

Complaint

IN THE MATTER OF

TRANSITIONS OPTICAL, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4288; File No. 091 0062
Filed, April 22, 2010 — Decision, April 22, 2010

This consent order addresses Transitions Optical, Inc.'s exclusionary acts and practices used to maintain its monopoly power in the photochromic lens industry. Transitions has monopoly power in the relevant market for the development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses in the United States. Since 1999, Transitions has maintained its dominance, in significant part, by implementing exclusive agreements and other exclusionary policies at nearly every level of the photochromic lens distribution chain. The order provides that any exclusive agreements between Transitions and Indirect Customers must: i) be terminable without cause, and without penalty, on 30 days written notice; ii) be available on a partially exclusive basis, if requested by the customer; and iii) not offer flat payments of monies in exchange for exclusivity Transitions from adopting or implementing any agreement or policy that results in "exclusivity" with lens casters, or its "Direct Customers." Also, Transitions may not limit its customers from communicating or discussing a competing photochromic lens with consumers and others. Furthermore, Transitions cannot offer market share discounts, *i.e.*, discounts based on the percentage of a customer's sales of Transitions' lenses as a percentage of all photochromic lens sales and Transitions cannot offer discounts that are applied retroactively once a customer reaches a specified threshold.

Participants

For the *Commission*: Linda M. Holleran and Christopher G. Renner.

For the *Respondents*: Jeffrey Ayer, William Kolasky, and Jim Lowe, Wilmer Cutler Pickering Hale & Dorr LLP.

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Transitions Optical, Inc. (“Transitions” or “Respondent”) has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. This action concerns Transitions’ exclusionary acts and practices in the photochromic lens industry. Transitions has improperly maintained its monopoly power by engaging in exclusionary acts and practices, which include entering into exclusive dealing arrangements that foreclose its rivals from key distribution channels. Transitions’ conduct has led to higher prices, lower output, reduced innovation and diminished consumer choice.

RESPONDENT

2. Respondent Transitions is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 9251 Belcher Road, Pinellas Park, Florida 33782. Transitions develops, manufactures and sells photochromic treatments for corrective ophthalmic lenses.

JURISDICTION

3. At all times relevant herein, Transitions has been, and is now, a corporation as “corporation” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

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4. The acts and practices of Transitions, including the acts and practices alleged herein, are in commerce or affect commerce in the United States, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

RELEVANT MARKET

5. The relevant product market is no broader than the development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses. The relevant geographic market is the United States.

6. Consumers of corrective ophthalmic lenses (lenses used in eyeglasses to correct vision defects) may purchase those lenses with the option of an add-on photochromic treatment, which protects eyes from harmful ultraviolet (“UV”) light. A “photochromic lens,” or a corrective ophthalmic lens with a photochromic treatment, will darken when it is exposed to the UV light present in sunlight, and fade back to clear when it is removed from the UV light.

7. Each year, U.S. consumers purchase roughly 76 million pairs of corrective ophthalmic lenses. In 2008, photochromic lenses represented approximately 18-20% of all corrective ophthalmic lens sales in the United States, totaling approximately \$630 million in sales at the wholesale level.

8. There are no close substitutes for photochromic lenses, and no other product significantly constrains the prices of photochromic lenses. Photochromic lenses have characteristics and uses distinct from those of clear corrective ophthalmic lenses, polarized lenses (which are designed to remove glare), or fixed-tint lenses (*e.g.*, prescription sunglasses).

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**TRANSITIONS HOLDS MONOPOLY POWER IN THE
RELEVANT MARKET**

9. Transitions possesses monopoly power in the relevant market. Transitions' share of the relevant market has been at least 80 percent during each of the past five years. In 2008, Transitions' market share was over 85 percent.

10. Significant and lasting barriers make entry into the relevant market difficult. These barriers include, but are not limited to: (i) product development costs; (ii) capital requirements; (iii) intellectual property rights; (iv) regulatory requirements; and (v) Transitions' unfair methods of competition.

11. Transitions' monopoly power is also demonstrated directly by its ability to exclude competitors and to control prices. The indicia of Transitions' monopoly power include, but are not limited to, the ability of Transitions: (i) to coerce lens casters, which manufacture and distribute corrective ophthalmic lenses, to accept exclusive dealing arrangements; (ii) to price its product without regard to its competitors' prices; (iii) to impose significant price increases; and (iv) to withhold a desired product – a low-priced, private label photochromic lens – from consumers in the United States, even though Transitions supplies it in other markets.

**TRANSITIONS EMPLOYED UNFAIR METHODS OF
COMPETITION TO MAINTAIN ITS MONOPOLY IN
THE RELEVANT MARKET**

12. Beginning in 1999 and continuing through to today, Transitions has engaged in unfair methods of competition that foreclose key distribution channels for existing rivals and impede market entry by potential rivals. Transitions has engaged in acts and practices that, when considered individually and collectively, have the effect of improperly maintaining Transitions' monopoly power in the relevant market. Transitions' exclusionary actions have caused injury to competition and to consumers. Transitions'

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conduct is likely to continue to harm competition absent the relief requested herein, and violates Section 5 of the FTC Act.

A. The Photochromic Lens Industry

13. Transitions partners with lens casters to produce its photochromic lenses. Specifically, lens casters supply the corrective ophthalmic lenses to Transitions, and Transitions uses proprietary processes to apply patented photochromic dyes or other photochromic materials to the lens. Transitions then sells the lenses, now photochromic, back to the original lens casters. Lens casters are Transitions' only direct customers.

14. Nearly 100 percent of all photochromic lenses are first sold and/or produced by lens casters. Attempts to bypass lens casters by fabricating photochromic lenses at lower levels of the supply chain (*e.g.*, the wholesale optical laboratories or optical retailers) have largely been abandoned as uneconomical.

15. Lens casters sell and distribute these photochromic lenses alongside their clear corrective ophthalmic lenses. Lens casters sell these lenses through two distribution channels: wholesale optical laboratories ("wholesale labs") and optical retailers ("retailers"), each of which represent approximately one half of the downstream market.

