

Complaint

IN THE MATTER OF

FLOW INTERNATIONAL CORPORATION

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

Docket C-4231; File No. 081 0079

Complaint, August 15, 2008 – Decision, August 15, 2008

This consent order addresses the acquisition of OMAX Corporation by Flow International Corporation. The companies are the leading manufacturers of waterjet cutting systems in the United States, and the transaction may substantially lessen competition in the market for the development, manufacture, marketing, and sale of such systems. Both companies offer an efficient PC-based controller that compensates for the unique characteristics of how a waterjet cuts. Under the terms of the order, Flow must grant a royalty-free license to each competitor who seeks to license the two broad OMAX patents relating to controllers that Flow will acquire with its acquisition of OMAX. This will eliminate the entry barrier faced by current waterjet cutting system competitors and future entrants and ensure that other firms are able to replace the competition that would otherwise be eliminated by the acquisition. In addition, Flow may not provide, disclose, or otherwise make available any confidential business information to any person except as set forth in the order. If Flow fails to grant a license within the time periods specified, the Commission may appoint a Licensing Trustee to grant the license to any competitors to satisfy the requirements of the order. Additional provisions include the requirements that Flow notify the Commission of any changes in corporate structure and file written reports on its compliance with the order.

Participants

For the *Commission*: *Stuart Hirschfeld, Joe Lipinsky, Alan Loughnan, Susan Raitt, Robert J. Schroeder, Art Strong, and Lore Unt.*

For the *Respondent*: *Ramona Emerson and Jim Weiss, K&L Gates.*

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Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondent Flow International Corporation (“Flow”), a corporation, and OMAX Corporation (“OMAX”), a corporation, both subject to the jurisdiction of the Commission, have agreed to an acquisition by Flow of OMAX in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Flow is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at 23500 - 64th Avenue South, Kent, Washington 98032. Flow is a global company engaged in the development, manufacture, marketing, and sale of waterjet cutting systems.

II. JURISDICTION

2. Flow is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED TRANSACTION

3. OMAX is a Washington company with its head office in Kent, Washington. OMAX is a global company engaged in the

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development, manufacture, marketing, and sale of waterjet cutting systems.

4. In December 2007, the parties signed an exclusive option agreement for the acquisition of OMAX. Under the agreement, Flow and OMAX will work to negotiate a definitive agreement for Flow to acquire OMAX. Upon closing, Flow will pay approximately \$109 million in cash and stock with the potential for a contingent earn-out in two years of up to \$26 million.

IV. WATERJET CUTTING SYSTEMS

5. The demand for waterjet cutting systems is growing very rapidly due to the versatility and ease of operation of these systems. Waterjet cutting systems can be used to cut and machine a much wider range of materials than other cutting systems. For most users of waterjet cutting systems, alternative cutting systems would not provide comparable features and therefore would not serve as adequate substitutes. Customers now using or seriously considering adopting waterjet cutting systems would be unlikely to switch to an alternative cutting technology if the prices of all waterjet cutting systems were to be raised by a small but significant non-transitory amount.

6. A waterjet cutting system contains four main parts: (1) pump, (2) cutting head, (3) cutting table, and (4) controller.

- The “pump” rated in pressure at or above 50,000 pounds per square inch creates ultra-high pressure water;
- The cutting head is a two-stage nozzle where the ultra-high pressure water passes through a small-diameter jewel orifice to form a narrow waterjet. In abrasive waterjet cutting systems, the resulting waterjet then passes through a small chamber where a slight vacuum pulls abrasive material into this area through a feed tube. The abrasive particles are accelerated by the narrow waterjet and

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together they pass into a long, hollow cylindrical ceramic mixing tube. The resulting mix of abrasive and narrow waterjet exits the mixing tube as a coherent stream and cuts the material;

- The cutting table holds the material to be cut and can utilize either a gantry or cantilever system to move the cutting head; and
- The controller is hardware and software that directs the cutting head. Controllers can be adapted from other cutting tools, such as lasers, that also use cutting tables, or they may be specifically designed to compensate for the unique characteristics of how the waterjet cuts, including taper (the waterjet expands after leaving the nozzle, forming a cone shape) and lag (the faster the cutting head moves, the more the waterjet will trail behind the cut).

