Indorama, and FENC. The Consent Agreement would remedy the anticompetitive effects that likely would result from CCP's proposed $1.1 billion acquisition of a polyethylene terephthalate ("PET") and purified terephthalic acid ("PTA") facility, currently under construction in Corpus Christi, Texas (the "Transaction"). Upon completion, the plant will become the largest vertically integrated PTA-PET production facility in North America.

Absent a remedy, the Transaction would threaten to harm competition in the manufacture and sale of PET. In particular, the Commission's Complaint alleges that the Transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the asset purchase 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 manufacture and sale of PET in an area no greater than North America.

The Consent Agreement addresses the Commission's concerns by, among other things, restricting DAK and Indorama's ability to exercise control over CCP and by implementing mechanisms to prevent the flow of competitively sensitive information between and among the Respondents. Consistent with the Commission and the U.S. Department of Justice's *Antitrust*

Guidelines for Collaborations Among Competitors, the Consent Agreement also ensures that the agreement between DAK, Indorama, and FENC is no broader than reasonably necessary to achieve the procompetitive benefits of the CCP joint venture.

The Commission has placed the proposed 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 proposed Consent Agreement and any comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent Corpus Christi Polymers LLC is a limited liability company incorporated in Delaware with its principal place of business in Corpus Christi, Texas. CCP is a joint venture entity formed by the corporate subsidiaries of Respondents DAK, Indorama, and FENC. The joint venture members formed CCP to complete the construction of the Corpus Christi plant and to act as a tolling manufacturer for the joint venture members. Each joint venture member will have the right to one-third of the Corpus Christi plant's PTA and PET capacity, and each joint venture member will independently procure raw materials and independently sell and distribute the corresponding PTA and PET.

Respondent Alfa S.A.B. de C.V. is a holding company with headquarters in Monterrey, Mexico, and it operates in North America through its subsidiaries, Alpek, S.A.B. de C.V. and DAK Americas, LLC. It is the largest PET producer in North America by production capacity and operates four facilities in the United States, one facility in Mexico, and one facility in Canada. DAK also manufactures PTA, the primary input in producing PET, in North America.

Respondent Indorama Ventures Plc is a Thai company. Indorama, through its subsidiaries, owns and operates three PET production facilities in the United States and one facility in Mexico, making Indorama the second-largest North American PET producer by capacity. Indorama also manufactures PTA in North America.

Respondents Aloke Lohia and Suchitra Lohia are the ultimate parent entities of Indorama for premerger notification purposes. Respondent Aloke Lohia is Executive Director, Vice Chairman of the Board, and Group Chief Executive Officer of Indorama. Respondent Suchitra Lohia is Executive Director and Chairperson of the Corporate Social Responsibility Committee of Indorama.

Respondent Far Eastern New Century Corporation is a corporation with headquarters in Taipei, Taiwan. FENC owns a PET plant in Apple Grove, West Virginia, which it acquired in early 2018. FENC is one of the largest polyester producers in the world.

III. The Proposed Acquisition

M&G Chemicals S.A. ("M&G") is an Italian-based global producer of PET. In July 2011, M&G announced plans to build a new PET and PTA facility in Corpus Christi, Texas, the

primary asset included in the Transaction. M&G began construction in April 2013. In the years that followed, cost overruns and construction problems delayed the project. During this time, DAK provided financing to M&G in exchange for a lien on the Corpus Christi plant and future rights to a substantial portion of the plant's capacity.

In October 2017, M&G and eleven affiliates filed for Chapter 11 bankruptcy protection. The bankruptcy court established requirements for the sale of M&G's assets and scheduled a March 2018 auction for the Corpus Christi plant and other assets. M&G received three final bids for the Corpus Christi plant: a bid from CCP, which at the time was a two-firm joint venture between DAK and Indorama, a bid from FENC, and a bid from a subsidiary of Grupo Financiero Inbursa, S.A.B. de C.V., the plant's largest lienholder.

M&G had concerns that the bids from the DAK/Indorama joint venture and FENC did not comply with the bankruptcy court's requirements. As the auction date approached, M&G consented to negotiations among the joint venture members to create a trilateral bid that would comply with the bankruptcy court's requirements. The joint venture members ultimately agreed to form a trilateral joint venture, and Respondent CCP submitted an approximately $1.1 billion bid for the Corpus Christi plant and related assets, which the bankruptcy court approved as the winning bid on March 29, 2018.

IV. North American PET Market

The Commission's Complaint alleges that a relevant product market in which to analyze the Transaction is the manufacture and sale of PET. PET is a plastic polymer primarily used to make plastic water and soda bottles and other packaging for consumer goods. Consumer goods manufacturers cannot switch to other products without incurring significant costs, as they have large investments in production lines that can only use PET as an input. Furthermore, in many applications, manufacturers and their customers disfavor potential substitutes such as glass, aluminum, and polypropylene, because these materials can be heavier, bulkier, and more expensive. Consumer goods manufacturing customers thus have no viable or economic substitute for PET.

The Commission's Complaint also alleges that an area no greater than North America is a relevant geographic market in which to analyze the effects of the Transaction. North American manufacturing customers prefer to purchase from North American suppliers due to simplified logistics, reduced supply chain risk, and quicker delivery times. Imported PET, which accounts for approximately 15% of North American sales, primarily serves customers located close to the coasts, and the Commission's Complaint alleges that imports do not constrain prices throughout North America. Duties on imported PET have made many foreign PET sources uncompetitive even for North American customers who might otherwise have competitive freight logistics from coastal ports.

The North American PET market is highly concentrated. The joint venture members are three of only four North American PET producers, and together the three firms control nearly 90 percent of North American PET capacity. The North American PTA market is also highly concentrated, with DAK and Indorama two of only three significant producers. Vertical

integration into the PTA markets gives DAK and Indorama an advantage over other, non-integrated PET producers. The market has high barriers to entry, including the significant time and cost of constructing a PET plant.

V. Effects of the Transaction

Without the proposed Consent Agreement, the Transaction would substantially lessen competition in the North American PET market by facilitating or increasing the likelihood of coordination between and among the joint venture members and by increasing the likelihood that the joint venture members, acting alone or in concert, would exercise market power. In addition, absent relief, the CCP joint venture lacks sufficient safeguards to prevent the joint venture members from using relationships occasioned by their joint ownership in CCP, and by the Transaction, to share competitively sensitive information beyond the minimum degree reasonably necessary to accomplish CCP's legitimate objectives.

VI. The Proposed Consent Agreement

The proposed Consent Agreement remedies the Transaction's anticompetitive effects by including a number of safeguards that limit DAK and Indorama's control over CCP and that prevent the flow of competitively sensitive information between and among the joint venture members. More fundamentally, the proposed Consent Agreement preserves the less concentrated market structure that resulted from CCP's transformation from a two-firm to a three-firm joint venture, while also ensuring that CCP operates as an independent toll manufacturing plant. At the same time, the proposed Consent Agreement allows the joint venture members to bring to bear their expertise in building large PET and PTA facilities to efficiently complete construction of the Corpus Christi plant.

The proposed Consent Agreement prohibits each joint venture member from owning more than a one-third equity interest in CCP and from owning tolling rights to more than one-third of the Corpus Christi plant's PET and PTA capacity, without prior approval from the Commission. Pursuant to the terms of the revised CCP joint venture operating agreement, as incorporated by reference into the proposed Consent Agreement, if a joint venture member fails to utilize the entirety of its one-third tolling rights in a given month, the other two joint venture members may use that capacity, without Commission approval. CCP will not share which joint venture member did not use its full capacity allotment. If no joint venture member claims the unused capacity, CCP must then market the capacity to third parties. The proposed Consent Agreement also ensures that any joint venture member can expand its capacity at the Corpus Christi plant without the approval of the other joint venture members. These provisions resolve concerns that Respondents might individually or cooperatively suppress output anticompetitively at the Corpus Christi plant.

The proposed Consent Agreement also includes safeguards against the improper sharing of competitively sensitive information between and among the joint venture members. The proposed Consent Agreement prohibits the joint venture members from receiving, sharing, or using any confidential information regarding CCP, with limited exceptions for reporting obligations and other operational necessities. The joint venture members must periodically

provide a log to the Commission that identifies and describes all communications with any other joint venture member relating to the operation and management of Respondent CCP. The proposed Consent Agreement also prohibits the joint venture member from directly or indirectly influencing members of CCP's board of managers, subject to limited exceptions defined in CCP's revised joint venture operating agreement. Finally, the proposed Consent Agreement limits the joint venture members' ability to hire former CCP independent board members and prohibits the joint venture members from soliciting or recruiting CCP employees. The joint venture members cannot hire former CCP employees for positions involving PET or PTA sales, marketing, or production decisions in the relevant market, for a period of one year.

To ensure the effectiveness of this relief, the proposed Consent Agreement requires the Commission's prior approval before the Respondents may make substantive governance or operating changes to CCP's revised joint venture operating agreement. Because a Respondent's future acquisition of any interest in a North American PET or PTA production facility would likely raise competition concerns, the proposed Consent Agreement requires that the Respondents provide the Commission prior notice of any such acquisition.

Consistent with the anticipated longevity of the Corpus Christi plant and the need for a remedy to continue throughout the CCP undertaking, the term of the proposed Consent Agreement is twenty years. The Commission has appointed Jeffrey Brennan of McDermott Will & Emery as a monitor to oversee the Respondents' compliance with the provisions in the proposed Consent Agreement. The Respondents must also submit detailed compliance reports that, among other things, identify and describe any instances in which a joint venture member used less than one-third of the Corpus Christi plant's PET or PTA capacity, asked for a change in grade of PET produced at the Corpus Christi plant, or requested an expansion of PET, PTA, or other feedstock capacity at the Corpus Christi plant.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

PENN NATIONAL GAMING, INC.,
AND
PINNACLE ENTERTAINMENT, 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-4658; File No. 181 0011
Complaint, September 28, 2018 – Decision, February 21, 2019

This consent order addresses the $2.8 billion acquisition by Penn National Gaming, Inc. of certain assets of Pinnacle Entertainment, Inc. The complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating meaningful and substantial competition between Penn and Pinnacle for casino services in the St. Louis, Kansas City, and Cincinnati area markets. The consent order requires Penn to divest to Boyd Gaming Corporation: (1) one of Pinnacle's casinos in the St. Louis, Missouri area, the Ameristar Casino Report Spa in St. Charles; (2) Pinnacle's only casino in the Kansas City, Missouri area, the Ameristar Kansas City Casino Hotel; and (3) both of Pinnacle's casinos in the Cincinnati, Ohio area: the Belterra Casino Resort in Florence, Indiana, and the Belterra Park casino and racetrack in Cincinnati.

Participants

For the *Commission*: *Maria DiMoscato, Rohan Pai,* and *Cathleen Williams.*

For the *Respondents*: *Nelson O. Fitts* and *Katharine R. Haigh, Wachtell, Lipton, Rosen & Katz; Clifford H. Aronson, Thomas Pak, and Kenneth B. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP.*

COMPLAINT

1. 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 Penn National Gaming, Inc. ("PNG"), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent Pinnacle Entertainment, Inc. ("Pinnacle"), 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

2. Respondent PNG is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its headquarters and

principal place of business located at 825 Berkshire Boulevard, Suite 200, Wyomissing, Pennsylvania.

3. Respondent Pinnacle is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 3980 Howard Hughes Parkway, Las Vegas, Nevada.

II. JURISDICTION

4. 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 ACQUISITION

5. Pursuant to an Agreement and Plan of Merger dated as of December 17, 2017, PNG proposes to acquire Pinnacle in a cash and stock transaction valued at approximately $2.8 billion ("the Acquisition").

IV. THE RELEVANT MARKETS

6. The relevant line of commerce in which to analyze the effects of the Acquisition is casino services. Casino services include a combination of slot machine, video poker machine, and table gaming (*i.e.*, gambling) services, and associated amenities that are used to drive gaming revenue, which typically include some combination of hotel accommodations, food and beverages, entertainment, and other amenities.

7. The three relevant geographic markets in which to analyze the effects of the Acquisition are: (1) the St. Louis area, which approximately corresponds to, the St. Louis, Missouri MSA; (2) the Kansas City area, which approximately corresponds to, the Kansas City, Missouri MSA; and (3) the Cincinnati area, which approximately corresponds to, the Cincinnati, Ohio MSA.

V. THE STRUCTURE OF THE MARKETS

A.
Casino Services in the St. Louis Area

7. Casino services in the St. Louis area is a relevant market. The Acquisition will reduce the number of providers of casino services in the St. Louis area from four to three and result in a highly concentrated market.

B.
Casino Services in the Kansas City Area

8. Casino services in the Kansas City area is a relevant market. The Acquisition will reduce the number of providers of casino services in the Kansas City area from five to four and result in a highly concentrated market.

C.
Casino Services in the Cincinnati Area

9. Casino services in the Cincinnati area is a relevant market. The Acquisition will reduce the number of providers of casino services in the Cincinnati area from five to four and result in a highly concentrated market.

VI. ENTRY CONDITIONS

A.
Entry Conditions in the St. Louis Area

10. Entry into the St. Louis area market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. The state of Missouri allows for the licensing of 13 riverboat casinos across the state, and all 13 licenses have been awarded. The state of Illinois caps the number of permitted riverboat casinos at 10, and all 10 licenses have been awarded. The relocation of any existing Missouri or Illinois riverboat casino to the St. Louis area to deter or counteract the anticompetitive effects described in Paragraphs 13-14 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, county, and city approvals.

B.
Entry Conditions in the Kansas City Area

11. Entry into the Kansas City area market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. The state of Missouri allows for the licensing of 13 riverboat casinos across the state, and all 13 licenses have been awarded. The state of Kansas limits the number of permitted casinos in the state to four, and all four licenses have been awarded. The relocation of any existing Missouri riverboat casino to the Missouri side of the Kansas City area to deter or counteract the anticompetitive effects described in Paragraphs 13-14 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, county, and city approvals.

C.
Entry Conditions in the Cincinnati Area

12. Entry into the Cincinnati area market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. The state of Ohio allows for the licensing of four casinos and seven racinos across the state, and all of these licenses have

been awarded. The state of Indiana limits the number of casinos in the state to a total of 13, with 11 casinos and two racinos. All of these licenses have been granted. The state of Kentucky does not permit casino gaming. The relocation of any existing Indiana riverboat casino to the Indiana side of the Cincinnati area to deter or counteract the anticompetitive effects described in Paragraphs 13-14 is unlikely to occur in a timely manner because of, among other things, the time and cost associated with acquiring the necessary state, county, and city approvals.

VII. EFFECTS OF THE ACQUISITION

13. The Acquisition, if consummated, is likely to substantially lessen competition in the relevant line of commerce in the following ways, among others:

a. by eliminating direct and substantial competition between Respondents PNG and Pinnacle; and

b. by increasing the likelihood that Respondent PNG will unilaterally exercise market power.

14. The ultimate effect of the Acquisition would be to increase the likelihood that prices of casino services will increase, and that the quality associated with casino services will decrease, in the relevant geographic markets.

VIII. VIOLATIONS CHARGED

15. The agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and 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.

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this twenty-eighth day of September, 2018, issues its complaint against said Respondents.

By the Commission, Commissioner Wilson not participating.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation into the proposed acquisition by Respondent Penn National Gaming, Inc. ("Penn National") of Respondent Pinnacle Entertainment, Inc. ("Pinnacle") (hereinafter referred to as "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 ("Agreement Containing Consent Orders" or "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. 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 the following Order to Maintain Assets:

1. Respondent Penn National Gaming, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its corporate head offices and principal place of business located at 825 Berkshire Boulevard, Suite 200, Wyomissing, Pennsylvania 19610.

2. Respondent Pinnacle Entertainment, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 3980 Howard Hughes Parkway, Las Vegas, Nevada 89169.

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

I. (Definitions)

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

A. "Asset Maintenance Period" means, for each of the Assets To Be Maintained, the period commencing on the date this Order to Maintain Assets is issued by the Commission and ending on the respective Divestiture Date.

B. "Assets To Be Maintained" means each of the Divested Casinos, and the Casino Business and Casino Assets related thereto.

C. "Decision and Order" means:

1. The proposed Decision and Order contained in the Consent Agreement in this matter until issuance of a final Decision and Order by the Commission; and

2. The Final Decision and Order issued by the Commission in this matter, following the issuance of a final Decision and Order by the Commission.

II. (Asset Maintenance)

IT IS FURTHER ORDERED that during the Asset Maintenance Period:

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

B. Respondents shall not terminate the operation of any of the Assets To Be Maintained, and shall conduct or cause to be conducted the business and operations of the Assets To Be Maintained 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 Assets To Be Maintained, 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 Assets To Be Maintained. Included in the above obligations, Respondents shall, without limitation:

1. Maintain all operations of the Assets To Be Maintained in the regular course of business and in accordance with past practices, keep the organization and properties of the Assets To Be Maintained intact, and not reduce operating hours, marketing and promotional efforts, customer programs, entertainment offerings, or other services, amenities, or offerings;

2. Make any payment required to be paid under any contract or lease when due, and otherwise satisfy all liabilities and obligations associated with the Assets To Be Maintained;

3. Provide the Assets To Be Maintained 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 (including gaming equipment), and to carry on at least at their scheduled pace all capital projects, business plans, development projects, promotional activities, and marketing activities;

4. Provide such other resources as may be necessary to respond to competition against the Assets To Be Maintained, prevent diminution in sales of the Assets To Be Maintained, and maintain the competitive strength of the Assets To Be Maintained;

5. Provide support services at levels customarily provided by Respondents;

6. Maintain all licenses, permits, approvals, authorizations, or certifications related to or necessary for the operation of the Assets To Be Maintained, and otherwise operate the Assets To Be Maintained in accordance and compliance with all regulatory obligations and requirements;

7. Maintain the books and records (including but not limited to all customer databases, loyalty program databases, and records relating to regulatory compliance) of the Assets To Be Maintained;

8. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with the Assets To Be Maintained, including:

    a. Continuing to provide each of the Key Employees and Casino Employees with all employee benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all benefits;

    b. Providing reasonable financial incentives to encourage Key Employees and Casino Employees to continue in his or her position until the Divestiture Date, and as may be necessary to facilitate the employment of such Key Employees and Casino Employees by the proposed Acquirer following the Divestiture Date;

    c. When vacancies occur, replacing the employees in the regular and ordinary course of business, in accordance with past practice; and

    d. Not transferring any employees from any of the Assets To Be Maintained to any of Respondents' assets or businesses that Respondents will not divest;

9. Not display any signs or conduct any advertising or promotions (e.g., direct mailing, emails, social media postings), or do anything else visible to the public to indicate that Respondent is moving its operations to another location, or that indicates any of the Assets To Be Maintained will close;

10. Not reduce, change, or modify in any material respect, the level of marketing, promotional, pricing, or advertising practices, programs, and policies for the Assets To Be Maintained (including Respondent Pinnacle's mychoice customer rewards program), other than changes in the ordinary course of business consistent with changes made at Respondent Pinnacle's other casino businesses that Respondents will not divest; and

11. Not target, encourage, or convert customers of Divested Casinos to become customers of Respondents' other casino businesses that will not be divested, or otherwise take actions to change the composition or makeup of the Casino Customer Database Records or the Retained Customer Database Records; *provided, however*, that nothing in this sub-paragraph shall prevent Respondents from engaging in advertising, marketing, and promotion activities: (i) generally applicable to all of Respondent Pinnacle's casinos or mychoice members, or (ii) in the ordinary course of business and in accordance with past practice.

Provided, however, that Respondents shall not be in violation of this Paragraph II if Respondents take actions (i) that are 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 Casino Assets and consistent with the purposes of the Decision and Order.

III. (Additional Obligations)

IT IS FURTHER ORDERED that:

A. During the Asset Maintenance Period, Respondents shall not:

1. Provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement; or

2. Use any Confidential Business Information for any reason or purpose, other than: as required or permitted by this Order to Maintain Assets, the Decision and Order, or a Divestiture Agreement;

Provided, however, that nothing in this Paragraph shall prevent Respondents from retaining and using any tangible or intangible property (including Retained Customer Database Records) that Respondents retain the right to use pursuant to this Order to Maintain Assets or the Decision and Order, provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order to Maintain Assets and the Decision and Order.

B. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information by Respondents that is not permitted by this Order to Maintain Assets, the Decision and Order, or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by any persons to information available or stored on any of Respondents' computers or computer networks.

C. Not later than 30 days from the date this Order to Maintain Assets is issued, Respondents shall:

1. Provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information; and

2. Require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission.

D. During the Asset Maintenance Period, Respondents, in consultation with each proposed Acquirer, for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Casino Assets by the Acquirer is not delayed or impaired by the Respondents;

2. Designate employees of Respondents knowledgeable about the operation of the Casino Assets, and Casino Business conducted at the Divested Casinos, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Casino Assets;

3. Allow the Acquirer reasonable access to all Confidential Business Information related to the Casino Assets and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effect the operational and marketing transition to the Acquirer in an efficient and timely manner.

E. No later than the Divestiture Date, Respondents shall obtain at their sole expense all Governmental Authorizations and third-party consents necessary to divest the Casino Assets and for the Acquirer to operate the Divested Casinos in a manner that achieves the purposes of this Order to Maintain Assets and the Decision and Order. *Provided, however*, that Respondents shall assist the Acquirer in obtaining the transfer from Respondents, or issuance to the Acquirer, of any Governmental Authorization, permit, license, asset, or right that Respondents have no legal right to divest or transfer to the Acquirer.

F. Respondents shall cooperate with and assist any person with whom Respondents engage in negotiations to acquire the Casino Assets in a due diligence investigation, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process.

G. Respondents shall cooperate with and assist any proposed Acquirer of the Casino Assets to evaluate independently and offer employment to the Key Employees and Casino Employees relating to each of the Divested Casinos, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:

   a. Provide to the proposed Acquirer a list of all Key Employees and Casino Employees, and provide Employee Information for each; and

   b. Allow the proposed Acquirer a reasonable opportunity to interview any Key Employees and Casino Employees;

2. Within 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:

   a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Key Employees and Casino Employees; and

   b. Make offers of employment to any of the Key Employees and Casino Employees;

3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Key Employees and Casino Employees, not offer any incentive to Key Employees and

Casino Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Key Employees and Casino Employees by a proposed Acquirer; and

4. Respondents shall remove any impediments within the control of Respondents that may deter any Key Employees or Casino Employees from accepting employment with a proposed 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 a proposed Acquirer, and shall not make any counteroffer to any Key Employees or Casino Employees who receive an offer of employment from the Acquirer; *provided, however*, that nothing in this Order to Maintain Assets shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

IV. (Purpose Clause)

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to (i) maintain and preserve the Casino Assets, and the Casino Business conducted at each of the Divested Casinos, as viable, marketable, competitive, and ongoing businesses until the divestitures required by the Decision and Order is achieved; (ii) prevent interim harm to competition pending the relevant divestiture and other relief; and (iii) promote achieving the purposes of the Decision and Order.

V. (Monitor)

IT IS FURTHER ORDERED that:

A. Jeffrey Hartmann shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached to the Decision and Order as Appendix IV ("Monitor Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements;

B. No later than 1 day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements, in a manner consistent with the purposes of the orders.

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

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders and in consultation with the Commission.

2. 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 the Respondents or of the Commission

3. The Monitor shall serve until all of Respondents' obligations under Paragraphs II and IV of the Decision and Order have been satisfied.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement(s).

E. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement(s).

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph V.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph V.F of this Order to Maintain Assets.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets and the Decision and Order, and as otherwise

provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order to Maintain Assets and the Decision and Order. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.

I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

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

2. Not later than 10 days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreement(s) in a manner consistent with the purposes of the orders and in consultation with the Commission.

L. 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 to Maintain Assets.

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order

VI. (Compliance Reports)

IT IS FURTHER ORDERED that:

A. Respondent Penn National shall notify Commission staff via email at bccompliance@ftc.gov of: (1) the Acquisition Date no later than 5 days after the Acquisition Date; and (2) the date Respondents complete each of the divestitures required to be made pursuant to Paragraph II of the Decision and Order, no later than 5 days from each respective divestiture date.

B. Within 30 days after this Order to Maintain Assets is issued, and every 30 days thereafter until this Order to Maintain Assets terminates, Respondents shall submit to the Commission verified written reports ("compliance reports") setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with all provisions of this Order to Maintain Assets. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order to Maintain Assets. Conclusory statements that Respondents have complied with their obligations under this Order to Maintain Assets 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 to Maintain Assets.

C. Each compliance report shall be verified 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. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that, after the Decision and Order in this matter is issued as final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission on the same timing as, the compliance reports required to be submitted by Respondents pursuant to the Decision and Order.

VII. (Change in Respondents)

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

A. Any proposed dissolution of Respondent Penn National Gaming, Inc.;

B. Any proposed acquisition, merger, or consolidation of Respondent Penn National Gaming, Inc.; or

C. Any other change in Respondent Penn National Gaming, Inc., including but not limited to assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

VIII. (Access)

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, 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 Decision and 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 to Maintain Assets, 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.

IX. (Term)

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

A. 3 business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. With respect to each Divested Casino, the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of the Casino Assets related to such Divested Casino, as described in and required by the Decision and Order.

Provided, however, that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three business days after the Decision and Order becomes final.

Provided, further, however, that if the Commission, pursuant to Paragraph II.B of the Decision and Order, requires the Respondents to rescind any or all of the divestitures to Boyd, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect with respect to the relevant Casino Assets until the day after Respondents' (or a Divestiture Trustee's) completion of the divestiture of those assets, as required by the Decision and Order.

By the Commission, Commissioner Wilson not participating.

DECISION

The Federal Trade Commission ("Commission") initiated an investigation into the proposed acquisition by Respondent Penn National Gaming, Inc. ("Penn National") of Respondent Pinnacle Entertainment, Inc. ("Pinnacle") (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 ("Agreement Containing Consent Orders" or "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, and issues the following Decision and Order ("Order"):

1. Respondent Penn National Gaming, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of

Pennsylvania, with its corporate head offices and principal place of business located at 825 Berkshire Boulevard, Suite 200, Wyomissing, Pennsylvania 19610.

2. Respondent Pinnacle Entertainment, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head offices and principal place of business located at 3980 Howard Hughes Parkway, Las Vegas, Nevada 89169.

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

A. "Penn National" means Penn National Gaming, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Penn National Gaming, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Penn National includes Pinnacle after the Acquisition Date.

B. "Pinnacle" means Pinnacle Entertainment, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates case controlled by Pinnacle Entertainment, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Boyd" means Boyd Gaming Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its offices and principal place of business located at 3883 Howard Hughes Parkway, Ninth Floor, Las Vegas, Nevada 89169, and including subsidiaries and affiliates controlled by Boyd Gaming Corporation.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means Boyd, or any other persons or entities approved by the Commission to acquire any or all of the Casino Assets pursuant to this Order.

F. "Acquisition" means Penn National's acquisition of Pinnacle, as described and contemplated by the Acquisition Agreement.

G. "Acquisition Agreement," means the Agreement and Plan of Merger dated as of December 17, 2017, by and among Pinnacle Entertainment, Inc., Penn National Gaming, Inc., and Franchise Merger Sub, Inc.

H. "Acquisition Date" means the date Penn National closes its acquisition of Pinnacle, as described and contemplated by the Acquisition Agreement.

I. "Ameristar Kansas City" means Respondent Pinnacle's Ameristar Kansas City Casino Hotel located at 3200 North Ameristar Drive in Kansas City, Missouri, and including all casino, hotel, restaurants, alcoholic beverage services, retail space, and other businesses, operations, properties, and services related thereto.

J. "Ameristar St. Charles" means Respondent Pinnacle's Ameristar Casino Resort Spa St. Charles, located at 1 Ameristar Boulevard in St. Charles, Missouri, and including all casino, hotel, restaurants, alcoholic beverage services, retail space, and other businesses, operations, properties, and services related thereto.

K. "Belterra Casino" means Respondent Pinnacle's Belterra Casino Resort, located at 777 Belterra Drive in Florence, Indiana, and the off-site hotel d/b/a "Ogle Haus Inn" located at 1013 West Main Street in Vevay, Indiana, and including all casino, hotel, restaurants, alcoholic beverage services, retail space, and other businesses, operations, properties, and services related thereto.

L. "Belterra Park" means Respondents Pinnacle's Belterra Park casino and racetrack located at 6301 Kellogg Road in Cincinnati, Ohio, and including all casino, restaurants, alcoholic beverage services, retail space, and other businesses, operations, properties, and services related thereto.

M. "Boyd Divestiture Agreement" means the Membership Interest Purchase Agreement by and among Respondents and Boyd, dated as of December 17, 2017, and all amendments, exhibits, attachments, ancillary agreements (including the Transition Services Agreement and Brand License), and schedules thereto, approved by the Commission and attached to this Order as Non-Public Appendix I.

N. "Brand License" means a license agreement approved by the Commission between Respondents and an Acquirer granting a perpetual, royalty-free license to the "Ameristar" trade name for use by the Acquirer of the Ameristar Kansas City and the Ameristar St. Charles Divested Casinos, along with a royalty-free, non-exclusive license to certain of Respondents' Retained Intellectual Property (including rights relating to the "mychoice" customer loyalty program) for transitionary purposes, as may be reasonably requested by an Acquirer. "Brand License" includes the brand license agreement attached to and made part of the Boyd Divestiture Agreement at Non-Public Appendix I to this Order.

O. "Casino Assets" means all of Respondents' rights, title, and interests in and to all tangible and intangible assets relating to each Divested Casino, and the Casino Business conducted at each Divested Casino, including but not limited to the following:

1. Real property interests, whether owned or leased, together with all easements, rights of way, buildings, improvements, facilities, parking lots, and appurtenances thereto, and including any options to acquire or lease additional properties for future use or development;

2. Tangible personal property, including but not limited to fixtures and equipment (including gaming equipment), machinery, vehicles, supplies, and inventories;

3. Intellectual Property;

4. Contracts and Governmental Authorizations;

5. All books and records;

6. Casino Customer Database Records;

7. All issued and outstanding membership interests in and to, respectively: PNK (Ohio), LLC; Belterra Resort Indiana LLC; Ameristar Casino Kansas City, LLC; and Ameristar Casino St. Charles, LLC; and

8. All other assets available to, or reserved for use by, each Divested Casino, wherever located, including but not limited to off-site properties, facilities, or assets used or available to each Divested Casino for event hosting, parking, storage, office space, billboards, advertising, and employee training or administration.

Provided, however, the Casino Assets need not include:

1. Retained Intellectual Property;

2. Respondent Corporate Contracts;

3. Retained Customer Database Records;

4. Enterprise software that Respondents also use to manage and account for businesses other than the Divested Casinos;

5. Corporate headquarters of Respondents;

6. The portion of any books and records that contains information about any other business that Respondents are not required to divest and from which Confidential Business Information has been redacted; and

7. Any original record that Respondents have a legal, contractual, or fiduciary obligation to retain so long as Respondents provide Acquirer with a copy of the record and access to the original materials if a copy is insufficient for regulatory or evidentiary purposes.

P. "Casino Business" means the business of marketing, selling, and providing casino gaming and related amenity services to customers, including gaming services such as slots, table gaming, poker, video poker, pari-mutuel wagering, video gaming terminals, and all other gaming services lawfully permitted in the jurisdiction where the casino is located (whether actually offered or which could be offered there), and amenities services such as hotel, restaurant, spa, retail, food, beverage, alcohol, entertainment, meetings and conferences, and other services typically provided by Respondent Pinnacle at its casino facilities.

Q. "Casino Customer Database Records" means Respondent Pinnacle's data and information, wherever located and however stored, provided to an Acquirer in a format and in a manner acceptable to that Acquirer, relating to customers that visit a Divested Casino or activities by customers at a Divested Casino, including:

1. Each person's personal and demographic information;

2. Each person's transactional history at a Divested Casino and/or each person's patronage, purchase, and use of casino or amenity services during visits to a Divested Casino, including the dates, game types, average wager, times, length of visits, and hotel room reservation details (*i.e.,* room types, dates, booked rates for future reservations, payment method);

3. All data and information relating to the value spent or lost by a customer during its visits to the Divested Casino or value as a consumer of casino services at a Divested Casino, including information such as each customer's total actual win or loss, total theoretical win or loss value, average daily worth (ADW), average daily theoretical value (ADT or THEO), or other metrics related to customer's transaction history or purchases of casino or amenity services at a Divested Casino;

4. Each person's tier status in Pinnacle's customer loyalty program and total comp balance on or immediately prior to the Divestiture Date based on each person's visits to all of Pinnacle's casinos in the aggregate (including both Divested Casinos and any other casino operated by Respondent Pinnacle);

5. The identity of excluded or disassociated customers, along with any related information (including whether the exclusion or disassociation is voluntary or involuntary);

6. Incentives or offers extended (whether or not redeemed) to customers of any Divested Casino, including special event invitations, gaming incentives (including downloadable slot credits, table games match play, free bet offers and other similar incentives);

7. Any other data and information customarily used by Respondents at, or on behalf of, a Divested Casino to market or sell casino or amenity services to customers, including, but not limited to, survey data, Twitter accounts, and Facebook accounts; and

8. Demographic, preference and other information (i) captured from the Respondent Pinnacle's enterprise-wide loyalty program system, (ii) maintained in connection with Respondent Pinnacle's mychoice customer loyalty program website guest portal (including PIN data, email preferences, contact preferences and other similar information), (iii) contained in hosted customer relationship management systems (including guest contact history, host bonus goals and calculation), (iv) regarding mileage and database elements required to compile the lifecycle score, (v) regarding yield management score and (vi) regarding group sales (including lead, contact, room count, food and beverage spend and similar information), in each case relating to any Divested Casino.

Provided, however, Casino Customer Database Records does not include a copy of the Retained Customer Database Records.

R. "Casino Employees" means: (1) with respect to each Divested Casino, each of Respondents' employees who were employed or under contract at the Divested Casino at any time between December 1, 2017, and the Divestiture Date; and (2) the shared services employees identified on Non-Public Appendix V.

S. "Confidential Business Information" means any non-public information relating to the Casino Assets and the Casino Business operated at the Divested Casinos, either prior to or after the Divestiture Date, including, but not limited to, all customer lists, Casino Customer Database Records, customer loss data, customer spending data, price lists, marketing methods, Intellectual Property, technologies, processes, written or unwritten know-how, or trade secrets, and:

1. Obtained by Respondents prior to the Divestiture Date; or,

2. Obtained by Respondent after the Divestiture Date, in the course of performing Respondents' obligations under any Divestiture Agreement (including any Transition Services Agreement);

Provided, however, that Confidential Business Information shall not include:

1. Information that is in the public domain when received by Respondents;

2. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;

3. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and

4. Information that becomes known to Respondents from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

T. "Contracts" means any written or unwritten contract, lease, sub-lease, license, and other agreement or obligation of any kind.

U. "Direct Costs" means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transitional Services. "Direct Cost" to a Commission-approved Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

V. "Divested Casino(s)" means, collectively or individually, Ameristar St. Charles, Ameristar Kansas City, Belterra Casino, and Belterra Park.

W. "Divestiture Agreement" means:

1. The Boyd Divestiture Agreement; or

2. Any other agreement between Respondents (or a Divestiture Trustee appointed pursuant to Paragraph IX of this Order) and an Acquirer to purchase any or all of the Casino Assets, and all amendments, exhibits, attachments, ancillary agreements (including any Transition Services Agreement and Brand License), and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

X. "Divestiture Date" means, with respect to each of the divestitures required by Paragraph II.A of this Order, the date upon which the respective divestiture closes.

Y. "Employee Information" means, for each Casino Employee and Key Employee, a profile prepared by Respondents summarizing the employment history of each

employee and including, as requested by the proposed Acquirer and to the extent permitted by applicable law:

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

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

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

Z. "Governmental Authorization" means any license, registration, approval, or permit issued, granted, given or otherwise made available by or under the authority of any governmental agency or pursuant to any legal requirement, and all applications and documents related thereto, related to or necessary for the operation of the Casino Business (and any other lawful business) at each of the Divested Casinos.

AA. "Key Employees" means the individuals listed on Non-Public Appendix II to this Order.

BB. "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.

CC. "Monitor" means the person approved by the Commission to serve as a Monitor pursuant to this Order and/or the Order to Maintain Assets issued by the Commission.

DD. "Order to Maintain Assets" means the Order to Maintain Assets (including any modifications thereto) issued by the Commission in this matter.

EE. "Respondent Corporate Contracts" means:

1. Contracts that are used solely by, or relate exclusively to, assets owned by Respondents other than the Divested Casinos; and

2. Contracts that are used by or relate to all of the casinos owned by Respondent Pinnacle, including but not limited to the Divested Casinos, and identified on Non-Public Appendix III to this Order.

FF. "Retained Customer Database Records" means the data and information, wherever located and however stored, relating to customers that visit Respondents' properties other than the Divested Casinos or activities by customers at properties other than the Divested Casinos, including:

1. Each person's personal and demographic information;

2. Each person's transactional history at Respondents' casinos or hotels other than a Divested Casino and/or each person's patronage, purchase, and use of casino or amenity services during visits to Respondents' casinos or hotels other than a Divested Casino, including the dates, game types, average wager, times, length of visits, and hotel room reservation details (*i.e.,* room types, dates, booked rates for future reservations, payment method);

3. All data and information relating to the value spent or lost by customers during their visits to Respondents' casinos or hotels other than a Divested Casino or value as a consumer of Casino Services at Respondents' casinos or hotels other than a Divested Casino, including information such as each customer's total actual win or loss, total theoretical win or loss value, average daily worth (ADW), average daily theoretical value (ADT or THEO), or other metrics related to customer's transaction history or purchases of casino and amenity services at Respondents' properties other than a Divested Casino;

4. Each person's tier status and total comp balance on or immediately prior to the Divestiture Date based on each person's visits to all of Pinnacle's casinos in the aggregate (including Divested Casinos);

5. The identity of excluded and disassociated customers, along with any related information (including whether the exclusion or disassociation is voluntary or involuntary);

6. Incentives from casinos other than the Divested Casinos extended to (whether or not redeemed) customers, including special event invitations, gaming incentives (including downloadable slot credits, table games match play, free bet offers and other similar incentives);

7. Any other data and information customarily used by Respondents at a casino or hotel other than a Divested Casino to market or sell casino or amenity services to customers, including survey data, Twitter accounts, and Facebook accounts; and

8. Demographic, preference and other information (i) captured from the Respondent Pinnacle's enterprise-wide loyalty program system, (ii) maintained in connection with Respondent Pinnacle's mychoice customer loyalty program website guest portal (including PIN data, email preferences, contact preferences and other similar information), (iii) contained in hosted customer relationship management systems (including guest contact history, host bonus goals and calculation), (iv) regarding mileage and database lifecycle score, (v) regarding yield management score and (vi) regarding group sales (including lead, contact, room count, food and beverage spend and similar information), in each case relating to properties other than Divested Casinos.

