

## Complaint

## IN THE MATTER OF

**AGILENT TECHNOLOGIES, 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-4292; File No. 091 0135*  
*Filed, June 25, 2010 — Decision, June 25, 2010*

This consent order addresses the \$1.5 billion acquisition by Agilent Technologies, Inc., of Varian, Inc. Agilent and Varian are the only two competitors in the market for Micro Gas Chromatography instruments. With only four suppliers, the markets for Triple Quadrupole Gas Chromatography-Mass Spectrometry and Inductively Coupled Plasma-Mass Spectrometry instruments are highly concentrated. Agilent's acquisition of Varian would leave only three suppliers, which would lessen competition in the markets for Micro GC, 3Q GC-MS and ICP-MS instruments. The order requires Agilent to: (1) divest the assets of its Micro Gas Chromatography instruments business to Inficon Group, a subsidiary of Inficon Holding AG; and (2) divest the assets of Varian's Triple Quadrupole Gas Chromatography-Mass Spectrometry and Inductively Coupled Plasma-Mass Spectrometry instruments businesses to Bruker Corp.

*Participants*

For the *Commission*: *Richard H. Cunningham, Lisa D. DeMarchi Sleigh, Aylin Skroejer, and James R. Weiss.*

For the *Respondents*: *Joanne C. Lewers and Robert A. Skitol, Drinker Biddle & Reath LLP.*

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Agilent Technologies, Inc. ("Agilent"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Varian,

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Inc. ("Varian"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 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 Agilent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 5301 Stevens Creek Blvd., Santa Clara, California 95051.

2. Respondent is engaged in, among other things, the production and sale of micro gas chromatography instruments, triple quadrupole gas chromatography-mass spectrometry instruments, and inductively coupled plasma-mass spectrometry instruments.

3. Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and 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.

**II. THE ACQUIRED COMPANY**

4. Varian is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 3120 Hansen Way, Palo Alto, California 94304.

5. Varian is engaged in, among other things, the production and sale of micro gas chromatography instruments, triple quadrupole gas chromatography-mass spectrometry instruments,

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and inductively coupled plasma-mass spectrometry instruments.

### III. PROPOSED ACQUISITION

6. Pursuant to an Agreement and Plan of Merger (the "Agreement") dated July 26, 2009, Agilent announced its intention to acquire the stock of Varian for \$1.5 billion (the "Acquisition").

### IV. RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the manufacture and sale of the following products: (a) micro gas chromatography instruments; (b) triple quadrupole gas chromatography-mass spectrometry instruments; and (c) inductively coupled plasma-mass spectrometry instruments.

- a. Micro gas chromatography instruments are portable gas chromatography instruments that are used primarily in the oil, mining, and waste disposal industries to detect the presence of certain toxins in air or in emissions. Unlike other types of gas chromatography equipment, these instruments are designed to be used in the field, and therefore are small and light enough to be portable, and sufficiently robust to withstand travel and field use in a variety of environments.
- b. Triple quadrupole gas chromatography-mass spectrometry instruments combine a gas chromatograph with a triple quadrupole mass spectrometer. They are extraordinarily sensitive devices that provide molecular-level analysis of the components of a sample and are commonly used to test for pesticides in food, drugs in blood, and

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environmental contaminants, such as lead, in drinking water.

- c. Inductively coupled plasma-mass spectrometry instruments combine inductively coupled plasma technology and mass spectrometry technology and are used for the analysis of inorganic materials. The most common application for the instrument is testing water samples, such as drinking, ground, waste, and seawater, for the presence of toxic metals, like arsenic, mercury, or lead.

8. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce. To compete in the relevant product markets in the United States, a firm must establish a local sales force, service infrastructure, and reputation among purchasers in the relevant product markets.

**V. STRUCTURE OF THE MARKETS**

9. In the United States, Agilent and Varian are the sole competitors in the \$6.8 million market for micro gas chromatography instruments. Agilent and Varian account for approximately 75 percent and 25 percent of the market, respectively, and directly compete on price, service, and product innovation. As a result, the Acquisition would significantly increase concentration and create a monopoly.