7. Waterjet cutting systems are used by a wide variety of industrial machine tool customers. These customers include:

- job shops that produce a wide variety of short-run parts use waterjet cutting systems to complement their traditional Computer Numerical Control milling machines and flame cutters;
- wire Electrical Discharge Machining (“EDM”) shops because waterjet cutting systems are up to ten times faster than wire EDM and can cut both conductive and non-conductive material without creating a heat-affected zone;
- laser shops, which can capitalize on the ability of waterjet cutting systems to cut thicker materials than lasers can, and, unlike lasers, can cut reflective materials;

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- aerospace shops because waterjet cutting systems can cut without damaging materials that are affected by heat, such as titanium and aluminum;
- tooling shops because waterjet cutting systems can work with hardened tool steel;
- architectural fabricators, which use waterjet cutting systems to create large signs, decorative tiles, or intricate design work in a wide variety of materials; and
- metal fabricators, which value the enhanced ability of waterjet cutting systems to cut clean edges for plate work.

8. Most waterjet customers derive a gain in productivity, which is a function of cutting speed and set-up time, by using a waterjet cutting system instead of an alternative cutting technology. Cutting speed is affected by pump strength, the number of cutting heads used on the system, and the sophistication of the controller. Controllers are often the least expensive means of improving cutting speed and have the further virtue of reducing set-up time if they are easily programmable. Controllers can also improve the quality of the cut by, among other things, automatically adjusting the speed of the cut.

V. COMPETITION BETWEEN FLOW AND OMAX

9. Flow is the largest manufacturer of waterjet cutting systems in the United States. OMAX is the second largest.

10. OMAX has received U.S. Patent Nos. 5,508,596 and 5,892,345 relating, among other things, to controllers that may include a personal computer for determining appropriate machining commands to control velocity, acceleration and/or jerk for a cutting head. These commands help compensate for the

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unique characteristics of how the waterjet cuts, including taper and lag.

11. Both Flow and OMAX produce waterjet cutting systems that feature relatively inexpensive yet sophisticated PC-based controllers. Flow and OMAX are each other's closest competitors because they are the only two competitors that manufacture comparably priced waterjet cutting systems with the most advanced and efficient controllers.

VI. RELEVANT MARKET

12. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the development, manufacture, marketing, and sale of waterjet cutting systems.

13. For the purposes of this Complaint, the relevant geographic market within which to analyze the effects of the Acquisition is the United States.

VII. CONCENTRATION IN THE RELEVANT MARKET

14. The relevant market would be highly concentrated as a result of the acquisition. Post-acquisition, Respondent would account for more than 55 percent of waterjet cutting system sales in the United States.

VIII. LIKELIHOOD OF ENTRY

15. New entrants and existing competitors are deterred by the risk of violating OMAX patents from developing and producing competitive waterjet cutting systems. Developing an efficient controller that clearly works around the potential reach of OMAX's patents would likely be an expensive and time-consuming process, with no guarantees of success. Therefore, entry into the relevant market would not be timely, likely, or

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sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition.

IX. EFFECTS OF THE ACQUISITION

16. The effects of the acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the acquisition would:

a. Eliminate actual, direct, and substantial competition between Flow and OMAX in the relevant market by eliminating competition for the development, manufacture, and sale of waterjet cutting systems that utilize PC-based controllers; and

b. Increase Respondent's ability to exercise market power unilaterally in the relevant market.

X. VIOLATIONS CHARGED

17. The agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

18. The transaction described in Paragraph 4, if consummated, 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, the Federal Trade Commission on this fifteenth day of August, 2008, issues its Complaint against said Respondent.

By the Commission.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Flow International Corporation (hereinafter “Flow International”, “Respondent”, or “Respondent Flow International”) of OMAX Corporation, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

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1. Respondent Flow International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its offices and principal place of business located at 23500 64th Avenue South, Kent, Washington 98032.

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

ORDER**I.**

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

- D. “Flow International” or “Respondent” means Flow International Corporation, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Flow International Corporation, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- E. “OMAX” means, OMAX Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its offices and principal place of business located at 21409 72nd Avenue, Kent, Washington 98032; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by OMAX Corporation.
- F. “Commission” means the Federal Trade Commission.

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- G. “Acquisition” means the proposed acquisition of OMAX by Flow International pursuant to an exclusive option agreement to negotiate the acquisition of Omax signed on December 5, 2007.
- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Competitor” means any person that, during the five (5) years after this Order becomes final, is or seeks to become engaged in the research, development, manufacturing, marketing, or sale of Waterjet Cutting Systems or Waterjet Cutting System Controllers in the United States.
- J. “Confidential Business Information” means any information relating to the research, development, manufacture, distribution, marketing, or sale of Waterjet Cutting Systems or Waterjet System Cutting System Controllers by any Licensee or Authorized Sublicensee that comes into the possession or control of the Respondent as the result of the License, including, but not limited to, any information that any Licensee is required to provide to the Respondent under the terms of the License. “Confidential Business Information” includes, but is not limited to, any information provided to Respondent in any License Report.
- K. “Controller” means computer software and hardware that direct the cutting head.
- L. “License” means:
 - 1. the license with a Licensee for the Licensed Patents attached as Exhibit A to this Decision and Order; or,