GG. "Retained Intellectual Property" means Intellectual Property owned or licensed by Respondents that, prior to the Acquisition, was used by Respondent solely or primarily for purposes other than the Divested Casinos.

HH. "Transition Services" means services, assistance, and cooperation as required by an Acquirer to facilitate the transfer and operation of the Casino Assets in a manner consistent with the purposes of this Order. Transition Services may include (by way of example only) services, training, personnel, information, access, and support related to: audits; finance and accounting; human resources and employee benefits; information technology and systems; databases; technology transfer; regulatory compliance; maintenance and repair of facilities and equipment; supply chain; maintaining or establishing relationships with vendors or other third-parties having business relations with the Divested Casinos; room reservation systems; food services; sales, marketing, and promotion; customer services; use of Retained Intellectual Property for transitionary purposes; and other logistical, operational, and administrative support.

II. "Transition Services Agreement" means the Transition Services Agreement between Boyd and Respondents for the provision of Transition Services, attached to and made part of the Boyd Divestiture Agreement at Non-Public Appendix I to this Order, and/or any other written agreement that the Commission approves between Respondents and an Acquirer (or a Divestiture Trustee and an Acquirer) for the provision of Transition Services.

II. (Divestiture)

IT IS FURTHER ORDERED that:

A. No later than 10 days from the Acquisition Date, Respondents shall divest, absolutely and in good faith, the Casino Assets to Boyd, and grant the Brand License, pursuant to the Boyd Divestiture Agreement.

Provided, however, that, if within 10 days of the Acquisition Date, Boyd has not received each of the Governmental Authorizations necessary for Boyd to acquire the Casino Assets from Respondents, and:

1. Respondents have not otherwise violated this Order or the Order to Maintain Assets;

2. Respondents have not breached the Boyd Divestiture Agreement;

3. Respondents have provided in a timely fashion all information and documents requested by any of the various state regulatory or gaming authorities; and,

4. The sole remaining condition for closing on the Divestiture Agreement is Boyd obtaining one or more Governmental Authorizations, then

Respondents shall have until 30 days from the Acquisition Date to divest the assets to Boyd in the manner required by this Paragraph.

B. If, prior to the date this Order becomes final, Respondents have divested the Casino Assets to Boyd pursuant to Paragraph II.A and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Boyd is not an acceptable Acquirer of the Casino Assets, then Respondents shall, within 5 days of notification by the Commission, rescind the Boyd Divestiture Agreement, and shall instead divest the Casino Assets as ongoing businesses, absolutely and in good faith, and grant the Brand License, at no minimum price, to one or more Acquirers and in a manner that receives the prior approval of the Commission, within 180 days of the date the Commission notifies Respondent that Boyd is not an acceptable Acquirer; or

2. The manner in which the divestitures identified in Paragraph II.A was accomplished was not acceptable, then the Commission may direct the Respondents (or appoint a Divestiture Trustee pursuant to Paragraph IX of this Order) to modify the divestiture in the manner the Commission determines is necessary to satisfy the requirements of this Order, which

may include entering into additional agreements or arrangements, or modifying the Boyd Divestiture Agreement.

C. No later than the Divestiture Date, Respondents shall obtain at their sole expense all Governmental Authorizations and third-party consents necessary to divest the Casino Assets and for the Acquirer to operate the Divested Casinos in a manner that achieves the purposes of this Order. *Provided, however*, that Respondents shall assist the Acquirer in obtaining the transfer from Respondents, or issuance to the Acquirer, of any Governmental Authorization, permit, license, asset, or right that Respondents have no legal right to divest or transfer to the Acquirer.

D. Respondents shall deliver all Casino Assets, including Confidential Business Information, to the Acquirer as soon as practicable in a manner that ensures its completeness, accuracy, and usefulness. Respondents shall provide the Acquirer with access to Confidential Business Information, and employees who possess or are able to locate the Confidential Business Information, until Respondents complete delivery of such materials to the Acquirer in the manner required by this Paragraph.

E. At least 30 days in advance of each Divestiture Date, Respondents, in consultation with each proposed Acquirer, for the purposes of ensuring an orderly transition, shall:

1. Develop and implement a detailed transition plan to ensure that the commencement of the operation of the Casino Assets by the Acquirer is not delayed or impaired by the Respondents;

2. Designate employees of Respondents knowledgeable about the operation of the Casino Assets, and Casino Business conducted at the Divested Casinos, who will be responsible for communicating directly with the Acquirer, and the Monitor (if one has been appointed), for the purposes of assisting in the transfer to the Acquirer of the Casino Assets;

3. Allow the Acquirer reasonable access to all Confidential Business Information related to the Casino Assets and to employees who possess or are able to locate such information; and

4. Establish projected timelines for accomplishing all tasks necessary to effect the operational and marketing transition to the Acquirer in an efficient and timely manner.

F. Respondents shall cooperate with and assist any person with whom Respondents engage in negotiations to acquire the Casino Assets in a due diligence investigation, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process.

G. The purpose of this Order is to remedy the harm to competition resulting from the Acquisition as alleged in the Commission's Complaint, and to ensure Boyd (or another Acquirer(s) approved by the Commission) can operate the Divested Casinos as an independent, viable and effective competitor and in a manner equivalent in all material respects to the manner in which Pinnacle operated the Divested Casinos prior to the Acquisition.

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 any 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, replace, or extend the terms of a Divestiture Agreement 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. (Transitional Assistance)

IT IS FURTHER ORDERED that:

A. Respondents shall provide the Acquirer with Transition Services sufficient to enable the Acquirer to transfer the Casino Assets efficiently and operate the Casino Business at the Divested Casinos in a manner equivalent in all material respects to the manner in which Pinnacle operated the Casino Business at the Divested Casinos prior to the Acquisition, in accord with the following:

1. Respondents shall provide Transition Services to an Acquirer:

   a. As set forth in a Divestiture Agreement; and

   b. As otherwise reasonably requested by the Acquirer (including before the Divestiture Date, if so requested);

2. Respondents shall provide Transition Services at no more than Respondents' Direct Cost;

3. Respondents shall provide Transition Services, as requested by the Acquirer, for at least 24 months after the Divestiture Date;

4. Respondents shall allow the Acquirer to terminate, in whole or part, any agreement for Transition Services upon commercially reasonable notice and without cost or penalty.

V. (Employees)

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with and assist any proposed Acquirer of the Casino Assets to evaluate independently and offer employment to the Key Employees and Casino Employees relating to each of the Divested Casinos, with such cooperation to include at least the following:

1. Not later than 5 business days after a request from a proposed Acquirer, Respondents shall, to the extent permitted by applicable law:

   a. Provide to the proposed Acquirer a list of all Key Employees and Casino Employees, and provide Employee Information for each; and

   b. Allow the proposed Acquirer a reasonable opportunity to interview any Key Employees and Casino Employees;

2. Within 10 days after a request from a proposed Acquirer, Respondents shall provide an opportunity for the proposed Acquirer to:

   a. Meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the Key Employees and Casino Employees; and

   b. Make offers of employment to any of the Key Employees and Casino Employees;

3. Respondents shall not directly or indirectly interfere with a proposed Acquirer's offer of employment to any one or more of the Key Employees and Casino Employees, not offer any incentive to Key Employees and Casino Employees to decline employment with a proposed Acquirer, and not otherwise interfere with the recruitment of any Key Employees and Casino Employees by a proposed Acquirer;

4. Respondents shall remove any impediments within the control of Respondents that may deter any Key Employees or Casino Employees from accepting employment with a proposed 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 a proposed

Acquirer, and shall not make any counteroffer to any Key Employees or Casino Employees who receive 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;

5. Respondents shall provide Key Employees and Casino Employees with reasonable financial incentives to continue in their positions, and/or as may be necessary to facilitate the employment of such Key Employees and Casino Employees by the proposed Acquirer. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of pension benefits, and additional incentives as may be necessary.

B. For a period of 2 years from the Divestiture Date, Respondents shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any Key Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, a violation of this provision will not occur if:

1. The Key Employee's employment has been terminated by the Acquirer;

2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or

3. Respondents hire a Key Employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order

C. For a period of 1 year from the Divestiture Date, Respondents shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any Casino Employee who has accepted an offer of employment with, or who is employed by, an Acquirer to terminate his or her employment relationship with the Acquirer.

Provided, however, a violation of this provision will not occur if:

1. The Casino Employee's employment has been terminated by the Acquirer;

2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or

3. Respondents hire a Casino Employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.

VI. (Additional Obligations)

IT IS FURTHER ORDERED that:

A. After the Divestiture Date, Respondents shall not:

1. Provide, disclose, or otherwise make available any Confidential Business Information to any person, except as required or permitted by this Order or a Divestiture Agreement; or

2. Use any Confidential Business Information for any reason or purpose, other than as required or permitted by this Order or a Divestiture Agreement.

Provided, however, that nothing in this Paragraph VI shall prevent Respondents from retaining and using any tangible or intangible property (including Retained Customer Database Records) that Respondents retain the right to use pursuant to this Order, provided further that to the extent that the use of such property involves disclosure of Confidential Business Information to another person, Respondents shall require such person to maintain the confidentiality of such Confidential Business Information under terms no less restrictive than Respondents' obligations under this Order.

B. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not permitted by this Order or any Divestiture Agreement. These measures shall include, but not be limited to, restrictions placed on access by persons to information available or stored on any of Respondents' computers or computer networks.

C. Not later than 30 days after the Divestiture Date, and not less than annually for 3 years after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of its officers, directors, employees, or agents who may have possession or access to such Confidential Business Information. Respondents shall require such personnel to acknowledge in writing or electronically their receipt and understanding of these written instructions, and shall maintain custody of these written instructions and acknowledgments for inspection upon request by the Commission

D. Notwithstanding this Paragraph VI of this Order, and subject to the Order to Maintain Assets, Respondent may use Confidential Business Information:

1. For the purpose of performing Respondents' obligations under this Order, the Order to Maintain Assets, or the Divestiture Agreements; and

2. To ensure compliance with legal and regulatory requirements, or as necessary to defend against legal claims.

VII. (Asset Maintenance)

IT IS FURTHER ORDERED that, pending divestiture of the Casino Assets, Respondents shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Casino Assets, to minimize any risk of loss of competitive potential of the Casino Assets, to operate the Casino Assets in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Casino Assets, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Casino 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 Casino Assets; and

B. Respondents shall not terminate the operation of any of the Casino Assets, and shall conduct or cause to be conducted the business and operations of the Casino Assets in the regular and 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 Casino Assets, 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 Casino Assets.

Provided, however, that Respondents shall not be in violation of this Paragraph VII 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 Casino Assets and consistent with the purposes of the Order.

VIII. (Monitor)

IT IS FURTHER ORDERED that:

A. Jeffrey Hartmann shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix IV ("Monitor

Agreement") and Non-Public Appendix IV-1 ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements;

B. No later than 1 day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, confer on the Monitor all rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements, in a manner consistent with the purposes of the orders.

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

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and related requirements of this Order, the Order to Maintain Assets, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the orders and in consultation with the Commission.

2. 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 the Respondents or of the Commission.

3. The Monitor shall serve until all of Respondents' obligations under Paragraphs II and IV of this Order have been satisfied.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreement(s).

E. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order, the Order to Maintain Assets, and the Divestiture Agreement(s).

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph VIII.G, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph VIII.F of this Order.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order or the Order to Maintain Assets, and as otherwise provided in the Monitor Agreement approved by the Commission. The Monitor shall evaluate the reports submitted by the Respondents with respect to the performance of Respondents' obligations under this Order and the Order to Maintain Assets. Within 30 days from the date the Monitor receives the first such report, and every 90 days thereafter (and otherwise as the Commission or its staff may request), the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the orders.

I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, and other representatives and assistants to sign a customary confidentiality agreement. *Provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

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

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

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

2. Not later than 10 days after the appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondents' compliance with

the relevant terms of this Order, the Order to Maintain Assets, and the Divestiture Agreement(s) in a manner consistent with the purposes of the orders and in consultation with the Commission.

L. 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.

M. The Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IX. (Divestiture Trustee)

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations of Paragraph II of this Order, the Commission may appoint one or more Divestiture Trustees to divest any or all of the Casino Assets, enter Transition Services Agreements, and perform Respondents' other obligations 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 Section 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 divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including one or more court-appointed Divestiture Trustees, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission may select one or more Divestiture Trustees, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Commission may appoint one Divestiture Trustee or separate Divestiture Trustees to divest one or more of the Divested Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. Any Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their 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.

1. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement for any divestitures required by this Order 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 effectuate the divestitures required by, and satisfy the additional obligations imposed by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

2. 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:

a. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.

b. The Divestiture Trustee shall have 1 year after the date the Commission approves each trust agreement described herein to accomplish the divestitures required by this Order, which shall be subject to the prior approval of the Commission. If, however, at the end of the 1 year period, the Divestiture Trustee has submitted a plan to satisfy the divestiture obligations of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the period only 2 times.

c. Subject to any demonstrated legally recognized privilege, any Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede any Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph IX for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

d. Any 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 divestitures shall be made in the manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by this Order; *provided, however,* if any Divestiture Trustee receives bona fide offers for any asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within 5 days after receiving notification of the Commission's approval.

e. Any 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. Any 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. Any Divestiture Trustee shall account for all monies derived from the divestitures 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 any 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.

f. Respondents shall indemnify any 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, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

g. Any Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. Any Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestitures.

i. Respondents may require any 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,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

C. If the Commission determines that any 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 IX.

D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

X. (Compliance Reports)

IT IS FURTHER ORDERED that:

A. Respondent Penn National shall notify Commission staff via email at bccompliance@ftc.gov of: (1) the Acquisition Date no later than 5 days after the Acquisition Date; and (2) the date Respondents complete each of the divestitures required to be made pursuant to Paragraph II of this Order, no later than 5 days from each respective divestiture date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Interim compliance reports 30 days after the Order is issued, and every 30 days thereafter until Respondents have fully complied with their obligations under Paragraph II of this Order;

2. Annual compliance reports 1 year after the date this Order is issued, and annually for the next 2 years on the anniversary of that date; and

3. Additional compliance reports as the Commission or its staff may request;

C. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order. 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 the Order, and a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted. Respondents shall retain copies of all material written communications to and from such parties, as well as all non-privileged internal memoranda, reports, and recommendations concerning completing their obligations under the Order for a period of 3 years, and shall provide copies of those records to Commission staff upon request.

D. Each compliance report shall be verified 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. 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 Respondents shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Respondent Penn National Gaming, Inc.;

B. Any proposed acquisition, merger, or consolidation of Respondent Penn National Gaming, Inc.; or

C. Any other change in Respondent Penn National Gaming, Inc., including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XII. (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.

XII. (Term)

IT IS FURTHER ORDERED that this Order shall terminate February 21, 2029.

By the Commission.

APPENDIX I

Boyd Divestiture Agreement

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

APPENDIX II

Key Employees

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

APPENDIX III

Respondent Corporate Contracts

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

APPENDIX IV

Monitor Agreement

APPENDIX IV-1

Monitor Compensation

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

APPENDIX V

Shared Services Employees

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

ANALYSIS OF CONSENT ORDERS 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 Order ("Consent Order") from Penn National Gaming, Inc. ("PNG") and Pinnacle Entertainment, Inc. ("Pinnacle"). The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from Penn's acquisition of Pinnacle. Under the terms of the proposed Consent Order, Penn is required to divest to Boyd Gaming Corporation: (1) one of Pinnacle's casinos in the St. Louis, Missouri area, the Ameristar Casino Report Spa in St. Charles; (2) Pinnacle's only casino in the Kansas City, Missouri area, the Ameristar Kansas City Casino Hotel; and (3) both of Pinnacle's casinos in the Cincinnati, Ohio area: the Belterra Casino Resort in Florence, Indiana, and the Belterra Park casino and racetrack in Cincinnati. The divestitures must be completed within 10 days of Penn's acquisition of Pinnacle.

The proposed Consent Order has been placed 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 again will review the proposed Consent Order and comments received, and decide whether it should withdraw the Consent Order, modify the Consent Order, or make it final.

On December 18, 2017, Penn agreed to acquire Pinnacle for approximately $2.8 billion, including the assumption of debt. On September 28, 2018, the Commission issued an administrative complaint alleging 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 eliminating meaningful and substantial competition between Penn and Pinnacle for casino services in the St. Louis, Kansas City, and Cincinnati area markets. The elimination of this competition would have caused significant competitive harm, specifically higher prices and diminished quality and service levels in each of these markets. The proposed Consent Order would remedy the alleged violations by requiring divestitures in the three affected markets. The divestitures will establish a new independent competitor to Penn in each relevant area, replacing the competition that otherwise would be lost as a result of the proposed acquisition.

II. THE PARTIES

Penn is a publicly traded owner and manager of gaming and racing facilities, as well as video gaming terminal ("VGT") operations, focused on slot machine entertainment. In the U.S. and Canada, Penn owns and operates 29 properties in 17 states, and manages one property in San Diego, California, and one in Orillia, Ontario. Penn is headquartered in Wyomissing, Pennsylvania, and operates most of its properties under its "Hollywood" brand. Penn also owns Prairie State Gaming, a VGT operator with more than 1,700 VGTs in bar and retail gaming establishments throughout Illinois. In the St. Louis area, Penn operates two casinos: the Hollywood Casino St. Louis, approximately 22 miles northwest of St. Louis in Maryland Heights, Missouri, and the Argosy Casino Alton, approximately 20 miles northeast of St. Louis

in Alton, Illinois. In Kansas City, Penn operates two casinos: the Hollywood Casino at Kansas Speedway, approximately 17 miles west of Kansas City, and the Argosy Casino Riverside, approximately five miles north of Kansas City. In Cincinnati, Penn operates the Hollywood Lawrenceburg casino, approximately 15 miles west of Cincinnati in Lawrenceburg, Indiana.

Headquartered in Las Vegas, Nevada, Pinnacle is a publicly traded casino entertainment operator and developer. Pinnacle owns and operates 16 properties across 10 states and manages a property near San Antonio, Texas. In the St. Louis area, Pinnacle owns and operates two casinos: the Ameristar Casino Resort Spa St. Charles ("Ameristar St. Charles"), approximately 22 miles west of downtown St. Louis, and the Ameristar Casino River City, approximately nine miles south of St. Louis in Lemay, Missouri. In Kansas City, Pinnacle operates the Ameristar Casino Hotel Kansas City ("Ameristar Kansas City"), approximately seven miles northeast of downtown Kansas City, Missouri. In Cincinnati, Pinnacle operates two facilities offering casino services: Belterra Park, a gaming and racetrack facility approximately 10 miles southeast of downtown Cincinnati, and Belterra Casino Resort ("Belterra Resort"), approximately 46 miles southwest of Cincinnati in Florence, Indiana.

III. CASINO SERVICES IN ST. LOUIS, KANSAS CITY, AND CINCINNATI

Penn's proposed acquisition of Pinnacle poses substantial antitrust concerns for casino services. The casino services market consists of casino-based gaming services (e.g., slots and table games), as well as related amenities such as lodging, entertainment, and food and beverage services. Casino operators typically generate the vast majority of their revenues from gaming. Casino services differ significantly from other entertainment activities in a number of respects. For example, casinos are highly regulated, with a limited number of casinos licensed to operate in any given state and age restrictions on who can gamble. More generally, the casino experience differs greatly from other entertainment and leisure activities. Thus, consistent with prior Commission precedent, the evidence here supports a distinct relevant market consisting of casino services.

There are three relevant geographic markets in which to analyze the merger's effects: (1) the St. Louis, Missouri, metropolitan area; (2) the Kansas City, Missouri, metropolitan area; and (3) the Cincinnati, Ohio, metropolitan area. Casinos in these markets tend to attract customers from the local vicinity, and view one another as competitors.

Penn and Pinnacle are close and vigorous competitors in the St. Louis, Kansas City, and Cincinnati area markets. The acquisition would substantially lessen the head-to-head competition between PNG and Pinnacle in St. Louis, Missouri; Kansas City, Missouri; and Cincinnati, Ohio. Moreover, the acquisition would increase Penn's ability and incentive to raise prices post-acquisition, in the form of hold rates, rake rates, and table game rules and odds that are less favorable to customers, and lower player reinvestments. Finally, the acquisition would diminish Penn's incentive to maintain or improve the quality of its services and amenities to the detriment of casino customers in each of these markets. The evidence of close competition between Penn and Pinnacle comes from ordinary-course documents and data from the parties and various market participants.

In St. Louis, the acquisition would reduce the number of competitors from four to three, and result in a substantial increase in concentration, absent relief. Notably, the acquisition would result in a highly concentrated market with just two competitors to Penn, only one of which is significant and has a casino of a similar size and with similar offerings to the parties' casinos. In Kansas City, the acquisition would reduce the number of competitors from five to four and substantially increase concentration levels. Likewise in Cincinnati, the acquisition would reduce the number of competitors from five to four and would lead to a significant increase in concentration levels.

New entry or expansion is unlikely to deter or counteract the anticompetitive effects of the acquisition in the St. Louis, Kansas City, or Cincinnati area markets. The affected markets are insulated from new entry or expansion by significant regulatory barriers, including limitations on the number of casino licenses available and the ability to expand existing gaming operations. In the St. Louis area casino services market, Missouri and Illinois law limit the total number of casino licenses available, and both states have issued all their respective licenses. Both states have restrictions in their respective statutes and gaming license regulations that also make significant expansion by current market participants extremely unlikely. Similarly, in the Kansas City area market, Missouri and Kansas law limit the total number of casino licenses available and both states have issued all their respective licenses. Expansion in Missouri is unlikely and only limited expansion in Kansas is possible. Entry or repositioning would be unlikely to be sufficient to deter or counteract the anticompetitive effects of the proposed acquisition. In the Cincinnati area market, Ohio and Indiana law limit the total number of casino licenses available and both states have issued all their respective licenses. Expansion is possible in Ohio, but would be unlikely to deter or counteract the proposed acquisition's anticompetitive effects due to the time and expenses involved. Entry by a tribal casino is possible along the Ohio border, but would not likely be timely enough to deter or counteract the proposed acquisition's anticompetitive effects.

IV. THE PROPOSED CONSENT ORDER

The proposed Consent Order remedies the likely anticompetitive effects in each of the three markets by requiring divestitures to a Commission-approved buyer within 10 days of the acquisition's closing. Until the completion of each divestiture, the parties are required to abide by the Order to Maintain Assets, which requires them to maintain the viability, marketability, and competitiveness of the divestiture assets until the divestitures are completed. The proposed Consent Order appoints a Monitor to ensure the parties' compliance with the Order to Maintain Assets, Consent Order, and Divestiture Agreements following the divestiture.

Additionally, the proposed Consent Order requires the parties to provide transitional services to the approved acquirer for at least 24 months after the divestiture, as needed, to assist the acquirer with the transfer and operation of the divested assets. Finally, the proposed Consent Order contains standard terms regarding the acquirer's access to employees, protection of Material Confidential Information, and compliance reporting requirements, among other things.

A. St. Louis

The proposed Consent Order remedies the likely anticompetitive effects in the St. Louis market by requiring the divestiture of Pinnacle's Ameristar St. Charles. The divestiture assets and rights include the casino (including gaming equipment, hotels, restaurants, spas, customer data, and property rights) and a perpetual, royalty-free license to continue use of the "Ameristar" trade name. Although the proposed consent only requires Penn to divest one of Pinnacle's two St. Louis casinos, this remedy will result in virtually no change to market concentration levels and preserve the status quo in the St. Louis casino services market because four independent casino operators will remain. The divestiture casino is the highest revenue-generating casino in the market.

B. Kansas City

The proposed Consent Order remedies the likely anticompetitive effects of the proposed acquisition by requiring Penn to divest the Ameristar Kansas City, Pinnacle's only casino in the Kansas City area. The divestiture assets and rights include the casino (including gaming equipment, hotels, restaurants, spas, customer data, and property rights) and a perpetual, royalty-free license to continue use of the "Ameristar" trade name. The proposed Consent Order will preserve five independent casino operators and result in no change in market concentration.

C. Cincinnati

In the Cincinnati area, the proposed Consent Order remedies the likely anticompetitive effects of the proposed acquisition by requiring Penn to divest both of Pinnacle's properties: Belterra Park and Belterra Resort. The divestitures include all rights and related assets, including gaming equipment, hotels, restaurants, spas, property rights, customer data, and trade names. The proposed Consent Order will preserve five independent casino operators and result in no change in market concentration.

* * *

The sole purpose of this analysis is to facilitate public comment on the proposed Consent Order. This analysis does not constitute an official interpretation of the proposed Consent Order or modify its terms in any way.

Complaint

IN THE MATTER OF

SOCIAL FINANCE, INC.,
AND
SOFI LENDING CORP.,
BOTH D/B/A SOFI

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

Docket No. C-4673; File No. 162 3197
Complaint, February 22, 2019 – Decision, February 22, 2019

This consent order addresses Social Finance, Inc.'s and SoFi Lending Corp.'s savings claims regarding consumers refinancing their student loans with SoFi. The complaint alleges that SoFi makes savings claims that, as detailed below, misrepresent how much money students have saved, will save, or will likely save by refinancing their student loans with SoFi. The consent order prohibits SoFi from misrepresenting that consumers who obtain a credit product have saved, will save, or will likely save money, or a specific amount of money, over the lifetime of a credit product or over any other time period (*e.g.* monthly), including by representing that the amount of money saved over a specific time period will be zero when consumers will instead pay more money over that specific time period.

Participants

For the *Commission*: *Patrick Roy* and *Evan Zullow.*

For the *Respondents*: *John Direnfeld, Sulina Gabale, Antony Kim,* and *Garret Rasmussen, Orrick, Herrington & Sutcliffe, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Social Finance, Inc., a corporation, also doing business as SoFi, and SoFi Lending Corp., a corporation, also doing business as SoFi (collectively, "Respondents" or "SoFi") 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 Social Finance, Inc., also doing business as SoFi, is a Delaware corporation with its principal office or place of business at One Letterman Drive, Building A, San Francisco, California 94129.

2. Respondent SoFi Lending Corp., also doing business as SoFi, is a California corporation with its principal office or place of business at 375 Healdsburg Avenue, Suite 280, Healdsburg, CA 95448. SoFi Lending Corp. is a wholly owned subsidiary of Respondent Social Finance, Inc.

3. Respondents have marketed, advertised, offered, and originated a variety of credit products to consumers, including unsecured loans for the purposes of refinancing consumers'

student loans. Respondents have disseminated or have caused to be disseminated advertisements promoting such student loan refinances.

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

Respondents' Claims Regarding the Average Savings Achieved by Consumers

5. Since at least April 2016, Respondents' Internet, television, and direct mail advertisements have represented that consumers who obtain a student loan refinance from Respondents have saved, on average, specific large amounts of money over the lifetime of their loans or each month.

6. In fact, in numerous instances, Respondents' representations inflate the average savings consumers have actually achieved – sometimes even doubling the actual savings – by selectively excluding large categories of consumers. For example, in numerous instances, Respondents have promoted average lifetime savings amounts in their advertisements that exclude all consumers whose loans with Respondents have a longer term than the previous student loans that consumers refinanced. Most of these excluded consumers actually pay *more* money – thousands of dollars, on average – as a result of their loans with Respondents over the lifetime of those loans.

7. Additionally, in numerous instances, Respondents have promoted average monthly savings amounts in their advertisements that exclude all consumers, on the flip side, whose loans with Respondents have a shorter term than the previous student loans that the consumers refinanced. Most of these excluded consumers actually pay *more* money each month – hundreds of dollars, on average – as a result of their loan with Respondents.

8. In numerous instances, Respondents' Internet advertisements have made prominent, unqualified claims regarding the average lifetime or monthly savings achieved by consumers who have obtained a student loan refinance from Respondents. For example, these advertisements, copies of which are attached as Exhibits A through E, have included the following statements:

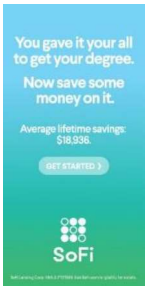


Exhibit A



Exhibit B



Exhibit C

Complaint

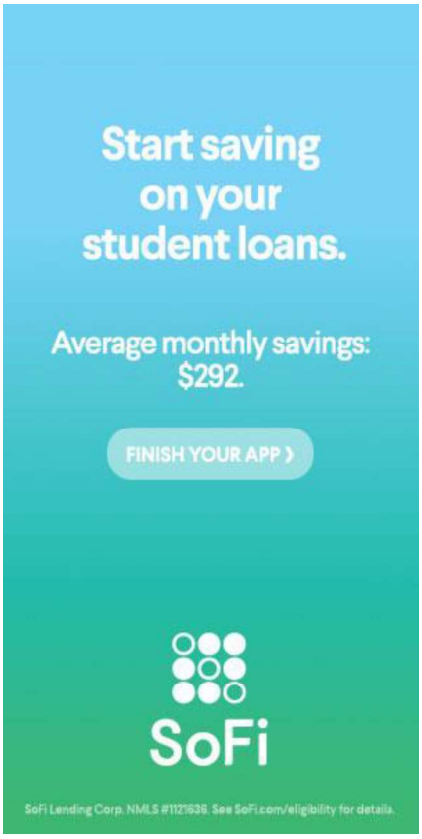


Exhibit D



Exhibit E

9. Respondents have made similar claims in television advertisements. For example, the visual component of a television advertisement broadcast during the fall 2017 Major League

Baseball playoffs, attached as Exhibit F, prominently represents the following about consumers' average lifetime savings:

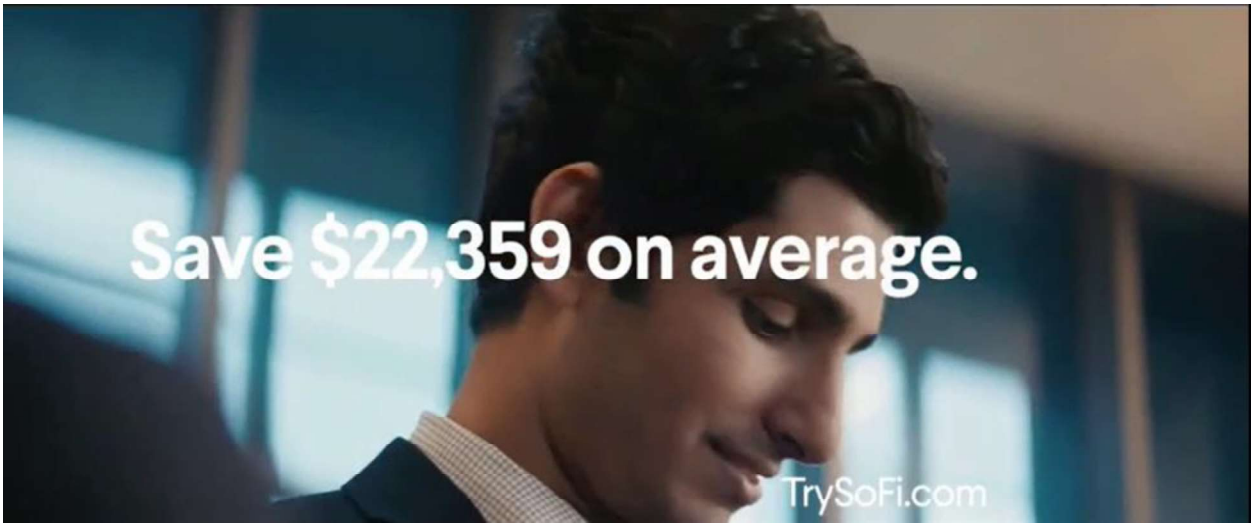


Exhibit F

10. Respondents have also made similar claims in their direct mail advertisements. A copy of one such advertisement is attached as Exhibit G.

a. The front of the first page of the direct mailer makes the following representations:

> **How much can you save?**
> **SoFi customers average over $18,936^ in savings** during the lifetime of their loan by refinancing. That's cash in your pocket — available for investing, vacations, buying a home, whatever.

Exhibit G at 2

b. At the bottom of the reverse side of this page – buried beneath descriptions of the frequently asked questions, terms and conditions, and prescreen opt-out notices – the mailer contains the following fine print disclaimer:

> ^Lifetime Savings
> Average savings calculation is based on all SoFi members who refinanced their student loans between 1/1/15 and 12/31/15. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members who refinanced their student loans. SoFi's average savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time (projections for variable rates are static at the time of the refinancing and do not reflect actual movement of rates in the future), 2) members make all payments on time, 3) members do not prepay loans, 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans, 2) the term length of the SoFi loan is greater than 25 years, 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average savings amount and to minimize the risk of member data error skewing the average savings amount.

Exhibit G at 3

This fine print disclaimer, in a buried provision, reveals that consumers had not, in fact, saved the average lifetime amount prominently promoted on the front of this direct mailer. Instead, it acknowledges on the fifth and sixth lines of fine print text that, among other things, "SoFi's average savings methodology for student loan refinancing excludes refinancings in which . . . members elect SoFi loans with longer maturity than their existing student loans."

11. Consumers who view one of Respondents' Internet or television advertisements, or who receive one of Respondents' direct mail advertisements, can apply for prequalification by visiting one of Respondents' website landing pages. In numerous instances, these landing pages again prominently promote the average savings amounts represented to consumers in Respondents' advertisements. Examples of such landing pages are attached as Exhibits H and I**.** The following statements have been featured at or near the top of these landing pages:



Exhibit H

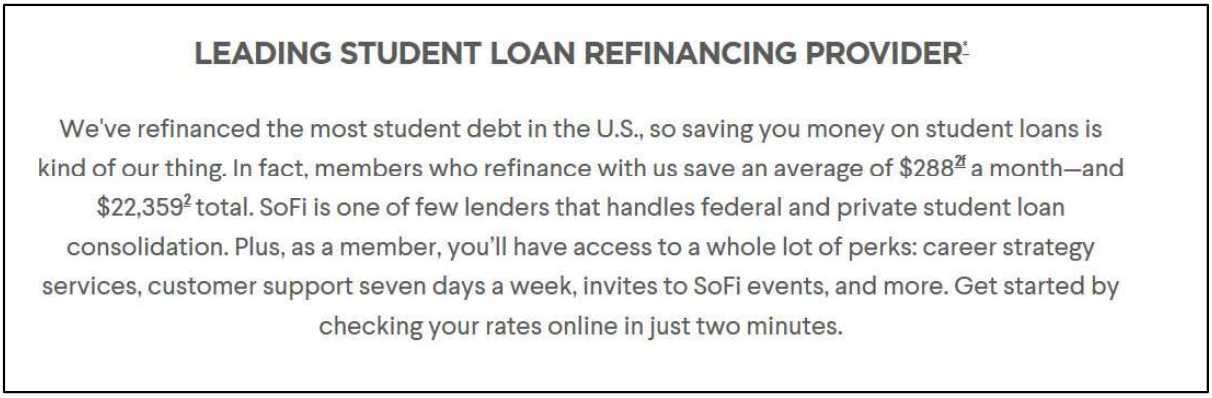


Exhibit I

12. To the extent Respondents' websites reveal that the prominently-touted average savings are not actually the average savings, that information is buried.

a. For example, if consumers who view the landing page in Exhibit I above notice and click on the small number "[2f]" that follows the statement "members who refinance with us save an average of $288," they have been directed to a separate webpage titled "Disclosures & Disclaimers" – an example of which is attached as Exhibit J. This webpage contains a lengthy list of buried disclaimers. Among those many disclaimers is the following:

2f. Member Monthly Savings – Average monthly savings calculation of **$288** is based on all SoFi members who refinanced their student loans between 8/16/2012 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

Exhibit J at 2

This disclaimer, in a buried provision, reveals that consumers had not, in fact, saved the average monthly savings amount prominently promoted on the landing pages and Respondents' other advertisements. Instead, it acknowledges on the sixth and seventh lines of text that, among other things, "SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which . . . members elect a SoFi loan with a shorter term than their prior student loan term(s)."

b. If consumers who view the landing page in Exhibit I above notice and click on the small number "[2]" in the statement "members who refinance with us save an average . . . $22,359[2] total," they have also been directed to the separate webpage titled "Disclosures & Disclaimers" – attached as Exhibit J. Among the lengthy list of buried disclaimers is the following:

2. Member Lifetime Savings – Average member lifetime savings calculation of **$22,359** is based on all SoFi members who refinanced their student loans between 8/16/2012 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

Exhibit J at 1

> This disclaimer, in a buried provision, reveals that consumers had not, in fact, saved the average lifetime savings amount prominently promoted on the landing pages and Respondents' other advertisements. Instead, it acknowledges on the seventh and eighth lines of text that, among other things, "SoFi's average savings methodology for student loan refinancing excludes refinancings in which … members elect SoFi loans with longer maturity than their existing student loans."

13. From the landing pages described in Paragraph 11 above, in many instances consumers can apply for prequalification for a loan by clicking on a button or link, such as the "Find My Rate" button in Exhibit H above.