10. The market for triple quadrupole gas chromatography-mass spectrometry instruments is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). In the United States, there are only four suppliers of triple quadrupole gas chromatography-mass spectrometry instruments. The Acquisition would reduce the number of suppliers from four to three, leaving Agilent significantly larger than any of its remaining competitors in this \$7 million market. Post-acquisition, the combined Agilent and Varian would have in excess of a 48 percent share of the U.S.

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market. The other two competitors, Thermo Fisher Scientific, Inc. and Waters Corp., have market shares of approximately 36 percent and 16 percent, respectively. The post-merger HHI would be 3,882 points and the acquisition will increase the HHI level by 1,157 points. This market concentration level far exceeds the range in which a proposed acquisition is likely to create market power or enhance the likelihood that it can be exercised successfully.

11. The market for inductively coupled plasma-mass spectrometry instruments is highly concentrated as measured by the HHI. In the United States, there are only four suppliers of inductively coupled plasma-mass spectrometry instruments. Agilent accounts for 40 percent of the \$26 million market for inductively coupled plasma-mass spectrometry instruments and the Acquisition would entrench Agilent further as the dominant supplier of inductively coupled plasma-mass spectrometry instruments in the United States and increase concentration significantly. Post-acquisition, the combined Agilent and Varian would have in excess of a 48 percent share of the U.S. market. The other two competitors, Thermo and PerkinElmer, Inc., have market shares of approximately 14 percent and 37 percent, respectively. The post-merger HHI would be 3,948 points and the acquisition will increase the HHI level by 705 points. This market concentration level far exceeds the range in which a proposed acquisition is likely to create market power or enhance the likelihood that it can be exercised successfully.

## VI. ENTRY CONDITIONS

12. Neither new entry nor entry by existing suppliers from outside the United States into the relevant product markets described in Paragraph 6 sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is likely to occur within two years. Entry into the relevant product markets *de novo* requires a significant amount of time and resources. In order to be successful, a new entrant must develop technology that

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is at least equivalent to the incumbent technologies in terms of performance and reliability. A new entrant must also develop around or obtain licenses for existing intellectual property. Finally, a new entrant must establish a U.S. sales force, support, capability, and reputation for robust and reliable instrument performance. Companies selling relevant products outside of the United States face the same reputation, sales, and service barriers as new entrants. Therefore, entry into the relevant line of commerce would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition.

**VII. EFFECTS OF THE ACQUISITION**

13. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Agilent and Varian for the sale of each of the relevant products in the United States;
- b. by increasing the likelihood that Respondent would unilaterally exercise market power in the U.S. markets for each of the relevant products;
- c. by increasing the likelihood that U.S. customers would be forced to pay higher prices for each of the relevant products;
- d. by increasing the likelihood that consumers would experience lower levels of innovation and service in the U.S. markets for each of the relevant products; and
- e. by increasing the likelihood and degree of coordinated interaction between or among suppliers in the U.S. markets for each of the relevant products.

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**VIII. VIOLATIONS CHARGED**

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

15. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-fifth day of June, 2010, issues its Complaint against said Respondent.

By the Commission.

## Decision and Order

**DECISION AND ORDER**  
**[Redacted Public Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Varian, Inc. (“Varian”) by Agilent Technologies, Inc. (“Respondent Agilent”), and Respondent Agilent 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 by the Commission, would charge Respondent Agilent 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 Agilent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent Agilent 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 Agilent 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 Agilent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, 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 Agilent is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 5301 Stevens Creek Boulevard, Santa Clara, California 95051.

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:

- A. “Agilent” means Agilent Technologies, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agilent Technologies, Inc. (including Varian, after the Acquisition Date), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Varian” means Varian, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 3120 Hansen Way, Palo Alto, California 94304.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquisition” means Respondent Agilent’s acquisition of Varian.
- E. “Acquisition Date” means the date on which the

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Acquisition is consummated.

- F. “Confidential Business Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, technologies, processes, or other trade secrets.
- G. “Copyrights” means rights to all original works of authorship of any kind directly Related To the Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, as applicable, and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports Relating To the research and development of the Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, as applicable, or of any materials used in the research, Development, manufacture, marketing or sale of the Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information; all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks Relating To the

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Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products; all copyrights in analytical and quality control data; and all correspondence with governmental agencies.