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2. a license that substantially complies with Exhibit A, that achieves the purposes of this Order, and that receives the prior approval of the Commission.
- M. “Licensed Patents” mean the OMAX ‘596 Patent and the OMAX ‘345 Patent.
- N. “Licensee” means any signatory (other than Respondent) to any License.
- O. “License Reports” means any report or information provided by any Licensee to Respondent under the terms of any License.
- P. “OMAX ‘345 Patent” means United States Patent No. 5,892,345, including all related patent applications, extensions, current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent No. 5,892,345, and all other rights included in the term Patent as it is defined in this Order.
- Q. “OMAX ‘596 Patent” means United States Patent No. 5,508,596, including all related patent applications, extensions, current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent No. 5,508,596, and all other rights included in the term Patent as it is defined in this Order.
- R. “Patent” means the United States patent and all related patent applications and includes all reissues, divisions, continuations, continuations-in-part, substitutions, reexaminations, restorations, and/or patent term extensions thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all

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rights to obtain and file for patents and registrations thereto in the United States.

- S. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.
- T. “Waterjet Cutting System” means a system that uses a high pressure stream of water to cut plastic, metal, composite, and other materials. A Waterjet Cutting System contains one or more of each of four main parts: (1) pump, (2) cutting head, (3) cutting table, and (4) controller.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent Flow International shall grant a License to any and all Competitors that, during the five (5) years after this Order becomes final, request a License. Respondent shall execute the License not more than thirty (30) days after Respondent receives a written request from a Competitor.
- B. At the request of a Licensee, and subject to the prior approval of the Commission, the Respondent shall enter into an agreement to modify the License if the modification reasonably is related to achieving the purpose of this Order.
- C. Respondent Flow International shall not threaten to file, file suit, or make any claim for damages against any Licensee relating to any actual or claimed infringement of any of the intellectual property that is the subject of and within the scope of the License.

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- D. Respondent shall comply with all terms of each License, and any breach by Respondent of any term of a License shall constitute a violation of this Order. If any term of the License varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Notwithstanding any paragraph, section, or other provision of the License, any modification of the License, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- E. The purpose of the License required by Paragraph II.A. of this Order is to create viable, independent Competitors to develop, manufacture, and sell Waterjet Cutting Systems or Waterjet Cutting System controllers, using the Licensed Patents, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s Complaint.

III.**IT IS FURTHER ORDERED** that:

- A. Respondent shall:
1. not provide, disclose or otherwise make available any Confidential Business Information to any Person except as set forth in Paragraph III.B. of this Order;
 2. not use any Confidential Business Information for any reason or purpose other than as otherwise required or permitted by the License and this Order; and,
 3. require all License Reports to be sent to the attention of Flow’s general counsel, who shall not provide, disclose, or otherwise make available any information

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contained in any License Report except to persons whose duties relate solely to providing legal services and representation to Respondent.

- B. Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order; and, (ii) for the purpose of exercising Respondent's rights explicitly granted to Respondent by the License.

IV.**IT IS FURTHER ORDERED** that:

- A. If the Commission finds that Respondent has failed to grant a License as required by Paragraph II. of this Order within the time periods specified therein, then the Commission may appoint a Licensing Trustee to grant the License to any Competitors to satisfy the requirements of Paragraph II of this Order.
- B. Neither the decision of the Commission to appoint a Licensing Trustee, nor the decision of the Commission not to appoint a Licensing Trustee, to grant the License under this Paragraph IV shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. If a Licensing Trustee is appointed by the Commission or a court, Respondent shall consent to the following terms and conditions regarding the Licensing Trustee's powers, duties, authority, and responsibilities:

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1. The Commission shall select the Licensing Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Licensing Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Licensing Trustee, Respondent shall be deemed to have consented to the selection of the proposed Licensing Trustee.
2. Subject to the prior approval of the Commission, the Licensing Trustee shall have the exclusive power and authority to grant the License to a Competitor pursuant to the terms of this Order.
3. Within ten (10) days after appointment of the Licensing Trustee, Respondent shall execute a (or amend the existing) trust agreement (“Licensing Trustee Agreement”) that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Licensing Trustee all rights and powers necessary to permit the Licensing Trustee to grant the License to a Competitor pursuant to the terms of this Order.
4. The Licensing Trustee may grant the License to any Competitor pursuant to the terms of this Order at any time after the Licensing Trustee Agreement is effective.
5. The Licensing Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to each License, as the Licensing Trustee may request. Respondent shall develop such financial or other information as the Licensing Trustee may request and shall cooperate with the Licensing

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Trustee. Respondent shall take no action to interfere with or impede the Licensing Trustee's accomplishment of his or her responsibilities.