14. After consumers click on the button or link, they can apply for prequalification. In order to apply for prequalification, in numerous instances, consumers have had to create an online account with Respondents, and then fill out an online application. In numerous instances, the application has required that consumers enter a variety of personal information, including name, contact information, date of birth, income, citizenship status, employment information, and educational history.

15. After consumers are prequalified for a loan online, in numerous instances Respondents' website directs consumers to a webpage alerting them that they prequalify and displaying the available loan options for which they prequalify (based on information consumers can input regarding their current student loans). An example of such a webpage is attached as Exhibit K. As shown in Exhibit K, this webpage provides the consumer's estimated individual savings for a select group of loans, while excluding the individual estimated savings or losses for other available loans, as discussed below:

a. To the extent a consumer seeking a fixed rate loan would pay *more* over the lifetime of a loan or each month, the webpage does not inform the consumer how much more money the consumer would pay. Instead, it falsely states that the consumer's lifetime or monthly savings would be "$0.00."

b. To the extent a consumer seeking a variable rate loan would pay *more* each month, the website does not inform the consumer how much more money the consumer would pay. Instead, it falsely states that the consumer's monthly savings would be "$0.00."

16. Respondents' prominent representations, in Paragraphs 8 through 11 above, that consumers have saved, on average, large amounts of money over the lifetime of their loans or each month are false. In fact, these representations significantly inflate the average savings consumers have actually achieved – sometimes even doubling the actual savings – by selectively excluding large categories of consumers. Further, none of Respondents' advertisements, buried disclaimers, or application information, as described in Paragraphs 8 through 15 above, shows consumers who were exposed to Respondents' deceptive savings claims the actual, dramatically-lower average lifetime or monthly savings Respondents' consumers have received. In fact, as

noted above, most of the consumers excluded from Respondents' savings claims pay more money over the relevant time periods – losing thousands of dollars (on average) over the lifetime of their loans, or paying hundreds of dollars more (on average) in monthly payments.

FEDERAL TRADE COMMISSION ACT VIOLATION

Count I

False, Misleading, or Unsubstantiated Claims Regarding the Amount of Money Saved by Consumers

17. In connection with the advertising, marketing, promotion, or offering of student loans, Respondents have represented, directly or indirectly, expressly or by implication, that:

a. Consumers who obtain a refinance of student loans from Respondents have saved a specific, large average amount over the lifetime of these loans, such as "$18,936" or "$22,359";

b. Consumers who obtain a refinance of student loans from Respondents have saved a specific, large average monthly amount, such as "$292" or "$316"; and

c. Consumers who prequalify for a refinance of student loans from Respondents will not lose money over the lifetime of one or more of Respondents' refinance loans, or each month.

18. In numerous instances, the representations set forth in Paragraph 17 were false or misleading, or were not substantiated at the time the representations were made.

19. Therefore, Respondents' practices constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. §45(a).

THEREFORE, the Federal Trade Commission this twenty-second day of February 2019, has issued this Complaint against Respondents.

By the Commission.

Complaint

Exhibit A

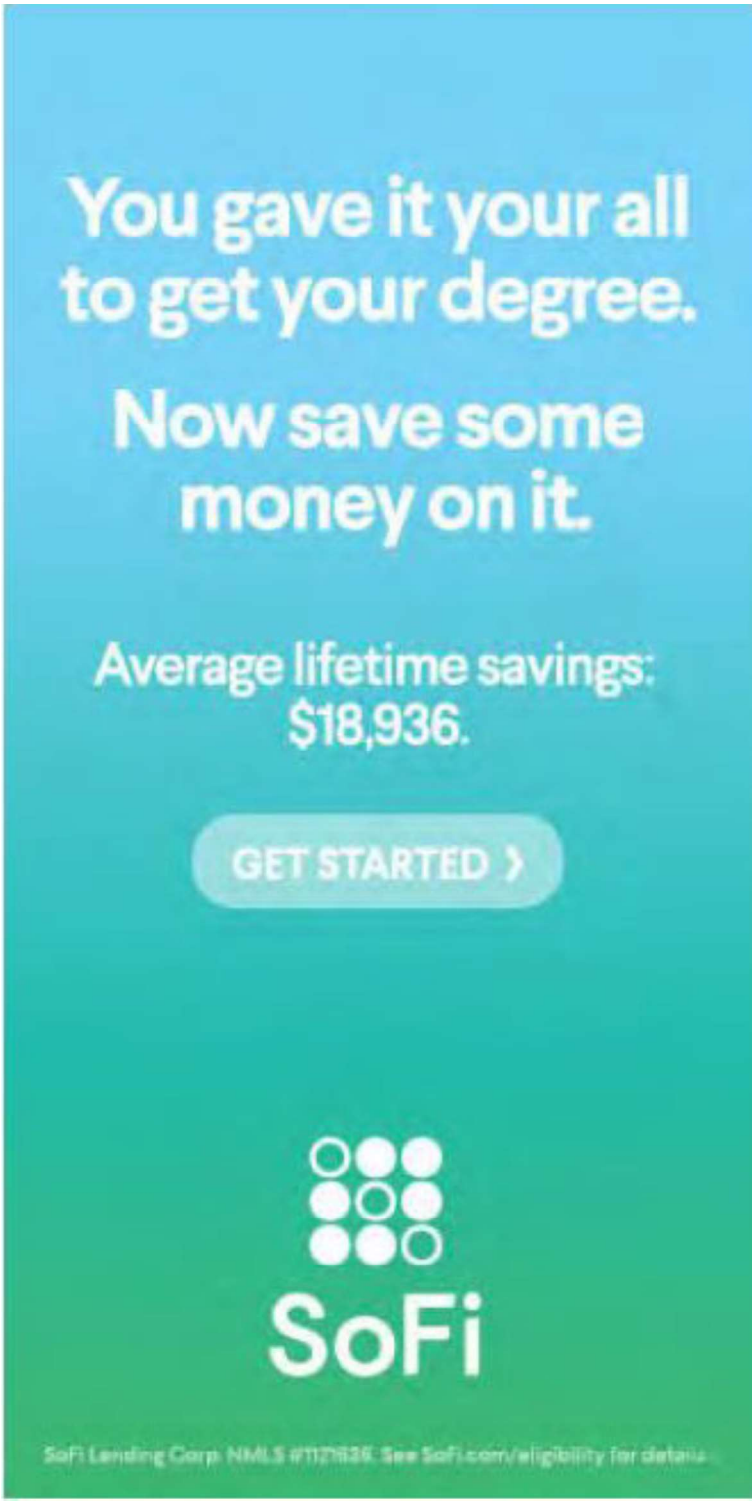


Exhibit B

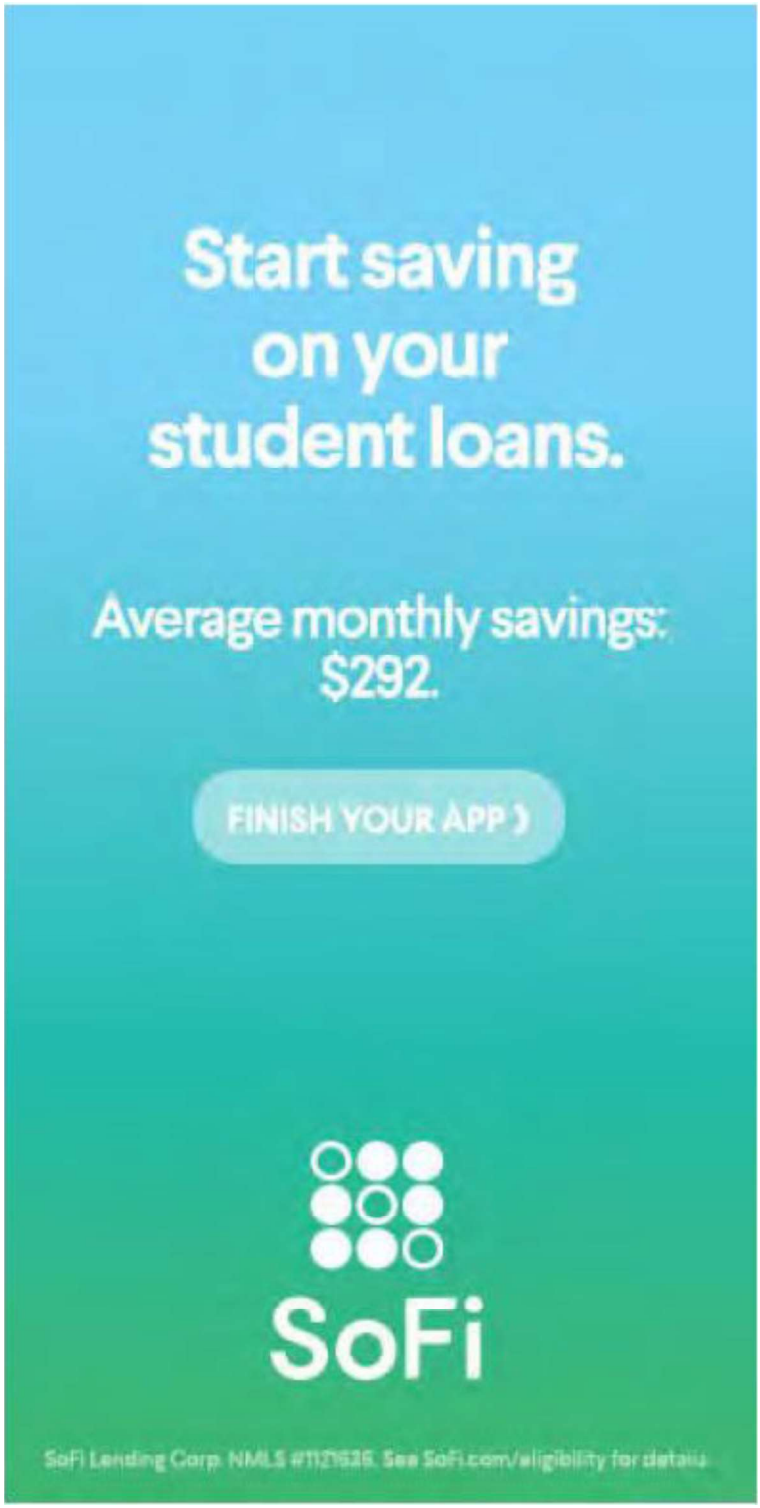

Refi your Student Loans today
Members save an average of $19k
SoFi
FIND MY RATE
SoFi Lending Corp. NMLS #1121636. See SoFi.com/eligibility for details

Complaint

Exhibit C



Exhibit D

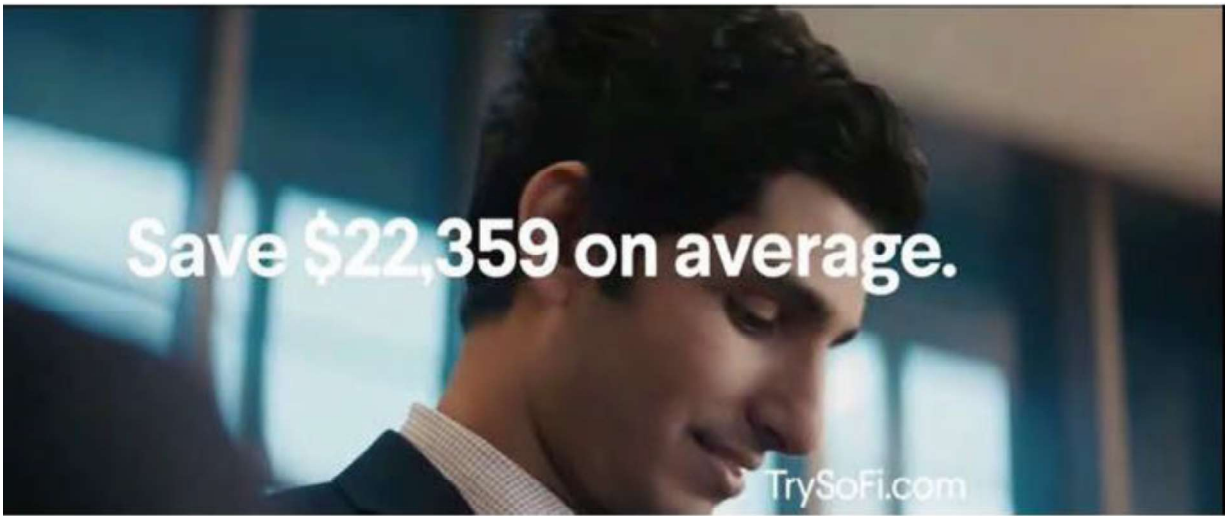

Start saving on your student loans.
Average monthly savings: $292.
FINISH YOUR APP
SoFi
SoFi Lending Corp. NMLS #1121636. See SoFi.com/eligibility for details.

Complaint

Exhibit E

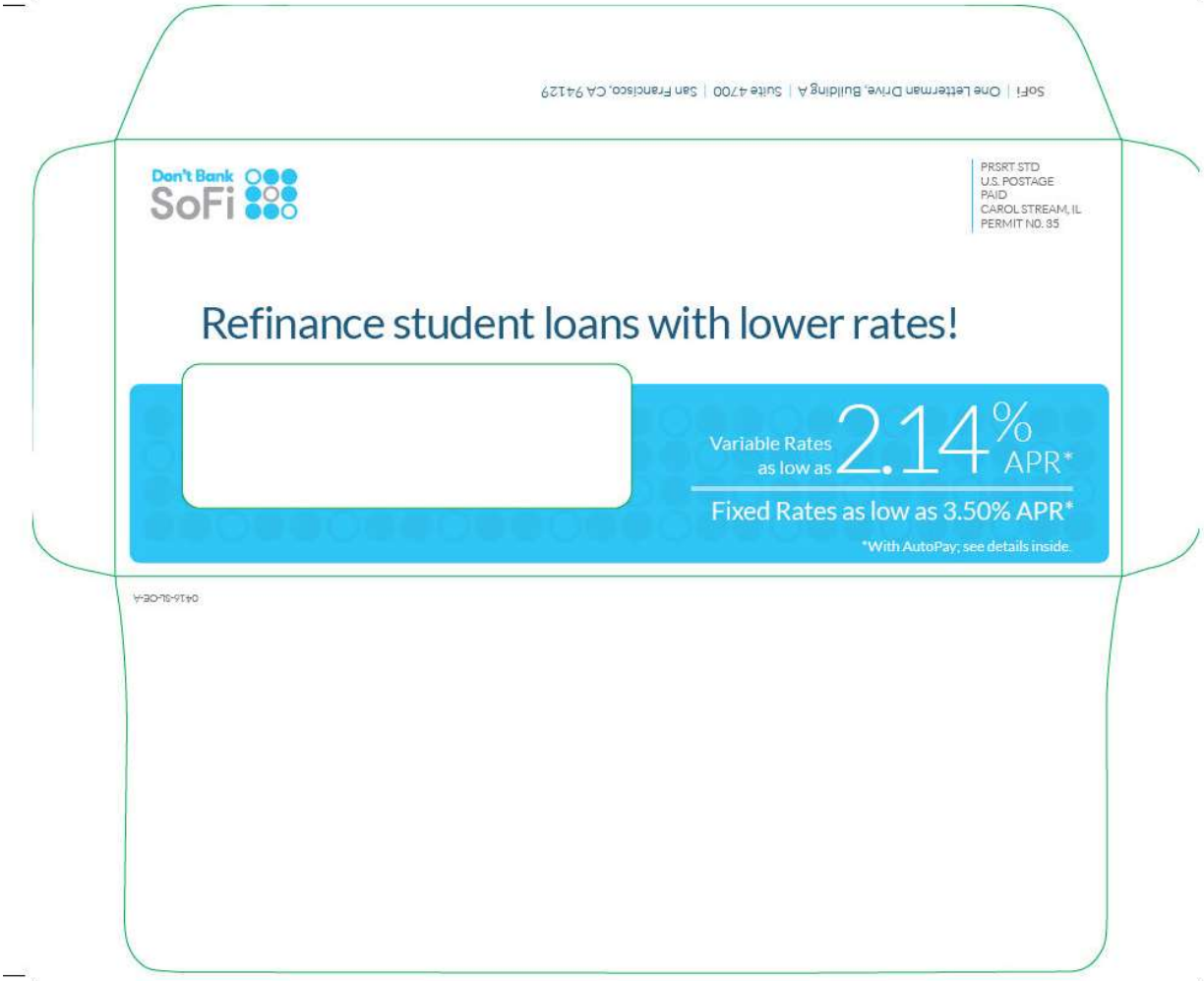


Exhibit F



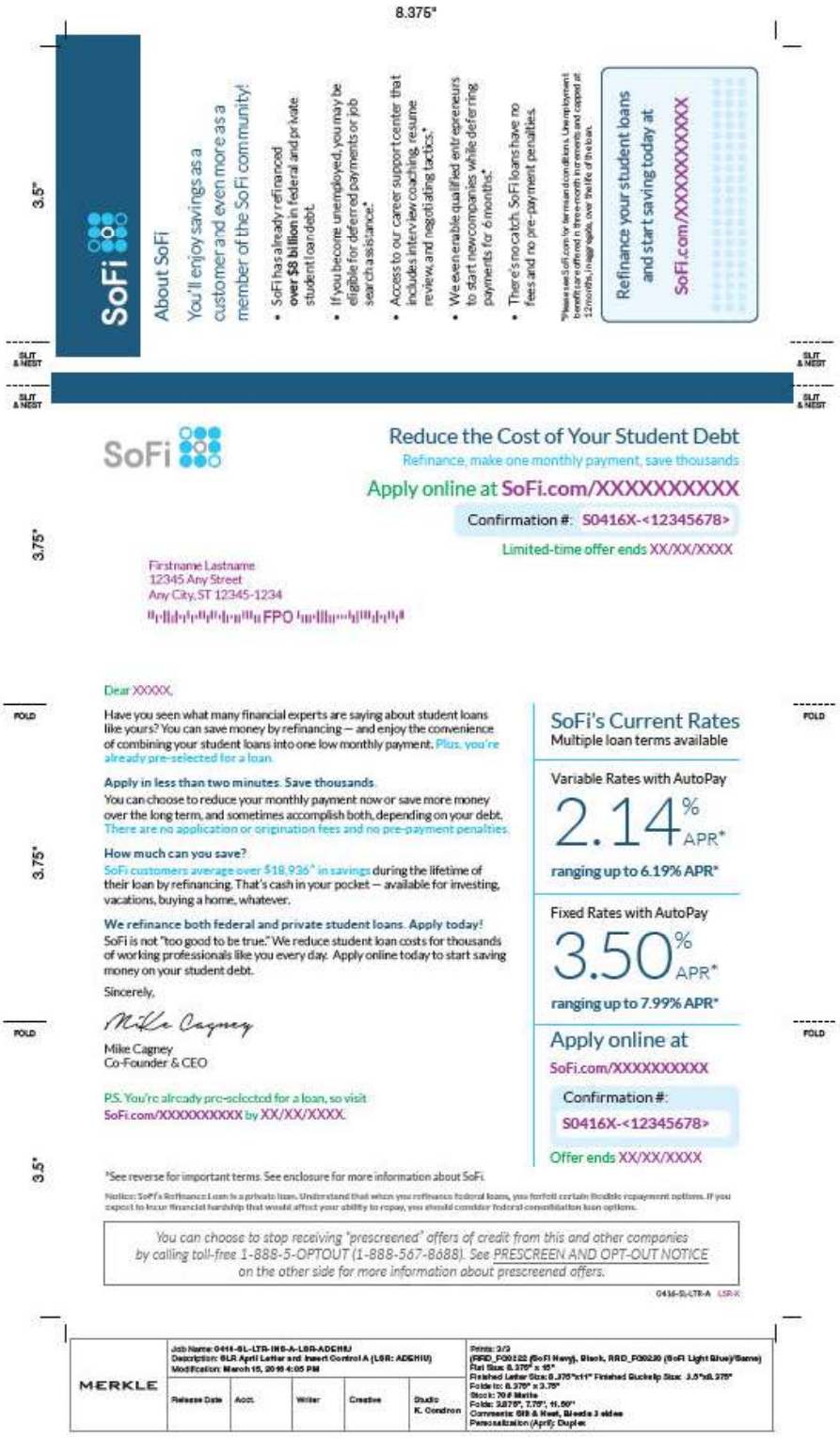
Complaint

Exhibit G

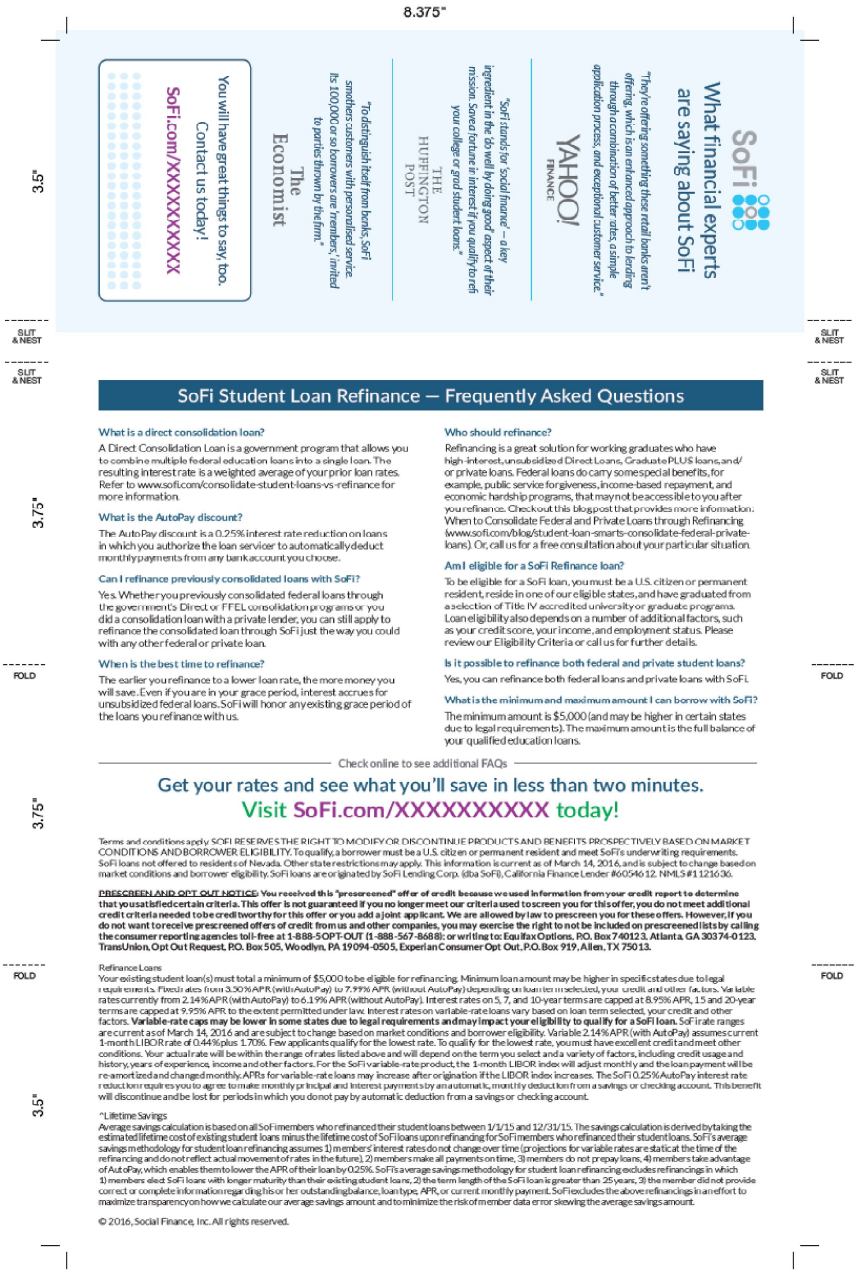


MERKLE	Job Name: 0416_SL_OE_A Description: SLR April OE A Modification: February 26, 2016 1:52 PM					Prints: 3/0 (RRD_FG0222 (SoFi Navy), Black, RRD_FG0230 (SoFi Light Blue)) Size: #10 - 11" x 9.1523" (Flat) 4.125" x 9.5" (Finished) Stock: 70# Gloss Window Size: 4.25"x .375" FL: .625" FB: .625"
	Release Date	Acct.	Writer	Creative	Studio K. Condron	

Complaint


8.375"
3.5"
SoFi
About SoFi
You'll enjoy savings as a customer and even more as a member of the SoFi community!
• SoFi has already refinanced over $8 billion in federal and private student loan debt.
• If you become unemployed, you may be eligible for deferred payments or job search assistance.*
• Access to our career support center that includes interview coaching, resume review, and negotiating tactics.*
• We even enable qualified entrepreneurs to start new companies while deferring payments for 6 months.*
• There's no catch. SoFi loans have no fees and no pre-payment penalties.
*Please see SoFi.com for terms and conditions. Unemployment benefit can be offered in three-month increments and capped at 12 months. In aggregate, not to exceed 12 months.
Refinance your student loans and start saving today at SoFi.com/XXXXXXXXXX
SLIT & NEST
SoFi
Reduce the Cost of Your Student Debt
Refinance, make one monthly payment, save thousands
Apply online at SoFi.com/XXXXXXXXXX
Confirmation #: S0416X-<12345678>
Limited-time offer ends XX/XX/XXXX
3.75"
Firstname Lastname
12345 Any Street
Any City, ST 12345-1234
FPO
FOLD
Dear XXXXX,
Have you seen what many financial experts are saying about student loans like yours? You can save money by refinancing — and enjoy the convenience of combining your student loans into one low monthly payment. Plus, you're already pre-selected for a loan.
Apply in less than two minutes. Save thousands.
You can choose to reduce your monthly payment now or save more money over the long term, and sometimes accomplish both, depending on your debt. There are no application or origination fees and no pre-payment penalties.
How much can you save?
SoFi customers average over $18,936* in savings during the lifetime of their loan by refinancing. That's cash in your pocket — available for investing, vacations, buying a home, whatever.
We refinance both federal and private student loans. Apply today!
SoFi is not "too good to be true." We reduce student loan costs for thousands of working professionals like you every day. Apply online today to start saving money on your student debt.
Sincerely,
Mike Cagney
Mike Cagney
Co-Founder & CEO
P.S. You're already pre-selected for a loan, so visit SoFi.com/XXXXXXXXXX by XX/XX/XXXX.
SoFi's Current Rates
Multiple loan terms available
Variable Rates with AutoPay
2.14% APR*
ranging up to 6.19% APR*
Fixed Rates with AutoPay
3.50% APR*
ranging up to 7.99% APR*
Apply online at
SoFi.com/XXXXXXXXXX
Confirmation #:
S0416X-<12345678>
Offer ends XX/XX/XXXX
3.5"
*See reverse for important terms. See enclosure for more information about SoFi.
Notice: SoFi's Refinance Loan is a private loan. Understand that when you refinance federal loans, you forfeit certain flexible repayment options. If you expect to incur financial hardship that would affect your ability to repay, you should consider federal consolidation loan options.
You can choose to stop receiving "prescreened" offers of credit from this and other companies by calling toll-free 1-888-5-OPTOUT (1-888-567-8688). See PRESCREEN AND OPT-OUT NOTICE on the other side for more information about prescreened offers.
0416-SL-LTR-A LSR-K
MERKLE
Release Date
Acct.
Writer
Creative
Studio
K. Condron

Complaint


8.375"
3.5"
3.75"
3.75"
3.5"
SLIT & NEST
FOLD
SoFi
What financial experts are saying about SoFi
"They're offering something those retail banks aren't offering which is an enhanced approach to lending through a combination of better rates, a simple application process, and exceptional customer service."
YAHOO! FINANCE
"SoFi stands for 'social finance' — a key ingredient in the 'do well by doing good' aspect of their mission. Save a fortune in interest if you qualify for refi your college or grad student loans."
THE HUFFINGTON POST
"To distinguish itself from banks, SoFi smothers customers with personalized service. Its 100,000 or so borrowers are 'members,' invited to parties thrown by the firm."
The Economist
You will have great things to say, too.
Contact us today!
SoFi.com/XXXXXXXXXX
SoFi Student Loan Refinance — Frequently Asked Questions
What is a direct consolidation loan?
A Direct Consolidation Loan is a government program that allows you to combine multiple federal education loans into a single loan. The resulting interest rate is a weighted average of your prior loan rates. Refer to www.sofi.com/consolidate-student-loans-vs-refinance for more information.
What is the AutoPay discount?
The AutoPay discount is a 0.25% interest rate reduction on loans in which you authorize the loan servicer to automatically deduct monthly payments from any bank account you choose.
Can I refinance previously consolidated loans with SoFi?
Yes. Whether you previously consolidated federal loans through the government's Direct or FFEL consolidation programs or you did a consolidation loan with a private lender, you can still apply to refinance the consolidated loan through SoFi just the way you could with any other federal or private loan.
When is the best time to refinance?
The earlier you refinance to a lower loan rate, the more money you will save. Even if you are in your grace period, interest accrues for unsubsidized federal loans. SoFi will honor any existing grace period of the loans you refinance with us.
Who should refinance?
Refinancing is a great solution for working graduates who have high-interest, unsubsidized Direct Loans, Graduate PLUS loans, and/or private loans. Federal loans do carry some special benefits, for example, public service forgiveness, income-based repayment, and economic hardship programs, that may not be accessible to you after you refinance. Check out this blog post that provides more information: When to Consolidate Federal and Private Loans through Refinancing (www.sofi.com/blog/student-loan-smarts-consolidate-federal-private-loans). Or, call us for a free consultation about your particular situation.
Am I eligible for a SoFi Refinance loan?
To be eligible for a SoFi loan, you must be a U.S. citizen or permanent resident, reside in one of our eligible states, and have graduated from a selection of Title IV accredited university or graduate programs. Loan eligibility also depends on a number of additional factors, such as your credit score, your income, and employment status. Please review our Eligibility Criteria or call us for further details.
Is it possible to refinance both federal and private student loans?
Yes, you can refinance both federal loans and private loans with SoFi.
What is the minimum and maximum amount I can borrow with SoFi?
The minimum amount is $5,000 (and may be higher in certain states due to legal requirements). The maximum amount is the full balance of your qualified education loans.
Check online to see additional FAQs
Get your rates and see what you'll save in less than two minutes.
Visit SoFi.com/XXXXXXXXXX today!
Terms and conditions apply. SOFI RESERVES THE RIGHT TO MODIFY OR DISCONTINUE PRODUCTS AND BENEFITS PROSPECTIVELY BASED ON MARKET CONDITIONS AND BORROWER ELIGIBILITY. To qualify, a borrower must be a U.S. citizen or permanent resident and meet SoFi's underwriting requirements. SoFi loans not offered to residents of Nevada. Other state restrictions may apply. This information is current as of March 14, 2016, and is subject to change based on market conditions and borrower eligibility. SoFi loans are originated by SoFi Lending Corp. (dba SoFi), California Finance Lender #6054612. NMLS#1121636.
PRESCREEN AND OPT OUT NOTICE: You received this "prescreened" offer of credit because we used information from your credit report to determine that you satisfied certain criteria. This offer is not guaranteed if you no longer meet our criteria used to screen you for this offer, you do not meet additional credit criteria needed to be creditworthy for this offer or you add a joint applicant. We are allowed by law to prescreen you for these offers. However, if you do not want to receive prescreened offers of credit from us and other companies, you may exercise the right to not be included on prescreened lists by calling the consumer reporting agencies toll-free at 1-888-5OPT-OUT (1-888-567-8688); or writing to: Equifax Options, P.O. Box 740123, Atlanta, GA 30374-0123, TransUnion, Opt Out Request, P.O. Box 505, Woodlyn, PA 19094-0505, Experian Consumer Opt Out, P.O. Box 919, Allen, TX 75013.
Refinance Loans
Your existing student loan(s) must total a minimum of $5,000 to be eligible for refinancing. Minimum loan amount may be higher in specific states due to legal requirements. Fixed rates from 3.30% APR (with AutoPay) to 7.99% APR (without AutoPay) depending on loan term selected, your credit and other factors. Variable rates currently from 2.14% APR (with AutoPay) to 6.19% APR (without AutoPay). Interest rates on 5, 7, and 10-year terms are capped at 8.95% APR, 15 and 20-year terms are capped at 9.95% APR to the extent permitted under law. Interest rates on variable-rate loans vary based on loan term selected, your credit and other factors. Variable-rate caps may be lower in some states due to legal requirements and may impact your eligibility to qualify for a SoFi loan. SoFi rate ranges are current as of March 14, 2016 and are subject to change based on market conditions and borrower eligibility. Variable 2.14% APR (with AutoPay) assumes current 1-month LIBOR rate of 0.44% plus 1.70%. Few applicants qualify for the lowest rate. To qualify for the lowest rate, you must have excellent credit and meet other conditions. Your actual rate will be within the range of rates listed above and will depend on the term you select and a variety of factors, including credit usage and history, years of experience, income and other factors. For the SoFi variable-rate product, the 1-month LIBOR index will adjust monthly and the loan payment will be re-amortized and changed monthly. APRs for variable-rate loans may increase after origination if the LIBOR index increases. The SoFi 0.25% AutoPay interest rate reduction requires you to agree to make monthly principal and interest payments by an automatic, monthly deduction from a savings or checking account. This benefit will discontinue and be lost for periods in which you do not pay by automatic deduction from a savings or checking account.
^Lifetime Savings
Average savings calculation is based on all SoFi members who refinanced their student loans between 1/1/15 and 12/31/15. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members who refinanced their student loans. SoFi's average savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time (projections for variable rates are static at the time of the refinancing and do not reflect actual movement of rates in the future), 2) members make all payments on time, 3) members do not prepay loans, 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%, SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans, 2) the term length of the SoFi loan is greater than 25 years, 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average savings amount and to minimize the risk of member data error skewing the average savings amount.
© 2016, Social Finance, Inc. All rights reserved.

SOFI LENDING CORP. REFI EDUCATION LOAN APPLICATION AND SOLICITATION DISCLOSURE VARIABLE RATE LOAN

Loan Interest Rate & Fees

Your starting **interest rate** will be between

2.39% and **6.19%**

After the starting rate is set, your rate will then vary with the market.

Your starting interest rate (upon approval)
The starting interest rate you pay will be determined after you apply. It will be based on your credit history and other factors (co-signer credit, term of your loan, etc.). If approved, we will notify you of the rate you qualify for within the stated range.

Your interest rate during the life of the loan
Your rate is variable. This means that your rate could move lower or higher than the rates on this form. The variable rate is based upon the 1-month LIBOR rate (as published in *The Wall Street Journal*). For more information on this rate, see the Reference Notes.

Although the interest rate will vary after you are approved, the interest rate will never exceed 8.95% for the 5-year, 7-year, and 10-year terms. For the 15-year and 20-year term product, the interest rate will never exceed 9.95% (the maximum rates for these loans).

Loan Fees

Application Fee:	$0
Origination Fee:	0% — the fee that we charge to make this loan
Loan Guarantee Fee:	0%
Repayment Fee:	0%
Late Charge:	4% of the amount of the past due payment or $5, whichever is less
Returned Check Charge:	$10

Loan Cost Example

The total amount you will pay for this loan will depend on the actual amount required to pay off the loans you select for consolidation.

Repayment Option	Amount Provided (amount paid to others on your behalf)	Interest Rate (highest possible starting rate)	Loan Term (how long you have to pay off the loan)	Total Paid Over Entire Loan Term (includes associated fees)
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	5.190%	**5 years** starting after your first payment	$11,375.04
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	5.320%	**7 years** starting after your first payment	$11,999.20
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	5.570%	**10 years** starting after your first payment	$13,064.82
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	5.940%	**15 years** starting after your first payment	$15,131.14
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	6.190%	**20 years** starting after your first payment	$17,458.45

About this example
The repayment example is based on the Loan Amount and Loan Term shown in the above table. It is based on the **highest starting rate currently charged** and associated fees. The example assumes that the borrower begins repayment one month after disbursement.

Federal Loan Alternatives and Disclosure Regarding Benefits

Loan Program	Current Interest Rates by Program Type	
PERKINS for Students	5.00% fixed	
DIRECT LOANS for Students	4.29% fixed 4.29% fixed 5.84% fixed	Undergraduate Subsidized Undergraduate Unsubsidized Graduate Unsubsidized
PLUS for Graduate/ Professional Students	6.84% fixed	Federal Direct PLUS
PLUS for Parents	6.84% fixed	Federal Direct PLUS

You may qualify for federal education loans.
For additional information, **contact your school's financial aid office or the Department of Education at** studentaid.ed.gov.

- Private education loans are not eligible to be included in a Federal Direct Consolidation Loan.
- You may be able to consolidate your outstanding federal loans into a Federal Direct Consolidation Loan. The current interest rate for a Federal Direct Consolidation Loan is the weighted average of the interest rates being consolidated rounded up to the nearest one-eighth of one percent.
- Think carefully before taking out a SoFi Lending Corp. ReFi Education Loan to pay off your federal loans. If you refinance your federal loans through this SoFi Lending Corp. ReFi Education Loan, you will not be able to select income-based repayment or other flexible payment plans that are available to federal student loan borrowers. In addition, federal student loans offer deferment and forbearance options that are not available to you if you take out a SoFi Lending Corp. ReFi Education Loan.
- See studentaid.ed.gov/types/loans/federal-vs-private for a description of the benefits and repayment options available to federal student loan borrowers.

Next Steps

1. **Find out about other loan options**
   The Federal Direct Consolidation Loan may have student loan benefits and terms not detailed on this form. Contact your school's financial-aid office or visit the Department of Education's website at www.loanconsolidation.ed.gov for more information about other consolidation loans.
2. **To apply for this loan, complete the application**
   If you are approved for this loan, the loan terms will be available for 30 days (terms will not change during this period, except as permitted by law).