- H. “Designated Employee” means Designated Micro GC Employee, Designated ICP-MS Employee, or Designated Triple Quad Employee.
- I. “Development” means all research and development activities, including, without limitation, the following: test method development; stability testing; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all product approvals or certifications. Develop means to engage in Development.
- J. “Divested Business” means the Micro GC Business, the ICP-MS Business, or the Triple Quad Business.
- K. “Divested Products” means the Agilent Micro GC Products, the Varian ICP-MS Products, or the Varian Triple Quad Products.
- L. “Effective Date” means the Micro GC Effective Date, the ICP-MS Effective Date, or the Triple Quad Effective Date.
- M. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions,

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divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, Related To any product of or owned by Respondent Agilent as of the Acquisition Date.

- N. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- O. "Relating To" or "Related To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- P. "Software" means computer programs Related To the production and use of Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, respectively, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, Related To any of the foregoing and the content and information contained on any website; *provided, however*, that Software does not include software that can readily be purchased or licensed from sources other than Respondent Agilent and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).
- Q. "Trade Dress" means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate

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name.

- R. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Agilent Micro GC Products, Varian Triple Quad Products, and Varian ICP-MS Products.

**[Micro GC Definitions]**

- S. “Agilent-Inficon Micro GC Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by Inficon and Respondent Agilent for the sale of the Agilent Micro GC Business. The Agilent-Inficon Micro GC Divestiture Agreement is attached as Confidential Exhibit A to this Order.
- T. “Agilent Micro GC Products” means the Micro GC instruments, Developed, manufactured and sold by Agilent, including but not limited to, Agilent models G2801-300A; G2802-3000A; G2803A-300A; G2804A-300A; G2805A-300A; G2806A-300A; and G2807A-300A.
- U. “Agilent Micro GC Business” means:
1. Agilent Micro GC Information;
  2. Agilent Micro GC Intellectual Property;

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*Provided, however,* that the Agilent Micro GC Intellectual Property does not include Agilent Micro GC Shared Intellectual Property.

*Provided, further, however,* that the Agilent Micro GC Intellectual Property does not include the corporate names or corporate Trade Dress of Agilent, or the related logos thereof.

3. Agilent Micro GC Inventory; and
  4. Agilent Micro GC Tangible Assets.
- V. “Agilent Micro GC Intellectual Property” means all of the following Related To the Agilent Micro GC Products including, but not limited to:
1. Copyrights;
  2. Patents;
  3. Software;
  4. Trademarks;
  5. Trade Dress;
  6. trade secrets, know-how, drawings, utility models, designs, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
  7. rights to obtain and file for Patents and Copyrights and registrations thereof;

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8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
  9. the exclusive right to all Agilent intellectual property used solely in the Development, manufacturing, storage, distribution and sale of the Agilent Micro GC Products including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party Software if transferable and sub-licenses to Software modified by Agilent), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets, technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.
- W. “Agilent Micro GC Information” means all information owned by, or in the possession or control of, Respondent Agilent that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Agilent Micro GC Products including, but not limited to, information not otherwise included in the Agilent Micro GC Intellectual Property, customer lists, current and historical

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customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Agilent's approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Agilent Micro GC Products including, without limitation, all filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Agilent in any location Relating To the Agilent Micro GC Products.

- X. "Agilent Micro GC Inventory" means all inventory of raw materials, intermediate work in progress, spare parts, prototypes, and finished Agilent Micro GC Products, wherever located.
- Y. "Agilent Micro GC Tangible Assets" means all of Respondent's rights, title, and interest in all physical assets Relating To the Development, manufacture, sale, and distribution of the Agilent Micro GC Products including, without limitation, the following:
  - 1. all machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property located at or Relating To a facility owned and operated by Respondent at No. 412 Ting Lun Road, Wai Gao Qiao Free Trade Zone, Shanghai, 200131, P.R. China.
  - 2. all machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property located at or Relating To a facility owned and operated by Respondent at

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2850 Centerville Road, Wilmington, Delaware.