6. The Licensing Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Licensing Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Licensing Trustee's duties and responsibilities. The Licensing Trustee shall account for all monies derived from the divestiture and all expenses incurred. Respondent shall pay the Licensing Trustee's fees and expenses in accordance with the Licensing Trustee Agreement.
7. Respondent shall indemnify the Licensing Trustee and hold the Licensing Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Licensing 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, willful or wanton acts, or bad faith by the Licensing Trustee.
8. If the Commission determines that the Licensing Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV of this Order.

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9. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Licensing Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this Order.
 10. The Licensing Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to grant Licenses under this Order, and Respondent's compliance with the terms of this Order.
- D. Respondent shall comply with all terms of the Licensing Trustee Agreement, and any breach by Respondent of any term of the Licensing Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Licensing Trustee Agreement, any modification of the Licensing Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in the Respondent, 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.

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VI.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter for one hundred and eighty (180) days, Respondent shall submit to the Commission (with simultaneous copies to the Licensing Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraph II of this Order. Respondent shall include in the reports, among other things that are required from time to time, the name, address, and phone number of each person who has inquired about receiving a License (whether or not Respondent granted a License to such person), the name, address, and phone number of each Person to whom Respondent granted a License, and a full description of any dispute between Respondent and any person to whom Respondent granted a License concerning any claimed actual or alleged breach (whether or not Respondent believes there has been a breach) of any License. Respondent shall include in the reports:
1. Copies of all Licenses executed in each reporting period, together with copies of all written communications to and from each Licensee; and,
 2. The name, address, and phone number of each person who requested a License, but to whom Respondent did not grant a License, together with a description in reasonable detail of the reasons why Respondent did not grant the person a license.
- B. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, annually for the next nine years on the anniversary of the date this

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Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Respondent shall include in the reports, among other things that are required from time to time, the name, address, and phone number of each person who has inquired about receiving a License (whether or not Respondent granted a License to such person), the name, address, and phone number of each Person to whom Respondent granted a License, and a full description of any dispute between Respondent and any person to whom Respondent granted a License concerning any claimed actual or alleged breach (whether or not Respondent believes there has been a breach) of any License. Respondent shall include in the reports:

1. Copies of all Licenses executed in each reporting period, together with copies of all written communications to and from each Licensee; and,
2. The name, address, and phone number of each person who requested a License, but to whom Respondent did not grant a License, together with a description in reasonable detail of the reasons why Respondent did not grant the person a license.

VII.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other

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records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and,

- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondent relating to any matter contained in this Order.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on August 15, 2018.

By the Commission.

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EXHIBIT A**PATENT LICENSE AGREEMENT**
(FOR U.S. PATENT NOS. 5,508,596 AND 5,892,345)

This Patent License Agreement (the "Agreement") is entered into between Flow International Corporation, a Washington corporation, with offices at 23500 – 64th Avenue South, Kent, Washington 98032 U.S.A. ("Flow"), and _____, a _____ corporation, at the address specified below, ("Licensee"), effective as of the date it has been signed on behalf of all parties (the "Effective Date").

Section 1. Definitions

- 1.1 "Authorized Sublicensee" means any waterjet cutting system manufacturer, distributor, dealer or customer of Licensee granted a sublicense under Section 2.4 to make, use, sell or offer for sale copies of the Licensed Technology.
- 1.2 "Distributor" means any distributor that Licensee authorizes, directly or indirectly, to Distribute a Licensed Product that contains Licensed Technology to End Users in accordance with the terms of this Agreement.
- 1.3 "Distribute" or "Distribution" means selling, offering to sell, licensing, distributing, importing or otherwise making available in any manner to a third party.
- 1.4 "End User" means a third party customer to which a product containing the Licensed Technology is Distributed, and not for further sublicense or further Distribution.
- 1.5 "License" means the license granted by Flow to Licensee under Section 2 of this Agreement.
- 1.6 "Licensed Patent(s)" means U.S. Patent Nos. 5,508,596 (Motion Control With Precomputation) and 5,892,345 (Motion Control For Quality In Jet Cutting).
- 1.7 "Licensed Product" means any product that includes the Licensed Technology and is used by the End User as part of an waterjet cutting system.
- 1.8 "Licensed Technology" means those portions of a Licensed Product, designed and developed by or for Licensee or any Authorized Sublicensee, the making, using, selling, offering for sale or importing of which infringes at least one claim of the applicable Licensed Patents.