0416-SL-INS2-A

Reference Notes

Disclosure Regarding Federal Loans
- **See your loan agreement for important disclosures about the consequences of refinancing federal student loans in this SoFi Lending Corp. ReFi Education Loan.**

Variable Interest Rate
- This loan has a variable interest rate that is based on a publicly available index, the 1-month London Interbank Offered Rate (LIBOR). Your rate will be calculated each month by adding a margin between 1.95% and 5.75% to the 1-month LIBOR.
- The rate will not increase more than once per month. The maximum rate for your loan is 8.95% if your loan term is five, seven, or 10 years or 9.95% if your loan term is 15 or 20 years.

AutoPay Discount
- If you make monthly principal and interest payments by an automatic, monthly deduction from a savings or checking account, the Variable Rate will be reduced by one-quarter of one percent (0.25%) for so long as you continue to make such automatic, electronic monthly payments. This benefit is suspended during periods of deferment and forbearance.

Borrower Eligibility Criteria
- Must be a U.S. citizen or permanent resident alien without conditions and with proper evidence of eligibility.
- Must be 21 or older at the time of loan application.
- Must have graduated from a SoFi-eligible school and program of study.
- Must reside in a state in which SoFi is authorized to lend.

Co-Signers
- Must be 21 or older at the time of loan application.

Bankruptcy Limitations
- If you file for bankruptcy you may still be required to pay back this loan.

More information about loan eligibility and repayment deferment or forbearance options is made available in your agreement.

SoFi Lending Corporation

SOFI LENDING CORP.
California Finance Lender License No. 6054612
One Letterman Drive, Building A
Suite 4700
San Francisco, CA 94129

MERKLE	Job Name: **0416_SL_INS2_A** Description: **SLR April Insert 2** Modification: **March 15, 2016 3:01 PM**				Prints: **1/1 (Black)** Size: **11" x 8.5" (Flat) 8.5" x 3.6875" (Folded)** Stock: **60# White Offset** Folds: **F1: 3.667" F2: 7.4375"**
	Release Date	Acct.	Writer	Creative	Studio **K. Condron**

SOFI LENDING CORP. REFI EDUCATION LOAN FIXED RATE APPLICATION AND SOLICITATION DISCLOSURE

Loan Interest Rate & Fees

Your **interest rate** will be between

3.75% and **7.99%**

After the rate is set, it will be fixed for the entire term of the loan.

Your interest rate (upon approval)
The interest rate you pay will be determined after you apply. It will be based upon your credit history, the loan term you select, and other factors. If approved, we will notify you of the rate you qualify for, which will be between 3.75% and 7.99%.

Your interest rate during the life of the loan
Your rate is fixed. This means that your interest rate will never change during the life of your loan. For more information on this rate, see the Reference Notes.

Your interest rate will not vary after you have been approved.

Loan Fees

Application Fee:	$0
Origination Fee:	0% — the fee that we charge to make this loan
Loan Guarantee Fee:	0%
Repayment Fee:	0%
Late Charge:	4% of the amount of the past due payment or $5, whichever is less
Returned Check Charge:	$10

Loan Cost Examples

The total amount you will pay for this loan will depend on the actual amount required to pay off the loans you select for consolidation and the loan term that you select from the options: 5, 7, 10, 15, or 20 years.

Repayment Option	Amount Provided (amount paid to others on your behalf)	Interest Rate (highest possible rate)	Loan Term (how long you have to pay off the loan)	Total Paid Over Entire Loan Term (includes associated fees)
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	6.240%	**5 years** starting after your first payment	$11,666.76
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	6.740%	**7 years** starting after your first payment	$12,571.36
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	7.250%	**10 years** starting after your first payment	$14,088.12
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	7.740%	**15 years** starting after your first payment	$16,932.65
MAKE FULL PAYMENTS Pay both the principal and interest	$10,000.00	7.990%	**20 years** starting after your first payment	$20,059.63

About these examples
The repayment examples are based on the Loan Amounts and Loan Terms shown in the above table. The Interest Rates shown are the highest possible for each Loan Term. The examples assume that the borrower begins repayment one month after disbursement.

Federal Loan Alternatives and Disclosure Regarding Benefits

Loan Program	Current Interest Rates by Program Type	
PERKINS for Students	5.00% fixed	
DIRECT LOANS for Students	4.29% fixed 4.29% fixed 5.84% fixed	Undergraduate Subsidized Undergraduate Unsubsidized Graduate Unsubsidized
PLUS for Graduate/ Professional Students	6.84% fixed	Federal Direct PLUS
PLUS for Parents	6.84% fixed	Federal Direct PLUS

You may qualify for federal education loans.
For additional information, **contact your school's financial aid office or the Department of Education at** studentaid.ed.gov.

- Private education loans are not eligible to be included in a Federal Direct Consolidation Loan.
- You may be able to consolidate your outstanding federal loans into a Federal Direct Consolidation Loan. The current interest rate for a Federal Direct Consolidation Loan is the weighted average of the interest rates being consolidated rounded up to the nearest one-eighth of one percent.
- Think carefully before taking out a SoFi Lending Corp. ReFi Education Loan to pay off your federal loans. If you refinance your federal loans through this SoFi Lending Corp. ReFi Education Loan, you will not be able to select income-based repayment or other flexible payment plans that are available to federal student loan borrowers. In addition, federal student loans offer deferment and forbearance options that are not available to you if you take out a SoFi Lending Corp. ReFi Education Loan.
- See studentaid.ed.gov/types/loans/federal-vs-private for a description of the benefits and repayment options available to federal student loan borrowers.

Next Steps

1. **Find out about other loan options**
   The Federal Direct Consolidation Loan may have student loan benefits and terms not detailed on this form. Contact your school's financial aid office or visit the Department of Education's website at www.loanconsolidation.ed.gov for more information about Federal Direct Consolidation Loans.
2. **To apply for this loan, complete the application**
   If you are approved for this loan, the loan terms will be available for 30 days (terms will not change during this period, except as permitted by law).

0416-SL-INS2-A

Reference Notes

Disclosure Regarding Federal Loans
- **See your loan agreement for important disclosures about the consequences of refinancing federal student loans in this SoFi Lending Corp. ReFi Education Loan.**

Interest Rate
- Your interest rate will depend on the loan term that you select.

Repayment Options
- This SoFi Lending Corp. ReFi Education Loan does not have a grace period. Monthly payments of principal and interest begin the month after the loan proceeds are disbursed unless we grant you a deferment and align your repayment begin date to the expiration of the grace period on the federal student loans that you are refinancing with us. You understand that interest will continue to accrue during this deferment period and that accrued interest will be capitalized at the end of this deferment period.

AutoPay Discount
- If you make monthly principal and interest payments by an automatic monthly deduction from a savings or checking account, the Fixed Rate will be reduced by one-quarter of one percent (0.25%) for so long as you continue to make such automatic electronic monthly payments. This benefit is suspended during periods of deferment and forbearance.

Borrower Eligibility Criteria
- Must be a U.S. citizen or permanent resident alien without conditions and with proper evidence of eligibility.
- Must be 21 or older at the time you apply.
- Must have graduated from a SoFi-eligible school and program of study.
- Must reside in a state in which SoFi is authorized to lend.

Bankruptcy Limitations
- If you file for bankruptcy you may still be required to pay back this loan.

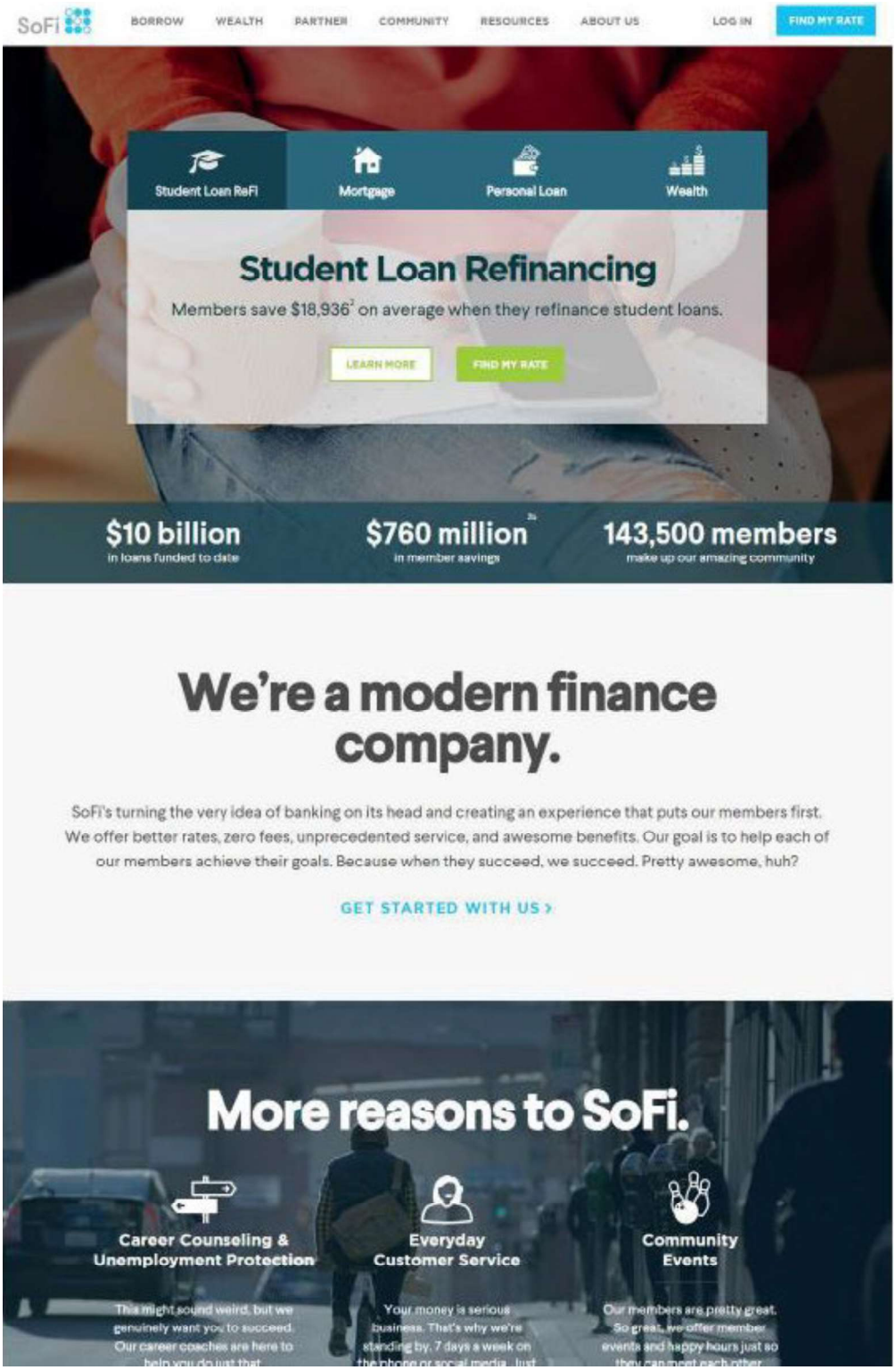
More information about loan eligibility and repayment deferral or forbearance options is available in your loan application and loan agreement.

SoFi Lending Corporation

SOFI LENDING CORP.
California Finance Lender License No. 6054612
One Letterman Drive, Building A
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San Francisco, CA 94129

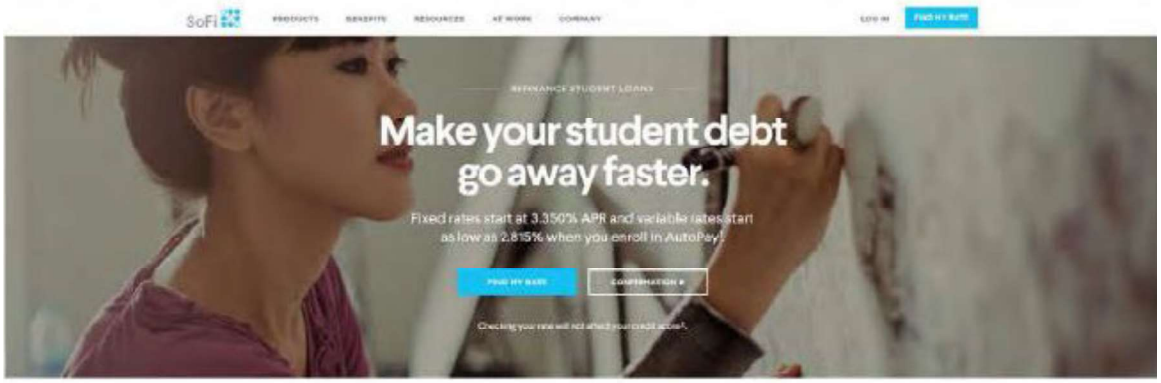
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Exhibit H



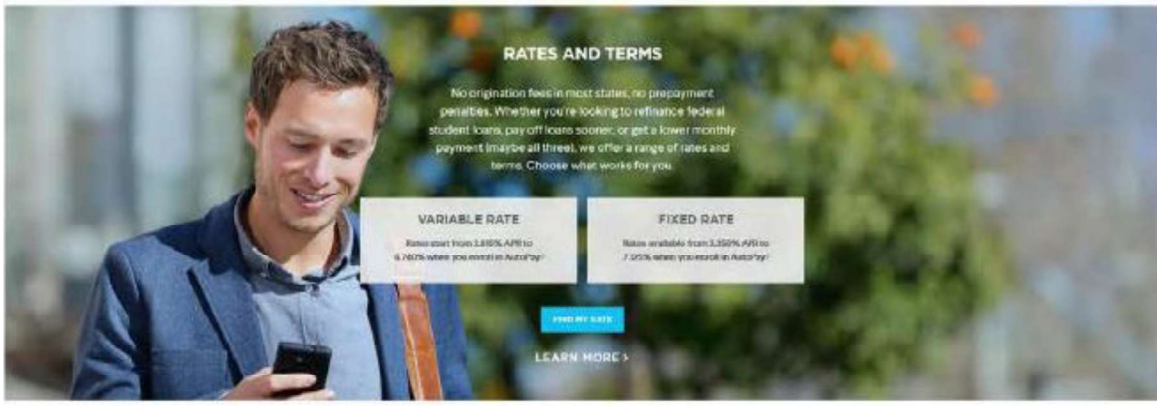
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Exhibit I



LEADING STUDENT LOAN REFINANCING PROVIDER

We've refinanced the most student debt in the U.S., so saving you money on student loans is kind of our thing. In fact, members who refinance with us save an average of $286 a month—and $22,359 total. SoFi is one of few lenders that handles federal and private student loan consolidation. Plus, as a member, you'll have access to a whole lot of perks: career strategy services, customer support seven days a week, invites to SoFi events, and more. Get started by checking your rates online in just two minutes.



WHY REFINANCE STUDENT LOANS WITH SOFI?

Serious Savings

Low fixed and variable rates, no application or origination fees. Average member savings $22,359.

Federal + Private

SoFi is one of few lenders that can consolidate and refinance both federal and private loans in a snap.

Exclusive Rates

Get a 0.125% rate discount on an additional SoFi loan—just for being a member.

Unemployment Protection

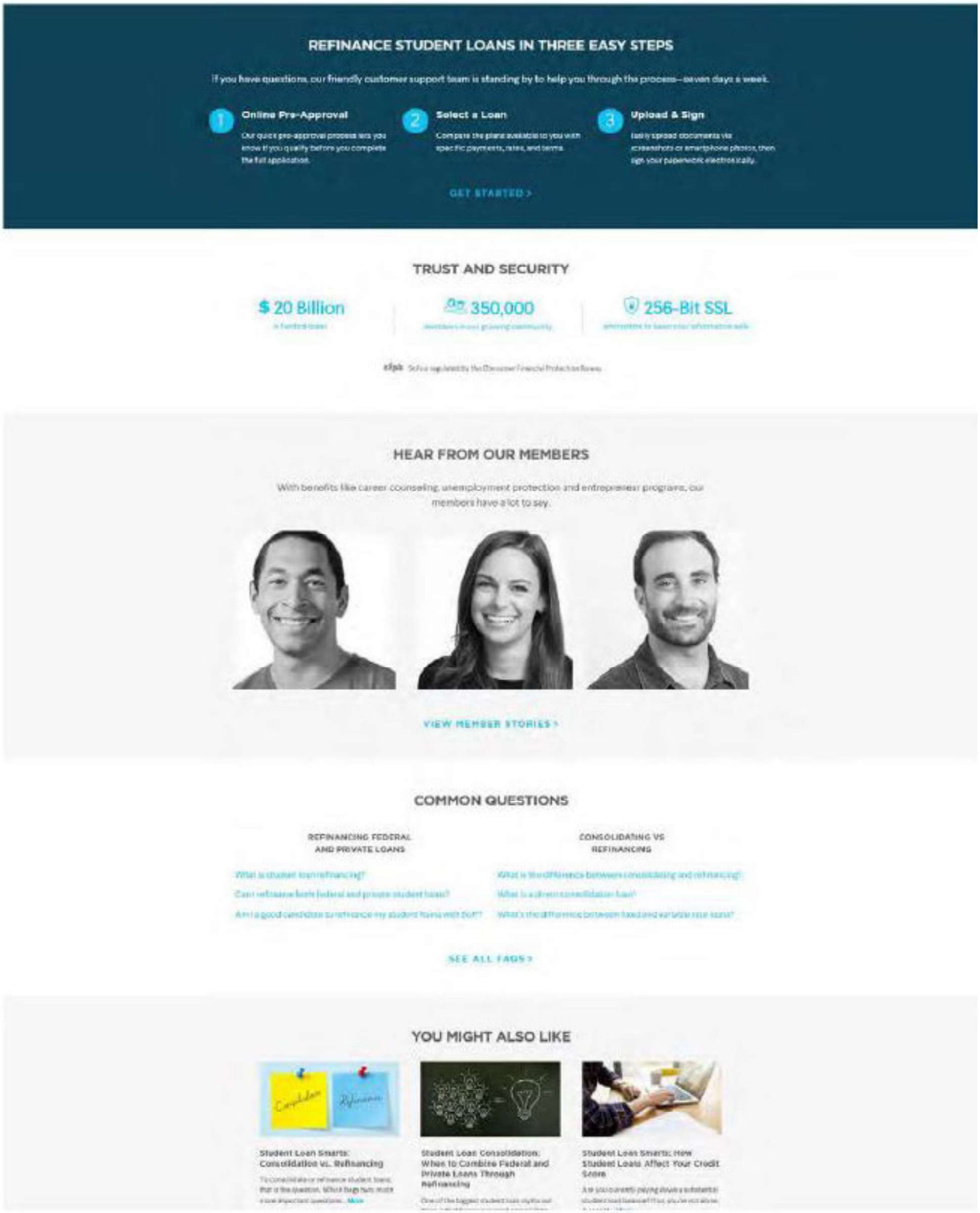
If the unexpected happens, we'll temporarily pause your loan payments and help you in your job search.

Career Support

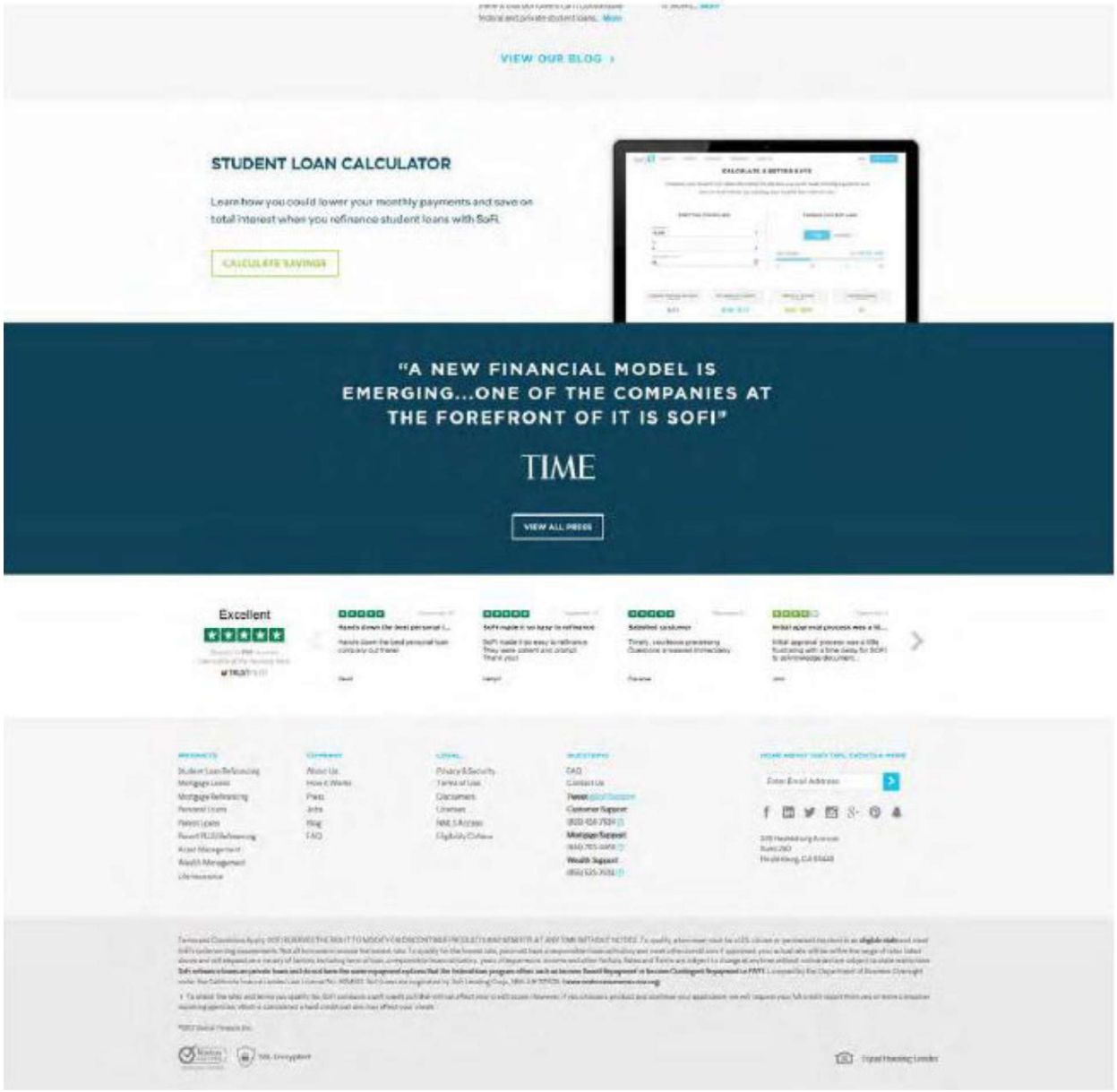
Our coaches will help you advance in your career, build a personal brand, negotiate your salary, and more.

Wealth Advisors

Finances and investments can be confusing. Our Wealth advisors are here to help you make sense of it all.

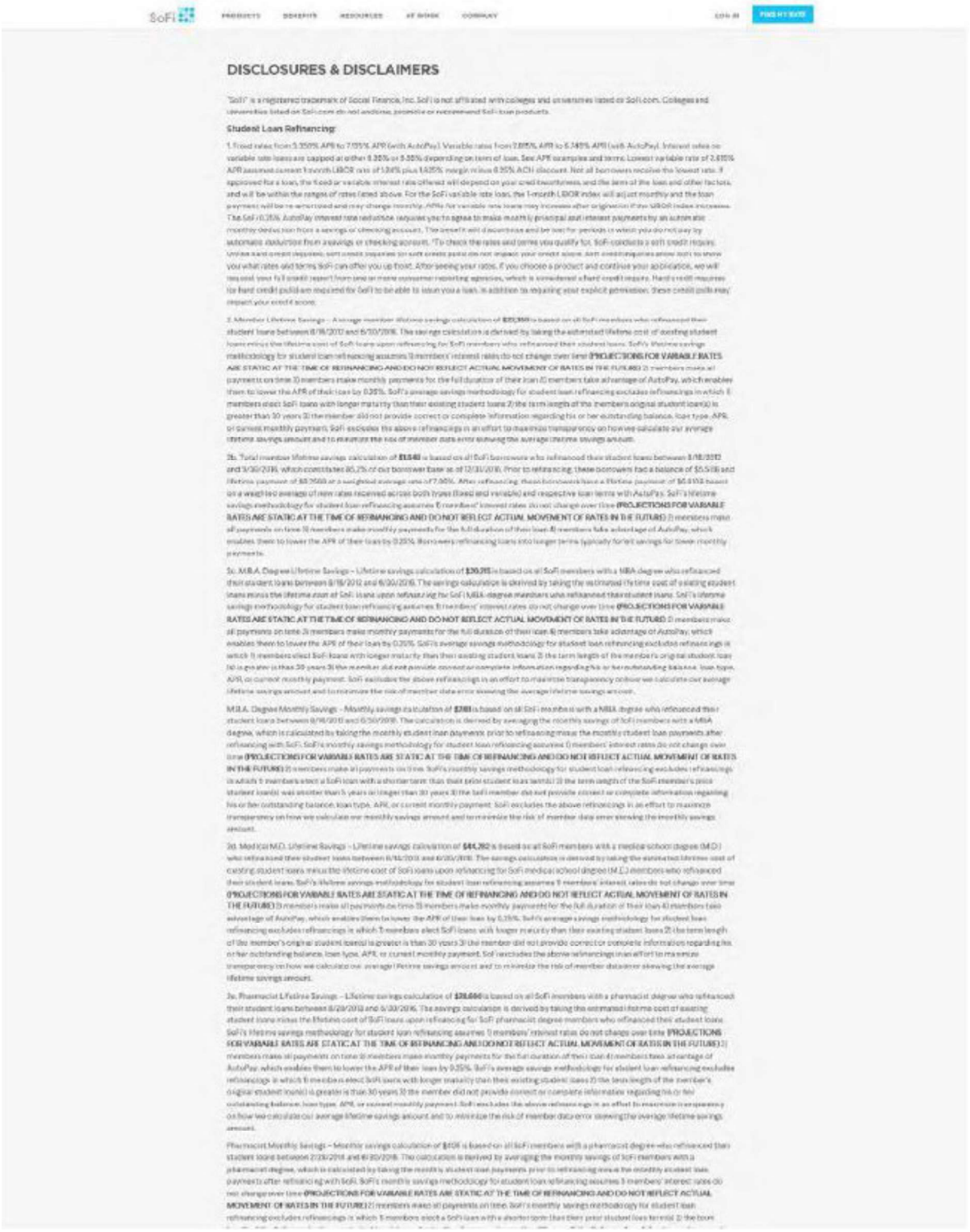

REFINANCE STUDENT LOANS IN THREE EASY STEPS
If you have questions, our friendly customer support team is standing by to help you through the process—seven days a week.
1 Online Pre-Approval
Our quick pre-approval process lets you know if you qualify before you complete the full application.
2 Select a Loan
Compare the plans available to you with specific payments, rates, and terms.
3 Upload & Sign
Easily upload documents via screenshots or smartphone photos, then sign your paperwork electronically.
GET STARTED >
TRUST AND SECURITY
$ 20 Billion
350,000
256-Bit SSL
HEAR FROM OUR MEMBERS
With benefits like career counseling, unemployment protection and entrepreneur programs, our members have a lot to say.
VIEW MEMBER STORIES >
COMMON QUESTIONS
REFINANCING FEDERAL AND PRIVATE LOANS
CONSOLIDATING VS REFINANCING
SEE ALL FAQS >
YOU MIGHT ALSO LIKE
Student Loan Smarts: Consolidation vs. Refinancing
Student Loan Consolidation: When to Combine Federal and Private Loans Through Refinancing
Student Loan Smarts: How Student Loans Affect Your Credit Score

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VIEW OUR BLOG
STUDENT LOAN CALCULATOR
Learn how you could lower your monthly payments and save on total interest when you refinance student loans with SoFi.
CALCULATE SAVINGS
"A NEW FINANCIAL MODEL IS EMERGING...ONE OF THE COMPANIES AT THE FOREFRONT OF IT IS SOFI"
TIME
VIEW ALL PRESS
Excellent

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Exhibit J



SoFi PRODUCTS BENEFITS RESOURCES AT WORK COMPANY LOG IN

DISCLOSURES & DISCLAIMERS

"SoFi" is a registered trademark of Social Finance, Inc. SoFi is not affiliated with colleges and universities listed on SoFi.com. Colleges and universities listed on SoFi.com do not endorse, promote or recommend SoFi loan products.

Student Loan Refinancing:

1. Fixed rates from 3.350% APR to 7.05% APR (with AutoPay). Variable rates from 2.895% APR to 6.340% APR (with AutoPay). Interest rates on variable rate loans are capped at either 8.25% or 9.95% depending on term of loan. See APR examples and terms. Lowest variable rate of 2.895% APR assumes current 1-month LIBOR rate of 1.84% plus 1.425% margin minus 0.35% ACH discount. Not all borrowers receive the lowest rate. If approved for a loan, the fixed or variable interest rate offered will depend on your credit worthiness, and the term of the loan and other factors, and will be within the ranges of rates listed above. For the SoFi variable rate loan, the 1-month LIBOR index will adjust monthly and the loan payment will be re-amortized and may change monthly. APRs for variable rate loans may increase after origination if the LIBOR index increases. The SoFi 0.25% AutoPay interest rate reduction requires you to agree to make monthly principal and interest payments by an automatic monthly deduction from a savings or checking account. The benefit will discontinue and be lost for periods in which you do not pay by automatic deduction from a savings or checking account. To check the rates and terms you qualify for, SoFi conducts a soft credit inquiry. Unlike hard credit inquiries, soft credit inquiries (or soft credit pulls) do not impact your credit score. Soft credit inquiries allow SoFi to show you what rates and terms SoFi can offer you up front. After seeing your rates, if you choose a product and continue your application, we will request your full credit report from one or more consumer reporting agencies, which is considered a hard credit inquiry. Hard credit inquiries (or hard credit pulls) are required for SoFi to be able to issue you a loan. In addition to requiring your explicit permission, these credit pulls may impact your credit score.

2. Member Lifetime Savings – Average member lifetime savings calculation of **$20,359** is based on all SoFi members who refinanced their student loans between 8/16/2012 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

3b. Total member lifetime savings calculation of **$1.54B** is based on all SoFi borrowers who refinanced their student loans between 8/16/2012 and 9/30/2016, which constitutes 85.2% of our borrower base as of 12/31/2016. Prior to refinancing, these borrowers had a balance of $5.51B and lifetime payment of $8.79B at a weighted average rate of 7.96%. After refinancing, these borrowers have a lifetime payment of $6.91B based on a weighted average of new rates received across both types (fixed and variable) and respective loan terms with AutoPay. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loans by 0.25%. Borrowers refinancing loans into longer terms typically forfeit savings for lower monthly payments.

3c. MBA Degree Lifetime Savings – Lifetime savings calculation of **$30,015** is based on all SoFi members with a MBA degree who refinanced their student loans between 8/16/2012 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi MBA degree members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

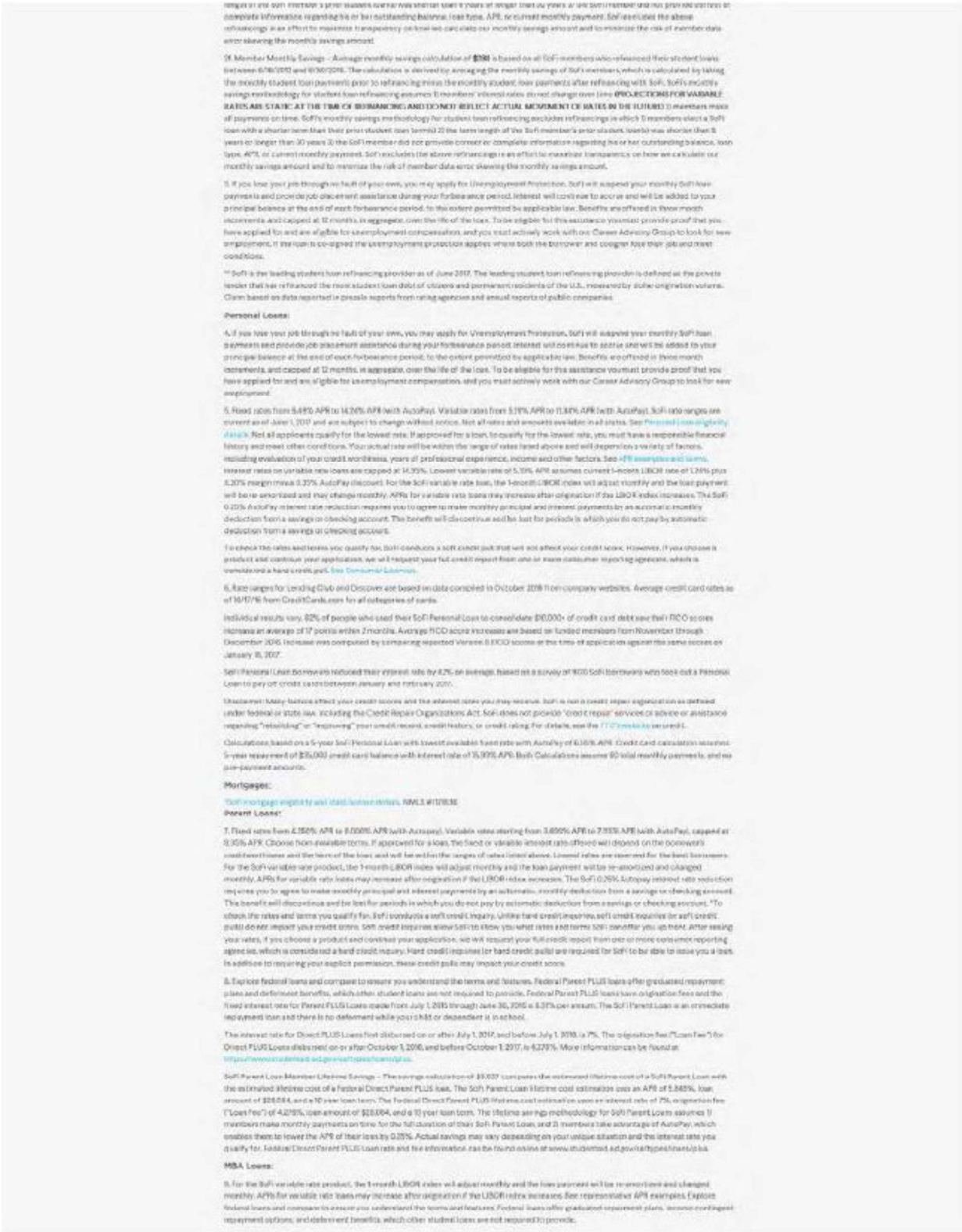
MBA Degree Monthly Savings – Monthly savings calculation of **$381** is based on all SoFi members with a MBA degree who refinanced their student loans between 8/16/2012 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members with a MBA degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loans term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

3d. Medical M.D. Lifetime Savings – Lifetime savings calculation of **$41,282** is based on all SoFi members with a medical school degree (M.D.) who refinanced their student loans between 8/16/2012 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi medical school degree (M.D.) members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

3e. Pharmacist Lifetime Savings – Lifetime savings calculation of **$28,666** is based on all SoFi members with a pharmacist degree who refinanced their student loans between 8/29/2012 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi pharmacist degree members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

Pharmacist Monthly Savings – Monthly savings calculation of $408 is based on all SoFi members with a pharmacist degree who refinanced their student loans between 2/29/2016 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members with a pharmacist degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term

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complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

9[Member Monthly Savings – Average monthly savings calculation of $700 is based on all SoFi members who refinanced their student loans between 6/16/2010 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time (**PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE**) 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide consent or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

5. If you lose your job through no fault of your own, you may apply for Unemployment Protection. SoFi will suspend your monthly SoFi loan payment and provide job placement assistance during your forbearance period. Interest will continue to accrue and will be added to your principal balance at the end of each forbearance period, to the extent permitted by applicable law. Benefits are offered in three month increments and capped at 12 months, in aggregate, over the life of the loan. To be eligible for this assistance you must provide proof that you have applied for and are eligible for unemployment compensation, and you must actively work with our Career Advisory Group to look for new employment. If the loan is co-signed the unemployment protection applies where both the borrower and cosigner lose their job and meet conditions.

** SoFi is the leading student loan refinancing provider as of June 2017. The leading student loan refinancing provider is defined as the private lender that has refinanced the most student loan debt of citizens and permanent residents of the U.S., measured by dollar origination volume. Claim based on data reported in periodic reports from rating agencies and annual reports of public companies.

Personal Loans:

4. If you lose your job through no fault of your own, you may apply for Unemployment Protection. SoFi will suspend your monthly SoFi loan payments and provide job placement assistance during your forbearance period. Interest will continue to accrue and will be added to your principal balance at the end of each forbearance period, to the extent permitted by applicable law. Benefits are offered in three month increments, and capped at 12 months, in aggregate, over the life of the loan. To be eligible for this assistance you must provide proof that you have applied for and are eligible for unemployment compensation, and you must actively work with our Career Advisory Group to look for new employment.

5. Fixed rates from 5.49% APR to 14.29% APR (with AutoPay). Variable rates from 5.19% APR to 11.84% APR (with AutoPay). SoFi rate ranges are current as of June 1, 2017 and are subject to change without notice. Not all rates and amounts available in all states. See Personal Loan eligibility details. Not all applicants qualify for the lowest rate. If approved for a loan, to qualify for the lowest rate, you must have a responsible financial history and meet other conditions. Your actual rate will be within the range of rates listed above and will depend on a variety of factors, including evaluation of your credit worthiness, years of professional experience, income and other factors. See APR examples and terms. Interest rates on variable rate loans are capped at 14.95%. Lowest variable rate of 5.19% APR assumes current 1-month LIBOR rate of 1.24% plus 3.20% margin minus 0.25% AutoPay discount. For the SoFi variable rate loan, the 1-month LIBOR index will adjust monthly and the loan payment will be re-amortized and may change monthly. APRs for variable rate loans may increase after origination if the LIBOR index increases. The SoFi 0.25% AutoPay interest rate reduction requires you to agree to make monthly principal and interest payments by an automatic monthly deduction from a savings or checking account. The benefit will be discontinued for periods in which you do not pay by automatic deduction from a savings or checking account.