*Provided, however, Agilent Micro GC Tangible Assets does not include any real property, plant facilities, or buildings located at Respondent Agilent's facilities in Shanghai, China or Wilmington, Delaware.*

- Z. "Agilent Micro GC Shared Intellectual Property" means the Agilent Micro GC Intellectual Property that is not used by Agilent exclusively for the Agilent Micro GC Business.
- AA. "Designated Micro GC Employee" means the employee or person filling the job descriptions listed in Confidential Exhibit C to this Order. "Designated Micro GC Employee" may include any other person not listed on Confidential Exhibit C to this Order who has been identified by the Micro GC Acquirer and the Monitor, and determined by the Commission staff to have devoted more than 25% of his/her time to Agilent Micro GC Products in the twelve (12) months preceding the Acquisition Date.
- BB. "Inficon" means Inficon Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its international headquarters located at Hintergasse 15B, CH-7310 Bad Ragaz, Switzerland and its principal place of business located in the United States at Two Technology Place, East Syracuse, New York 13057-9714.
- CC. "Manifold Supply Agreement" means the agreement between the Micro GC Acquirer and Respondent Agilent under which Respondent Agilent will produce the nickel-plated manifold used in the production of the Agilent Micro GC Products, which shall be approved by the Commission and become a part of the

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## Micro GC Divestiture Agreement.

- DD. “Micro GC” means a portable (transportable by one person) gas chromatograph having intimately connected column, injector valve and detectors, an ability to run on a 200 watt or lower capacity battery or power supply, and a carrier gas requirement of 1 to 5 mL/min per channel or less.
- EE. “Micro GC Acquirer” means the Person specified by name in this Order, or the Person approved by the Commission, to acquire the Agilent Micro GC Business pursuant to Paragraph II or Paragraph VII of this Order. The Micro GC Acquirer may be the same Person as the Triple Quad Acquirer and the ICP-MS Acquirer.
- FF. “Micro GC Acquirer Employee” means any person employed by the Micro GC Acquirer who has been determined by the Micro GC Acquirer, the Monitor, and Commission staff to have devoted any of his/her time to Agilent Micro GC Products after the Micro GC Effective Date.
- GG. “Micro GC Contracts” means:
1. Micro GC Customer Contracts;
  2. Micro GC Sales and Distribution Contracts;
  3. Micro GC Flow Parts Contracts;
  4. Micro GC Service Contracts; and
  5. Micro GC Supply Contracts.
- HH. “Micro GC Customer Contracts” means the customer contracts for the purchase and sale of Agilent Micro

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GC Products. Micro GC Customer Contracts shall include contracts between Agilent and a customer that are not exclusively for the purchase and sale of Agilent Micro GC Products, but may also include other Agilent products, to the extent that such contracts pertain to the purchase and sale of Agilent Micro GC Products.

- II. “Micro GC Sales and Distribution Contracts” means the contracts between Agilent and Persons who sell and distribute the Agilent Micro GC Products including, but not limited to, those contracts identified in Confidential Exhibit M.
- JJ. “Micro GC Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the Micro GC Acquirer and Respondent Agilent, including the Agilent-Inficon Micro GC Divestiture Agreement, pursuant to Paragraph II.
- KK. “Micro GC Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph II or Paragraph VII of this Order, are consummated.
- LL. “Micro GC Flow Parts Contracts” means the contracts between Agilent and Micralyne, Inc. for the supply and maintenance of flow parts for the manufacture and production of Agilent Micro GC Products, attached as Confidential Exhibit D.
- MM. “Micro GC Service Contracts” means the contracts under which Respondent Agilent provides repair and maintenance services for the Agilent Micro GC Products.

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- NN. “Micro GC Supply Contracts” means the contracts under which Respondent Agilent purchases inputs used in the manufacture and production of the Agilent Micro GC Products.
- OO. “Remedial Micro GC Agreement” means the following:
1. the Agilent-Inficon Micro GC Divestiture Agreement if such agreement has not been rejected by the Commission pursuant to Paragraph II.F of this Order; and
  2. any agreement between Respondent Agilent and a Commission-approved Micro GC Acquirer (or between a Divestiture Trustee and a Commission-approved Micro GC Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.
- PP. “Varian Micro GC Products” means Micro GC instruments Developed, manufactured or sold by Varian including, but not limited to, products contained in the Varian CP-4900 series.