Section 2. License and Licensee Requirements

2.1 License Grant. Subject to Sections 2.2, 2.7 and 2.8 below, Flow hereby grants to Licensee a royalty-free, fully-paid personal, nonexclusive, nonsublicensable (except as specifically provided for in Section 2.4 of this Agreement) license under the Licensed Patents to do the following during the Term:

- (a) make and use the Licensed Technology for the research and development, production, offer for sale or sale of waterjet cutting systems;
- (b) Distribute the Licensed Technology to manufacturers of waterjet cutting systems; and
- (c) Distribute the Licensed Technology in the Licensed Products to End Users

2.2 Conditions. The licenses granted in Section 2.1 are conditioned upon: (i) Licensee's compliance with the notice requirements of Section 2.6; (ii) Licensee's compliance with the requirements of Sections 2.7 and 2.8; and (iii) Licensee's compliance with the reporting requirements of Section 3.

2.3 Covenant Not to Sue. Flow hereby covenants not to sue Licensee, or any Sublicensees or End Users or any of their subsidiaries, for any and all claims of infringement of the Licensed Patents, or a claim on any other patent the scope of which may be coextensive with any of the claims of the Licensed Patents, based on having at any time prior to or during the term of this License made, used, sold, offered for sale or imported, or on the making, use, selling, offering for sale or importing of the Licensed Technology, but only to the extent that such activities are permitted under the License.

2.4 Limited Right to Sublicense.

- (a) The License includes the right of Licensee to grant to any of its Distributors a sublicense to any waterjet cutting system manufacturer, distributor, dealer or customer of Licensee.

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(b) Licensee will ensure that each Authorized Sublicensee complies with this Agreement. The License does not include the right to grant or authorize any other sublicense under the License or otherwise to take or authorize any action outside the scope of the License.

2.5 Reservation of Rights. All rights not expressly granted in this Agreement are reserved. The License does not include, and Flow does not grant, any right under any patent or intellectual property other than the Licensed Patents.

2.6 Waiver. Licensee agrees and acknowledges that by signing this Agreement, Licensee waives its right to contest the validity of the Licensed Patents as applied to waterjet cutting systems.

2.7 Limitation. Licensee shall not represent directly or indirectly that any product it makes or sells pursuant to this License is made or endorsed by Flow International Corporation or OMAX Corporation.

2.8 Licensee Requirements. To qualify to be a licensee under this Agreement, the licensee must be engaged in the business of manufacture or distribution of, or creation of control equipment for, waterjet cutting systems. Additionally, the License does not modify the Licensee's obligations to comply with the law of the United States or any other jurisdiction, including export and trade laws (such as U.S. Export Administration Regulations, and end-user, end-use, and destination restrictions).

Section 3. Reporting

Licensee will provide quarterly reports to Flow, no later than 45 days following the end of each calendar quarter, identifying the number, location (by state or province or by country if outside the U.S. or Canada) and type (to Distributor, End User, etc.) of any sale, lease or other disposition of a Licensed Product. Such reports should be sent to the addresses designated in **Section 8.4**. Flow shall treat the quarterly reports provided under this Section as Confidential Business Information, the use and dissemination of which are subject to the terms of the Decision & Order of the Federal Trade Commission.

Section 4. Term and Termination

4.1 General. The term of the License will commence as of the Effective Date and terminate upon the first of the following to occur: (a) the expiration of the last of the Licensed Patents to expire or (b) Flow gives Licensee written notice of termination in accordance with **Section 4.2 or 8.6 ("Term")**.

4.2 Early Termination by Flow. Flow may terminate the Term by giving Licensee written notice of termination if Flow has determined, in good faith, that Licensee has breached the Agreement and has failed to cure such breach within sixty (60) days after Flow has given Licensee written notice of such breach.

4.3 Effect of Expiration or Termination. Only Sections 2.3, 2.6, 5, 6, 7 and 8 of this Agreement will survive any expiration or termination of the Term.

Section 5. Warranties, Exclusion of Warranties, Exclusive Remedy and Sole Liability

5.1 Warranties. Flow represents and warrants to Licensee that: (a) it is the owner of the Licensed Patents; and (b) it has the right to grant the License. Each Party represents and warrants that it has the power and authority to enter into this Agreement.