To check the rates and terms you qualify for, SoFi conducts a soft credit pull that will not affect your credit score. However, if you choose a product and continue your application, we will request your full credit report from one or more consumer reporting agencies, which is considered a hard credit pull. See Consumer Disclosure.

6. Rate ranges for Lending Club and Discover are based on data compiled in October 2016 from company websites. Average credit card rates as of 10/17/16 from CreditCards.com for all categories of cards.

Individual results vary. 82% of people who used their SoFi Personal Loan to consolidate $10,000+ of credit card debt saw their FICO scores increase an average of 17 points within 2 months. Average FICO score increases are based on funded members from November through December 2016. Increase was computed by comparing reported Vantage 3.0 FICO scores at the time of application against the same scores on January 16, 2017.

SoFi Personal Loan borrowers reduced their interest rate by 4.2% on average, based on a survey of 1600 SoFi borrowers who took out a Personal Loan to pay off credit cards between January and February 2017.

Disclaimer: Many factors affect your credit scores and the interest rates you may receive. SoFi is not a credit repair organization as defined under federal or state law, including the Credit Repair Organizations Act. SoFi does not provide "credit repair" services or advice or assistance regarding "rebuilding" or "improving" your credit record, credit history, or credit rating. For details, see the FTC's website on credit.

Calculations based on a 5-year SoFi Personal Loan with lowest available fixed rate with AutoPay of 6.16% APR. Credit card calculation assumes 5-year repayment of $15,000 credit card balance with interest rate of 15.99% APR. Both Calculations assume 60 total monthly payments, and no pre-payment amounts.

Mortgages:

SoFi mortgage eligibility and state licensing details. NMLS #1121636

Parent Loans:

7. Fixed rates from 4.356% APR to 8.006% APR (with Autopay). Variable rates starting from 3.696% APR to 7.115% APR (with AutoPay), capped at 9.125% APR. Choose from available terms. If approved for a loan, the fixed or variable interest rate offered will depend on the borrower's credit worthiness and the term of the loan, and will be within the ranges of rates listed above. Lowest rates are reserved for the best borrowers. For the SoFi variable rate product, the 1-month LIBOR index will adjust monthly and the loan payment will be re-amortized and changed monthly. APRs for variable rate loans may increase after origination if the LIBOR index increases. The SoFi 0.25% Autopay interest rate reduction requires you to agree to make monthly principal and interest payments by an automatic monthly deduction from a savings or checking account. This benefit will discontinue and be lost for periods in which you do not pay by automatic deduction from a savings or checking account. *To check the rates and terms you qualify for, SoFi conducts a soft credit inquiry. Unlike hard credit inquiries, soft credit inquiries (or soft credit pulls) do not impact your credit score. Soft credit inquiries allow SoFi to show you what rates and terms SoFi can offer you up front. After seeing your rates, if you choose a product and continue your application, we will request your full credit report from one or more consumer reporting agencies, which is considered a hard credit inquiry. Hard credit inquiries (or hard credit pulls) are required for SoFi to be able to issue you a loan. In addition to requiring your explicit permission, these credit pulls may impact your credit score.

8. Explore federal loans and compare to ensure you understand the terms and features. Federal Parent PLUS loans offer graduated repayment plans and deferment benefits, which other student loans are not required to provide. Federal Parent PLUS loans have origination fees and the fixed interest rate for Parent PLUS Loans made from July 1, 2016 through June 30, 2016 is 6.31% per annum. The SoFi Parent Loan is an immediate repayment loan and there is no deferment while your child or dependent is in school.

The interest rate for Direct PLUS Loans first disbursed on or after July 1, 2017, and before July 1, 2018, is 7%. The origination fee ("Loan Fee") for Direct PLUS Loans disbursed on or after October 1, 2016, and before October 1, 2017, is 4.276%. More information can be found at https://www.studentaid.ed.gov/sa/types/loans/plus.

SoFi Parent Loan Member Lifetime Savings – The savings calculation of $9,037 compares the estimated lifetime cost of a SoFi Parent Loan with the estimated lifetime cost of a Federal Direct Parent PLUS loan. The SoFi Parent Loan lifetime cost estimation uses an APR of 5.845%, loan amount of $58,084, and a 10 year loan term. The Federal Direct Parent PLUS lifetime cost estimation uses an interest rate of 7%, origination fee ("Loan Fee") of 4.276%, loan amount of $58,084, and a 10 year loan term. The lifetime savings methodology for SoFi Parent Loans assumes 1) members make monthly payments on time for the full duration of their SoFi Parent Loan, and 2) members take advantage of AutoPay, which enables them to lower the APR of their loans by 0.25%. Actual savings may vary depending on your unique situation and the interest rate you qualify for. Federal Direct Parent PLUS Loan rate and fee information can be found online at www.studentaid.ed.gov/sa/types/loans/plus.

MBA Loans:

9. For the SoFi variable rate product, the 1-month LIBOR index will adjust monthly and the loan payment will be re-amortized and changed monthly. APRs for variable rate loans may increase after origination if the LIBOR index increases. See representative APR examples. Explore federal loans and compare to ensure you understand the terms and features. Federal loans offer graduated repayment plans, income-contingent repayment options, and deferment benefits, which other student loans are not required to provide.

Entrepreneur Program:

9) Any unpaid interest will be capitalized and added to your principal balance at the end of the deferment period. Maximum deferment period is six months.

Campus Relations:

9. The Financial Education Awareness Council (FEAC) is a group of experienced and passionate financial aid administrators that have volunteered to assist SoFi with our financial education efforts. Their participation in FEAC does not imply any endorsement or recommendation of SoFi on behalf of their schools. None of the FEAC representatives are compensated by SoFi. *To check the rates and terms you qualify for, SoFi conducts a soft credit inquiry. Unlike hard credit inquiries, soft credit inquiries (or soft credit pulls) do not impact your credit score. Soft credit inquiries allow SoFi to show you what rates and terms SoFi can offer you up front. After seeing your rates, if you choose a product and continue your application, we will request your full credit report from one or more consumer reporting agencies which is considered a hard credit inquiry. Hard credit inquiries (or hard credit pulls) are required for SoFi to be able to issue you a loan. In addition to requiring your explicit permission, these credit pulls may impact your credit score.

Parent PLUS Refinancing:

12. Fixed rates from 3.302% APR to 6.750% APR (with AutoPay). Variable rates from 2.010% APR to 6.490% APR (with AutoPay). Interest rates on variable rate loans are capped at either 8.95% or 9.95% depending on term of loan. See APR examples and terms. Lowest variable rate of 2.883% APR assumes current 1 month LIBOR rate of 1.26% plus 1.620% margin minus 0.25% autopay discount. Not all borrowers receive the lowest rate. If approved for a loan, the fixed or variable interest rate offered will depend on your credit worthiness, and the term of the loan and other factors, and will be within the ranges of rates listed above. For the SoFi variable rate loan, the 1-month LIBOR index will adjust monthly and the loan payment will be re-amortized and may change monthly. APRs for variable rate loans may increase after origination if the LIBOR index increases. The SoFi 0.25% AutoPay interest rate reduction requires you to agree to make monthly principal and interest payments by an automatic monthly deduction from a savings or checking account. The benefit will discontinue and be lost for periods in which you do not pay by automatic deduction from a savings or checking account. Unlike Federal Parent PLUS loans, the SoFi Parent Loan is not discharged in the event of death or permanent disability of the borrower or the student on whose behalf the loan is taken out.

School Savings:

13. UCLA Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from UCLA who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from UCLA who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) member elect SoFi loans with longer maturity than their existing student loans 2) the term lengths of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. UCLA is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

14. UCLA Member Monthly Savings – Monthly savings calculation is based on all SoFi members that graduated from UCLA who refinanced their student loans between 7/1/15 and 6/30/16. The calculation is derived by averaging the monthly savings of SoFi members that graduated from UCLA, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 25 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

17. Rutgers Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from Rutgers who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from Rutgers who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) member elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

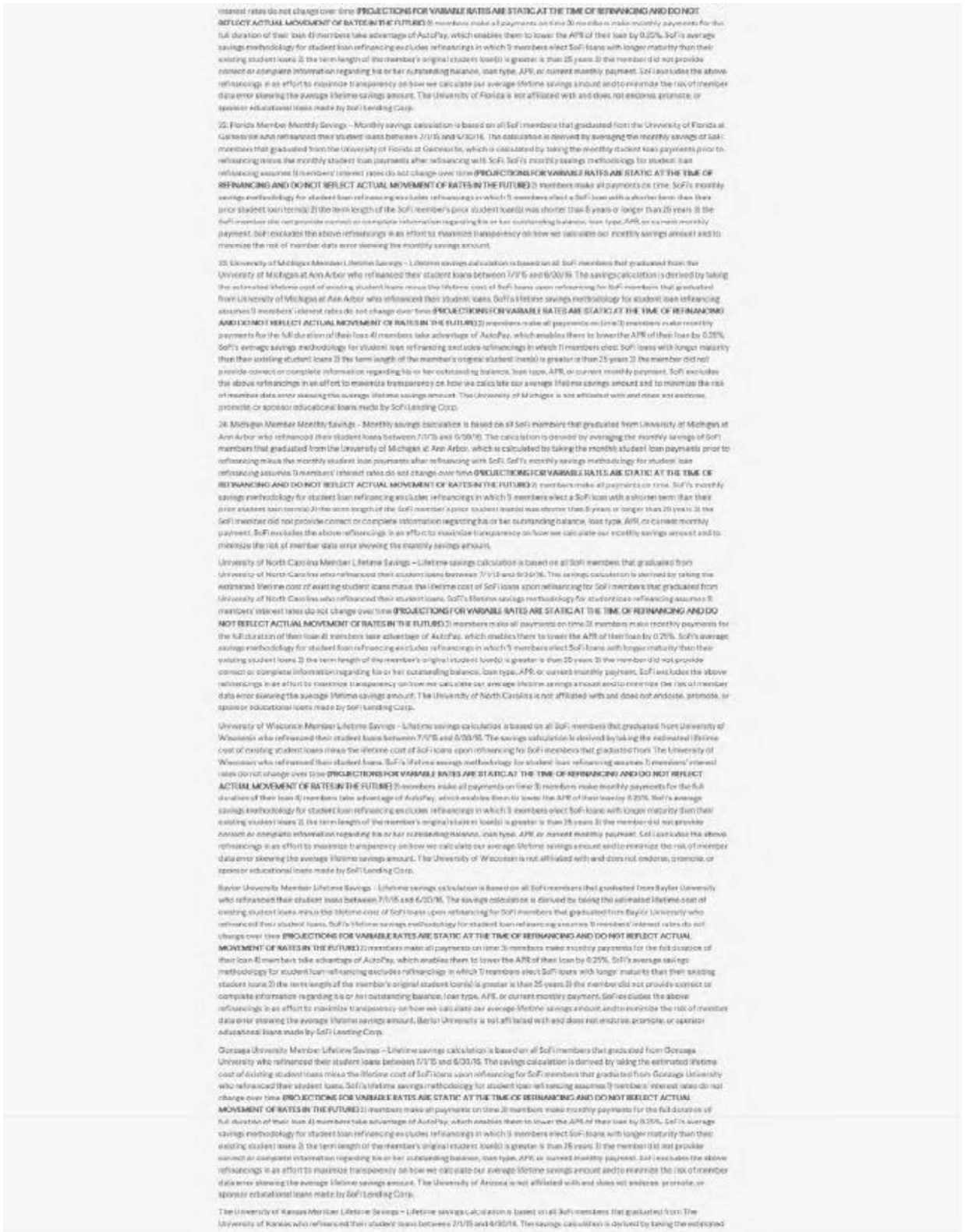
18. Rutgers Member Monthly Savings – Monthly savings calculation is based on all SoFi members that graduated from Rutgers who refinanced their student loans between 7/1/15 and 6/30/16. The calculation is derived by averaging the monthly savings of SoFi members that graduated from Rutgers, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 25 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

19. Texas Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from the University of Texas at Austin who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from the University of Texas at Austin who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

20. Texas Member Monthly Savings – Monthly savings calculation is based on all SoFi members that graduated from the University of Texas at Austin who refinanced their student loans between 7/1/15 and 6/30/16. The calculation is derived by averaging the monthly savings of SoFi members that graduated from the University of Texas at Austin, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 25 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

21. Florida Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from the University of Florida at Gainesville who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from the University of Florida at Gainesville who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members'

Complaint



interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 3) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of Florida is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

22. Florida Member Monthly Savings – Monthly savings calculation is based on all SoFi members that graduated from the University of Florida at Gainesville and refinanced their student loans between 7/1/15 and 6/30/16. The calculation is derived by averaging the monthly savings of SoFi members that graduated from the University of Florida at Gainesville, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 25 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

23. University of Michigan Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from the University of Michigan at Ann Arbor who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from University of Michigan at Ann Arbor who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of Michigan is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

24. Michigan Member Monthly Savings – Monthly savings calculation is based on all SoFi members that graduated from University of Michigan at Ann Arbor who refinanced their student loans between 7/1/15 and 6/30/16. The calculation is derived by averaging the monthly savings of SoFi members that graduated from the University of Michigan at Ann Arbor, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 25 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

University of North Carolina Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from University of North Carolina who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from University of North Carolina who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of North Carolina is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

University of Wisconsin Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from University of Wisconsin who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from The University of Wisconsin who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of Wisconsin is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

Baylor University Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from Baylor University who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from Baylor University who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. Baylor University is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

Gonzaga University Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from Gonzaga University who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from Gonzaga University who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of Arizona is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

The University of Kansas Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from The University of Kansas who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated

lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from the University of Kansas who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **[PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE]** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of Kansas is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

Purdue University Member Lifetime Savings - Lifetime savings calculation is based on all SoFi members that graduated from Purdue University who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from Purdue University who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **[PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE]** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. Purdue University is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

University of Oregon Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from the University of Oregon who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from the University of Oregon who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **[PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE]** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of Oregon is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

The University of South Carolina Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from University of South Carolina who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from University of South Carolina who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **[PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE]** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of South Carolina is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

Butler University Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from Butler University who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from Butler University who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **[PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE]** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. Butler University is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

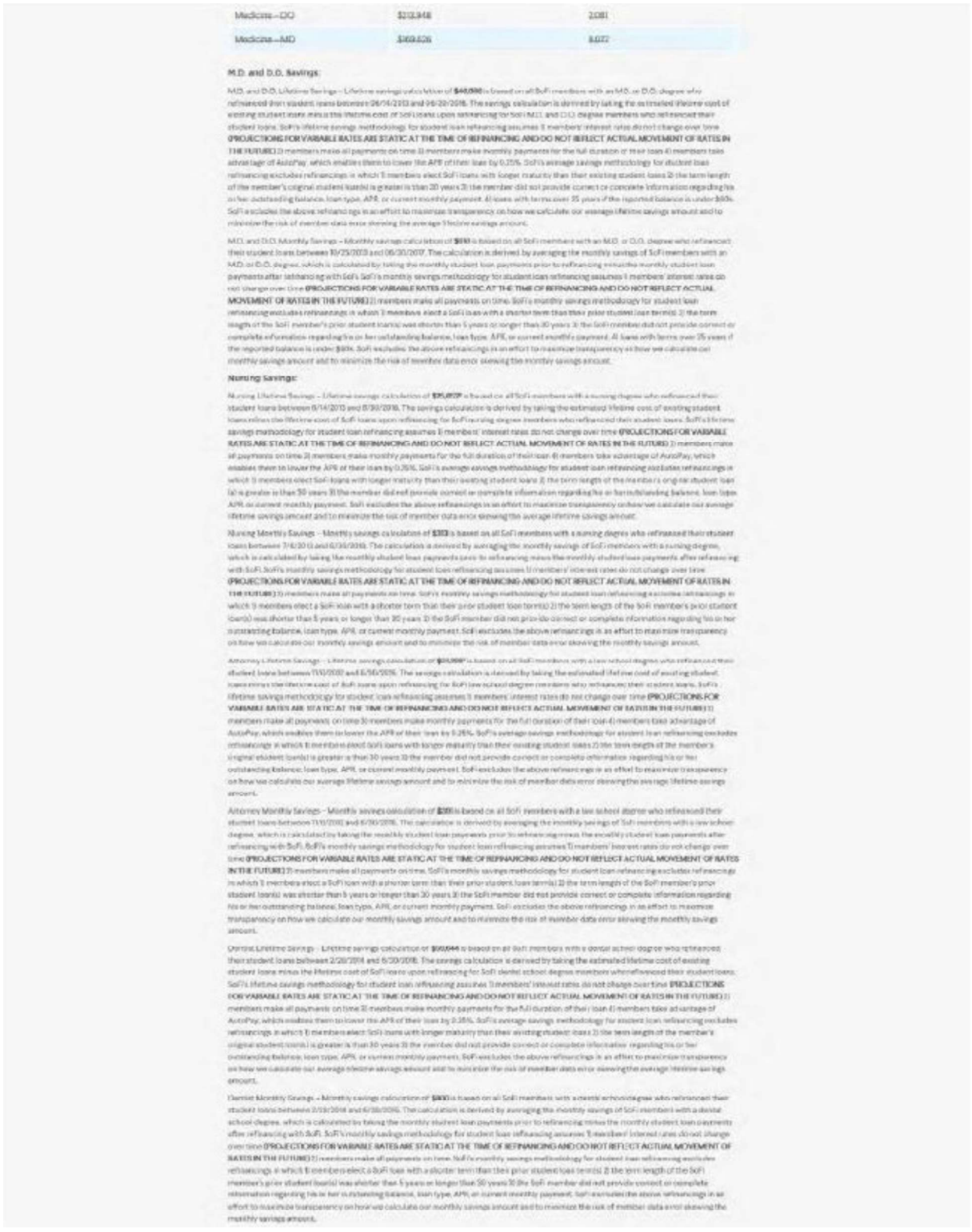
University of Kentucky Member Lifetime Savings – Lifetime savings calculation is based on all SoFi members that graduated from University of Kentucky who refinanced their student loans between 7/1/15 and 6/30/16. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi members that graduated from University of Kentucky who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **[PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE]** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater than 25 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount. The University of Kentucky is not affiliated with and does not endorse, promote, or sponsor educational loans made by SoFi Lending Corp.

Degree-Specific Metrics

Average number and amount of loans refinanced by degree type is based on member-submitted degree information and includes loans funded between 08/30/2013 and 04/05/2017.

Degree Type	Avg. Amount Refinanced	# Loans Refinanced
Undergraduates	$48,391	50,950
Dental	$199,929	3,083
Pharmacy	$165,990	4,856
Law	$100,689	17,581
Nursing	$65,675	9,063
MBA	$70,071	20,142
Engineering	$50,680	4,071
Math	$50,384	811
Medicine - M.D. & D.O.	$178,708	10,958

Complaint



Medicine – DO	$213,948	2,081
Medicine – MD	$169,626	8,077

M.D. and D.O. Savings:

M.D. and D.O. Lifetime Savings – Lifetime savings calculation of **$40,000** is based on all SoFi members with an M.D. or D.O. degree who refinanced their student loans between 06/14/2013 and 06/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi M.D. and D.O. degree members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 20 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. 4) loans with terms over 25 years if the reported balance is under $80k. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

M.D. and D.O. Monthly Savings – Monthly savings calculation of **$810** is based on all SoFi members with an M.D. or D.O. degree who refinanced their student loans between 10/25/2013 and 06/30/2017. The calculation is derived by averaging the monthly savings of SoFi members with an M.D. or D.O. degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. All loans with terms over 25 years if the reported balance is under $80k. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

Nursing Savings:

Nursing Lifetime Savings – Lifetime savings calculation of **$51,000** is based on all SoFi members with a nursing degree who refinanced their student loans between 6/14/2013 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi nursing degree members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan (s) is greater is than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

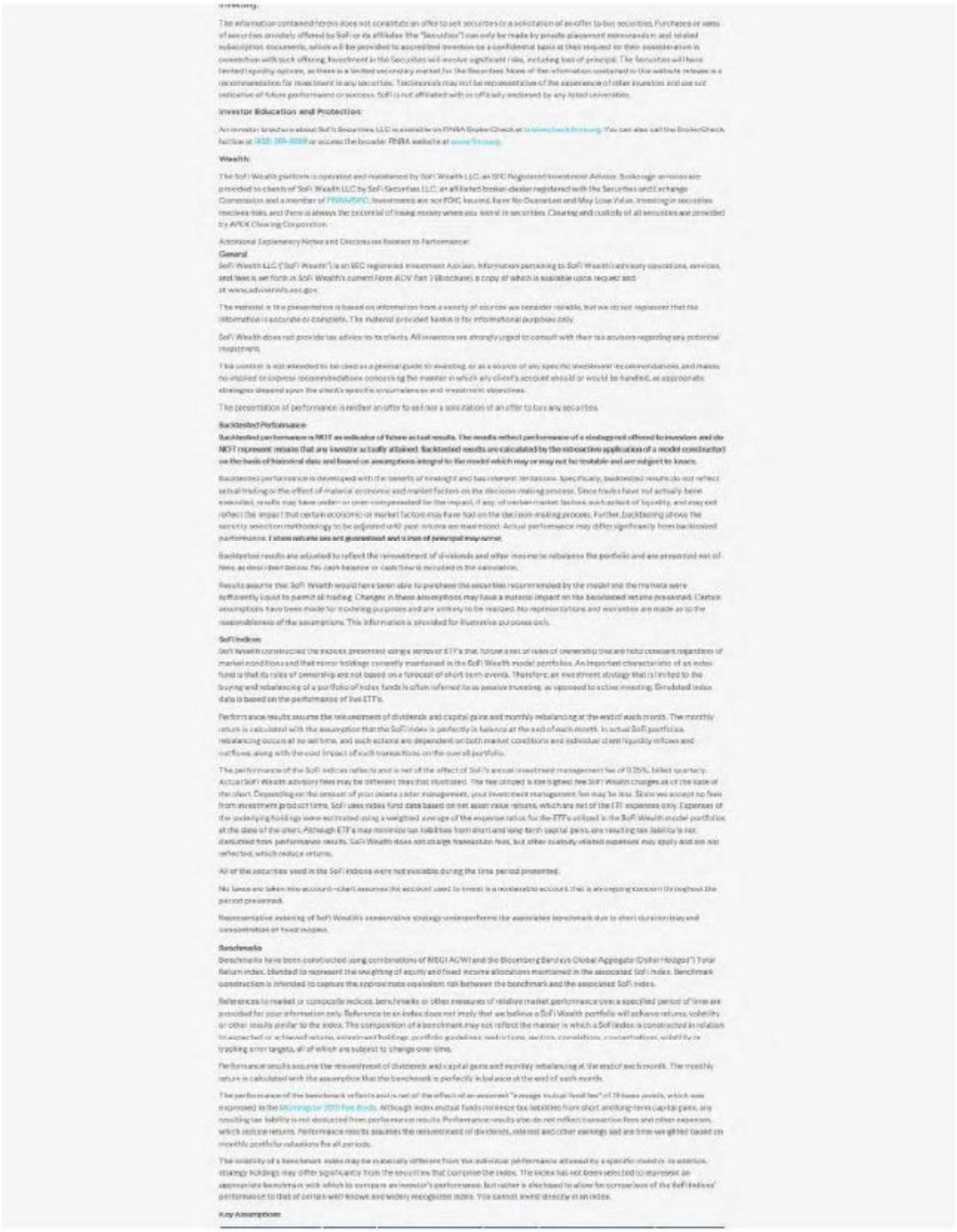
Nursing Monthly Savings – Monthly savings calculation of **$303** is based on all SoFi members with a nursing degree who refinanced their student loans between 7/6/20 0 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members with a nursing degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

Attorney Lifetime Savings – Lifetime savings calculation of **$84,000** is based on all SoFi members with a law school degree who refinanced their student loans between 11/0/2010 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi law school degree members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

Attorney Monthly Savings – Monthly savings calculation of **$350** is based on all SoFi members with a law school degree who refinanced their student loans between 11/0/2010 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members with a law school degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.

Dentist Lifetime Savings – Lifetime savings calculation of **$90,000** is based on all SoFi members with a dental school degree who refinanced their student loans between 2/20/2014 and 6/30/2016. The savings calculation is derived by taking the estimated lifetime cost of existing student loans minus the lifetime cost of SoFi loans upon refinancing for SoFi dental school degree members who refinanced their student loans. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. SoFi's average savings methodology for student loan refinancing excludes refinancings in which 1) members elect SoFi loans with longer maturity than their existing student loans 2) the term length of the member's original student loan(s) is greater is than 30 years 3) the member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our average lifetime savings amount and to minimize the risk of member data error skewing the average lifetime savings amount.

Dentist Monthly Savings – Monthly savings calculation of **$800** is based on all SoFi members with a dental school degree who refinanced their student loans between 2/20/2014 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members with a dental school degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount.



investing.

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Wealth:

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Additional Explanatory Notes and Disclosures Related to Performance:

General

SoFi Wealth LLC ("SoFi Wealth") is an SEC registered investment Adviser. Information pertaining to SoFi Wealth's advisory operations, services, and fees is set forth in SoFi Wealth's current Form ADV Part 2 (Brochure), a copy of which is available upon request and at www.adviserinfo.sec.gov.

The material in this presentation is based on information from a variety of sources we consider reliable, but we do not represent that the information is accurate or complete. The material provided herein is for informational purposes only.

SoFi Wealth does not provide tax advice to its clients. All investors are strongly urged to consult with their tax advisors regarding any potential investment.

This content is not intended to be used as a personal guide to investing, or as a source of any specific investment recommendations, and makes no implied or express recommendations concerning the manner in which any client's account should or would be handled, as appropriate strategies depend upon the client's specific circumstances and investment objectives.

The presentation of performance is neither an offer to sell nor a solicitation of an offer to buy any securities.

Backtested Performance

Backtested performance is NOT an indicator of future actual results. The results reflect performance of a strategy not offered to investors and do NOT represent returns that any investor actually attained. Backtested results are calculated by the retroactive application of a model constructed on the basis of historical data and based on assumptions integral to the model which may or may not be testable and are subject to losses.

Backtested performance is developed with the benefit of hindsight and has inherent limitations. Specifically, backtested results do not reflect actual trading or the effect of material economic and market factors on the decision-making process. Since trades have not actually been executed, results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity, and may not reflect the impact that certain economic or market factors may have had on the decision-making process. Further, backtesting allows the security selection methodology to be adjusted until past returns are maximized. Actual performance may differ significantly from backtested performance. **Future returns are not guaranteed and a loss of principal may occur.**

Backtested results are adjusted to reflect the reinvestment of dividends and other income to rebalance the portfolio and are presented net of fees, as described below. No cash balance or cash flow is included in the calculation.

Results assume that SoFi Wealth would have been able to purchase the securities recommended by the model and the markets were sufficiently liquid to permit all trading. Changes in these assumptions may have a material impact on the backtested returns presented. Certain assumptions have been made for modeling purposes and are unlikely to be realized. No representations and warranties are made as to the reasonableness of the assumptions. This information is provided for illustrative purposes only.

SoFi Indices

SoFi Wealth constructed the indices presented using a series of ETF's that follow a set of rules of ownership that are held constant regardless of market conditions and that mirror holdings currently maintained in the SoFi Wealth model portfolios. An important characteristic of an index fund is that its rules of ownership are not based on a forecast of short-term events. Therefore, an investment strategy that is limited to the buying and rebalancing of a portfolio of index funds is often referred to as passive investing, as opposed to active investing. Simulated index data is based on the performance of live ETFs.

Performance results assume the reinvestment of dividends and capital gains and monthly rebalancing at the end of each month. The monthly return is calculated with the assumption that the SoFi Index is perfectly in balance at the end of each month. In actual SoFi portfolios, rebalancing occurs at no set time, and such actions are dependent on both market conditions and individual client liquidity inflows and outflows, along with the cost impact of such transactions on the overall portfolio.

The performance of the SoFi indices reflects and is net of the effect of SoFi's annual investment management fee of 0.25%, billed quarterly. Actual SoFi Wealth advisory fees may be different than that illustrated. The fee utilized in the is the highest fee SoFi Wealth charges as of the date of the chart. Depending on the amount of your assets under management, your investment management fee may be less. Clients who accept no fees from investment product firms. SoFi uses index fund data based on net asset value returns, which are net of the ETF expenses only. Expenses of the underlying holdings were estimated using a weighted average of the expense ratios for the ETFs utilized in the SoFi Wealth model portfolios at the date of the chart. Although ETFs may minimize tax liabilities from short and long-term capital gains, any resulting tax liability is not deducted from performance results. SoFi Wealth does not charge transaction fees, but other custody related expenses may apply and are not reflected, which reduce returns.

All of the securities used in the SoFi indices were not available during the time period presented.

No taxes are taken into account—chart assumes the account used to invest is a nontaxable account, that is an ongoing concern throughout the period presented.

Representative indexing of SoFi Wealth's conservative strategy underperforms the associated benchmark due to short duration bias and concentration of fixed income.

Benchmarks

Benchmarks have been constructed using combinations of MSCI ACWI and the Bloomberg Barclays Global Aggregate (Dollar Hedged") Total Return index, blended to represent the weighting of equity and fixed income allocations maintained in the associated SoFi Index. Benchmark construction is intended to capture the approximate equivalent risk between the benchmark and the associated SoFi Index.

References to market or composite indices, benchmarks or other measures of relative market performance over a specified period of time are provided for your information only. Reference to an index does not imply that we believe a SoFi Wealth portfolio will achieve returns, volatility or other results similar to the index. The composition of a benchmark may not reflect the manner in which a SoFi Index is constructed in relation to expected or achieved returns, investment holdings, portfolio guidelines, restrictions, sectors, correlations, concentrations, volatility or tracking error targets, all of which are subject to change over time.

Performance results assume the reinvestment of dividends and capital gains and monthly rebalancing at the end of each month. The monthly return is calculated with the assumption that the benchmark is perfectly in balance at the end of each month.

The performance of the benchmark reflects and is net of the effect of an assumed "average mutual fund fee" of 78 basis points, which was expressed in the Morningstar 2019 Fee Study. Although index mutual funds minimize tax liabilities from short and long-term capital gains, any resulting tax liability is not deducted from performance results. Performance results also do not reflect transaction fees and other expenses, which reduce returns. Performance results assumes the reinvestment of dividends, interest and other earnings and are time-weighted based on monthly portfolio valuations for all periods.

The volatility of a benchmark index may be materially different from the individual performance attained by a specific investor. In addition, strategy holdings may differ significantly from the securities that comprise the index. The index has not been selected to represent an appropriate benchmark with which to compare an investor's performance, but rather is disclosed to allow for comparison of the SoFi Indices' performance to that of certain well-known and widely recognized index. You cannot invest directly in an index.

Key Assumptions

Complaint

Portfolio Weights	Aggressive	Moderately Aggressive	Moderate	Moderately Conservative	Conservative
US	38%	48%	30%	20%	0
Developed Ex US	25%	10%	5%	0%	0%
EM Equity	20%	18%	10%	5%	0
US Energy	5%	0%	0%	0%	0%
REIT	5%	0%	0%	0%	5%
EM USD		5%	10%	15%	5%
Inflation Linked Treasury		0%	0%	0%	0%
Short Duration Treasury		0%	0%	0%	70%
Intermediate Treasury		0%	0%	5%	10%
Intermediate Corp		0%	7%	17.50%	10%
Short Term Corp		5%	10%	10%	0%
Barclays High Yield		5%	10%	5%	0%
Short Term HY		15%	18%	17.50%	0%
Short Term Inv Muni		0%	0%	0%	0%
Int Muni		0%	0%	0%	0%
High Yield Muni		0%	0%	0%	0%
1-3 Month Bill		0%	0%	0%	0%

Risks

All investments are subject to risk, which should be considered prior to making any investment decisions.

Exchange Traded Funds (ETFs)

ETFs are open-end investment companies, unit investment trusts or depositary receipts that hold portfolios of stocks, commodities and/or currencies that commonly are designed, before expenses, to closely track the performance and dividend yield of a specific index, or a basket of securities, commodities or currencies, or (as a particular commodity or currency. The types of indices commonly sought to be replicated by ETFs most often include domestic equity indices, fixed income indices, sector indices and foreign or international indices. ETF shares are traded on exchanges and are traded and priced throughout the trading day. ETFs permit an investor to purchase a selling interest in a portfolio of stocks throughout the trading day. Because ETFs trade on an exchange, they may not trade at NAV. Sometimes, the prices of ETFs may vary significantly from the NAVs of the ETFs' underlying securities. Additionally, if an investor decides to redeem ETF shares rather than selling them on a secondary market, the investor may receive the underlying securities which must be sold in order to obtain cash.

Equity

Equity securities include common stocks, preferred stocks, convertible securities and mutual funds that invest in these securities. Equity markets can be volatile. Stock prices rise and fall based on changes in an individual company's financial condition and overall market conditions. Stock prices can decline significantly in response to adverse market conditions, company-specific events, and other domestic and international political and economic developments.

Fixed Income

Fixed income securities include corporate bonds, municipal bonds, other debt instruments and mutual funds that invest in these securities. Issuers generally pay a fixed, variable, or floating interest rate, and must repay the amount borrowed at maturity. Some debt instruments, such as zero-coupon bonds, do not pay current interest, but are sold at a discount from their face value. Prices of fixed income securities generally decline when interest rates rise, and rise when interest rates fall. Longer-term debts and zero-coupon bonds are more sensitive to interest rate changes than debt instruments with shorter maturities.

Fixed income securities are also subject to credit risk, which is the chance that an issuer will fail to pay interest or principal on time. Many fixed income securities receive credit ratings from Nationally Recognized Statistical Rating Organizations (NRSROs). These NRSROs assign ratings to securities by assessing the likelihood of issuer default. Changes in the credit strength of an issuer may reduce the credit rating of its debt investments and may affect their value. High-quality debt instruments are rated at least AA or its equivalent by any NRSRO or are unrated debt instruments of equivalent quality. Issuers of high-grade debt instruments are considered to have a very strong capacity to pay principal and interest. Investment grade debt instruments are rated at least Baa or its equivalent by any NRSRO or are unrated debt instruments of equivalent quality. Baa rated securities are considered to have adequate capacity to pay principal and interest, although they also have speculative characteristics. Lower rated debt securities are more likely to be adversely affected by changes in economic conditions than higher rated debt securities.

U.S. Government securities include securities issued or guaranteed by the U.S. Treasury, issued by a U.S. Government agency, or issued by a Government-Sponsored Enterprise (GSE). U.S. Treasury securities include direct obligations of the U.S. Treasury (i.e., Treasury bills, notes and bonds). U.S. Government agency bonds are backed by the full faith and credit of the U.S. Government or guaranteed by the U.S. Treasury (such as securities of the Government National Mortgage Association (GNMA or Ginnie Mae)). GSE bonds are issued by various federally-chartered, but privately-owned corporations, but are neither direct obligations of, nor backed by the full faith and credit of the U.S. Government. GSE bonds include: bonds issued by Federal Home Loan Banks (FHLB), Federal Farm Credit Banks (FCS), Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac) and the Federal National Mortgage Association (FNMA or Fannie Mae).

International Securities

International investments involve additional risks you should be aware of, which include differences in financial accounting standards, currency fluctuations, political instability, foreign taxes and regulations, news that can trigger volatile conditions, and the potential for illiquid markets. Small cap companies in these markets may react with greater volatility in reaction to activities in these markets. It is more difficult to obtain reliable information about some foreign securities. The costs of investing in some foreign markets may be higher than investing in domestic markets. Investments in foreign securities also are subject to currency fluctuations.

Definitions

Asset Class is a standard term that broadly defines a category of investments. The three basic asset classes are Cash, Bonds (fixed income), and Stocks (equity). Bonds and Stocks are often further subdivided into more narrowly defined classes. Some of the most common asset classes are defined below.

Cash and Cash Alternatives

Cash typically includes bank accounts or certificates of deposit, which are insured by the Federal Deposit Insurance Corporation up to a limit per account. Cash Alternatives typically include money market securities, U.S. treasury bills, and other investments that are readily convertible to cash, have a stable market value, and a very short-term maturity. U.S. Treasury bills are backed by the full faith and credit of the U.S. Government and, when held to maturity, provide safety of principal. (See the "Risks Inherent in Investing" section in this Important Disclosure Information for a summary of the risks associated with investing in cash alternatives.)

Bonds

Bonds are either domestic (U.S.) or global debt securities issued by either private corporations or governments. See the "Risks Inherent in Investing" section in this Important Disclosure Information for a summary of the risks associated with investing in bonds. Bonds are also called "fixed income securities.")

Domestic government bonds are backed by the full faith and credit of the U.S. Government and have superior liquidity and, when held to maturity, safety of principal. Domestic corporate bonds carry the credit risk of their issuers and thus usually offer additional yield. Domestic government and corporate bonds can be sub-divided based upon their term to maturity. Short-term bonds have an approximate term to maturity of 1 to 5 years; intermediate-term bonds have an approximate term to maturity of 6 to 10 years; and, long-term bonds have an approximate term to maturity greater than 10 years.

Stocks

Stocks are equity securities of domestic and foreign corporations. (See the "Risks Inherent in Investing" section in this important Disclosure Information for a summary of the risks associated with investing in stocks.)

Domestic stocks are equity securities of U.S. corporations. Domestic stocks are often sub-divided based upon the market capitalization of the company (the market value of the company's stocks). "Large cap" stocks are from larger companies, "mid-cap" from the middle range of companies, and "small cap" from smaller, perhaps newer, companies. Generally, small cap stocks experience greater market volatility than stocks of companies with larger capitalizations. Small cap stocks are generally those from companies whose capitalization is less than $500 million; mid cap stocks those between $500 million and $5 billion; and large cap over $5 billion.