16. Wholesale labs sell ophthalmic lenses, including photochromic lenses, to ophthalmologists, opticians and optometrists (collectively known as "eye care practitioners") who are not affiliated with retailers. The wholesale labs grind the lens according to a lens prescription, fit the lens into an eyeglass frame, and deliver the frame with the finished lens to the eye care practitioner. In addition to these laboratory functions, a wholesale lab will often employ a sales force to promote specific lenses to eye care practitioners. Photochromic lens suppliers, such as Transitions, use wholesale labs and their sales forces to market their lenses because wholesale labs are the most efficient means

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for a photochromic lens supplier to promote and sell its products to the tens of thousands of independent eye care practitioners prescribing photochromic lenses to consumers.

17. There has been considerable consolidation in the wholesale lab channel in recent years as lens casters have begun to acquire wholesale labs. Lens casters generally have used these wholesale labs to sell and promote primarily their own brand of lenses.

18. Retailers represent the other important distribution channel for photochromic lenses, and include national, regional and smaller retail chains. Retailers generally provide both eye care practitioner and laboratory services. They employ their own eye care practitioners who deal directly with consumers. In addition, retailers grind and fit lenses into eyeglass frames and deliver the frame with the finished lens to the consumer. Because retailers employ their own eye care practitioners, the retail channel is generally a more efficient means for promoting and selling photochromic lenses to consumers than comparable efforts through the wholesale lab channel. For example, a decision by the corporate headquarters of one retail chain to buy a specific photochromic lens can have an immediate impact on the prescribing behavior of all the practitioners who are employed by that retailer. The retail channel has also witnessed significant consolidation over time.

B. Transitions' Exclusive Dealing with Lens Casters

19. In 1999, Corning Inc. ("Corning") introduced a new plastic photochromic lens, SunSensors[®], which was a direct challenge to Transitions. Transitions responded to this competitive threat by terminating the first lens caster that began selling the new SunSensors[®] lens, Signet Armorlite, Inc. ("Signet"), and by adopting a general policy not to deal with any lens caster that sold or promoted a competing photochromic lens. Transitions continues to enforce this policy by, among other things, entering into agreements with certain lens casters that

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expressly require exclusivity and by publicizing its exclusive dealing policy. Accordingly, even lens casters that have not signed exclusive agreements with Transitions have a clear and well-founded understanding that Transitions will refuse to deal with them if they sell or promote a competing photochromic lens. This understanding is reinforced by Transitions' acts and practices, including but not limited to, the following:

- a. Transitions terminated Signet when it began selling a competing photochromic lens, SunSensors[®];
- b. Transitions announced its policy to deal only with exclusive lens casters;
- c. Transitions threatened to terminate other lens casters that did not initially agree to sell Transitions' photochromic lenses on an exclusive basis; and
- d. Transitions terminated another lens caster, Vision-Ease Lens ("Vision-Ease"), because Vision-Ease planned to sell a competing photochromic lens, LifeRx[®], that it had developed for use on its own ophthalmic lenses.

20. Given Transitions' dominant market position and practice of demanding exclusivity, lens casters face powerful economic incentives to deal with Transitions on an exclusive basis. Transitions' "all-or-nothing" exclusivity policy ensures that lens casters that want to sell a competing photochromic lens will be forced to forgo significant revenues from the sale of Transitions' products, which can represent up to 40 percent of a lens caster's overall profit. In addition, a lens caster's inability to offer Transitions' photochromic lenses is likely to jeopardize significant sales of its clear corrective ophthalmic lenses as well because many chain retailers and wholesale labs (and their eye care practitioner customers) prefer to buy both clear and photochromic

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versions of the same lens.

21. Transitions' exclusionary acts and practices exclude rival suppliers of photochromic treatments that need to partner with lens casters to bring their product to market, such as Corning. For example, no major lens caster has been willing to sell the SunSensors[®] plastic photochromic lens since Transitions terminated Signet. Without access to effective distribution, Corning has been unable to pose a competitive threat to Transitions' monopoly, and has had little incentive to invest in research and development to further innovate and improve its product.

22. Transitions' exclusionary acts and practices also erect significant barriers to entry by the lens casters themselves, which can supply their own ophthalmic lenses. Some lens casters would likely develop their own competing photochromic lens absent Transitions' exclusionary conduct. Only one lens caster, Vision-Ease, has been able to resist Transitions' coercion and introduce a new photochromic lens, LifeRx[®]. However, Vision-Ease was only able to do so after it entered into secret negotiations with one of the largest optical retailers in the United States. This large retailer's commitment to buy LifeRx[®] allowed Vision-Ease to secure enough business to replace its lost Transitions sales. Since Transitions terminated Vision-Ease for introducing LifeRx[®] in 2005, no other lens caster has introduced a new line of photochromic lenses in the United States.

23. Lens casters that are exclusive to Transitions collectively account for over 85% of photochromic lens sales in the United States.

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C. Transitions' Exclusive and Restrictive Dealing with Retailers and Wholesale Labs

24. Transitions also has entered into exclusive and other restrictive agreements with its indirect customers: retailers and wholesale labs. These agreements foreclose downstream outlets for photochromic lenses and create significant barriers to entry.

25. Transitions has entered into exclusive agreements with retailers with the purpose and effect of impeding entry into the relevant market. For example, after terminating Vision-Ease for developing and selling a competing photochromic lens, Transitions entered into exclusive contracts with over 50 retailers, including many of the largest retail chains. Most of these exclusive agreements were of long duration and could not be easily terminated. Transitions' conduct deprived Vision-Ease of access to many large retailers (one of the most efficient channels of distribution for photochromic lenses to consumers), which blunted the force of its entry into the market and diminished the ability of Vision-Ease to constrain Transitions' exercise of monopoly power. Potential entrants observed Transitions' exclusionary campaign and were deterred from entering the market.

26. Transitions' agreements with wholesale labs restrict the ability of rivals to promote and sell their photochromic lenses to independent eye care practitioners unaffiliated with a retail chain. For example, Transitions has entered into over 100 agreements with wholesale labs, including 23 of the top 30 independent wholesale labs, that require the wholesale lab to sell Transitions' lenses as its "preferred" photochromic lens and not to promote any competing photochromic lens. The anticompetitive impact of these wholesale lab agreements is augmented by Transitions' exclusive policies with lens casters – at least 50 percent of all wholesale labs are owned by lens casters that sell Transitions' photochromic lenses on an exclusive basis. As a result, rival suppliers of photochromic treatments have only limited access to

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these lens caster-owned wholesale labs as well.