5.2 Exclusion of Warranties. EXCEPT AS EXPRESSLY SET FORTH IN **SECTION 5.1**, TO THE MAXIMUM EXTENT PERMITTED BY LAW, FLOW EXCLUDES ALL CONDITIONS, WARRANTIES AND OTHER TERMS WHICH MIGHT HAVE EFFECT BETWEEN THE PARTIES OR BE IMPLIED OR INCORPORATED INTO THIS AGREEMENT (INCLUDING WITHOUT LIMITATION, THE IMPLIED CONDITIONS, WARRANTIES AND OTHER TERMS AS TO SATISFACTORY QUALITY, FITNESS FOR PURPOSE, NON-INFRINGEMENT, TITLE AND THE USE OF REASONABLE SKILL AND CARE). WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, FLOW HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION OR WARRANTY OF ANY KIND: (i) WITH REGARD TO THE SCOPE, COVERAGE, VALIDITY OR ENFORCEABILITY OF ANY OF THE LICENSED PATENTS; (ii) WITH RESPECT TO ANY LICENSED PRODUCT OR LICENSED TECHNOLOGY; OR (iii) THAT ANY LICENSED TECHNOLOGY MADE, USED, SOLD, OFFERED FOR SALE OR IMPORTED UNDER THE LICENSE IS OR WILL BE FREE FROM INFRINGEMENT OF ANY PATENT OR OTHER INTELLECTUAL PROPERTY RIGHT OF ANY THIRD PARTY.

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Section 6. Exclusive Remedy of Licensee and Sole Liability of Flow.

BOTH PARTIES AGREE THAT LICENSEE'S SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OF THIS AGREEMENT BY FLOW WILL BE TERMINATION OF THIS AGREEMENT AND COMPENSATORY DAMAGES LIMITED TO AN AMOUNT NOT TO EXCEED ONE HUNDRED DOLLARS.

Section 7. Limitation of Liability

IN NO EVENT WILL FLOW BE LIABLE FOR ANY INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR INDIRECT LOSSES OR DAMAGES OR ANY LOSS OF REVENUE, PROFIT, USE, BUSINESS OPPORTUNITY OR GOODWILL ARISING OUT OF OR RELATED TO THE LICENSE OR THIS AGREEMENT EVEN IF FLOW HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES, INCLUDING THAT FLOW SHALL NOT BE LIABLE FOR ANY DEATH, PERSONAL INJURY OR OTHER HARM ARISING FROM ANY MANUFACTURE, USE, OFFER FOR SALE, SALE, EXPORT OR OTHER ACTIVITY RELATING TO ABRASIVE WATERJET MACHINES MADE, USED, OFFERED FOR SALE, OR SOLD UNDER THIS LICENSE..

Section 8. Miscellaneous

8.1 No Right to Technology. Flow will not have any obligation under this Agreement to disclose or otherwise make available to Licensee any Technology, trade secrets, programs, specifications, designs, technical data, know how or other technology, whether or not the same may be required for the exercise or commercial exploitation of the License.

8.2 Compliance with Laws. Licensee and Sublicensed Subsidiaries will comply with all applicable international and national laws and regulations in the performance of all of their activities under the License and this Agreement.

8.3 Actions on Behalf of the Parties. Flow and Licensee are each liable for, and will be deemed for all purposes of this Agreement to have done or failed to do, any act or omission of their respective officers, employees, temporary personnel, or independent contractors related to acts or omissions in connection with this Agreement.

8.4 Notices. All notices and requests in connection with this Agreement are deemed given on the day they are received either by messenger, delivery service, or in the United States of America mails, postage prepaid, certified or registered, return receipt requested, and addressed to Licensee using the contact information indicated on the first page of this Agreement, to Flow using the contact information below, or to either party at such other address as the party to receive the notice or request so designates per this notice provision:

Flow International Corporation
John Leness
General Counsel and Corporate Secretary
23500 - 64th Avenue South
Kent, WA 98032
U.S.A.

8.5 Jurisdiction, Governing Law and Attorneys' Fees. This Agreement will be governed by and construed in accordance with the laws of the state of Washington. Each party hereby submits to the exclusive jurisdiction of the state and federal courts of the state of Washington. Process may be served on either party in the manner authorized by applicable law or court rule. In any formal action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party is entitled to recover its costs, including reasonable attorneys' fees, costs and other expenses.