Large cap, mid cap and small cap may be further sub-divided into "growth" and "value" categories. Growth companies are those with an orientation towards growth, often characterized by commonly used metrics such as higher price-to-book and price-to-earnings ratios. Analogously, value companies are those with an orientation towards value, often characterized by commonly used metrics such as lower price-to-book and price-to-earnings ratios.

International stocks are equity securities from foreign corporations. International stocks are often sub-divided into those from "developed" countries and those from "emerging markets." The emerging markets are in less developed countries with emerging economies that may be characterized by lower income per capita, less developed infrastructure and nascent capital markets. These "emerging markets" usually are less economically and politically stable than the "developed markets."

Welcome Bonus:

Terms and conditions apply. Offer is subject to lender approval. To receive the offer, you must: (1) register and/or apply through the referral link you were given; (2) complete a loan application with SoFi; (3) have and provide a valid US bank account to receive bonus; (4) and meet SoFi's underwriting criteria. Once conditions are met and the loan has been disbursed, you will receive your welcome bonus via automated clearing house (ACH) into your checking account within 30 calendar days. Bonuses that are not redeemed within 180 calendar days of the date they were made available to the recipient may be subject to forfeit. Bonus amounts of $600 or greater in a single calendar year may be reported to the Internal Revenue Service (IRS) as miscellaneous income to the recipient on Form 1099-MISC in the year received as required by applicable law. Recipient is responsible for any applicable federal, state or local taxes associated with receiving the bonus offer; consult your tax advisor to determine applicable tax consequences. SoFi reserves the right to change or terminate the offer at any time with or without notice.

Member Rate Discount Program:

Eligibility

Existing SoFi members with a SoFi Mortgage, Personal Loan, or Student Loan who take out a new loan of a different product type will receive the 0.125% Member Rate Discount on that new loan. To be eligible for the Member Rate Discount Program, members must meet the following criteria: 1) The member must be in good standing with their current and prior SoFi loans; 2) the member has never been 60 or more days past due on a current and prior SoFi loan; 3) the member has not been 30 or more days past due more than once on a current and prior SoFi loan; and 4) the member was never in forbearance on a SoFi loan. The Member Rate Discount must be for a different type of loan, thus it does not apply to another loan of the same type. For instance, an existing SoFi Personal Loan borrower is not eligible to receive the Member Rate Discount on a second SoFi Personal Loan, but is eligible to receive the Member Rate Discount on a SoFi Mortgage, Mortgage Refinance, Student Loan Refinance, Parent PLUS Student Loan Refinance, or a Parent to Student Loan.

SoFi Wealth members with an SoFi loan account will also receive the Member Rate Discount on a new loan if the member's existing SoFi Wealth account meets minimum balance criteria described below at the time of origination of the new loan. SoFi Wealth members are eligible to receive the Member Rate Discount on a Mortgage Loan if they have and maintain a minimum balance of $50,000 in their SoFi Wealth account. SoFi Wealth members are eligible to receive the Member Rate Discount on a Personal and Student Loan if they have and maintain a minimum balance of $10,000 in their SoFi Wealth account.

The SoFi Wealth platform is operated and maintained by SoFi Wealth LLC, an SEC Registered Investment Advisor. Brokerage services are provided to clients of SoFi Wealth LLC by SoFi Securities LLC, an affiliated broker-dealer registered with the Securities and Exchange Commission and a member of FINRA/SIPC. Investments are not FDIC insured, have No Guarantee and May Lose Value. Investing in securities involves risks, and there is always the potential of losing money when you invest in securities. Clearing and custody of all securities are provided by APEX Clearing Corporation.

Standards and Limitations

7/1 Adjustable Rate Mortgage (ARM) loan products will receive the Member Rate Discount for the duration of the fixed period, i.e. 7 years only. Limit one Member Rate Discount per loan. Member Rate Discount cannot be combined with other rate discounts, with the exception of the 0.25% AutoPay rate discount. SoFi reserves the right to change or terminate the Member Rate Discount Program to select/all participants at any time with or without notice.

Personal Loan Member Rate Discount Average Savings

Member Rate Discount Program average savings of **$847** for SoFi Personal Loans is based on all SoFi members who financed their personal loans between 1/1/2016 and 12/31/2016. The savings calculation is derived by taking the lifetime cost of SoFi loans minus the lifetime cost of SoFi loans assuming a 0.125% discount. The savings calculation assumes an average rate of **9.71% APR**, an average term of **67.67 months**, and an average balance **$34,514**. SoFi's lifetime savings methodology for personal loans assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%.

Student Loan Member Rate Discount Average Savings

Member Rate Discount Program average savings of **$650** for SoFi Student Loans is based on all SoFi members who refinanced their student loans between 1/1/2016 and 12/31/2016. The savings calculation is derived by taking the lifetime cost of SoFi loans minus the lifetime cost of SoFi loans assuming a 0.125% discount. The savings calculation assumes an average rate of **4.660% APR** as average term of **137.43 months**, and an average balance **$77,405**. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%.

Member Daily Savings:

Average daily savings calculation of $81 is based on all SoFi members who refinanced their student loans between 8/15/2013 and 6/30/2016. The calculation is derived by averaging the monthly savings of SoFi members, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi, and then taking the daily average of that monthly savings. SoFi's daily savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time. SoFi's daily savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 30 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our daily savings amount, and to minimize the risk of member data error skewing the daily savings amount.

Member Referral Program:

Lifetime referral bonus payment calculation is based on the total funds paid or pending payment to SoFi referral members who earned one or more welcome bonuses through the referral program between 12/31/14 – 1/30/2017, regardless of whether the funds have been disbursed.

The member lifetime savings calculation of $120,909,738 is for SoFi referred members who had their student or parent plus loans refinanced between 7/12/2012 – 1/27/2017. SoFi's lifetime savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)** 2) members make all payments on time 3) members make monthly payments for the full duration of their loan 4) members take advantage of AutoPay, which enables them to lower the APR of their loan by 0.25%. Borrowers refinancing loans into longer terms typically forfeit savings for lower monthly payments.

Lifetime welcome bonus payment calculation is based on the total funds paid or pending payment to SoFi referral members who earned a welcome bonus through the referral program between 11/30/14 – 1/30/2017, regardless of whether the funds have been disbursed.

Complaint

Employer Contribution Program:

Average Enrollee Lifetime Savings

Average enrollee lifetime savings calculation of $8,957.50 is based on all employees of SoFi's Employer Contribution Program partners who received contributions between 5/10/2016 and 4/5/2017. SoFi itself is a participant in the Employer Contribution Program. The savings calculation is derived by taking the estimated lifetime cost of the enrollee's existing student loan without the employer contribution minus the lifetime cost of existing student loan with the employer's contribution added as an additional payment each month. SoFi's average lifetime savings methodology for its Employer Contribution Program assumes: 1) data entered during enrollment in the contribution program is accurate; 2) enrollees' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)**; 3) enrollees make all payments on time; 4) enrollees make their minimum monthly payment for the full duration of their loan; 5) employer contribution is applied for the duration of the enrollee's loan; and 6) enrollee remains employed by the company for the duration of their loan. SoFi's average lifetime savings methodology for its Employer Contribution Program excludes: 1) enrollees from employers that do not apply the contribution for the duration of the enrollee's loan; 2) enrollees with loan terms of 25 years or greater who have a remaining loan balance under $60,000; and 3) enrollees with loan terms greater than 30 years.

Average Monthly Employer Contribution Amount

Average monthly employer contribution amount calculation of $88.44 is based on all of SoFi's Employer Contribution Program partners who have offered a monthly contribution between 5/10/2016 and 4/5/2017. SoFi itself is a participant in the Employer Contribution Program. The calculation is derived by averaging the monthly contribution amount offered to each enrollee for each employer, then averaging all of the employer's monthly contribution amounts. SoFi's average monthly contribution amount methodology for its Employer Contribution Program uses the contribution amount that enrollees receive as of 4/5/2017.

Total Employer Contributions Amount

Total employer contributions amount calculation of $4,763,556.34 is based on all of SoFi's Employer Contribution Program partners who have offered a monthly contribution between 5/10/2016 and 4/5/2017. SoFi itself is a participant in the Employer Contribution Program. The calculation is derived by summing the contributions offered to each enrollee since their enrollment in their employer's program.

Average Enrollee Repayment Years Reduced

Average enrollee repayment years reduced calculation of 3.80 is based on all employees of SoFi's Employer Contribution Program partners who received contributions between 5/10/2016 and 4/5/2017. SoFi itself is a participant in the Employer Contribution Program. The repayment years reduced calculation is derived by taking the estimated years of repayment for the enrollee's existing student loan without the employer contribution minus the years of repayment of existing student loan with the employer's contribution added as an additional payment each month. SoFi's repayment years reduced methodology for its Employer Contribution Program assumes: 1) data entered during enrollment in the contribution program is accurate; 2) enrollees' interest rates do not change over time **(PROJECTIONS FOR VARIABLE RATES ARE STATIC AT THE TIME OF REFINANCING AND DO NOT REFLECT ACTUAL MOVEMENT OF RATES IN THE FUTURE)**; 3) enrollees make all payments on time; 4) enrollees make their minimum monthly payment for the full duration of their loan; 5) employer contribution is applied for the duration of the enrollee's loan; and 6) enrollee remains employed by the company for the duration of their loan. SoFi's repayment years reduced methodology for its Employer Contribution Program excludes: 1) enrollees from employers that do not apply the contribution for the duration of the enrollee's loan; 2) enrollees with loan terms of 25 years or greater who have a remaining loan balance under $60,000; and 3) enrollees with loan terms greater than 30 years.

LICENSES

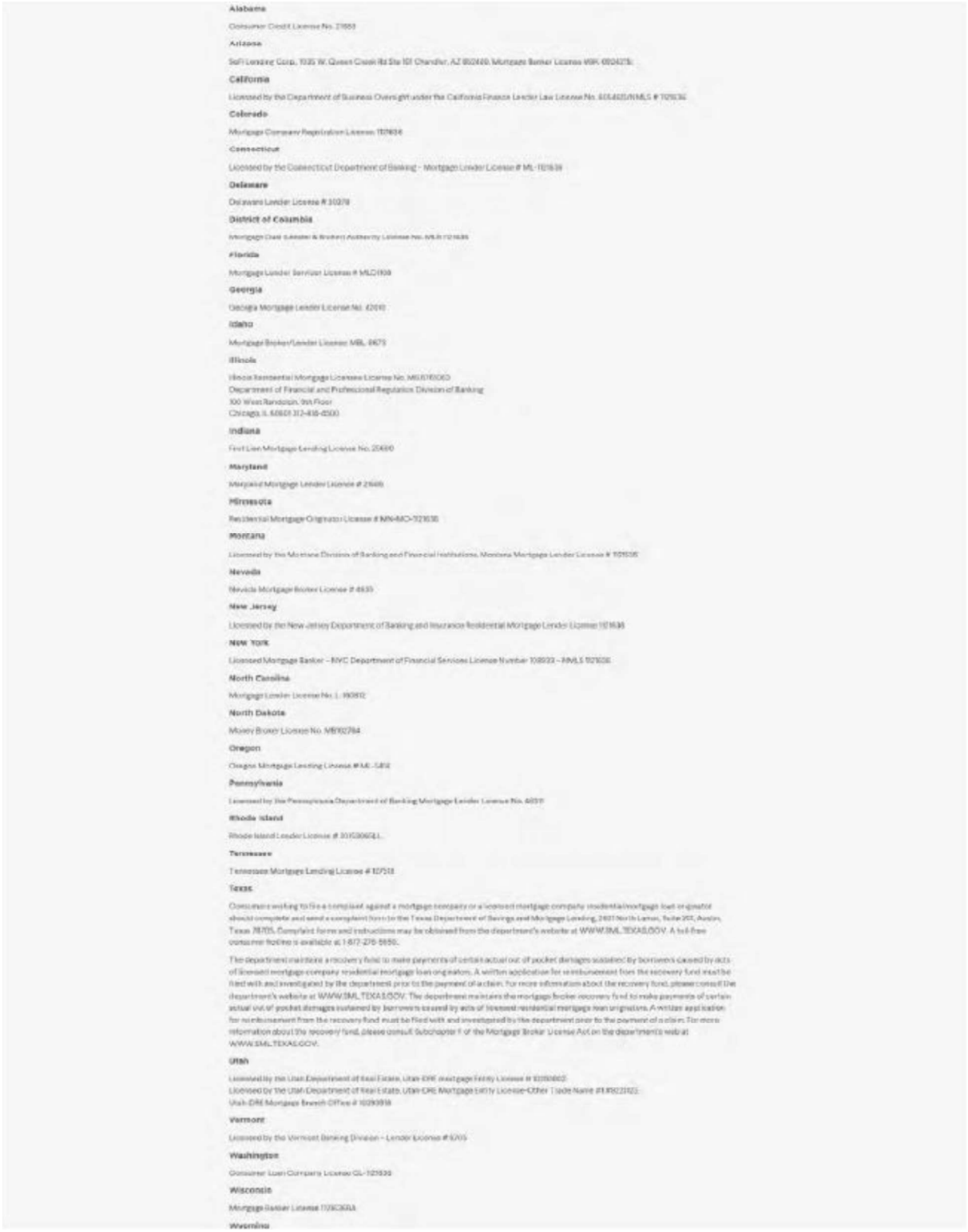
SoFi Lending Corp. holds consumer lending licenses in the following states:

State	License	License Type
Alabama	21663	Consumer Credit
California	6054602 / NMLS# 1013536	Finance Lender
Delaware	30278	Lender
DC	MLB1013536	Money Lenders – Class A
Idaho	RRL-9120	Regulated Lender
Indiana	18090	Consumer Credit
Iowa	NMLS#1094-0058	Regulated Loan
Louisiana	1013536	Licensed Lender
Maryland	1401	Consumer Loan
Michigan	RL-0018684	Regulatory Loan
Minnesota	RL-167	Regulated Loan Co.
Missouri	387-14-7215	Consumer Credit Loan Co.
Montana	1013536	Consumer Loan
Nevada	4635	Broker License
North Dakota	1013536	Money Broker
Oregon	0436-001-C	Consumer Finance
Pennsylvania	42549	Consumer Discount Co.
Rhode Island	20168666LL	Lender
South Dakota	MFL.3076	Money Lending Licenses
Tennessee	3765	Industrial Loan & Thrift License
Texas	156481	Regulated Lender License
Vermont	6705	Lender
Washington	CL-1013536	Consumer Loan

SOFI LENDING CORP. MORTGAGE STATE LICENSING DETAILS

SoFi Lending Corp. is an Equal Housing Lender. As prohibited by federal law, we do not engage in business practices that discriminate on the basis of race, color, religion, national origin, sex, marital status, age (provided you have the capacity to enter into a binding contract), because all or part of your income may be derived from any public assistance program, or because you have, in good faith, exercised any right under the Consumer Credit Protection Act. The federal agency that administers our compliance with these federal laws is the Federal Trade Commission, Equal Credit Opportunity, Washington, DC, 20580.

SoFi Lending Corp. is currently able to issue and refinance mortgages in the following states:



Alabama

Consumer Credit License No. 21663

Arizona

SoFi Lending Corp., 1035 W. Queen Creek Rd Ste 101 Chandler, AZ 852486, Mortgage Banker License #BK-0924275

California

Licensed by the Department of Business Oversight under the California Finance Lender Law License No. 6054655/NMLS # 1121536

Colorado

Mortgage Company Registration License 1121634

Connecticut

Licensed by the Connecticut Department of Banking - Mortgage Lender License # ML-1121539

Delaware

Delaware Lender License # 31078

District of Columbia

Mortgage Dealer, Lender & Broker Authority License No. MLB-1121535

Florida

Mortgage Lender Servicer License # MLD1958

Georgia

Georgia Mortgage Lender License No. 42010

Idaho

Mortgage Broker/Lender License: MBL-8675

Illinois

Illinois Residential Mortgage Licensee License No. MB.6761060
Department of Financial and Professional Regulation, Division of Banking
300 West Randolph, 9th Floor
Chicago, IL 60601 312-814-2500

Indiana

First Lien Mortgage Lending License No. 20490

Maryland

Maryland Mortgage Lender License # 21646

Minnesota

Residential Mortgage Originator License # MN-MO-1121535

Montana

Licensed by the Montana Division of Banking and Financial Institutions, Montana Mortgage Lender License # 1121535

Nevada

Nevada Mortgage Broker License # 4835

New Jersey

Licensed by the New Jersey Department of Banking and Insurance Residential Mortgage Lender License 1121535

New York

Licensed Mortgage Banker – NYC Department of Financial Services License Number 1048222 – NMLS 1121535

North Carolina

Mortgage Lender License No. L-190812

North Dakota

Money Broker License No. MB102784

Oregon

Oregon Mortgage Lending License # ML-5812

Pennsylvania

Licensed by the Pennsylvania Department of Banking Mortgage Lender License No. 46511

Rhode Island

Rhode Island Lender License # 20152060LL

Tennessee

Tennessee Mortgage Lending License # 107518

Texas

Consumers wishing to file a complaint against a mortgage company or a licensed mortgage company residential mortgage loan originator should complete and send a complaint form to the Texas Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705. Complaint forms and instructions may be obtained from the department's website at WWW.SML.TEXAS.GOV. A toll-free consumer hotline is available at 1-877-276-5550.

The department maintains a recovery fund to make payments of certain actual out of pocket damages sustained by borrowers caused by acts of licensed mortgage company residential mortgage loan originators. A written application for reimbursement from the recovery fund must be filed with and investigated by the department prior to the payment of a claim. For more information about the recovery fund, please consult the department's website at WWW.SML.TEXAS.GOV. The department maintains the mortgage broker recovery fund to make payments of certain actual out of pocket damages sustained by borrowers caused by acts of licensed residential mortgage loan originators. A written application for reimbursement from the recovery fund must be filed with and investigated by the department prior to the payment of a claim. For more information about the recovery fund, please consult Subchapter F of the Mortgage Broker License Act on the department's web at WWW.SML.TEXAS.GOV.

Utah

Licensed by the Utah Department of Real Estate, Utah-DRE mortgage entity License # 8356602
Licensed by the Utah Department of Real Estate, Utah-DRE Mortgage Entity License-Other Trade Name #8356202
Utah-DRE Mortgage Branch Office # 10293918

Vermont

Licensed by the Vermont Banking Division – Lender License # 6705

Washington

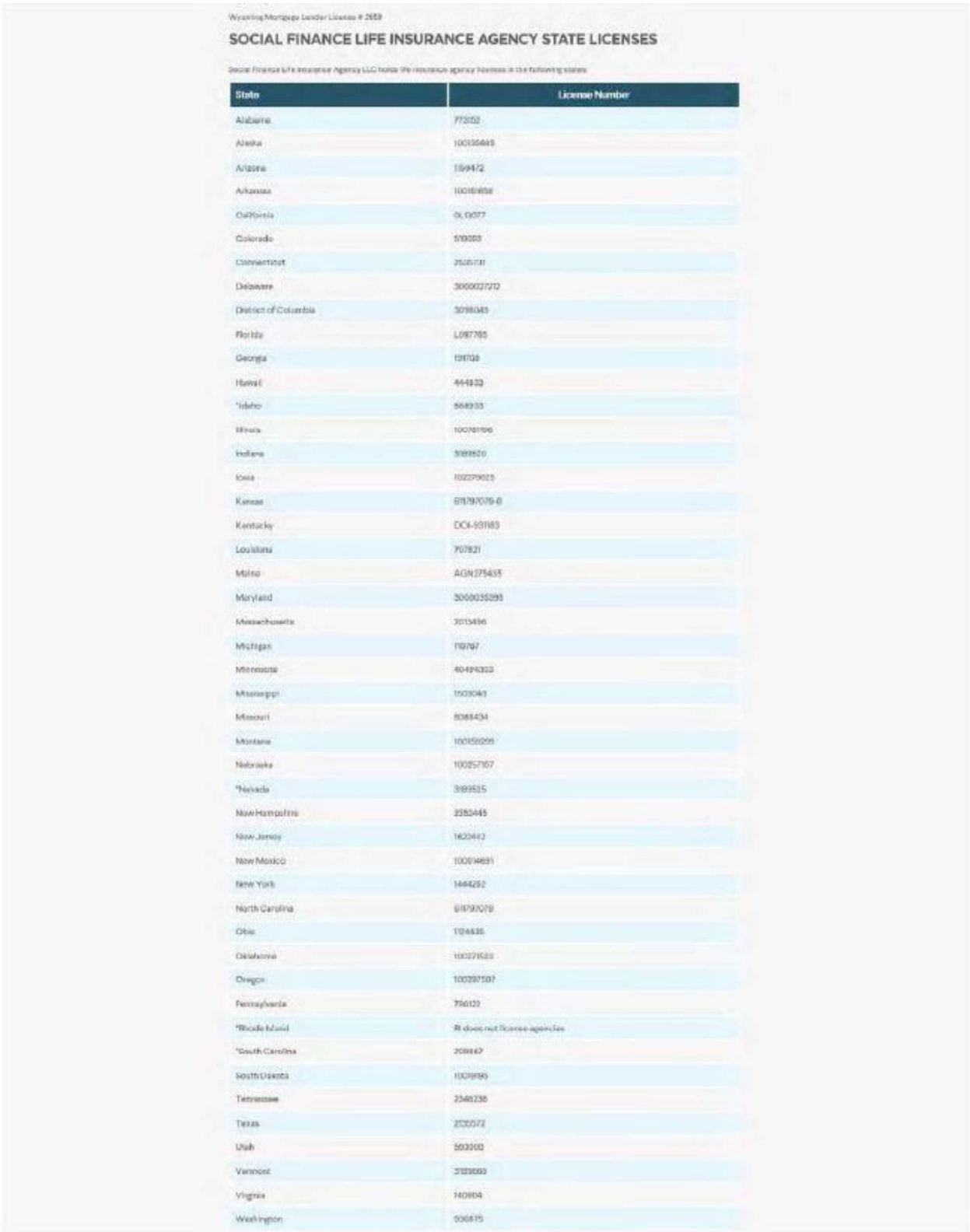
Consumer Loan Company License CL-121535

Wisconsin

Mortgage Banker License 17263BA

Wyoming

Complaint

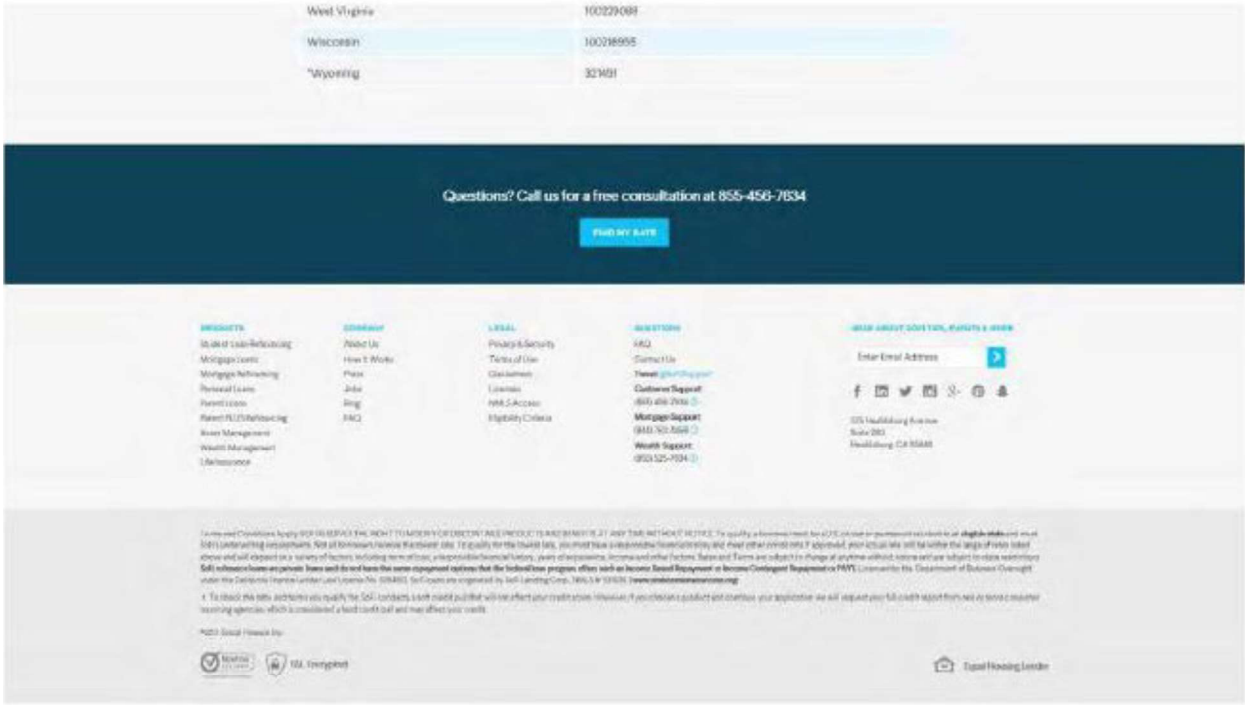


Wyoming Mortgage Lender License # 2659

SOCIAL FINANCE LIFE INSURANCE AGENCY STATE LICENSES

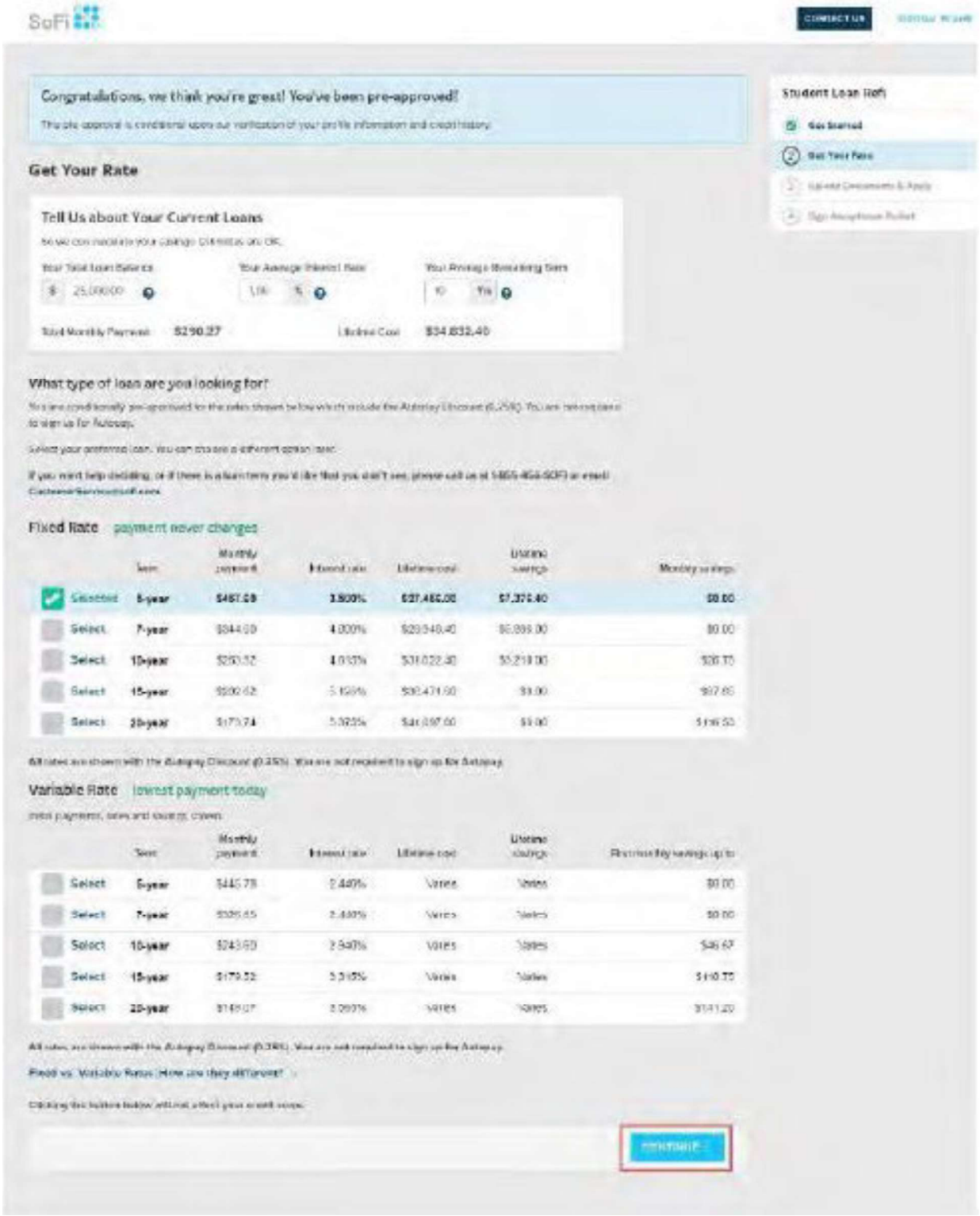
Social Finance Life Insurance Agency LLC holds life insurance agency licenses in the following states:

State	License Number
Alabama	772052
Alaska	100106445
Arizona	1594472
Arkansas	100189858
California	OL 06577
Colorado	578060
Connecticut	2535730
Delaware	3000027272
District of Columbia	3098043
Florida	L087765
Georgia	191708
Hawaii	444832
*Idaho	568033
Illinois	100191996
Indiana	3189820
Iowa	100279025
Kansas	01787078-0
Kentucky	DOI-107183
Louisiana	707821
Maine	AGN275455
Maryland	3000035395
Massachusetts	3015496
Michigan	19797
Minnesota	40494303
Mississippi	1503043
Missouri	8088434
Montana	100156099
Nebraska	100257167
*Nevada	3189515
New Hampshire	2353445
New Jersey	1622442
New Mexico	100194891
New York	1444252
North Carolina	01787079
Ohio	1124435
Oklahoma	100271520
Oregon	100297597
Pennsylvania	796122
*Rhode Island	RI does not license agencies
*South Carolina	208867
South Dakota	1009595
Tennessee	2348238
Texas	2720572
Utah	5033100
Vermont	3123503
Virginia	140804
Washington	906875


West Virginia
Wisconsin
Wyoming
Questions? Call us for a free consultation at 855-456-7634

Complaint

Exhibit K



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 a violation 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 Social Finance, Inc., a Delaware corporation, also doing business as SoFi, with its principal office or place of business at One Letterman Drive, Building A, San Francisco, California 94129.

   b. Respondent SoFi Lending Corp., a California corporation, also doing business as SoFi, with its principal office or place of business at 375 Healdsburg Avenue, Suite 280, Healdsburg, CA 95448.

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. **"Advertisement"** shall mean a commercial message in any medium that directly or indirectly promotes a consumer transaction.

B. **"Competent and reliable evidence"** means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that (1) have been conducted and evaluated in an objective manner by qualified persons and (2) are generally accepted in the profession to yield accurate and reliable results.

C. Unless otherwise specified, **"Respondents"** shall mean Social Finance, Inc., a corporation, also doing business as SoFi, and SoFi Lending Corp., a corporation, also doing business as SoFi, individually or collectively; and their successors and assigns.

Provisions

I. Prohibited False, Misleading, or Unsubstantiated Representations Regarding Credit Product Savings

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 advertising, promotion, offering, or extension of a credit product, must not:

A. Misrepresent, expressly or by implication, that consumers have saved, will save, or will likely save money, or a specific amount of money, over the lifetime of a credit product or over any other time period (*e.g.*, monthly), including by representing that the amount saved over a specific time period will be zero when consumers may instead pay more money over that specific time period.

B. Make any representation, expressly or by implication, concerning the claims set forth in I.A., unless at the time such representation is made, Respondents possess and rely upon competent and reliable evidence that substantiates that the representation is true.

C. Misrepresent, expressly or by implication, any other material fact about the performance, benefits, or characteristics of any credit product(s) in any Advertisement that makes any representation, expressly or by implication, concerning the claims set forth in I.A.

II. 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 10 years after the issuance date of this Order, each Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in the marketing or advertising of credit products; 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.

III. 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 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; (c) describe the activities of each business; (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.

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 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. 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 Social Finance, Inc.*, Docket No. C-4673

IV. Recordkeeping

IT IS FURTHER ORDERED that Respondents must create certain records for 10 years after the issuance date of the Order, and retain each such record for 5 years. Specifically, Respondents 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 consumer complaints concerning the subject matter of the Order, 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; and

E. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission.

V. 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 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.

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 February 22, 2039, 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.

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Today, the Federal Trade Commission has issued for public comment a settlement with SoFi, an online student lender. According to the FTC's complaint, SoFi's widely disseminated advertisements have significantly exaggerated the average savings that student loan borrowers achieve when they refinance through the company. These advertisements were deceptive and I agree that SoFi's actions were unlawful, so I have voted in favor.

Our proposed resolution does not require SoFi to pay any money whatsoever for this misconduct. Ideally, SoFi would pay civil penalties for violating the law. Due to limitations in the FTC's authority, the agency cannot seek civil penalties in matters like these. However, the Consumer Financial Protection Bureau and the State Attorneys General would be able to seek penalties from SoFi under existing federal law.[1]

In future matters where we are unable to obtain monetary remedies, we should carefully consider whether partnering with other law enforcement agencies can lead to better results for consumers and deter bad actors from violating the law.

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 Social Finance, Inc. and SoFi Lending Corp. (collectively "SoFi").

1 SoFi's alleged misconduct likely violated both the Federal Trade Commission Act's ban on unfair or deceptive practices and the Consumer Financial Protection Act's (CFPA) prohibition on unfair, deceptive, or abusive practices by those who offer or provide a consumer financial product or service. With some exceptions, States can enforce the CFPA and obtain remedies available under it. *See* 12 U.S.C. § 5552(a).

Analysis to Aid Public Comment

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this 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.

SoFi is an online lender that offers, among other credit products, student loan refinancing. The Commission's proposed complaint alleges that SoFi makes savings claims that, as detailed below, misrepresent how much money students have saved, will save, or will likely save by refinancing their student loans with SoFi.

SoFi has prominently advertised that consumers who refinance their loans with SoFi have saved large average amounts of money over the lifetime of those loans or each month. These claims overstate consumers' average savings. SoFi's calculations of its members' average savings selectively excludes large categories of consumers who would likely pay more money, instead of saving. Specifically, when SoFi calculates its members' average lifetime savings it excludes all consumers who refinance into longer term loans, most of whom actually pay *more* over the lifetime of the loan. Further, when SoFi calculates its members' average monthly savings it excludes all consumers who refinance into shorter term loans, most of whom actually pay *more* on a monthly basis. As a result, SoFi's representations significantly inflate the average savings consumers have actually achieved – sometimes even doubling the actual savings.

Additionally, when a consumer submits an application to refinance his or her student loan(s) and is presented with loan options, SoFi misrepresents that the consumer will save zero dollars when the consumer is actually expected to lose money. Specifically, if, for a fixed rate loan option, the consumer is expected to lose money over the lifetime of the loan, then SoFi falsely states that the consumer's lifetime savings will be "$0.00." Likewise, if a consumer is expected to pay more on a monthly basis for a given loan option, then SoFi falsely states that the consumer's monthly savings will be "$0.00."

The proposed order will prevent SoFi from engaging in similar acts or practices. Part I.A. would prohibit SoFi from misrepresenting that consumers who obtain a credit product have saved, will save, or will likely save money, or a specific amount of money, over the lifetime of a credit product or over any other time period (*e.g.,* monthly), including by representing that the amount of money saved over a specific time period will be zero when consumers will instead pay more money over that specific time period. Part I.B**.** would also prohibit SoFi from making any of the savings claims covered by Part I.A., unless those claims are substantiated with competent and reliable evidence. Part I.C. would prohibit SoFi from misrepresenting any other material fact about the performance, benefits, or characteristics of any credit product when making a savings claim covered by Part I.A.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II is an order distribution provision that requires SoFi to provide the order to current and future principals, officers, and corporate directors, as well as current and future managers, employees, agents and representatives who participate in certain duties related to the subject matter of the proposed complaint and order, and to secure statements acknowledging receipt of the order. Part

Analysis to Aid Public Comment

III requires SoFi to submit a compliance report one year after the order is entered. It also requires SoFi to notify the Commission of corporate changes that may affect compliance obligations within 14 days of such a change.

Part IV requires SoFi to maintain and upon request make available certain compliance-related records, including certain consumer complaints and unique advertisements. Part V requires SoFi to submit additional compliance reports within 10 business days of a written request by the Commission. Part VI is a provision "sunsetting" 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 complaint or proposed order, or to modify in any way the proposed order's terms.

Complaint

IN THE MATTER OF

LINDE AG, PRAXAIR, INC. AND LINDE PLC

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-4660; File No. 171 0068
Complaint, October 19, 2018 – Decision, February 26, 2019

This consent order addresses the $80 billion acquisition by Linde AG of certain assets of Praxair, Inc. The complaint alleges that the merger violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating direct and substantial competition between Praxair and Linde in relevant markets, providing the merged firm with an enhanced ability to increase prices unilaterally, and eliminating a competitor for gas customers in markets where alternative sources of supply are limited. The consent order requires Linde to divest the vast majority of Linde's U.S. industrial gas business, and some worldwide assets to MG Industries GmbH. The order also requires Linde to divest five facilities that produce hydrogen and carbon monoxide ("HyCO") for on-site customers, along with Linde's hydrogen pipeline in the Gulf Coast and related customer contracts, to Matheson Tri-Gas, Inc., its HyCO plant in Clear Lake, Texas to Celanese Corporation and its HyCO plant in La Porte, Texas to LyondellBasell Industries N.V.