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

28. Transitions' exclusive and restrictive agreements with indirect customers deprive its rivals of access to outlets for the distribution and sale of competing photochromic lenses, and impair their ability to compete effectively with Transitions or to pose a significant threat to its monopoly. These agreements also deter incremental entry by a supplier with a photochromic treatment that applies to less than the full line of ophthalmic lenses, and reinforce and strengthen the barriers to entry erected by Transitions' policy of requiring that lens casters deal exclusively with Transitions. Transitions' exclusionary practices foreclose its rivals, in whole or in part, from a substantial share – as much as 40 percent or more – of the entire downstream photochromic lens market.

**ANTICOMPETITIVE EFFECTS OF
TRANSITIONS' CONDUCT**

29. The acts and practices of Transitions as alleged herein have the purpose, capacity, tendency, and effect of impairing the competitive effectiveness of Transitions' rivals in the relevant market, and of significantly raising barriers to entry for potential rivals. Transitions' conduct reasonably appears capable of making a significant contribution to the enhancement or maintenance of Transitions' monopoly power.

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30. Transitions' conduct also adversely affects competition and consumers by:

- a. increasing the prices and reducing the output of photochromic lenses;
- b. deterring, delaying and impeding the ability of Transitions' actual or potential competitors to enter or to expand their sales in the photochromic lens market;
- c. reducing innovation; and
- d. reducing consumer choice among competing photochromic lenses.

31. Additionally, by effectively stifling competition, Transitions has been able to refuse to supply its low-priced, private label photochromic lens in the U.S. market, notwithstanding considerable consumer demand for such a product. Transitions offers this product for sale outside the United States where it faces more competition. There are no legitimate procompetitive efficiencies that justify Transitions' conduct or outweigh its substantial anticompetitive effects.

VIOLATION ALLEGED

32. The acts and practices of Respondent, as alleged herein, constitute monopolization and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of April, 2010, issues its complaint against Respondent.

By the Commission, Commissioner Ramirez and Commissioner Brill not participating.

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DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Transitions Optical, Inc. (hereinafter "TOI" or Respondent), and Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of 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 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 Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent TOI is a corporation organized, existing

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and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 9251 Belcher Road, Pinellas Park, Florida 33782.

2. The Federal Trade Commission has jurisdiction of 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 this Order, the following definitions shall apply:

The Parties

- A. “Respondent” or “TOI” means Transitions Optical, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Transitions Optical, Inc.; and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.

Other Definitions

- C. “Analysis to Aid Public Comment” means the public statement provided by the Commission that describes the allegations in the Complaint in FTC Dkt. No. 091-0062 and the terms of this Order.
- D. “Antitrust Compliance Program” means the program to ensure compliance with this Order and with the

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Antitrust Laws, as required by Paragraph III of this Order.

- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et. seq.*, the Sherman Act, 15 U.S.C. § 1 *et. seq.*, and the Clayton Act, 15 U.S.C. § 12 *et. seq.*
- F. “Bundled Discount” means any Discount that is conditioned, either formally or informally, directly or indirectly, upon a Direct Customer or Indirect Customer’s purchase, distribution, promotion, marketing, license, or sale of Photochromic Products in more than one Lens Material and/or more than one Refractive Index Range.
- G. “Competing Photochromic Product” means any Photochromic Product other than Respondent’s Photochromic Product.
- H. “Corrective Ophthalmic Lenses” means any lens, whether finished, semi-finished or unfinished, that is designed to be used for vision correction and to be worn in eyeglass frames, including but not limited to, any single vision, bifocal, trifocal, or progressive lens made of or containing glass, polycarbonate, plastic, Trivex[®] or other materials.
- I. “Development Partner” means any Direct Customer that, together with Respondent, invests substantial resources, in terms of time, money and/or technical know-how, in the research and development of a new and innovative Photochromic Product.
- J. “Direct Customer” means any Person who purchases, or otherwise takes delivery or receives directly, from Respondent any Photochromic Product; or who

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conveys, delivers, consigns, or sells Corrective Ophthalmic Lenses directly to Respondent for the application of Respondent's Photochromic Materials or Photochromic Treatments. A Direct Customer includes without limitation ophthalmic lens casters, but specifically excludes Shareholders.

- K. "Discount" means any price reduction, rebate, or other incentive that provides pecuniary value to a Direct Customer or Indirect Customer, including but not limited to, marketing funds, co-op funds, and business building funds.
- L. "Exclusivity" or "Exclusive" means any requirement, whether formal or informal, or direct or indirect, by the Respondent that a Direct Customer or Indirect Customer research, develop, manufacture, distribute, produce, market, purchase, sell, or license Respondent's Photochromic Products as its Preferred or as its only Photochromic Product, or any other requirement that a Direct Customer or Indirect Customer restrain, refrain from, or limit its research, development, manufacture, production, distribution, marketing, promotion, sales, purchases, or licensing of any Competing Photochromic Product.
- M. "Executive and Sales Staff" means all Directors on the Board of Directors, the President, all Vice-Presidents, the General Counsel, the General Manager, the Chief Financial and Administrative Officer, members of the Executive Committee, and the Directors of External Affairs and Managed Vision Care of Respondent (or their equivalent positions regardless of job title); and the officers, directors, employees, and contractors of Respondent whose duties primarily relate to the marketing, promotion, or sale of Photochromic Products.

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- N. “Independent Eye Care Professional” means any optician, optometrist or ophthalmologist not affiliated with a wholesale optical laboratory or optical retailer, and who works in a non-franchised operation with fewer than four establishments.
- O. “Indirect Customer” means any Person who sells, distributes, produces, markets, promotes, purchases, or licenses Respondent’s Photochromic Products but does not buy or sell Respondent’s Photochromic Products or Corrective Ophthalmic Lenses directly from or to Respondent. Indirect Customers include, but are not limited to, any retailer of Corrective Ophthalmic Lenses, any insurance company that provides vision care benefits, and any wholesale optical laboratory, regardless of whether or not the Indirect Customer: (i) is owned, in whole or in part, by a Direct Customer; or (ii) receives shipments of Respondent’s Photochromic Products directly from Respondent on behalf of a Direct Customer.
- P. “In-Kind Contribution” means: (i) any item of pecuniary value, other than money; (ii) the reimbursement by Respondent of the purchase price of any item of pecuniary value if purchased directly by an Indirect Customer; and/or (iii) a lump-sum advance of Discounts reasonably anticipated to be paid by Respondent to an Indirect Customer if necessary to provide joint marketing support at a third party’s special event (*e.g.*, golf tournament).
- Q. “In-Person Training” means any educational session, seminar, or other meeting whereby individuals participate on a face-to-face basis or through a live video-conference feed as part of the Antitrust Compliance Program required in Paragraph III of this Order.