8.6 Assignment. Either party may assign this Agreement or any of its rights or obligations hereunder, provided that the Licensee gives the Licensor written notice of its assignment within thirty (30) days of its assignment having been made. Such written notice will also include a signed statement by the assignee that it is willing to be bound by the terms and conditions of this Agreement. This Agreement will be binding upon, enforceable by, and inure to the benefit of the parties and their respective successors and permitted assignees. For purposes of this Agreement, an "assignment" by Licensee under this Section will be deemed to include, without limitation, each of the following: (a) a change in beneficial ownership of Licensee of greater than twenty percent (20%) (whether in a single transaction or series of transactions) if Licensee is a partnership, trust, limited liability company or other like entity; (b) a merger of Licensee with another entity, whether or not Licensee is the surviving entity; (c) the acquisition of more than twenty percent (20%) of any class of voting stock (or any class of non-voting security convertible into voting stock) of Licensee by another

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entity (whether in a single transaction or series of transactions); and (d) the sale or other transfer of more than fifty percent (50%) of such Licensee's assets (whether in a single transaction or series of transactions). Any attempted transfer or assignment in violation of this Section will be void; and, in the event of any such assignment or attempted assignment by Licensee, Flow will have the right to immediately terminate the License.

8.7 **No Third Party Beneficiaries.** This Agreement is for the benefit of, and will be enforceable by, the Parties only. This Agreement is not intended to confer any right or benefit on any third party. No action may be commenced or prosecuted against a Party by any third party (including, without limitation, Subsidiaries) claiming as a third-party beneficiary of this Agreement or the License.

8.8 **Counterparts and Facsimile.** This Agreement may be executed on facsimile copies in two counterparts, each of which will be deemed an original and all of which together will constitute one and the same Agreement. Notwithstanding the foregoing, the parties will deliver original executed copies of this Agreement to one another as soon as practicable following execution thereof.

8.101 **Entire Agreement, Modifications and Waiver.** This Agreement constitutes the entire agreement between the Parties with respect to its subject matter and supersedes all prior and contemporaneous agreements, arrangements and understandings, whether written or oral, between the Parties in connection with this Agreement and on such subject matter. This Agreement will not be modified except by a written agreement signed by an authorized representative of the Party against whom such modification is sought to be enforced. Failure by either Party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that provision.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be made and executed by duly authorized officers.

[LICENSEE NAME]

FLOW INTERNATIONAL CORPORATION

By (Sign) _____

By (Sign) _____

Name (Print) _____

Name (Print) _____

Title _____

Title _____

Date _____

Date _____

Licensee Information:

Licensee Full Legal Name:

Type of Legal Entity (corporation, company, partnership, sole proprietorship or other):

State/Province Organized:

Street Address:

City, State (or equivalent), Country and Postal Code:

Licensee Contact Name:

Phone Number:

Fax Number:

Email Address:

Licensee Legal Advisor Contact Information, if any:

Legal Advisor Name:

Legal Advisor Contact Phone Number:

Legal Advisor Contact Fax Number:

Legal Advisor Contact Email Address:

Analysis to Aid Public Comment

ANALYSIS OF THE CONSENT ORDER TO AID PUBLIC COMMENT**I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Flow International Corporation (“Flow”). The proposed Consent Agreement is designed to remedy the likely anticompetitive effects arising from Flow’s proposed acquisition of OMAX Corporation (“OMAX”). Under the terms of the Consent Agreement, Flow will grant a royalty-free license to two Omax patents relating to waterjet controllers to any firm that seeks a license.

II. Background

Flow and OMAX are the leading manufacturers of waterjet cutting systems in the United States. Waterjet cutting systems use high pressure water and garnet to cut a wide variety of materials from steel to stone. The two companies have developed PC-based controllers that automatically compensate for the unique characteristics of how the waterjet cuts, such as taper (the waterjet expands after leaving the nozzle, forming a cone shape) and lag (the faster the cutting head moves, the more the waterjet will trail behind the cut). The controllers and related technology differentiate these two firms from other competitors in the marketplace. However, the controllers and related technology are also the subject of ongoing litigation between the two companies. In 2004, OMAX filed suit alleging that Flow’s products infringed its patents pertaining to controllers. Flow counterclaimed alleging that OMAX infringed its patents pertaining to controllers.

Flow, a publicly traded company headquartered in Kent, Washington, is the leading manufacturer of waterjet cutting systems in the United States market. OMAX is a privately-held company headquartered in Kent, Washington. OMAX owns two

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very broad U.S. patents covering its controller. OMAX's controller is a significant factor behind its position as the second leading supplier of waterjet cutting systems in the United States.

On December 5, 2007, Flow signed an exclusive option agreement to negotiate the acquisition of OMAX. Under the agreement, Flow and OMAX will work to negotiate a definitive agreement for Flow to acquire OMAX. Upon closing, Flow would pay approximately \$109 million in cash and stock with the potential for a contingent earn-out in two years of up to \$26 million. The closing will also settle the long-running and expensive patent litigation between Flow and OMAX.