Participants

For the *Commission*: *Jordan S. Andrew, Peter Colwell, Jeffrey Dahnke, Kelly A. Horne,* and *Samantha R. Morelli.*

For the *Respondents*: *Renata Hesse, Steven L. Holley, and Joseph J. Matelis, Sullivan & Cromwell LLP; Thomas A. McGrath, Linklaters 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 Linde AG ("Linde"), a corporation subject to the jurisdiction of the Commission, and Praxair, Inc. ("Praxair"), a corporation subject to the jurisdiction of the Commission, have entered into an agreement and plan of merger to form Linde PLC, 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 Linde is a corporation organized, existing, and doing business under, and by virtue of, the laws of Germany, with its office and principal place of business located at Klosterhofstrasse 1, 80331 Munich, Germany. Linde's United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Linde North America, Inc., 200 Somerset Corporate Boulevard, Bridgewater, New Jersey 08807 (attention: Greg Schuetz, Esq.).

2. Respondent Praxair is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 10 Riverview Drive, Danbury, Connecticut 06810.

3. Respondent Linde PLC is a corporation organized, existing, and doing business under and by virtue of the laws of Ireland with its executive office located at The Priestley Centre, 10 Priestley Road, The Surrey Research Park, Guildford, Surrey GU2 7XY, United Kingdom. Linde PLC's United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Praxair, Inc., 10 Riverview Drive, Danbury, Connecticut 06810 (attention: Guillermo Bichara, Esq.).

4. Respondents are engaged in, among other things, the production and sale of industrial gases, including, but not limited to, bulk liquid oxygen, bulk liquid nitrogen, bulk liquid argon, bulk liquid carbon dioxide, bulk liquid hydrogen, bulk refined helium, on-site hydrogen, on-site carbon monoxide, and excimer laser gases.

5. The Respondents are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a company 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.

THE PROPOSED MERGER

6. Pursuant to a Business Combination Agreement dated June 1, 2017, the Respondents will come together under a new holding company through an all-stock merger of equals transaction valued at approximately $80 billion (the "Merger"). The Merger is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

THE RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Merger are the manufacture and sale of:

a. bulk liquid oxygen;

b. bulk liquid nitrogen;

c. bulk liquid argon;

d. bulk liquid carbon dioxide;

e. bulk liquid hydrogen;

f. bulk refined helium;

g. on-site hydrogen;

h. on-site carbon monoxide; and

i. excimer laser gases ("ELGs").

8. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Merger on the bulk liquid oxygen and bulk liquid nitrogen markets are:

a. the Northeast;

b. the Mid-Atlantic;

c. Upstate and Western New York;

d. the Carolinas;

e. Northern Florida and Surrounding Areas;

f. Atlanta and Surrounding Areas;

g. the Pacific Northwest;

h. Northern California;

i. Southern California;

j. Arkansas and Surrounding Areas;

k. Northern Texas and Surrounding Areas;

l. Southern Texas;

m. the Central Gulf Coast;

n. the Eastern Midwest;

o. Greater Chicago;

p. Missouri and Surrounding Areas; and

q. Puerto Rico.

9. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Merger on the bulk liquid argon market is the United States.

10. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Merger on the bulk liquid carbon dioxide market are:

a. Northern California;

b. Southern California;

c. the Southeast;

d. the Mid-Atlantic;

e. the Rocky Mountains;

f. the Plains;

g. Southern Texas;

h. the Eastern Midwest; and

i. Greater Chicago.

11. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Merger on the bulk liquid hydrogen market is the United States.

12. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Merger on the bulk refined helium market is the world.

13. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Merger on the on-site hydrogen market is the United States.

14. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Merger on the on-site carbon monoxide market is the United States.

15. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Merger on the ELG market is the United States.

THE STRUCTURE OF THE MARKETS

16. Respondents Linde and Praxair are two of a limited number of significant participants in each of the relevant markets for bulk liquid oxygen, nitrogen, argon, carbon dioxide, and hydrogen; bulk refined helium; on-site hydrogen and carbon monoxide; and ELGs, and each relevant market is highly concentrated, as measured by the Herfindahl-Hirschman

Index. The Merger would result in Respondents becoming one of the largest suppliers in each relevant area and significantly increase concentration levels in each relevant market.

ENTRY CONDITIONS

17. New entry into the relevant markets would not occur in a timely manner sufficient to deter or counteract the likely adverse competitive effects of the Merger.

18. Entry into the bulk liquid oxygen, nitrogen, and argon markets is costly, difficult, and unlikely because of, among other things, the time and cost required to construct the air separation units that produce these products. Constructing an air separation unit at a scale sufficient to be viable in the market would cost at least $30 to $100 million, most of which is sunk costs. In addition, argon is only produced at large ASUs that are equipped with specialized equipment capable of capturing argon, which adds millions of dollars to the cost of the plant. The required investment can only be justified if a substantial portion of the plant's capacity is pre-sold prior to construction, either to an on-site customer or to customers with commitments under contract. Such pre-sale opportunities occur infrequently and can take several years to secure.

19. Entry into the bulk liquid carbon dioxide market is not likely to be timely or sufficient to deter or counteract the likely adverse competitive effects of the Merger. Entry into the market requires access to raw carbon dioxide supply sources, which are typically unavailable due to long-term contracts with incumbent liquid carbon dioxide suppliers. In most instances, a supplier must have access to multiple raw carbon dioxide sources to ensure that it is able to supply its customers consistently. In addition, entry requires constructing a plant capable of producing bulk liquid carbon dioxide takes over a year and costs $5 to $30 million.

20. Entry into the bulk liquid hydrogen market would also not be likely, timely, or sufficient to deter or counteract the likely adverse competitive effects of the Merger. Constructing a hydrogen production facility capable of producing liquid hydrogen at a scale sufficient to be viable in the market requires a capital investment of $75 to $100 million. In addition, an entrant would need to acquire distribution assets and build a network of distribution facilities.

21. Entry into the bulk refined helium market is also costly, difficult, and unlikely, because of, among other things, the time and cost required to gain access to a source of crude helium, acquire helium distributions assets, and build a distribution network. Significant sources of crude helium are limited and all sources of refined helium are committed to long-term contracts. A new entrant would need to locate a new source of crude helium and build a refinery, or rely on a supply agreement with a competitor. Both options require an investment of several million dollars. In addition, millions of dollars would be needed to acquire the necessary infrastructure and distribution assets, including transfill facilities, cryogenic storage containers, and high-pressure tube trailers and liquid dewars capable of transporting helium from the source to customers.

22. Entry into the on-site hydrogen and carbon monoxide markets would not be likely, timely, or sufficient to deter or counteract the adverse competitive effects of the Merger. Entry into the on-site hydrogen and carbon monoxide markets requires sophisticated engineering capabilities, operational expertise, and significant capital resources. The investment necessary to participate in the markets for on-site hydrogen and carbon monoxide is also a significant obstacle for new entrants. A new facility costs between $30 and $300 million to build, depending on the product mix and capacity, and requires years to construct. To participate in the Gulf Coast, a new entrant would need to gain access to a hydrogen pipeline. It is crucial to have access to a hydrogen pipeline in the Gulf Coast to be competitive for on-site opportunities in the region, since pipelines are the only way to monetize excess or by-product hydrogen not sold to the on-site customer. The time, cost, and regulatory hurdles associated with building a pipeline make de novo entry into this region highly unlikely.

23. It is unlikely that there would be entry into the ELG market that is timely and sufficient to deter or counteract the likely adverse competitive effects of the Merger. The largest barrier a new entrant would face is obtaining access to a substantial and reliable source of neon. Neon is a very scarce gas that is produced only at the largest air separation units that are equipped with a specialized neon column. Developing such an air separation unit would take several years and cost hundreds of million dollars, and cannot be justified on the basis of extracting neon. In addition to developing a source of neon, an entrant into the ELG market would also need to construct a plant that is capable of precisely mixing neon with other gases to produce ELGs. Such a facility would cost between $8 and $12 million and take approximately one year to eighteen months to construct. Once the facility comes on line, the new entrant must begin the process of qualifying its ELGs with OEMs and customers, which can take an additional year or more to complete. Only after completing all of these steps could the entrant begin selling ELGs to customers.

EFFECTS OF THE MERGER

24. The effects of the Merger may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Respondents Linde and Praxair;

b. by increasing the likelihood that Respondents would unilaterally exercise market power in the bulk liquid oxygen, bulk liquid nitrogen, bulk liquid argon, bulk liquid carbon dioxide, bulk liquid hydrogen, bulk refined helium, on-site hydrogen, on-site carbon monoxide, and ELG markets in the relevant geographic areas;

c. by enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the bulk liquid oxygen, bulk liquid nitrogen, bulk liquid argon, bulk liquid carbon dioxide, bulk liquid

hydrogen, bulk refined helium, on-site hydrogen, on-site carbon monoxide, and ELG markets in the relevant geographic areas; and

d. by increasing the likelihood that consumers would be forced to pay higher prices for bulk liquid oxygen, bulk liquid nitrogen, bulk liquid argon, bulk liquid carbon dioxide, bulk liquid hydrogen, bulk refined helium, on-site hydrogen, on-site carbon monoxide, and ELG gases in the relevant geographic areas.

VIOLATIONS CHARGED

25. The Merger 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 nineteenth day of October, 2018, issues its Complaint against said Respondents.

By the Commission, Commissioner Chopra dissenting.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed merger of Linde AG and Praxair, Inc. to form Linde PLC (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 ("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 Hold Separate and 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 the following Order to Hold Separate and Maintain Assets ("Order to Hold Separate"):

1. Respondent Linde AG is a corporation organized, existing, and doing business under, and by virtue of, the laws of Germany, with its office and principal place of business located at Klosterhofstrasse 1, 80331 Munich, Germany. Linde AG's United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Linde North America, Inc., 200 Somerset Corporate Boulevard, Bridgewater, New Jersey 08807 (attention: Greg Schuetz, Esq.).

2. Respondent Praxair, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 10 Riverview Drive, Danbury, Connecticut 06810.

3. Respondent Linde PLC is a corporation organized, existing, and doing business under and by virtue of the laws of Ireland with its executive office located at The Priestley Centre, 10 Priestley Road, The Surrey Research Park, Guildford, Surrey GU2 7XY, United Kingdom. Linde PLC's United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Praxair, Inc., 10 Riverview Drive, Danbury, Connecticut 06810 (attention: Guillermo Bichara, Esq.).

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

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order to Hold Separate, the following definitions shall apply (to the extent any capitalized term appearing in this Order to Hold Separate is not defined below, the term shall be defined as that term is defined in the Decision and Order contained in the Consent Agreement):

A. "Linde" means Linde AG, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Linde AG (including Linde North America, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Praxair" means Praxair Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Praxair, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Linde PLC" means Linde PLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Linde PLC (including Linde North America, Inc., after the Merger), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means any Person that acquires any of the Gases Assets pursuant to the Decision and Order.

F. "Active Employee" means any full-time, part-time, or contract individual employed by Linde, Praxair, or Linde PLC whose job responsibilities relate or related to any of part of the Gases Business, as of and after the date of the announcement of the Merger.

G. "Confidential Information" means any and all of the following information:

1. all information that is a trade secret under applicable trade secret or other law;

2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business, including historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials; and

4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order to Hold Separate; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

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

I. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission in this matter following the issuance and service of a final Decision and Order by the Commission.

J. "Gases Assets" means the Helium Assets, HyCO Assets, and Industrial Gases Assets and, if applicable, any additional assets identified in Paragraphs I.G., I.H., and I.I. of the Decision and Order.

K. "Gases Business" means the Helium Business, HyCO Business, and Industrial Gases Business.

L. "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.

M. "Including" means including without limiting the generality of any description preceding such term.

N. "Merger" means the merger of Linde and Praxair described in the Business Combination Agreement by and among Linde Aktiengesellschaft, Praxair, Inc., Zamalight PLC, Zamalight Holdco LLC, and Zamalight Subco, Inc., dated as of June 1, 2017.

O. "Merger Date" means the date the Merger closes.

P. "Orders" means this Order to Hold Separate and the Decision and Order.

Q. "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.

II.

IT IS FURTHER ORDERED that from the date this Order to Hold Separate is issued until the date that all of the Industrial Gases Assets and HyCO SMR Assets have been divested pursuant to the Decision and Order:

A. Respondents shall continue to operate Linde and Praxair as independent, ongoing, economically viable, competitive businesses held separate, distinct, and apart from each other's operations.

B. Respondents shall not coordinate any aspect of the operations of Linde and Praxair, including the marketing or sale of any products. Respondents shall take all steps necessary to ensure that:

1. Neither Linde nor Praxair attempts to influence, direct, or control the management of the other with regard to any aspects of its operations; and

2. The management of Linde and Praxair each shall act to maintain and increase their respective sales and income, and maintain operational, promotional, advertising, sales, technical, customer service, and marketing support at 2018 levels or previously approved levels for 2019, whichever are higher.

C. Linde and Praxair shall maintain, in accordance with sound accounting principles, separate, accurate, and complete financial ledgers, books, and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues, and income of each.

III.

IT IS FURTHER ORDERED that from the date this Order to Hold Separate is issued until the Gases Assets are divested, Respondents shall operate the Gases Assets and Gases Business in the ordinary course of business consistent with past practices, including:

A. Maintaining the (i) Gases Assets and Gases Business in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement, and (ii) relations and good will with employees, suppliers, customers, landlords, creditors, agents, and others having business relationships with the Gases Business and Gases Assets;

B. Providing the Gases Business with sufficient financial and other resources to (i) operate the Gases Business and Gases Assets at least at the current rate of

operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the date the Merger was announced; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Gases Business in the ordinary course of business and in accordance with past practice and current plans; (iii) carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to, existing or planned renovation, remodeling, or expansion projects; and

C. Preserving the Gases Business and Gases Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Gases Business and Gases Assets would be diminished.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer any of the Gases Assets no later than the date that such assets are divested; *provided, however,* that in the event that Respondents are unable to obtain any:

1. Governmental Authorization, Respondents shall provide such assistance as an Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and

2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.

B. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of any of the Gases Assets and Gases Business, including providing access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.

C. From the time Respondents engage in negotiations with any Acquirer until 6 months after the divestiture of any of the Gases Assets to that Acquirer, Respondents shall cooperate and assist the Acquirer to identify and hire any Active Employee whose responsibilities relate in any way to the Gases Assets to be divested to the Acquirer:

1. No later than 10 days after the request of an Acquirer, Respondents shall provide all information of any relevant Active Employee, including providing access to personnel Records (to the extent permissible under

applicable laws) and allowing Acquirer to privately interview such Active Employee;

2. Respondents shall (i) not solicit the continued employment of any Active Employee (unless Acquirer has informed Respondents that a particular Active Employee will not receive an employment offer from Acquirer) and (ii) not otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Active Employee by an Acquirer;

3. Respondents shall provide reasonable financial incentives as necessary to any Active Employee to accept an offer of employment from an Acquirer, which may include providing a retention bonus for continuing employment in connection with any Gases Assets to be divested; and

4. All Active Employees hired by an Acquirer who are participants in Respondents' retirement and savings plans (i) shall retain their accrued benefits under such plans as of the date the Gases Assets are divested and Respondents shall be liable for payment of the benefits when employees become eligible for them and (ii) shall become fully vested in their accrued benefits as of the date the Gases Assets are divested.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Gases Assets, Gases Business, and the post-divestiture Gases 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 any Divestiture Agreement; or

2. Complying with financial, regulatory, or other reporting or legal obligations, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Gases Assets or Gases Business or as required by law.

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 Hold Separate, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A., and (iii) 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 Paragraph V. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph V., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI.

IT IS FURTHER ORDERED that:

A. Grant Thornton LLP ("Monitor") shall serve to monitor Respondent's compliance with all of its obligations and responsibilities as required by this Order to Hold Separate, Decision and Order, and any Divestiture Agreement.

B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order to Hold Separate and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order to Hold Separate and (ii) 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 the Respondents or of the Commission;

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with the Orders or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to the Orders;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

C. The Monitor shall report in writing to the Commission (i) every 30 days after the Merger Date and (ii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with the Orders.

D. The Commission may require the Monitor and each of the Monitor'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 Monitor's duties.

E. The Monitor's power and duties shall terminate when this Order to Hold Separate term-inates at which time the Monitor's power and duties shall continue as set forth under the Decision and Order, or at such other time as directed by the Commission.

F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order to Hold Separate on the same terms and conditions as provided in this Paragraph VI.

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.

IT IS FURTHER ORDERED that:

A. Respondent shall:

1. No later than 5 days after the Merger Date, notify the Commission via email at bccompliance@ftc.gov of the Merger Date; and

2. No later than 10 days after the divestiture of any of the Gases Assets has been completed, (a) notify the Commission of the date such divestiture closed and (b) submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov.

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

1. Respondent shall submit interim Compliance Reports 30 days from the date Respondent signs the Consent Agreement (as set forth in the Consent Agreement) and every 30 days thereafter until this Order to Hold Separate terminates; and

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);

3. Respondents shall include in their Compliance Reports 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 Order, and a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted; and

4. Respondents shall retain copies of all material written communications to and from such parties, as well as all non-privileged internal memoranda, reports, and recommendations concerning completing their obligations under this Order for a period of 3 years, and shall provide copies of those records to Commission staff upon request.

C. Respondent shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee

specifically authorized to perform this function. Respondent shall submit an original and two 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. In addition, Respondent shall provide a copy of each Compliance Report to the Monitor if the Commission has appointed one in this matter.

Provided, however, that after the Decision and Order in this matter is issued, the compliance reports required by this Paragraph VII. may be consolidated with and submitted to the Commission on the same timing as the compliance reports required by the Decision and Order.

VIII.

IT IS FURTHER ORDERED that the purpose of this Order to Hold Separate is (i) to hold the operations of Linde and Praxair separate and apart and to preserve the Gases Assets and Gases Business as a viable, competitive, and ongoing business until the divestitures required by the Decision and Order are achieved; (ii) prevent interim harm to competition pending the divestitures and other relief; and (iii) help remedy any anticompetitive effects of the proposed Merger as alleged in the Commission's Complaint.

IX.

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

A. Any proposed dissolution of Linde PLC;

B. Any proposed acquisition, merger, or consolidation of Linde PLC; or

C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Hold Separate.

X.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Hold Separate, 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 to Hold Separate, 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 to Hold Separate, 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.

XI.

IT IS FURTHER ORDERED that this Order to Hold Separate shall terminate:

A. Three business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. Three business days after the date that Respondents complete the divestitures required by Paragraph II. of the Decision and Order; *provided, however,* that if at the time such divestitures have been completed, the Decision and Order in this matter is not yet final, then this Order to Hold Separate shall terminate three business days after the Decision and Order becomes final.

By the Commission, Commissioner Chopra dissenting.

DECISION
[Public Record Version]

The Federal Trade Commission ("Commission") initiated an investigation of the proposed merger of Linde AG and Praxair, Inc. to form Linde PLC (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 ("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 Hold Separate and 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 Hold Separate and 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 Linde AG is a corporation organized, existing, and doing business under, and by virtue of, the laws of Germany, with its office and principal place of business located at Klosterhofstrasse 1, 80331 Munich, Germany. Linde AG's United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Linde North America, Inc., 200 Somerset Corporate Boulevard, Bridgewater, New Jersey 08807 (attention: Greg Schuetz, Esq.).

2. Respondent Praxair, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 10 Riverview Drive, Danbury, Connecticut 06810.

3. Respondent Linde PLC is a corporation organized, existing, and doing business under and by virtue of the laws of Ireland with its executive office located at The Priestley Centre, 10 Priestley Road, The Surrey Research Park, Guildford, Surrey GU2 7XY, United Kingdom. Linde PLC's United States address for service of process, the Complaint, Decision and Order, and Order to Hold Separate and Maintain Assets is Praxair, Inc., 10 Riverview Drive, Danbury, Connecticut 06810 (attention: Guillermo Bichara, Esq.).

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

ORDER

I.

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

A. "Linde" means Linde AG, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Linde AG (including Linde North America, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Praxair" means Praxair, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Praxair, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Linde PLC" means Linde PLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Linde PLC (including Linde North America, Inc. after the Merger), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means any Person that acquires any of the Gases Assets pursuant to this Order.

F. "Active Employee" means any full-time, part-time, or contract individual employed by Linde, Praxair, or Linde PLC whose job responsibilities relate or related to any part of the Gases Business or Gases Assets, as of and after the date of the announcement of the Merger.

G. "Additional HyCO SMR Assets" means all assets identified on Appendix D of this Order.

H. "Additional Helium Assets" means all assets located outside of the United States relating to the Helium Business that are not identified on Non-Public Appendix B of this Order.

I. "Additional Industrial Gases Assets" means all assets (i) identified on Appendix A of this Order except for assets owned by Lincare Holdings, Inc. and (ii) relating to the Specialty Gases Business located in the United States.

J. "Atmospheric Gases" means oxygen, nitrogen, argon, krypton, neon, and xenon.

K. "Atmospheric Gases Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of Atmospheric Gases produced anywhere in the United States, Trail, British Columbia, Canada, and Sarnia, Ontario, Canada including researching, developing, producing, or selling Atmospheric Gases.

L. "Celanese" means Celanese International Corporation, a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its office and principal place of business located at 222 West Colinas Blvd., Suite 900N, Irving, Texas 75039.

M. "CO_2 Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of carbon dioxide anywhere in the United States, including researching, developing, producing, or selling carbon dioxide.

N. "Confidential Information" means any and all of the following information:

1. all information that is a trade secret under applicable trade secret or other law;

2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business, including historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials; and

4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a

confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

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

P. "Contract" means any 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.

Q. "Designated Assets" means:

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 Tangible Personal Property, including any Tangible Personal Property removed from any location of a relevant business since the date of the announcement of the Merger and not replaced;

3. all inventories;

4. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

5. all Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;

6. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, Records relating to Contracts, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law); and

7. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondent (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings.

R. "DivestCo Products" means any raw materials, partially finished products, supplies, and any other product that an Acquirer produces at or provides from a property or third-party source included in the Gases Assets.

S. "Divestiture Agreement" means any agreement between Respondents (or between a Divestiture Trustee) and a Person to divest any of the Gases Assets that has been approved by the Commission pursuant to this Order, including any ancillary agreements relating to the divestiture, all amendments, exhibits, agreements, and schedules thereto.

T. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Paragraph VII. of this Order.

U. "EP&C Assistance" means field consulting, engineering, procurement, and construction services in connection with the design, delivery, and construction of industrial gases plants.

V. "Gases Assets" means the Helium Assets, HyCO Assets, and Industrial Gases Assets and, if applicable, any additional assets identified in Paragraphs I.G., I.H., and I.I. of this Order.

W. "Gases Business" means the Helium Business, HyCO Business, and Industrial Gases Business.

X. "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.

Y. "Helium Assets" means all of Respondent's 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, relating to the Helium Business, including the Designated Assets; *provided, however,* that the Helium Assets shall not include any Helium Retained Assets; *provided further* that the Helium Assets shall include helium assets owned by Praxair identified on Non-Public Appendix C of this Order.

Z. "Helium Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of bulk helium anywhere in the world, including researching, developing, producing, or selling bulk helium.

AA. "Helium Retained Assets" means the (i) Standard Retained Assets, (ii) any assets located outside of the United States other than the assets identified on Non-Public Appendix B of this Order, (iii) any assets exclusively related to the sale of helium through the Specialty Gases Business and Industrial Gases Retained Assets, and (iv) Linde's supply rights for 100 mmscf per annum starting in 2020 from the helium source contract between ExxonMobil Gas & Power Marketing and Linde Gas North America LLC, dated April 9, 2018.

BB. "HyCO Assets" means the HyCO Clear Lake Assets, HyCO La Porte Assets, and HyCO SMR Assets.

CC. "HyCO Business" means the HyCO Clear Lake Business, HyCO La Porte Business, and HyCO SMR Business.

DD. "HyCO Clear Lake Assets" means all of Respondent's 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, relating to the HyCO Clear Lake Business, including the Designated Assets; *provided, however,* that the HyCO Clear Lake Assets shall not include (i) Linde's Gulf coast hydrogen pipeline and related assets necessary for its operation, (ii) any Standard Retained Assets or (iii) any assets located outside of the United States.

EE. "HyCO Clear Lake Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of hydrogen, carbon monoxide, syngas, and superheated steam produced in Clear Lake, Texas, including researching, developing, producing, or selling hydrogen, carbon monoxide, syngas, and superheated steam.

FF. "HyCO La Porte Assets" means all of Respondent's 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, relating to the HyCO La Porte Business, including the Designated Assets; *provided, however,* that the HyCO La Porte Assets shall not include (i) Linde's Gulf coast hydrogen pipeline and related assets necessary for its operation, (ii) Linde's air separation unit located in La Porte, Texas, (iii) any Standard Retained Assets or (iv) any assets located outside of the United States.

GG. "HyCO La Porte Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of hydrogen, carbon monoxide, syngas, and superheated steam produced in La Porte, Texas, including researching, developing, producing, or selling hydrogen, carbon monoxide, syngas, and superheated steam.

HH. "HyCO SMR Assets" means all of Respondent's 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, relating to the HyCO SMR Business, including the Designated Assets; *provided, however,* that the HyCO SMR Assets shall not include any (i) Standard Retained Assets, (ii) assets located outside of the United States, or (iii) assets identified on Appendix D of this Order; *provided further* that the HyCO SMR Assets shall include Linde's Gulf coast hydrogen pipeline and related assets necessary for its operation.

II. "HyCO SMR Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of hydrogen, carbon monoxide, syngas, and superheated steam produced anywhere in the United States using SMR technology, including researching, developing, producing, or selling hydrogen, carbon monoxide, syngas, and superheated steam.

JJ. "Including" means including without limiting the generality of any description preceding such term.

KK. "Industrial Gases Assets" means all of Respondent's 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, relating to the Industrial Gases Business, including the Designated Assets; *provided, however,* that the Industrial Gases Assets shall not include any Industrial Gases Retained Assets.

LL. "Industrial Gases Business" means the Atmospheric Gases Business, CO_2 Business, Laser Gases Business, and Liquid Hydrogen Business.

MM. "Industrial Gases Retained Assets" means the (i) Standard Retained Assets, (ii) any assets located outside of the United States other than assets relating to the Liquid Hydrogen Business located at Magog, Quebec, Canada, and (iii) any assets identified on Appendix A of this Order.

NN. "Intellectual Property" means all intellectual property owned or licensed (as licensor or licensee), 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; and (6) all rights in internet web sites and internet domain names presently used.

OO. "Laser Gases" means excimer laser gas mixtures containing neon and one or more of the following gases: argon, krypton, xenon, and fluorine.

PP. "Laser Gases Acquirer" means the Acquirer of the Industrial Gases Assets relating to the Laser Gases Business.

QQ. "Laser Gases Assets" means the Industrial Gases Assets relating to the Laser Gases Business.

RR. "Laser Gases Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of Laser Gases anywhere in the United States, including researching, developing, producing, or selling Laser Gases.

SS. "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.

TT. "Liquid Hydrogen Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of liquid hydrogen produced anywhere in the United States and Magog, Quebec, Canada, including researching, developing, producing, or selling liquid hydrogen.

UU. "Lyondell" means LyondellBasell Industries N.V., a corporation organized, existing, and doing business under, and by virtue of, the laws of The Netherlands, with its office and principal place of business in the United States located at 1221 McKinney Street, Suite 300, Houston, Texas 77010.

VV. "Matheson" means Matheson Tri-Gas, Inc., a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its office and principal place of business located at 150 Allen Road, Suite 302, Basking Ridge, NJ 07920. Matheson is a wholly-owned subsidiary of Taiyo Nippon Sanso Corporation.

WW. "Merger" means the merger of Linde and Praxair described in the Business Combination Agreement by and among Linde Aktiengesellschaft, Praxair, Inc., Zamalight PLC, Zamalight Holdco LLC, and Zamalight Subco, Inc., dated as of June 1, 2017.

XX. "Merger Date" means the date the Merger closes.

YY. "Messer" means MG Industries GmbH, a corporation organized, existing, and doing business under, and by virtue of, the laws of Germany, with its office and principal place of business located at Messer-Platz 1, 65812 Bad Soden/Taunus, Germany.

ZZ. "Multi-Product Customer" means any customer who, at any time within 12 months before the Merger Date, (i) purchased products or services from Respondents included in the Gases Business and (ii) purchased products or services from Respondents in the United States not included in the Gases Business.

AAA. "Multi-Location Customer" means any customer who, at any time within 12 months before the Merger Date, purchased products or services from Respondents from (i) any location of the Gases Business and (ii) any other location of Respondents in the United States.

BBB. "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.

CCC. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

DDD. "RemainCo Products" means any raw materials, partially finished products, supplies, and any other products relating to any Gases Business that Respondents produce at or provide from a facility or a third-party source that is not included in the Gases Assets.

EEE. "Specialty Gases" means electronic, specialty, calibration, and other packaged gases, including mixtures and Linde's Spectra and HiQ products, except for the Laser Gases.

FFF. "Specialty Gases Business" means all business activities conducted by Linde prior to the Merger Date relating to the sale of Specialty Gases produced anywhere in the United States, including researching, developing, producing, or selling specialty gases.

GGG. "Standard Retained Assets" means:

1. corporate, business, or other names of Linde or Praxair or any logo, trademark, service mark, domain name, trade or other name or any derivation thereof;

2. 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);

3. enterprise software that Respondents used primarily to manage and account for businesses other than the Gases Businesses;

4. the portion of any Record that contains information about any business other than the business divested to an Acquirer;

5. any Record that Respondents have a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that Respondents shall provide copies of the Record and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes; and

6. any assets if not needed by an Acquirer.

HHH. "Tangible Personal Property" means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, rolling stock, and other items of tangible personal property (other than inventories) of every kind owned or leased, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

III. "Transitional Assistance" means the assistance described in Paragraph II.D.1. of this Order.

JJJ. "Transitional Services" means any (i) goods and services relating to the Gases Business that Linde provides from a property, facility, or third-party source that is not included in the Gases Assets and (ii) training and consultation reasonably necessary to operate the Gases Business, including operation of new facilities constructed by Linde.

II.

IT IS FURTHER ORDERED that:

A. No later than 120 days from the date that Linde signs the Consent Agreement, Respondents shall divest the:

1. Industrial Gases Assets and Helium Assets, as on-going businesses, absolutely and in good faith, at no minimum price to Messer or to any other Person that receives the prior approval of the Commission, *provided, however,* that if the Commission approves a Person other than Messer to acquire the Industrial Gases Assets and Helium Assets, then Respondents shall also divest some or all of the Additional Industrial Gases Assets and Additional Helium Assets to such Person;

2. HyCO SMR Assets, as on-going businesses, absolutely and in good faith, at no minimum price to Matheson or to any other Person that receives the prior approval of the Commission, *provided, however,* that if the Commission approves a Person other than Matheson to acquire the HyCO SMR Assets, then Respondents shall also divest some or all of the Additional HyCO SMR Assets to such Person;

3. HyCO Clear Lake Assets, as on-going businesses, absolutely and in good faith, at no minimum price to Celanese or to any other Person that receives the prior approval of the Commission; and

4. HyCO La Porte Assets, as on-going businesses, absolutely and in good faith, at no minimum price to Lyondell or to any other Person that receives the prior approval of the Commission.

B. With respect to Intellectual Property, Respondents:

1. If Messer acquires the Helium Assets, shall grant a License to Messer under any Intellectual Property not included in the Helium Assets (except for Intellectual Property of the kind identified in Paragraph I.GGG. of this Order) required to operate the Helium Business, as constituted after the divestiture of the Helium Assets, anywhere in the world in a manner

consistent with the operation of the Helium Business prior to the Merger Date with the freedom to extend existing products and services and develop new products and services; and

2. May receive a License back from the Acquirer under any Intellectual Property included in the Gases Assets that also relates to any business conducted by Linde prior to the Merger that Respondents are not required to divest for use solely in those retained businesses.

C. Notwithstanding any other provision of this Order, Respondents may retain all or a portion of any Contract with a Multi-Product Customer or Multi-Location Customer as agreed between Respondents and an Acquirer; *provided, however,* that customer Contracts included in any of the Gases Assets shall provide the Acquirer with a volume of business equal to the historical volume of each relevant business and location; *provided further* that the quality and terms of the divested customer Contracts collectively shall be substantially similar to those retained by Respondents.

D. Respondents shall:

1. In connection with the divestiture of any of the Gases Assets and at the option of the Acquirer of such assets, provide assistance to the Acquirer as set forth below for up to the specified period of time after divestiture:

Type of Assistance	Period of Time
Provide Transitional Services	24 months
Supply RemainCo Products	36 months
Purchase DivestCo Products	36 months

The assistance required by this Paragraph II.D.1. shall be individually and collectively referred to as "Transitional Assistance."

2. Provide Transitional Assistance on terms and conditions sufficient for Acquirer to conduct the relevant Gases Business, as constituted after the divestiture of the relevant assets, in a manner consistent with the operation of such business prior to the Merger Date, including the ability to develop new products, increase sales of current products, make reasonable modifications to the relevant Gases Business, and maintain the competitiveness of the relevant Gases Business; *provided, however,* that:

a. Acquirer may terminate any Transitional Assistance at any time upon commercially reasonable notice and without cost or penalty;

b. Upon Acquirer's request, Respondents shall file with the Commission a request to extend the time period of any Transitional Assistance needed to achieve the purposes of this Order; and

c. Respondents shall not seek to limit any damages (such as indirect, special, and consequential damages) which Acquirer would be entitled to receive in the event of Respondents' breach of any agreement relating to Transitional Assistance.

3. Not sell or provide Laser Gases produced at any facility owned or operated by Linde prior to the Merger Date to any Person in the United States, other than the Laser Gases Acquirer during the period of such sales to the Laser Gases Acquirer, up to 5 years.

4. No later than 30 days from the date Respondents divest the Laser Gases Assets, deposit funds as set forth in Non-Public Appendix E into a Commission administered escrow account ("Construction Fund"):

a. The Construction Fund shall include earnings, but exclude costs of administration which shall be paid from the Construction Fund.

b. The Monitor will oversee payments from the Construction Fund, which shall be used to reimburse the Laser Gases Acquirer for the costs (up to $12 million) associated with the design and construction or renovation of a facility to manufacture and blend Laser Gases ("Laser Gases Plant') in the United States, and to provide milestone payments to the Laser Gases Acquirer for the certification and operation of the Laser Gases Plant as set forth in Non-Public Appendix E.

c. If the Laser Gases Acquirer does not begin actual physical construction or renovation of a Laser Gases Plant within 12 months after the Laser Gases Assets are divested:

i. Respondents shall rescind the divestiture of the Laser Gases Assets within 5 days of the failure to meet the 12 month deadline and continue to operate the Laser Gases Business; and

ii. The Commission shall appoint a Divestiture Trustee to divest the Laser Gases Assets (including any rights in the Laser Gases Plant and rights to the escrow account) pursuant to Paragraph VII. of this Order.

d. 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 this Paragraph.

5. Provide EP&C Assistance pursuant to Paragraph II.D.2. of this Order to complete the construction of industrial gas plants located in Keyes, California; Claymont, Delaware; and Adel, Georgia; and (ii) at the option of an Acquirer, to design, deliver, and construct industrial gas plants in Indianapolis, Indiana; Enid, Oklahoma; and in connection with the Laser Gases Business; *provided, however,* that notwithstanding Paragraph II.D.2.(c) of this Order, Respondents may enter into arrangements with the Engineering Division of Linde on customary commercial terms.

E. Respondents shall obtain all Governmental Authorizations and Consents from any Person that are necessary to transfer any of the Gases Assets no later than the date that such assets are divested; *provided, however,* that in the event Respondents are unable to obtain any:

1. Governmental Authorization, Respondents shall provide such assistance as an Acquirer may reasonably request in Acquirer's efforts to obtain a comparable authorization; and

2. Consent from a third party, Respondents shall, with the acceptance of the Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.

F. For a period of 2 years after divestiture of any of the Gases Assets, Respondents shall not solicit or induce any:

1. Multi-Product Customer, Multi-Location Customer, or any customer of the Laser Gases Business to discontinue or reduce such customer's purchases from an Acquirer; *provided, however,* that Respondents may (i) advertise in newspapers, trade publications, or other media in a manner not targeted specifically at customers of an Acquirer or (ii) sell products to a Multi-Product Customer or Multi-Location Customer that initiates communications with Respondents to purchase products, so long as such customers were not solicited by Respondents in violation of this paragraph; or

2. Active Employee who has accepted an offer of employment with an Acquirer to terminate such employment; *provided, however,* that Respondents may (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees or (ii) hire employees if employment has been terminated by an Acquirer or who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this Paragraph.

G. The purpose of the divestiture of the Gases Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Merger by Respondents and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall set forth and submit to the Commission for prior approval the manner in which they will comply with Paragraph II. of this Order in one or more agreements with one or more Acquirers. Upon approval, such agreements shall individually and collectively be referred to as "Divestiture Agreement."

B. Respondents shall comply with all terms of any Divestiture Agreement, which shall be incorporated by reference into this Order and made a part hereof; *provided, however,* that a Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order and 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.

C. Respondents shall not modify, replace, or extend the terms of a Divestiture Agreement 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.

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate and assist with an Acquirer's due diligence investigation of any of the Gases Assets and Gases Business, including providing access to any and all personnel, properties, contracts, authorizations, documents, and information customarily provided as part of a due diligence process.

B. From the time Respondents engage in negotiations with any Acquirer until 6 months after the divestiture of any of the Gases Assets to that Acquirer, Respondents shall cooperate and assist the Acquirer to identify and hire any Active Employee whose responsibilities relate in any way to the Gases Assets to be divested to the Acquirer:

1. No later than 10 days after the request of an Acquirer, Respondents shall provide all information of any relevant Active Employee, including providing access to personnel Records (to the extent permissible under

applicable laws) and allowing Acquirer to privately interview such Active Employee;

2. Respondents shall (i) not solicit the continued employment of any Active Employee (unless Acquirer has informed Respondents that a particular Active Employee will not receive an employment offer from Acquirer) and (ii) not otherwise interfere, directly or indirectly, with the recruitment, hiring, or employment of any Active Employee by an Acquirer;

3. Respondents shall provide reasonable financial incentives as necessary to any Active Employee to accept an offer of employment from an Acquirer, which may include providing a retention bonus for continuing employment in connection with any Gases Assets to be divested; and

4. All Active Employees hired by an Acquirer who are participants in Respondents' retirement and savings plans (i) shall retain their accrued benefits under such plans as of the date the Gases Assets are divested and Respondents shall be liable for payment of the benefits when employees become eligible for them and (ii) shall become fully vested in their accrued benefits as of the date the Gases Assets are divested.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall (i) not disclose (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Gases Assets, Gases Business, and the post-divestiture Gases Business; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing their obligations or as permitted under this Order, the Order to Hold Separate and Maintain Assets, or any Divestiture Agreement; or

2. Complying with financial, regulatory, or other reporting or legal obligations, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Gases Assets or Gases Business or as required by law.