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- R. "Lens Material" means any glass, plastic, polycarbonate, Trivex[®] or other material used in whole or in part to manufacture Corrective Ophthalmic Lenses.
- S. "Minimum Batch Size" means the minimum quantity of Corrective Ophthalmic Lenses that can be cost effectively produced by Respondent in a single operation, which shall not exceed 150 lenses.
- T. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiary, division, group or affiliate thereof.
- U. "Photochromic Corrective Ophthalmic Lenses" means any Corrective Ophthalmic Lenses to which Photochromic Materials have been applied.
- V. "Photochromic Material" means any dye, monomer, coating, film or other substance that darkens when exposed to ultraviolet radiation and lightens when removed from ultraviolet radiation.
- W. "Photochromic Products" means one or more of Photochromic Materials, Photochromic Treatments, or Photochromic Corrective Ophthalmic Lenses.
- X. "Photochromic Treatments" means the process or method of applying Photochromic Materials to Corrective Ophthalmic Lenses.
- Y. "Preferred" means any requirement, whether formal or informal, or direct or indirect, that a Direct Customer or Indirect Customer research, develop, manufacture, produce, distribute, promote, market, purchase, sell, or

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license Respondent's Photochromic Products on a more favorable basis than a Competing Photochromic Product.

- Z. "Price Term" means the retail or wholesale price, resale price, purchase price, price list, credit term, delivery term, service term, or any other monetary term defining, setting forth, or relating to the money, compensation, or service paid by a Direct Customer or Indirect Customer to Respondent or received by a Direct Customer or Indirect Customer in connection with the purchase or sale of any of Respondent's Photochromic Product.
- AA. "Product Development Service" means any service, assistance or other support related to the research, development or application of any improved, modified, or innovative Photochromic Product.
- BB. "Product Support" means any service, assistance or other support related to: (i) the qualification or validation process associated with applying Respondent's Photochromic Materials or Photochromic Treatments on Corrective Ophthalmic lenses; and (ii) examining, identifying, and developing solutions related to any problems associated with the application to or performance of Respondent's Photochromic Materials or Photochromic Treatments on Corrective Ophthalmic Lenses.
- CC. "Refractive Index" means the measure of the ability of a Corrective Ophthalmic Lens to bend light, which influences the center thickness of the lens.
- DD. "Refractive Index Range" means each of the following categories of Refractive Indices for Corrective

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Ophthalmic Lenses: (i) 1.5; (ii) 1.51 - 1.60; and (iii) 1.61 and higher.

- EE. "Respondent's Other Photochromic Products" means any ophthalmic lenses, other than Corrective Ophthalmic Lenses, that are treated with Photochromic Materials and that are researched, developed, manufactured, produced, distributed, promoted, marketed, or sold by, under license by, or on behalf of Respondent, including but not limited to, by contract manufacturers.
- FF. "Respondent's Photochromic Product" means any Photochromic Product researched, developed, manufactured, produced, distributed promoted, marketed, or sold by, under license by, or on behalf of Respondent, including but not limited to, by contract manufacturers.
- GG. "Shareholder" means any Person that holds at least a forty (40) percent ownership interest in Respondent, its successors and assigns, and any wholly-owned subsidiaries or affiliates of such Shareholder that otherwise would be considered a Direct Customer.
- HH. "Volume Discount" means any Discount that is based upon increasing quantities of purchases or sales, by Lens Material or by Refractive Index Range, of Respondent's Photochromic Product, and specifically excludes any Discount that is based upon the amount of Respondent's Photochromic Products that are purchased or sold as a percentage or proportion of a customer's total purchases or sales of Photochromic Products.

II.

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IT IS FURTHER ORDERED that, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, in connection with the licensing, development, production, manufacture, marketing, promotion, purchase or sale of Photochromic Products:

- A. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, or understanding that has the intent or effect of achieving Exclusivity with a Direct Customer, including but not limited to:
1. Conditioning the research, development, manufacture, promotion, distribution, marketing, sale, purchase, or licensing of any of Respondent's Photochromic Products on Exclusivity;
 2. Requiring a Direct Customer to purchase minimum amounts (by units, revenue, or any other measure) of Respondent's Photochromic Products in excess of the Minimum Batch Size;
 3. Requiring a Direct Customer to restrain or limit its sales, research, development, production, distribution, marketing, promotion, purchases, or licensing of any Competing Photochromic Product; and
 4. Conditioning the availability or applicability of Discounts, Price Terms, Product Support, or Product Development Services for Respondent's Photochromic Products on Exclusivity.

provided, however, that Respondent may enter into a written agreement, contract, or other understanding

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with any Development Partner(s) that provides for Exclusivity by both the Respondent and the Development Partner(s) regarding the research, development, manufacture, promotion, purchase, or sale of any jointly developed Photochromic Product.

- B. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, understanding, or any other requirement with respect to an Indirect Customer that:
1. Contains a condition, term or other provision providing for Exclusivity unless:
 - a. the Indirect Customer, for any or no cause, and without payment or penalty of any kind, may terminate any condition, agreement, contract or understanding providing for Exclusivity upon thirty (30) days or less written notice;
 - b. the condition, term or other provision providing for Exclusivity can be applied to any subset of Lens Materials and/or any subset of Refractive Index Ranges, if requested in writing by the Indirect Customer; and
 - c. the Discount terms and rates offered or provided to an Indirect Customer by Respondent for Exclusivity on any Lens Material(s) and/or any Refractive Index Range(s) are the same irrespective of whether or not the Indirect Customer elects to be Exclusive on all Lens Materials and Refractive Index Ranges or only a subset thereof.
 2. Provides a flat or lump-sum payment of monies to an Indirect Customer in exchange for any

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condition, agreement, contract or understanding providing for Exclusivity; and

3. Provides an In-Kind Contribution to an Indirect Customer in exchange for any condition, agreement, contract or understanding providing for Exclusivity, unless:
 - a. Respondent cannot recover the In-Kind Contribution, or any part of the value of the In-Kind Contribution, in the event of termination; and
 - b. The provision of the In-Kind Contribution, or the manner in which the In-Kind Contribution is provided, does not infringe upon, limit, or otherwise make it impractical for an Indirect Customer to exercise its termination rights under Paragraph II.B.1 of this Order.
- C. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, understanding or any other requirement by the Respondent that:
1. Limits, restrains or prohibits any Direct Customer or Indirect Customer from communicating information about any Competing Photochromic Product to any Person, unless such information is false or deceptive; and
 2. Limits, restrains or prohibits any Direct Customer or Indirect Customer from selling a Competing Photochromic Product on the same brand(s) or product(s) in which the Direct Customer or Indirect Customer also sells Respondent's Photochromic

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Products, unless an Indirect Customer has a condition, agreement, contract or other understanding with Respondent providing for Exclusivity as permitted under Paragraph II.B. of this Order.