III. The Draft Complaint

The draft complaint alleges that the transaction may substantially lessen competition in the market for the development, manufacture, marketing, and sale of waterjet cutting systems. A waterjet cutting system contains four main parts: (1) pump, (2) cutting head, (3) cutting table, and (4) controller.

Waterjet cutting systems are used by a wide variety of industrial machine tool customers. These customers range from job shops, which produce a wide variety of short-run parts, and use waterjet cutting systems to complement their traditional milling machines, lasers and flame cutters, to aerospace shops that use waterjet cutting systems because they cut without damaging materials that are affected by heat, such as titanium and aluminum. Industrial machine tool customers, as well as others, can increase cutting speed and minimize set-up time by using a waterjet cutting system instead of an alternative cutting technology. Cutting speed is affected by pump pressure, the number of cutting heads used on the system, and the sophistication of the controller. Controllers are often the least expensive means of improving cutting speed and have the further virtue of reducing set-up time if they are easily programmable. To compensate for the unique characteristics of how the waterjet

Analysis to Aid Public Comment

cuts, controllers can improve the quality of the cut by, among other things, automatically adjusting the speed of the cut.

Both Flow and OMAX produce waterjet cutting systems that feature relatively inexpensive yet sophisticated PC-based controllers that compensate for the unique characteristics of how the waterjet cuts. These controllers make Flow and OMAX each other's closest competitors because only they manufacture waterjet cutting systems with the most advanced and efficient controllers.

The relevant geographic market within which to analyze the likely effects of the proposed transaction is the United States. The draft complaint further alleges that new entry would not prevent or counteract the anticompetitive effects of this acquisition. New entrants and existing competitors are deterred by the risk of violating the OMAX patents from developing and producing competitive waterjet cutting systems. Developing an efficient controller that clearly works-around the potential reach of OMAX's patents would likely be an expensive and time-consuming process, with no guarantee of success.

The draft complaint also alleges that Flow's acquisition of OMAX, if consummated, may substantially lessen competition in the market for the development, manufacture, marketing, and sale of waterjet cutting systems in the United States in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between Flow and OMAX and increasing the likelihood that Flow will unilaterally exercise market power.

IV. The Terms of the Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, Flow

Analysis to Aid Public Comment

must grant a royalty-free license to each competitor who seeks to license the two broad OMAX patents relating to controllers that Flow will acquire with its acquisition of OMAX.

Currently Flow and OMAX are each other's closest competitor because they each offer an efficient PC-based controller that compensates for the unique characteristics of how a waterjet cuts. OMAX's two patents make the development of such a controller substantially more expensive and risky. Requiring Flow to grant a royalty-free license to these patents will ensure that other firms are able to replace the competition that would otherwise have been eliminated by the proposed acquisition.

While Flow has two patents relating to controllers, its patents are significantly narrower in scope than the OMAX patents and, as a result, do not prevent current or future competitors from offering a viable waterjet cutting system. Current and future competitors will not need licenses to these narrow patents in order to compete effectively in this market. Other aspects of Flow's and OMAX's business, such as customer lists, brand names, key employees, or the other parts of waterjet cutting systems, are easily duplicated by current competitors or future entrants. Consequently, to restore the competition lost by Flow's acquisition of OMAX, the proposed consent order eliminates the entry barrier faced by current waterjet cutting system competitors and future entrants by giving them a royalty-free license to the OMAX patents.

V. Opportunity for Public Comment

The proposed consent 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 proposed consent order and the comments received and will

Analysis to Aid Public Comment

decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF

WE GIVE LOANS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF THE TRUTH IN LENDING ACT

*Docket C-4232; File No. 072 3205
Complaint, September 3, 2008 – Decision, September 3, 2008*

This consent order addresses payday loan advertisements disseminated by We Give Loans, Inc. The advertisements failed to disclose the annual percentage rate for these loans. The order prohibits the respondent, in any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by the Truth in Lending Act and its implementing Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate. The respondent is prohibited from stating a rate of finance charge without stating it as an annual percentage rate. The respondent is also prohibited from failing to comply in any other respect with the Truth in Lending Act or Regulation Z. Additional provisions of the order include requirements that the respondent retain documents, to ensure compliance with the proposed order; distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of any changes in its corporate structure that might affect compliance with the order; and file with the Commission one or more reports detailing compliance with the order.

Participants

For the *Commission*: *Beverly Childs, Thomas B. Pahl, Cara Petersen, Peggy L. Twohig, and Quisaira Whitney.*

For the *Respondent*: *Glen Trudel, Connolly Bove Lodge & Hutz LLP.*