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, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A., and (iii) 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 Paragraph V. as to its employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph V., including implementation of access and data controls, training of its employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

VI.

IT IS FURTHER ORDERED that:

A. Grant Thornton LLP ("Monitor") shall serve to observe and report on Respondent's compliance with all of its obligations as required by this Order and any Divestiture Agreement.

B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order and (ii) 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 the Respondents or of the Commission;

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondent shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in

connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

C. The Monitor shall report in writing to the Commission:

1. every 30 days from the date the Monitor is appointed until Respondents have fully complied with the provisions of Paragraphs II.A.-B. of this Order;

2. every 90 days from the date Respondents have complied with Paragraphs II.A.-B. of this Order until Respondents have fully complied with the provisions of Paragraph II.D of this Order;

3. no later than 10 days after Respondents have completed their obligations required by Paragraph II.D of this Order ("Final Report"); and

4. at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

D. The Commission may require the Monitor and each of the Monitor'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 Monitor's duties.

E. The Monitor's power and duties shall terminate 10 business days after the Monitor has completed his Final Report, or at such other time as directed by the Commission.

F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of

any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph VI.

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.

VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order or the Respondents have rescinded the divestiture of the Laser Gases Assets pursuant to Paragraph II.D.4. of this Order, the Commission may appoint a Divestiture Trustee to divest the Gases Assets (including the Laser Gases Assets, if applicable) and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor.

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 divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*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 Respondent of the identity of any

proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within 10 days after 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 this Order, 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 relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Gases Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order;

2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 12 month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VIII. 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 as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further*, *however,* that Respondents shall select such entity 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 and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. 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. For purposes of this Paragraph VII.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VII.E.5. of this Order;

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 60 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,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may 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 Paragraph 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 this Order.

VIII.

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. No later than 5 days after the Merger Date, notify the Commission via email at bccompliance@ftc.gov of the Merger Date; and

2. No later than 10 days after the divestiture of any of the Gases Assets has been completed, (a) notify the Commission of the date such divestiture closed and (b) submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov.

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, every 30 days thereafter until Respondents have fully complied

with the provisions of Paragraphs II.A.-B. of this Order, and every 90 days thereafter until Respondents have fully complied with the provisions of Paragraph II.D 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);

3. Respondents shall include in their Compliance Reports 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 Order, and a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted; and

4. Respondents shall retain copies of all material written communications to and from such parties, as well as all non-privileged internal memoranda, reports, and recommendations concerning completing their obligations under this Order for a period of 3 years, and shall provide copies of those records 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 other 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. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor if the Commission has appointed one in this matter.

IX.

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

A. Any proposed dissolution of Linde PLC;

B. Any proposed acquisition of, or merger or consolidation of Linde PLC; or

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

X.

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.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on February 26, 2029.

By the Commission.

Decision and Order

Appendix A

The Industrial Gases Retained Assets shall include the type of assets identified below at the specified locations for the following businesses.

Business	Type of Assets	Locations
Atmospheric Gases Business	On-site air separation facilities	Crawfordsville, IN Baton Rouge, LA Fostoria, OH (closed) Warren, OH (closed) Butler, PA Jewett, TX
	On-site ECOVAR facilities	All
	Packaged gases products facilities	Hammond, IN Twinsburg, OH Union City, GA Blythewood, SC
	All assets owned by Linde Engineering	All
	All assets owned by Lincare Holdings, Inc. and the LifeGas business assets	All
	Office building and leased space	Murray Hill, NJ Shreveport, LA (sales) Bridgewater, NJ (leased) Stewartsville, NJ (leased) Butler, PA warehouse (leased)

Business	Type of Assets	Locations
CO_2 Business	CO_2 facilities	El Segundo, CA Muscatine, IA Sandhill, MS Enid, OK (closing) Denver City, TX (closed) Fort Worth, TX McCamey, TX (closed) Green River, WY
	Transfer (FPU) contracts	Sauget, IL Clearfield, PA Oshkosh, WI Cheyenne, WY
Laser Gases Business	Real property and Tangible Personal Property (intangible assets, inventories, and records of the Laser Gases Business shall not be included in the Industrial Gases Retained Assets)	Phoenix, AZ San Marcos, CA Acton, MA Research Triangle, NC Alpha, NJ Pohatcong, NJ Hobbs, NM (closed) Medford, OR Freeport, TX (joint venture) Terrell, TX Vancouver, WA

Non-Public Appendix B

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

Non-Public Appendix C

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

Appendix D

The HyCO SMR Assets shall not include the type of assets identified below at the specified locations for the HyCO SMR Business.

Business	Type of Assets	Locations
HyCO SMR Business	On-site SMR facilities (including equipment required for crude CO_2 production in Decatur, AL, the liquid hydrogen storage assets related to Charleston, TN, and the Charleston, TN SMR spare parts located in the Butler, PA warehouse)	Decatur, AL Delaware City, DE Crawfordsville, IN Toledo, OH Charleston, TN Salt Lake City, UT Morris, IL

Non-Public Appendix E

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

Concurring Statement

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Today, the FTC is proposing to impose conditions on a merger between Praxair, Inc. (NYSE: PX) and Linde AG (FWB: LIN), the world's second- and third-largest industrial gas suppliers. While these firms may not be household names, they provide inputs to an enormous number of industrial and consumer products throughout our economy. The merger would be clearly anticompetitive in violation of the Clayton Act, with a high likelihood of harming manufacturers of a wide range of industrial and consumer products.

The Commission is proposing to order substantial divestitures across multiple lines of businesses. Notably, Linde is divesting the vast majority of its U.S. industrial gas business to a joint venture between Messer Group GmbH and CVC Capital Partners, a private equity firm. Separately, Linde will also divest other assets to Matheson Tri-Gas, Inc. While the divestitures go a long way to address the anticompetitive concerns, the decision to approve this remedy was still a close call.

The transaction, as originally structured, does not appear to have any significant merger-specific efficiencies that would guarantee benefits to customers. However, the proposed order requires substantial divestitures that might preserve or even increase competition in some product markets. But even with the proposed remedies, this transaction is not without risks to competition. In particular, I would have preferred to include additional protections for the public to safeguard against risks often posed by the private equity buyer interest in the divested assets, as well as the level of debt financing and investment horizons involved.

Divestiture Buyer Financing

Competition enforcers, including the FTC, should always examine whether its merger remedies have been successful over the long term. The FTC's 2017 Merger Remedies study highlighted some of the lessons learned from past merger remedies.[1]

When evaluating the suitability of a divestiture buyer, agencies must determine whether the buyer can meaningfully replace competitive market forces eliminated by a merger. For example, agencies need to be confident that the buyer possesses the know-how and technical capabilities to successfully operate the divested businesses. Among other things, the 2017 study found that the success of a divestiture over time depends, in part, on whether the buyer has adequate financing to ensure success. Given recent trends in our capital markets, we need to carefully scrutinize buyer financing.

In situations like the matter before us, I approached this line of inquiry with several questions in mind:

1 *See* The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics, Federal Trade Commission, January 2017, *available at:* https://www ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics

(1) Does the deal's financing structure allow the buyer to make significant investments to maintain and grow their business in order to vigorously compete? Does the buyer have adequate liquidity to be a nimble and opportunistic competitor?

(2) What is the buyer's level of debt financing, compared to others in the industry? Have creditors protected themselves in ways that are aligned – or misaligned – with the goal of preserving competition?

(3) Does the buyer's financing and governance structure create temptations to make asset sales that would reduce competition?

As noted above, in this matter one of the divestiture buyers, MG Industries, is a new joint venture between Messer Group GmbH, a major industrial gas company, and CVC Capital Partners, a private equity firm.

In this situation, I would have preferred terms in the proposed order that would have required prior notice to or approval by the Commission of any asset sales by MG Industries. There is past Commission precedent for doing so. In situations where there was a risk that the divestiture buyer may subsequently sell assets it acquired pursuant to a divestiture order, the Commission has sometimes ordered the divestiture buyer to agree to a prior approval provision covering any sale of the assets acquired for a defined period of time.

For example, in the Koninklijke Ahold and Delhaize Group matter, due to concern that one of the divestiture buyers (Supervalu) might later transact acquired stores, the Commission required Supervalu to seek prior approval for any such transfer of the divested stores for a period of three years.[2]

In the Nestle Holdings, Inc. and Ralston Purina Co. matter, the Commission required the divestiture buyer (a private equity fund) to seek approval by the Commission prior to the sale of certain assets held less than five years.[3] The buyer would later seek permission from the Commission to sell assets, reducing the likelihood of needing to litigate an anticompetitive transaction.

Special Considerations with Financial Buyers

Private equity funds continue to play a greater role in deal activity across the globe. Notably, private equity participation is associated with higher levels of debt financing, which can amplify both risk and returns on equity. At the most basic level, heavy debt burdens can increase the likelihood of insolvency. Private equity participation is also associated with other firm behavior that can reduce long-term competition, including opportunistic asset sales. This risk may be more acute when funds purchase assets in unusual and distressed situations.

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2 In the Matter of Koninklijke Ahold and Delhaize Group, C-4588 (Consent) (July 22, 2016), available at: https://www.ftc.gov/enforcement/cases-proceedings/151-0175/koninklijke-ahold-delhaize-group.

3 In the Matter of Nestle Holdings, Inc., and Ralston Purina Company, C-4028 (Consent) (December 11, 2001), available at: https://www.ftc.gov/enforcement/cases-proceedings/0110083/nestle-holdings-inc-ralston-purina-company.

Enforcers must carefully examine investors' unique incentives that can drive firm behavior in ways that affect competition. To assess these incentives, we must always actively probe the entire circumstances of investor involvement in a merger transaction under review. For example, what is the buyer's investment thesis and strategy? How has the investor typically realized gains out of past investments? Does the buyer plan to invest more of its own equity capital into the business or simply further rely on debt financing? When and how does the investor intend to exit its investment? Given all of this, what really is the long-term impact on competition?

While Commission staff certainly ask many of these questions in their review of divestiture buyers, it will be important to ensure that we are conducting careful and adequate due diligence with respect to buyers that are heavily reliant on debt financing and where investment firms exert significant control.

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 Orders ("Consent Agreement") designed to remedy the anticompetitive effects resulting from the proposed merger of Praxair, Inc. ("Praxair") and Linde AG ("Linde").

Pursuant to the Consent Agreement, Linde will divest the vast majority of Linde's U.S. industrial gas business, and some worldwide assets to MG Industries GmbH ("Messer").[1] The divestiture will include air separation units ("ASUs"); carbon dioxide facilities; all of Linde's U.S. bulk refined helium business, as well as global helium sourcing contracts; all of Linde's bulk liquid hydrogen business, as well as equipment, contracts, and related assets. Linde also will divest assets related to its excimer laser gas business to Messer.

Separately, Linde will divest five facilities that produce hydrogen and carbon monoxide ("HyCO") for on-site customers, along with Linde's hydrogen pipeline in the Gulf Coast and related customer contracts, to Matheson Tri-Gas, Inc. ("Matheson"). Lastly, Linde will divest two additional HyCO plants to their respective owners. Linde will divest its HyCO plant in Clear Lake, Texas to Celanese Corporation ("Celanese") and its HyCO plant in La Porte, Texas to LyondellBasell Industries N.V. ("LyondellBasell").

Praxair and Linde have agreed to divest the required facilities and assets to the aforementioned buyers or to alternative Commission-approved buyers with possibly alternative

1 Messer has partnered with CVC Capital Partners to finance its acquisition of the divested assets.

Commission-approved assets, within 120 days after Linde signed the Consent Agreement on October 1, 2018. Although Praxair and Linde will be allowed to close on their transaction, the Order to Hold Separate and Maintain Assets ("Hold Separate Order") requires Linde and Praxair to hold the entirety of their worldwide businesses separate until they have accomplished the divestitures to Messer and Matheson. The divestiture of these facilities and related assets will preserve the competition between Praxair and Linde that the proposed merger would otherwise eliminate.

The proposed Consent Agreement will be on the public record for thirty days, so that interested persons may submit comments. Comments that the Commission receives during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the accompanying Decision and Order.

II. THE TRANSACTION

On June 1, 2017, Linde and Praxair entered into an agreement and plan of merger, in a transaction valued at approximately $80 billion. Pursuant to the terms of their agreement, the parties will initiate a stock-for-stock exchange to form a new company under the Linde name with headquarters split between Danbury, Connecticut and Munich, Germany. The Commission's Complaint alleges that the proposed merger, 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 substantially lessening competition in the United States in markets for bulk liquid oxygen; bulk liquid nitrogen; bulk liquid argon; bulk liquid carbon dioxide; bulk liquid hydrogen; bulk refined helium; excimer laser gases; on-site hydrogen; and on-site carbon monoxide.

III. THE PARTIES

Praxair is an international industrial gas and surface technology company headquartered in Danbury, Connecticut. The company primarily serves industrial and specialty gas customers in manufacturing, metals, and chemicals industries. Praxair is the third-largest industrial gas supplier globally by revenue. In the United States, Praxair owns 41 ASUs and 28 carbon dioxide facilities. In 2017, Praxair's revenue totaled approximately $11.4 billion, about $5 billion of which derived from business in the United States.

Linde, headquartered in Munich, Germany, is a global supplier of industrial gases, homecare respiratory services, and engineering services to customers in the healthcare, chemicals, and energy industries. Linde is the second-largest global industrial gas supplier worldwide. In the United States, Linde owns 32 ASUs and 35 carbon dioxide facilities.[2] In 2017, Linde generated approximately $20.2 billion in total revenue. Linde's 2017 U.S. revenue

2 Linde's carbon dioxide facilities include production plants, finished product pickup agreements, and depots.

totaled approximately $4.4 billion, of which about $2.5 billion derived from its LinCare home healthcare business.[3]

IV. THE RELEVANT MARKETS FOR BULK LIQUID OXYGEN, BULK LQUID NITROGEN, AND BULK LQUID ARGON

Oxygen, nitrogen, and argon are "atmospheric gases," present in the Earth's atmosphere in varying amounts. Industrial gas suppliers like Linde and Praxair produce atmospheric gases for a range of customer applications and industries, such as oil and gas, steelmaking, health care, and food manufacturing. Oxygen, nitrogen, and argon are three of the most widely used atmospheric industrial gases. Each atmospheric gas has specific properties that make it uniquely suited for its respective applications. For most of these applications, there is no substitute for oxygen, nitrogen, or argon.

Suppliers distribute atmospheric gases to customers in different forms and methods, depending on the volume of gas that the customer requires. Customers that require extremely large volumes receive atmospheric gases from on-site ASUs located at their facilities, or via pipelines connecting ASUs to customer sites. Bulk customers require gas volumes that are substantial, but not large enough to justify on-site or pipeline gas delivery. For bulk customers, suppliers typically transport bulk liquid oxygen, bulk liquid nitrogen, or bulk liquid argon in cryogenic trailers that hold the gas in liquid form. The liquid form is more condensed than the gaseous form, and therefore easier to transport and store in large quantities. Bulk liquid gases are then stored in tanks located at customer sites. From there, customers can use the product in its liquid form, or convert it back to its gaseous form before use. Small-volume customers purchase nitrogen, oxygen, or argon in cylinders containing the product in gaseous form. Typically, smaller customers receive gas cylinders from distributors that purchase products from industrial gas suppliers in bulk liquid form. It is impractical for bulk liquid oxygen, bulk liquid nitrogen, or bulk liquid argon customers to switch distribution methods, as their demand is too great to satisfy efficiently with cylinders, but too small to justify the expense of on-site or pipeline delivery.

For atmospheric gases, the ratio of the product's value to its transportation costs largely determines the relevant geographic market. Due to the relatively low sales prices of bulk liquid oxygen and bulk liquid nitrogen and the significant freight costs associated with transporting them, these gases can ship, economically, a maximum distance of approximately 100 to 250 miles from the ASU that produces the gas. Therefore, it is appropriate to analyze the competitive effects of the proposed merger in regional geographic markets for bulk liquid oxygen and bulk liquid nitrogen. The relevant geographic markets in which to analyze the effects of the proposed merger upon bulk liquid oxygen and bulk liquid nitrogen are the following regions: (1) the Northeast; (2) the Mid-Atlantic; (3) Upstate and Western New York; (4) the Carolinas; (5) Northern Florida and Surrounding Areas; (6) Atlanta and Surrounding Areas; (7) the Pacific Northwest; (8) Northern California; (9) Southern California; (10) Arkansas and Surrounding Areas; (11) Northern Texas and Surrounding Areas; (12) Southern Texas; (13) the Central Gulf

3 Praxair does not have a home healthcare business in the United States. Thus, the transaction does not raise competitive concerns in this market, and the merged firm will retain Linde's LinCare business.

Coast; (14) the Eastern Midwest; (15) Greater Chicago; (16) Missouri and Surrounding Areas; and (17) Puerto Rico. Because bulk liquid argon is rarer and more expensive than bulk liquid oxygen and bulk liquid nitrogen, suppliers can transport it economically much greater distances. Therefore, the relevant geographic area in which to analyze the effects of the proposed merger on the bulk liquid argon market is the United States.

Each of the relevant markets for bulk liquid oxygen and bulk liquid nitrogen would become significantly more concentrated following the proposed merger. The proposed merger would consolidate two of the leading suppliers of bulk liquid oxygen and bulk liquid nitrogen in each of these areas. For bulk liquid argon, there are five significant suppliers in the United States. Praxair is the second-largest domestic producer of bulk liquid argon. The proposed merger would eliminate one of the largest suppliers and substantially increase concentration in the U.S. bulk liquid argon market, creating a highly concentrated market.

V. THE RELEVANT MARKETS FOR BULK LIQUID CARBON DIOXIDE

Carbon dioxide is a "process gas," which means that it is captured as a by-product of other manufacturing processes, such as ethanol, ammonia, and hydrogen. Crude carbon dioxide also derives from natural sources, such as natural gas wells. Suppliers convert and distill crude carbon dioxide into final liquid form using a cryogenic process at plants often located near carbon dioxide gas sources. The most common applications for liquid carbon dioxide are in food and beverage production. For example, customers commonly use carbon dioxide in processes to carbonate beverages and chill or freeze food. For the majority of its applications, liquid carbon dioxide has no viable substitutes.

Suppliers deliver liquid carbon dioxide to customers in bulk trailers or rail cars. Most customers store liquid carbon dioxide in tanks located at their manufacturing facilities. Customers would not switch to cylinder delivery because bulk delivery is far cheaper, and they would have to manage significantly more deliveries to meet their needs. In addition, customers would not consider self-sourcing liquid carbon dioxide unless the cost increased significantly more than ten percent, because of the costs to build necessary infrastructure and the limited sources of carbon dioxide available.

Due to the significant freight costs associated with transporting liquid carbon dioxide relative to its sales price, suppliers can only ship liquid carbon dioxide economically up to 250 miles by truck. In areas with few or no carbon dioxide sources, liquid carbon dioxide is shipped as much as 750 miles by rail. Therefore, it is appropriate to analyze the competitive effects of the proposed merger in regional geographic markets for bulk liquid carbon dioxide. For bulk liquid carbon dioxide, the relevant geographic markets in which to analyze the effects of the proposed merger include the following regions: (1) Northern California; (2) Southern California; (3) the Southeast; (4) the Mid-Atlantic; (5) the Rocky Mountains; (6) the Plains; (7) Southern Texas; (8) the Eastern Midwest; and (9) Greater Chicago.

The proposed merger would combine the largest and third-largest suppliers of bulk liquid carbon dioxide in the United States. In each relevant geographic market for bulk liquid carbon dioxide, the merged firm would control a high share of capacity. Further, Linde and Praxair are

the two closest suppliers for numerous customers across multiple relevant geographic markets, and the merger would eliminate a close constraint on pricing of bulk liquid carbon dioxide.

VI. THE RELEVANT MARKET FOR BULK REFINED HELIUM

Both Linde and Praxair are suppliers of bulk refined helium. Bulk refined helium has specific properties that make it uniquely suited for its applications. For example, because helium has the lowest boiling point of any element, liquid helium is valuable as a cooling agent in superconductivity for medical applications, such as magnetic resonance imaging ("MRI"), and certain manufacturing applications. For most applications, there is no substitute for bulk refined helium, and customers are unlikely to switch to another gas or product, even if the price of bulk refined helium increased by five to ten percent.

Suppliers distribute refined helium to customers in cylinder form or bulk form, depending on the customers' volume requirements. Customers that require large volumes of refined helium generally purchase the gas in bulk form. Suppliers often package bulk refined helium in containers called "dewars," and then distribute the product in liquid form to customers. For customers that require helium in its gaseous state, suppliers can convert bulk refined helium from liquid to gaseous form. Suppliers distribute bulk quantities of gaseous helium in high-pressure "tube trailers." Customers obtain helium in bulk form because it is the most cost-effective way to purchase the high volume of refined helium that they require. Accordingly, customers would not switch distribution methods for their purchases of refined helium, even if the prices of bulk refined helium distributed by one method increased by five to ten percent.

Helium is a rare and expensive gas that can be, and is, transported economically on a worldwide basis. Capacity and demand for helium produced abroad influences the capacity and demand for helium produced domestically. Suppliers source helium primarily from a few large sources, and ship helium from those sources to customers around the world. Therefore, it is appropriate to analyze the competitive effects of the proposed merger using a worldwide market for bulk refined helium.

The market for bulk refined helium is highly concentrated. Linde and Praxair are two of only five companies in the world with access to significant quantities of bulk refined helium. The proposed transaction combines the largest and third-largest bulk refined helium suppliers in the world. Post-merger, the combined entity would control two-fifths of the global helium supply.

VII. THE RELEVANT MARKET FOR BULK LIQUID HYDROGEN

Hydrogen is a non-atmospheric gas produced as a by-product of other processes, including natural gas extraction and petrochemical production. Most crude hydrogen comes from third-party feedstocks. Industrial gas suppliers purify and liquefy crude hydrogen before distributing it to customers. Customers use liquid hydrogen for a range of applications across several industries. For example, liquid hydrogen has applications in space programs as a primary rocket fuel and as a propellant for nuclear powered rockets and space vehicles, in hydrogenation and clean energy storage, and as an active ingredient in chemical manufacturing processes.

Customers that require very large quantities of hydrogen on a regular basis typically receive the gas via an on-site plant or pipeline. For customers that require a small amount of hydrogen, cylinders are most economical. Customers that require more hydrogen than can be practicably supplied with cylinders, but not enough volume to justify the costs of on-site or pipeline delivery, typically receive bulk liquid delivery. For most applications, there are no viable economic alternatives to bulk liquid hydrogen. Further, because distribution methods depend on volume requirements, customers cannot switch to cylinders or on-site distribution if bulk prices were to increase.

The relevant geographic market for bulk liquid hydrogen is national. The value of bulk liquid hydrogen relative to the cost of transportation is the primary factor in defining the relevant geographic market. Liquid hydrogen's high value and limited production allows suppliers to transport it over long distances economically and more efficiently than hydrogen in bulk gaseous form.

Linde and Praxair are two of just four main suppliers of bulk liquid hydrogen in the United States. The U.S. bulk liquid hydrogen market is highly concentrated, and Praxair is the largest producer of bulk liquid hydrogen in the United States. The proposed merger would remove one of the few bulk liquid hydrogen suppliers from the market.

VIII. THE RELEVANT MARKET FOR EXCIMER LASER GASES

Excimer laser gases are a subset of specialty gases commonly used to serve customers in the electronics industry, such as semiconductor or liquid crystal display manufacturers. Excimer lasers use gas mixtures, typically containing multiple noble gases (e.g., neon, krypton, or xenon) and, occasionally, a halogen gas (e.g., fluorine or chlorine). Suppliers of excimer laser gases produce or source noble and halogen gases worldwide, then purify and blend these gases into products that they distribute to customers in cylinders. Neon comprises 95 to 99 percent of most excimer laser gases, with other rare and halogen gases making up the remainder. Neon, krypton, and xenon are present in the air in extremely small amounts, and industrial gas companies produce them only at very large ASUs with specialized equipment to capture these trace gases.

The semiconductor industry is the main customer base for excimer laser gases in the United States. Excimer laser gases generate ultraviolet light in excimer lasers, a component of photolithography machines. In addition, excimer laser gases have applications in annealing processes to produce display screens and for medical ablation, a minimally invasive process that cuts human tissue with minimal scarring (e.g., LASIK vision surgery).

The relevant geographic market for excimer laser gases is at least as broad as the United States. U.S. suppliers ship excimer laser gases to customer sites around the country and the world. Suppliers source excimer laser gas inputs, such as neon, domestically and internationally. Although international customers may not distinguish between excimer laser gases produced domestically or abroad, U.S. excimer laser gas customers prefer suppliers that have domestic production facilities and sources of neon.

Before supplying excimer laser gases to customers, suppliers must complete qualification processes with both laser manufacturers and individual customers to ensure that their excimer laser gases meet purity, quality, and other specifications. Each qualification takes three to eighteen months, and costs at least $125,000. Customers cannot switch from excimer laser gases to another product because there is no substitute that produces the same wavelength of light, and switching to another supplier often requires additional qualifications, resources, and time.

The market for excimer laser gases in the United States is highly concentrated. Linde and Praxair have a combined share of approximately 70 percent in this market, and the proposed merger would reduce the number of domestic suppliers from four to three.

IX. THE RELEVANT MARKET FOR HYCO

HyCO is the industry term for the on-site provision of hydrogen and carbon monoxide gas. The same chemical process produces both gases, so one gas is always the by-product of the other. Plants that produce hydrogen and carbon monoxide create a mixture called synthesis gas ("syngas"), which producers separate into its constituent parts using a cryogenic process.

HyCO includes separate product markets for on-site hydrogen and carbon monoxide, because the two gases are not substitutes for each other. For most applications, there are no viable substitutes for hydrogen or carbon monoxide. Likewise, customers cannot substitute bulk delivery for on-site supply of hydrogen or carbon monoxide, and so on-site supply of these gases is a distinct product market, as well.

There are three main types of HyCO plants: (1) the steam methane reformer ("SMR"); (2) the partial oxidation plant ("POX"); and (3) the autothermal reformation plant ("ATR"). Each plant type produces different proportions of hydrogen and carbon monoxide. SMRs produce the highest proportion of hydrogen relative to carbon monoxide. POX and ATR plants produce these gases in more equal proportions. For most on-site hydrogen customers, suppliers build on-site SMRs; however, for customers that need on-site carbon monoxide, suppliers will typically construct POX or ATR plants. On-site HyCO customers usually conduct a competitive bidding process several years in advance of a plant's opening. This bidding process is the source of most competition in the HyCO market. The customer and winning bidder typically enter into long-term contracts that lock-in prices and other terms.

The majority of HyCO plants in the United States are SMRs built for oil and petrochemical companies that only require hydrogen. Carbon monoxide customers are few in number, but large in size and gas needs—most are chemical companies that produce acetic acid, polyurethane, and other compounds. HyCO plants are expensive, costing from $30 million to over $400 million, depending on size and type. The industrial gas supplier usually absorbs the cost of building the plant, and then yields the return from a long-term (15 to 20 year) supply contract with the customer. HyCO is a critical input for its customers' products, and HyCO plants often integrate into customers' production sites. Accordingly, HyCO customers require suppliers to have engineering and operational expertise, as well as a demonstrated history and reputation of successfully operating HyCO plants.

Relevant geographic markets for on-site hydrogen and carbon monoxide are national. HyCO suppliers are generally able to serve customers in all areas of the country. The Gulf Coast region is a distinct submarket within the broader national markets for on-site hydrogen and carbon monoxide, as it has the highest concentration of HyCO customers anywhere in the United States. There, hydrogen pipelines serve multiple customers from a single HyCO plant or serve as backup. Hydrogen pipelines allow HyCO suppliers to offer customers lower prices than they could with a dedicated on-site plant at the customer's location. Consequently, HyCO suppliers are only competitive in areas of the Gulf Coast where they have hydrogen pipeline networks.

U.S. markets for on-site hydrogen and carbon monoxide are highly concentrated. Praxair is a market leader, and Linde represents one of a limited number of viable alternative HyCO suppliers. The proposed merger would remove one of the few HyCO suppliers from the market.

X. EFFECTS OF THE ACQUISITION

The proposed merger would eliminate direct and substantial competition between Praxair and Linde in each of the relevant markets, provide the merged firm with an enhanced ability to increase prices unilaterally, and eliminate a competitor for gas customers in markets where alternative sources of supply are limited. The proposed merger, therefore, likely would allow the merged firm to exercise market power unilaterally, increasing the likelihood that purchasers of bulk liquid oxygen, bulk liquid nitrogen, bulk liquid argon, bulk liquid carbon dioxide, bulk liquid hydrogen, bulk refined helium, excimer laser gases, on-site hydrogen, and on-site carbon monoxide would pay higher prices in the relevant areas.

The proposed merger would also enhance the likelihood of collusion or coordinated action among remaining firms in these relevant markets, because the merger would eliminate a significant competitor from each market, leaving a small number of viable competitors. In addition, certain market conditions, such as the relative homogeneity of suppliers and products, and the transparency of detailed market information, are conducive to coordination among competing suppliers. These conditions also enhance the ability of competitors engaged in a coordinated scheme to detect and punish deviations from the scheme.

XI. ENTRY

New entry into the relevant markets would not occur in a timely manner sufficient to deter or counteract the likely adverse competitive effects of the proposed merger. Entry into the bulk liquid oxygen, nitrogen, and argon markets is costly, difficult, and unlikely because of, among other things, the time and cost required to construct the ASUs that produce these products. Constructing an ASU at a scale sufficient to be viable in the market would cost at least $30 to $100 million, most of which are sunk costs. Moreover, it is not economically justifiable to build an ASU unless a significant amount of the plant's capacity has been pre-sold prior to construction, either to an on-site customer or to customers with commitments under contract. Such pre-sale opportunities occur infrequently and unpredictably and can take several years to secure.

Entry into the bulk liquid carbon dioxide market would also not be timely, likely, or sufficient to deter or counteract the adverse competitive effects of the proposed merger. Constructing a plant capable of producing bulk liquid carbon dioxide would cost at least $5 to $30 million. In addition, successful entry into the bulk liquid carbon dioxide market requires access to raw carbon dioxide supply sources, which are typically unavailable due to long-term contracts with incumbent liquid carbon dioxide suppliers.

New entry into the bulk liquid hydrogen market is unlikely to be timely or sufficient to counteract the proposed transaction's likely anticompetitive effects. Liquid hydrogen production facilities require years to construct and considerable capital to finance. Further, customers require liquid hydrogen suppliers to have backup supply and be able to deliver product to their sites. A firm is more likely to succeed if it has a portfolio of diversified liquid hydrogen sources, as well as a reliable distribution network, which would require substantial time, resources, and investments to obtain.

Timely, sufficient entry into the bulk refined helium market is extremely unlikely, if not impossible. The most significant impediment to entry is securing a source of refined helium. A new entrant would need to secure multiple sources of refined helium, acquire necessary transportation and storage equipment, and establish a distribution infrastructure. Market incumbents secure all available sources of refined helium in long-term contracts. A new entrant would need to locate a new source of crude helium and build a refinery. In addition, an entrant would need to invest tens of millions of dollars to acquire necessary infrastructure and distribution assets, including transfills, cryogenic storage trailers, high-pressure tube trailers, and liquid dewars capable of transporting helium from the refinery to customers. Given the substantial costs and challenges of entering the bulk refined helium market, new entry sufficient to counteract the competitive effects of the proposed merger would not occur in a timely manner.

Entry into the HyCO market requires engineering expertise, experience in designing and operating the various types of HyCO plants, significant capital resources, and a proven record of success with HyCO customers. It would take several years and substantial investments for a new entrant to develop the expertise, experience, reputation, and credibility necessary to compete in the HyCO market. A new HyCO facility costs $30 to $300 million, depending on the plant size and product mix. Further, in the Gulf Coast, a hydrogen pipeline is an added barrier to enter the HyCO market. Existing pipelines are scarce in this region, and building a new pipeline requires substantial time and resources that few firms have. Finally, opportunities to compete for new or existing HyCO customers are limited, as HyCO supply contracts are long-term, and customers invariably award contracts to proven suppliers.

New entry sufficient to deter or avert the proposed merger's anticompetitive effects in the market for excimer laser gases is unlikely to occur. The principal barrier to new entry is sourcing neon, which accounts for just 0.0018 percent of the Earth's atmosphere. Suppliers can produce neon efficiently only at the largest ASUs, which must have a neon gas column. Such an ASU would take several years and cost hundreds of million dollars to construct. In addition, an entrant would have to produce or otherwise secure other input gases, as well as supply, logistics, and distribution infrastructure and employees. An entrant would also have to construct a facility

to blend excimer laser gases. Finally, an entrant would have to qualify its products with laser manufacturers and customers, which involves testing gas blends at a customer plants. The costs of entry would be difficult to justify, as the total U.S. excimer laser gas market is only around $40 million.

XII. THE CONSENT AGREEMENT

The proposed Consent Agreement aims to eliminate the competitive concerns that the proposed merger raises in each relevant market. It requires Linde to divest to Messer all 32 of its U.S. ASUs, along with related equipment, supply contracts, technology, and goodwill, in the 17 bulk liquid oxygen and nitrogen markets at issue in this matter. With the divestitures, the merger will not increase concentration in any market for bulk liquid nitrogen, oxygen, or argon. As part of the divestiture, Messer will acquire all of Linde's customer contracts and bulk tanks located at the customer locations.

The proposed Consent Agreement also requires Linde to divest to Messer 27 carbon dioxide facilities, including production plants and all associated rail depots. Linde will divest all existing contracts with customers supplied by the respective carbon dioxide facilities. Additionally, all assets used to support the distribution of bulk liquid carbon dioxide will be part of the divestiture, including trailers, tractors, and rail cars.

Linde must also divest to Messer its entire bulk liquid hydrogen business, which includes Linde's liquid hydrogen production facility in Magog, Quebec, source agreements, and four hydrogen transfills. Linde will divest all assets related to the bulk liquid hydrogen business including, among other things, employee contracts and information, customer and supply contracts, leases, distribution trailers, and equipment necessary to distribute bulk liquid hydrogen.

The proposed Consent Agreement requires Linde to divest to Messer all of Linde's U.S. bulk refined helium business, as well as global helium sourcing contracts, which, when combined with divestitures in other jurisdictions, are equal to Praxair's current worldwide helium capacity. In addition, Linde will divest its entire network of helium transfills across the United States. All of Linde's helium customer contracts in the United States, Canada, Brazil, Colombia, and Chile are included in the divestiture. The proposed Consent Agreement also provides Messer with the requisite number of dewars, tube trailers, and helium ISO containers to serve its helium customers worldwide.

To address competitive concerns in the market for excimer laser gases, the proposed Consent Agreement also requires Linde to divest to Messer all of Linde's customer contracts, intellectual property, and key Linde staff to sustain business operations and customer relationships. Neon-producing ASUs are also included in the asset package. To ensure a seamless transfer, Linde has agreed to supply its finished excimer laser gas products to Messer for a period of three years (with possible extensions of time). This supply agreement will give Messer sufficient time to construct or renovate a facility and obtain OEM and customer certifications. The proposed Decision and Order also requires Linde to underwrite the cost of building Messer's new facility. If Messer does not commence construction of the plant within

one year, then Linde must rescind its sale of the excimer laser gas business to Messer and divest it to a Commission-approved acquirer.

The proposed Consent Agreement also requires Linde to divest to Matheson five on-site hydrogen SMRs to Matheson, along with Linde's hydrogen pipeline in the Gulf Coast and all relevant customer contracts. The proposed divestiture includes Linde's SMR facilities in Anacortes, Washington; Lemont, Illinois; Lima, Ohio; McIntosh, Alabama; and Saraland, Alabama. The SMR assets also include Linde's Remote Operating Center in La Porte, Texas, the "control center" for Linde's on-site hydrogen business. In addition, Linde will divest its POX plants in Clear Lake, Texas, and La Porte, Texas, back to their customers, Celanese and LyondellBasell, respectively. This divestiture will resolve the competitive issues that these customers would otherwise face post-merger, as they will be able operate the facilities themselves or contract with one of the firms with a nearby hydrogen pipeline.

Linde and Praxair have agreed to divest the required facilities, together with all related equipment, customer and supply contracts, technology, and goodwill, to one or more Commission-approved buyers within 120 days after signing the Consent Agreement. All acquirers of divested assets must receive the prior approval of the Commission.

The proposed Consent Agreement incorporates an Order to Hold Separate to ensure that Linde and Praxair (1) continue to operate separately until the divestitures to Messer and Matheson have been completed and (2) continue to maintain all assets until the required divestitures have been completed. The Order to Hold Separate appoints Grant Thornton LLP as monitor to oversee compliance with all the obligations and responsibilities under the proposed Decision and Order and requires Linde to execute an agreement conferring upon the monitor all of the rights, powers, and authorities necessary to permit the monitor to ensure the continued health and competitiveness of the divested businesses. Further, if the parties fail to divest the assets as required within the time specified, the Commission may appoint a divestiture trustee to divest the assets in a manner consistent with the proposed Decision and Order and subject to Commission approval.

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