- D. Respondent, for ten (10) years from the date this Order becomes final, shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, understanding or any other requirement that:
1. Conditions Price Terms or Discounts offered or provided to a Direct Customer or Indirect Customer based upon the amount of Respondent's Photochromic Products purchased or sold (in units, revenues, or any other measure) by that Direct Customer or Indirect Customer as a percentage or proportion of that customer's total purchases or sales of Photochromic Products; and
 2. Conditions Discounts offered or provided to a Direct Customer or Indirect Customer as a flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon the Direct Customer or Indirect Customer's sales or purchases of Respondent's Photochromic Products reaching a specified threshold (in units, revenues, or any other measure), or otherwise reducing the price of one unit of Respondent's Photochromic Products because of the purchase or sale of an additional unit. By way of example, Respondent may offer or provide a discount of X% on all sales in excess of Y lenses, but it may not offer or provide a discount of X% on all lenses if sales exceed Y lenses.
- E. Respondent, for ten (10) years from the date this Order

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becomes final, shall not provide Bundled Discounts to any Direct Customer or Indirect Customer.

- F. Except to the extent permitted in Paragraph II.B of this Order, Respondent shall cease and desist from discriminating against, penalizing, or otherwise retaliating against any Direct Customer or Indirect Customer, for the reason, in whole or in part, that the Direct Customer or Indirect Customer engages in, or intends to engage in, the research, development, manufacture, production, distribution, purchase, marketing, promotion, sales, or licensing of a Competing Photochromic Product, or otherwise refuses to enter into or continue any condition, agreement, contract, understanding or other requirement of Exclusivity. Examples of prohibited discrimination or retaliation against a Direct Customer or Indirect Customer shall include, but not be limited to:
1. Terminating, suspending or delaying, or threatening or proposing thereto, sales of Respondent's Photochromic Products to the Direct Customer or Indirect Customer;
 2. Auditing the Direct Customer's or Indirect Customer's purchases or sales of Photochromic Products to determine the extent of purchases or sales of Competing Photochromic Products;
 3. Withdrawing or modifying, or threatening or proposing thereto, favorable Price Terms, Product Development Services, or Product Support to the Direct Customer;
 4. Providing, or threatening or proposing thereto, less favorable Price Terms, Product Development

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Services, or Product Support to the Direct Customer;

5. Withholding from the Direct Customer or Indirect Customer Photochromic Products newly developed or introduced by Respondent; and
6. Refusing to deal with the Direct Customer or Indirect Customer on terms and conditions generally available to other Direct Customers or Indirect Customers.

provided, however, that Respondent will not be considered to be in violation of this Paragraph by the mere fact that Respondent markets or competes against a Competing Photochromic Product that is owned or sold by a Direct Customer or Indirect Customer.

G. Notwithstanding any provision of this Order, Respondent may provide or offer to provide the following without it constituting in and of itself a violation of this Order:

1. Volume Discounts to Direct Customers or Indirect Customers that are calculated, based upon, or reflect actual differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which Respondent's Photochromic Products are sold or delivered;
2. Discounts to Direct Customers or Indirect Customers that are sufficient to meet but not exceed the Discounts, Price Terms, Product Development Services, or Product Support actually provided or offered to be provided by any Person selling, distributing, promoting, marketing, or licensing Competing Photochromic Products; and

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3. Discounts that are offered or provided to Direct Customers or Indirect Customers with a condition or other requirement that the Discount be used solely in the sale, development, manufacture, distribution, promotion or marketing of Respondent's Photochromic Products, *provided* that Respondent does not preclude sales or promotional efforts of Competing Photochromic Products on any portion of sales or marketing materials or events that are not funded by Respondent.
- H. Respondent, within ninety (90) days after the date this Order becomes final, shall waive or modify any condition, requirement, policy, agreement, contract, or understanding with Direct Customers or Indirect Customers that is inconsistent with the terms of this Order.

III.

IT IS FURTHER ORDERED that Respondent shall design, maintain, and operate an Antitrust Compliance Program to comply with this Order and with the Antitrust Laws. This program shall include, but not be limited to:

- A. Respondent's designation of an officer or director to supervise personally the design, maintenance, and operation of this program;
- B. Distribution of a copy of this Order and Exhibit A to this Order to all Executive and Sales Staff:
 1. Within thirty (30) days of the date this Order becomes final; and,

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2. Annually within thirty (30) days of the anniversary of the date this Order becomes final until the Order terminates;
- C. In-Person Training on the requirements of this Order and the Antitrust Laws for Respondent's Executive and Sales Staff to occur within thirty (30) days after this Order becomes final, or for any subsequently hired Executive and Sales Staff, within thirty (30) days of their employment start date;
 - D. The retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III of this Order;
 - E. Creation on Respondent's web site within thirty (30) days after this Order becomes final, and which shall be maintained until the termination of this Order, a link to this Order and the Analysis to Aid Public Comment on the Commission's web site, with such link to be located on Respondent's web site at a place reasonably calculated to be found by Independent Eye Care Professionals.
 - F. Distribution within thirty (30) days after this Order becomes final of a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to all Direct Customers who have purchased or sold Photochromic Products from or to Respondent within twelve (12) months prior to the date this Order becomes final; and
 - G. Distribution of a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to:
 1. All Indirect Customers with existing conditions, contracts, agreements or other understandings providing for Exclusivity within thirty (30) days

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after this Order becomes final and at the time of any contract renewal; and

2. All Indirect Customers, other than Independent Eye Care Professionals, that may enter into new conditions, contracts, agreements or other understandings providing for Exclusivity, or any other contracts, agreements or other understandings for the provision of Discounts to the Indirect Customer, at the beginning of any negotiations, or before any proposals or offers are made or accepted by Respondent.

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

- A. Within sixty (60) days after the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:
 1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;
 2. The name, title, and business address of each Person to whom Respondent distributed a copy of Exhibit A to this Order, and the date and manner of distribution to each;

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3. The name, title, and business address of each Person who received In-Person Training on the requirements of this Order and the Antitrust Laws; the date and location at which each Person was trained; the name, title, and business address of the Person who conducted the training; and a description in reasonable detail of the In-Person Training;
 4. The name, address, and phone number of each Direct Customer to whom Respondent distributed a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to this Order; and,
 5. The name, address, and phone number of each Indirect Customer to whom Respondent distributed a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to this Order.
- B. One (1) year after the date this Order becomes final, and annually for the following six (6) years on the anniversary of the date this Order becomes final, as well as at any other such times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;
 2. The name, title, and business address of each Person to whom Respondent distributed a copy of

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Exhibit A to this Order, and the date and manner of distribution to each;

3. The name, title, business address, e-mail address, and business phone number of each Person within Respondent's Executive and Sales Staff who received Exhibit A to this Order and In-Person Training on the requirements of this Order and the Antitrust Laws during the reporting period, the date each Person received Exhibit A to this Order and In-Person Training, and a description in reasonable detail of the In-Person Training;
4. A description in reasonable detail of any policy, agreement, contract, understanding, or other requirement by Respondent that a Direct Customer or Indirect Customer deal Exclusively with Respondent with respect to any of Respondent's Other Photochromic Products, and with respect to each such product:
 - (a) Describe in reasonable detail the policy, agreement, contract, understanding, or requirement providing for Exclusivity; and,
 - (b) State the name, address, phone number, and e-mail address of each Person concerning which Respondent has enforced or attempted to enforce the policy, agreement, contract, understanding, or other requirement of Exclusivity; and
5. The name, address, phone number, and e-mail address of each Person who has complained or alleged, orally or in writing (including, but not limited to, pleadings filed in any state or federal court), that Respondent has violated this Order or

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the Antitrust Laws, a description in reasonable detail of the complaint or allegation, and a description of any action or conduct by Respondent taken or proposed in response to the complaint or allegation.

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 Respondent, including but not limited to, assignment, the creation or dissolution of subsidiaries, or if such change may affect compliance obligations arising out of this Order.

VI.

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 records and documents in the possession or under the control of Respondent relating to any matters contained in this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and

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

VII.

IT IS FURTHER ORDERED that this Order shall terminate on April 22, 2030.

By the Commission, Commissioner Ramirez and Commissioner Brill not participating.

Decision and Order

EXHIBIT A**[INTERNAL NOTICE]**

The Federal Trade Commission (“FTC”) has been investigating various practices used by Transitions Inc. (“TOI”) in the marketing and sale of photochromic materials and coatings used on corrective ophthalmic lenses. The purpose of the FTC’s investigation has been to determine if any of those practices violate federal antitrust laws.

TOI does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines about how TOI can market and sell its products, TOI has reached a settlement with the FTC. Under the settlement, TOI has signed a consent agreement with the FTC agreeing that the FTC can issue and TOI will be bound by a Decision and Order (“Order”) issued by the FTC.

It is very important to TOI that all of its executives, employees and contractors understand and comply with the Order. We are providing this notice as a first step to help you do that by telling you about the Order, describing a few of its most important terms, and telling you how you can learn more about the Order and get answers to any questions you may have about it.

Some of the Order’s terms apply to TOI’s transactions with its direct customers (e.g., lens casters), some terms apply to TOI’s relationships with its indirect customers (e.g., wholesale optical laboratories and optical retailers), and some Order terms apply to both. Generally, the Order prohibits TOI, directly or indirectly, formally or informally, from agreements or practices that require its direct customers to purchase photochromic materials, coatings, or products exclusively from TOI.

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The Order's terms regarding TOI's indirect customers are different. Under circumstances described in the Order, TOI can enter into agreements with indirect customers to sell TOI's photochromic products exclusively. However, TOI must allow these indirect customers the option to terminate these agreements without cause and without penalty on 30 days notice. TOI also must allow these indirect customers the option to sell exclusively only some of TOI's products (by lens material or by refractive index range). The terms of the Order affect how TOI can offer volume discounts, cooperative advertising, and other marketing support to its customers. The Order prohibits TOI from using its pricing and marketing policies and programs to retaliate against or punish direct or indirect customers who refuse to sell TOI's photochromic products exclusively.

TOI wants to help you better understand TOI's rights and obligations under the Order. Therefore, as required by the Order, TOI has appointed [name and title] to oversee a program to train TOI's executives and sales staff on the Order and the antitrust laws. You will be contacted soon to schedule your training, which must be conducted by [insert date 30 days from the date the Order becomes final by service]. In the meantime, if you have any questions at any time about the Order or your training, please contact [identify contact person] at [e-mail or phone].

EXHIBIT B

[Transitions letterhead]

Dear [name of customer]:

The Federal Trade Commission ("FTC") has been investigating various practices used by Transitions Inc. ("TOI") in

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the marketing and sale of photochromic materials and coatings used on corrective ophthalmic lenses. The purpose of the FTC's investigation has been to determine if any of those practices violate federal antitrust laws.

TOI does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines about how TOI can market and sell its products, TOI has reached a settlement with the FTC. Under the settlement, TOI has signed a consent agreement with the FTC agreeing that the FTC can issue and TOI will be bound by a Decision and Order ("Order") issued by the FTC.

The Order requires TOI to send the enclosed copies of the Order and the FTC's Analysis to Aid Public Comment to its customers. You also may read and download a copy of the Order from the FTC at its web site at [web link to Order] and a copy of the Analysis to Aid Public Comment at [web link to AAPC]. TOI's obligations under the Order are set out in Paragraph II of the Order, beginning on page 5. Capitalized terms used in the Order are defined in Paragraph I of the Order, which begins on page 2.

If you have concerns in the future about whether TOI is complying with its obligations under the Order, TOI invites you to raise them with us directly. You may contact any of our sales staff with whom you do business, or contact our corporate offices directly by phoning or e-mailing [name] at [phone number and e-mail address].

Alternatively or additionally, you may contact the FTC directly to express your concerns. You may reach the FTC by phone at [phone number] or by e-mail at [e-mail address].

Sincerely,

[name and title]

Analysis to Aid Public Comment

ANALYSIS TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order to Cease and Desist (“Agreement”) with Transitions Optical, Inc. (“Transitions”). The Agreement seeks to resolve charges that Transitions used exclusionary acts and practices to maintain its monopoly power in the photochromic lens industry in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Photochromic lenses are corrective ophthalmic lenses that darken when exposed to the ultraviolet light present in sunlight, and fade back to clear when removed from the ultraviolet light.

The proposed Complaint that accompanies the Agreement (“Complaint”) alleges that Transitions has used its monopoly power to impose an exclusive-dealing policy on its customers since 1999. As a result, Transitions has foreclosed rivals from key distribution channels and limited competition in the relevant market, leading to higher prices, lower output, reduced innovation and diminished consumer choice.

The Commission anticipates that the competitive issues described in the Complaint will be resolved by accepting the proposed Order, subject to final approval, contained in the Agreement. The Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed Order. It is not intended to constitute an official interpretation of the Agreement and proposed Order or in any way to modify their terms.

Analysis to Aid Public Comment

The Agreement is for settlement purposes only and does not constitute an admission by Transitions that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Complaint

The Complaint makes the following allegations.

A. Industry Background

This case involves the photochromic lens industry. Consumers of corrective ophthalmic lenses (lenses used for vision correction and worn in eyeglasses) have the option to purchase those lenses with a photochromic treatment, which protects eyes from harmful ultraviolet (“UV”) light. A “photochromic lens,” which is a corrective ophthalmic lens with a photochromic treatment, will darken when it is exposed to the UV light present in sunlight, and fade back to clear when it is removed from the UV light.

In 2008, approximately 18 to 20 percent of all corrective ophthalmic lenses purchased in the United States were photochromic, and photochromic lenses totaled approximately \$630 million in sales at the wholesale level. Photochromic lenses have characteristics and uses distinct from polarized lenses (which are designed to remove glare) and fixed-tint lenses (*e.g.*, prescription sunglasses).

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

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

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

This industry structure is reflected in the diagram below.

Analysis to Aid Public Comment

B. Transitions' Monopoly Power

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

C. Transitions' Conduct

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

1. Exclusionary Practices with Direct Customers (Lens Casters)

In 1999, Corning Inc. introduced a new plastic photochromic lens, SunSensors[®], which was a direct challenge to Transitions. Transitions responded to this competitive threat by terminating the first lens caster that began selling the new SunSensors[®] lens, Signet Armorlite, Inc. ("Signet"), and by adopting a general policy not to deal with lens casters that sold or promoted a competing photochromic lens. Transitions furthered its anticompetitive and exclusionary efforts by, among other things: (i) entering into exclusive agreements with certain lens casters; (ii) announcing to the industry its policy of dealing only with lens casters that sold its lenses on an exclusive basis; (iii) threatening to terminate lens casters that did not want to sell its lenses on an exclusive basis; and (iv) terminating a second lens caster, Vision-Ease Lens

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("Vision-Ease"), that developed a photochromic treatment, LifeRx[®], to apply to its own ophthalmic lenses. Because of Transitions' course of conduct, even lens casters that have not signed exclusive agreements have a clear understanding that they cannot sell or promote a competing photochromic lens without being terminated by Transitions.

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

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

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

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

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

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

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

D. Competitive Impact of Transitions' Conduct

Transitions' course of conduct harms competition by marginalizing existing competitors and by deterring new entry. Faced with the threat of termination by Transitions, no major lens caster operating in the United States has been willing to carry the plastic SunSensors[®] lens since Transitions terminated Signet. Without access to effective distribution, Corning has been unable to pose a competitive threat to Transitions' monopoly, and has had little incentive to invest in research and development to improve

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its product. Further, some lens casters would likely develop and/or sell competing photochromic lenses, but Transitions' exclusive dealing – particularly its “all or nothing” ultimatum to lens casters – effectively deters new entrants.

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

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

Transitions' exclusionary practices have likely increased prices and reduced output. For example, because it does not face effective competition, Transitions has been able to ignore consumer demand and refuse to supply its low-priced, private label photochromic lens in the U.S. market, even though Transitions offers this product in other markets.

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Transitions' conduct has also harmed consumers by depriving rivals of the incentive to innovate and to develop competing photochromic lenses. If faced with more competition, Transitions would also likely have a greater incentive to invest additional resources in research and development.

There are no procompetitive efficiencies that justify Transitions' conduct or outweigh its substantial anticompetitive effects.

II. Legal Analysis

Exclusive dealing by a monopolist is condemned under Section 2 of the Sherman Act, 15 U.S.C. § 2, when the challenged conduct significantly impairs the ability of rivals to compete with the monopolist and thus to constrain its exercise of monopoly power.¹ Agreements that foreclose key distribution channels are often found to have this proscribed effect and are deemed illegal.²

¹ See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985) (exclusionary conduct "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way") (citations omitted); *Lorain Journal Co. v. United States*, 342 U.S. 143, 151-54 (1951) (condemning newspaper's refusal to deal with customers that also advertised on rival radio station because it harmed the radio station's ability to compete); *United States v. Microsoft Corp.*, 253 F.3d 34, 68-71 (D.C. Cir. 2001) (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly"); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) ("test is not total foreclosure but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit"); *LePage's, Inc. v. 3M*, 324 F.3d 141, 159-60 (3d Cir. 2003) (same).

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

Analysis to Aid Public Comment

The factual allegations in the Complaint are consistent with a finding of monopoly power and competitive harm. Transitions' policy of requiring exclusivity from its lens caster customers has foreclosed its rivals from over 85 percent of available sales opportunities at this level of the distribution chain. This foreclosure is particularly significant because nearly all photochromic lenses are first sold by lens casters – attempts to fabricate photochromic lenses at the wholesale lab or retailer level have largely been abandoned as uneconomical. The competitive impact of this exclusive dealing with lens casters is amplified by Transitions' exclusionary practices with retailers and wholesale labs, which further foreclose rivals, in whole or in part, from as much as 40 percent or more of these downstream distribution channels. Transitions' exclusionary conduct has thus likely caused higher prices, lower output, and reduced innovation and consumer choice.

A monopolist may rebut a such a showing of competitive harm by demonstrating that the challenged conduct is reasonably necessary to achieve a procompetitive benefit.³ Any proffered justification, if proven, must be balanced against the harm caused by the challenged conduct.⁴

No procompetitive efficiencies justify Transitions' exclusionary and anticompetitive conduct. Transitions cannot show that the exclusive arrangements were reasonably necessary to achieve a procompetitive benefit, such as protecting Transitions' intellectual property or technical know-how, or preventing interbrand free-riding.⁵ Transitions does not transfer

³ *E.g., Microsoft*, 253 F.3d at 59.

⁴ *Id.*

⁵ "Interbrand free-riding" occurs when a manufacturer provides services, training, or other incentives in the promotion of its products for which it cannot

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substantial intellectual property or technical know-how to its customers, and even if it did, any such transfer would likely be protected by existing confidentiality agreements.

A concern about interbrand free-riding also does not justify the substantial anticompetitive effects found here. The vast majority of Transitions' promotional efforts are brand specific, reducing the significance of any free-riding concern.⁶ While Transitions' marketing efforts may generate some consumer interest in the product category as a whole – and not just in Transitions' own products – this is a part of the natural competitive process. This type of consumer response does not raise a free-riding concern sufficient to justify the substantial anticompetitive effects found here.⁷

III. The Order

The proposed Order remedies Transitions' anticompetitive and exclusionary conduct and imposes certain fencing-in requirements that are designed to prevent *de facto* exclusive dealing.⁸ Paragraph II of the Order addresses the core of Transitions'

easily charge its dealer, and that dealer “free-rides” on these demand-generating services by substituting a cheaper, more profitable product made by another manufacturer that does not invest in comparable services. See generally Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1, 8 (1982).

⁶ See *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387, 445 (D. Del. 2003), *aff'd in rel. part*, 399 F.3d at 196-97; Marvel, *Exclusive Dealing*, 25 J.L. & ECON. at 8 (explaining that an interbrand free-riding justification “does not apply if the promotional investment is purely brand specific. In such cases, the dealer will not be in a position to switch customers from brand to brand.”).

⁷ See *In re Polygram*, 136 F.T.C. 310, 361-62 (2003), *aff'd*, 416 F.3d 29, 37-38 (D.C. Cir. 2005).

⁸ We use the term “*de facto* exclusive dealing” to refer to practices that significantly deter a customer from purchasing or selling a competing photochromic lens.

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exclusionary conduct and seeks to lower entry barriers and to restore competition. Paragraph III requires Transitions to implement an antitrust compliance program, which includes providing notice of this Order to Transitions' customers. Paragraphs IV-VI impose reporting and other compliance requirements. The Order expires in 20 years unless otherwise indicated.

Paragraph II.A prohibits Transitions from adopting or implementing any agreement or policy that results in "exclusivity" with lens casters, or its "Direct Customers." "Exclusivity" is defined in the Order to include any requirement that a customer limit or refrain from dealing with a competing photochromic lens, as well as any requirement that a customer give Transitions' products more favorable treatment as compared to a competitor's products.

Paragraph II.B allows Transitions to enter into exclusive agreements with retailers and wholesale labs ("Indirect Customers"), provided certain safeguards are met. Specifically, any exclusive agreements with Indirect Customers must: i) be terminable without cause, and without penalty, on 30 days written notice; ii) be available on a partially exclusive basis, if requested by the customer; and iii) not offer flat payments of monies in exchange for exclusivity. These provisions, along with Paragraph II.E, which prohibits Transitions from bundling discounts, are designed to enable a competitor or entrant to compete for a customer's business, even if it does not offer a photochromic treatment that applies to a full line of ophthalmic lenses. Creating conditions conducive to effective entry on an incremental basis is likely to hasten new entry and to restore competition.

Under Paragraph II.C, Transitions may not limit its customers from communicating or discussing a competing photochromic lens with consumers and others. This Paragraph also requires Transitions to allow a lens caster or another customer that sells

Analysis to Aid Public Comment

Transitions' photochromic treatment on a particular brand of lens to sell a competitors' photochromic treatment on the same brand.

Paragraph II.D has two provisions designed to prevent *de facto* exclusive dealing through pricing policies. First, Transitions cannot offer market share discounts, *i.e.*, discounts based on the percentage of a customer's sales of Transitions' lenses as a percentage of all photochromic lens sales. Second, Transitions cannot offer discounts that are applied retroactively once a customer reaches a specified threshold. For example, Transitions may provide a discount on sales beyond 1000 units but it may not lower the price of the first 999 units if and when the customer buys the 1000th unit. The provisions in Paragraph II.D, along with Paragraph II.E, will be in effect for 10 years.

Notwithstanding any provision of the Order, Paragraph II.G explicitly allows Transitions to provide volume discounts that reflect certain cost differences, and to offer discounts to meet competition. It also allows Transitions to require that any monies it provides to customers be used solely for the manufacture, promotion or sale of Transitions lenses.

Finally, Paragraph II.F prohibits Transitions from retaliating against a customer that purchases or sells Transitions lenses on a non-exclusive basis.

Complaint

IN THE MATTER OF

**SERVICE CORPORATION INTERNATIONAL
AND
KEYSTONE NORTH AMERICA, INC.**

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

*Docket No. C-4284; File No. 101 0013
Filed, March 24, 2010 — Decision, April 30, 2010*

This consent order addresses the acquisition by Service Corporation International of Keystone North America Inc. The relevant funeral and cemetery services markets are highly concentrated, and the acquisition would significantly increase market concentration and eliminate substantial, direct competition between two significant funeral and cemetery services providers. The acquisition also will result in SCI controlling between 52 percent and 93 percent market share in each of the affected funeral services markets. With respect to the cemetery services markets, the acquisition will reduce the number of cemetery services providers from five to four in the Columbia, South Carolina and Macon, Georgia areas, and from three to two in Yuma, Arizona. The proposed Consent Agreement requires the divestiture of 22 funeral services facilities and four cemetery services facilities, as well as related equipment, customer and supply contracts, commercial trade names, and real property in the 19 funeral and cemetery services markets at issue in this transaction. Each funeral and cemetery services facility to be divested is a stand-alone business, and includes all of the assets necessary for a Commission-approved buyer to independently and effectively operate each facility.

Participants

For the *Commission*: Susan Huber, Kaj Rozga, Andrea Ryan, Jennifer Stiefvater, and Michelle Yost.

For the *Respondents*: Brian McCalmon and James Weiss, K&L Gates LLP; and Howard Fogt, Jr. and Alan Rutenberg, Foley & Lardner LLP.