**[Triple Quad Definitions]**

- QQ. “Bruker” means Bruker Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its international headquarters and principal place of business located in the United States at 40 Manning Road, Billerica,

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Massachusetts 01821.

- RR. “Agilent-Bruker Divestiture Agreement” means all the divestiture agreements, licenses, assignment, and other agreements entered into by Bruker and Respondent Agilent for the sale of the Varian Triple Quad Business and the Varian ICP-MS Business. The Agilent-Bruker Divestiture Agreement is attached as Confidential Exhibit B to this Order.
- SS. “Agilent Triple Quad Products” means Triple Quad instruments manufactured, researched, Developed or sold by Agilent that combine a gas chromatograph with a triple quadrupole mass spectrometer including, but not limited to, the Agilent 7000A product series.
- TT. “Designated Triple Quad Employee” means the employee or person filling the job descriptions listed in Confidential Exhibit E to this Order. “Designated Triple Quad Employee” may include any other person not listed on Confidential Exhibit E to this Order who has been identified by the Triple Quad Acquirer and the Monitor, and determined by Commission staff to have devoted more than 25% of his/her time to Varian Triple Quad Products in the twelve (12) months preceding the Acquisition Date.
- UU. “Remedial Triple Quad Agreement” means the following:
1. the Agilent-Bruker Divestiture Agreement, if such agreement has not been rejected by the Commission pursuant to Paragraph III.F of this Order; and
  2. any agreement between Respondent Agilent and a Commission-approved Triple Quad Acquirer (or

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between a Divestiture Trustee and a Commission-approved Triple Quad Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.

- VV. "Triple Quad" means an instrument that combines a gas chromatograph with a triple quadrupole mass spectrometer.
- WW. "Triple Quad Acquirer" means the Person specified by name in this Order, or the Person approved by the Commission, to acquire the Varian Triple Business pursuant to Paragraph III or Paragraph VII of this Order. The Triple Quad Acquirer may be the same Person as the Micro GC Acquirer or the ICP-MS Acquirer.
- XX. "Triple Quad Acquirer Employee" means any person employed by the Triple Quad Acquirer who has been determined by the Triple Quad Acquirer, the Monitor, and Commission staff to have devoted any of his/her time to Varian Triple Quad Products after the Triple Quad Effective Date.
- YY. "Triple Quad Contracts" means:
1. Triple Quad Customer Contracts;
  2. Triple Quad Sales and Distribution Contracts;
  3. Triple Quad Service Contracts; and

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## 4. Triple Quad Supply Contracts.

- ZZ. “Triple Quad Customer Contracts” means the customer contracts for the purchase and sale of Varian Triple Quad Products. Triple Quad Customer Contracts shall include contracts between Varian and a customer that are not exclusively for Varian Triple Quad Products, but may also include other Varian products, to the extent that such contracts pertain to the purchase and sale of Varian Triple Quad Products.
- AAA. “Triple Quad Sales and Distribution Contracts” means the contracts between Varian and Persons who sell and distribute the Varian Triple Quad Products including, but not limited to, those contracts identified in Confidential Exhibit F.
- BBB. “Triple Quad Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the Triple Quad Acquirer and Respondent Agilent pursuant to Paragraph III of this Order, including the Agilent-Bruker Divestiture Agreement.
- CCC. “Triple Quad Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph III or Paragraph VII of this Order, are consummated.
- DDD. “Triple Quad Laboratory GC Supply Agreement” means an agreement between the Triple Quad Acquirer and Respondent Agilent under which Respondent Agilent will produce laboratory gas chromatographs for incorporation into the Varian Triple Quad Products, which shall be approved by the Commission and become a part of the Triple Quad Divestiture Agreement.

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- EEE. “Triple Quad Service Contracts” means the contracts under which Varian provides repair and maintenance services for the Varian Triple Quad Products.
- FFF. “Triple Quad Supply Contracts” means the contracts for the supply of inputs used in the manufacture and production of the Varian Triple Quad Products including, but not limited to, the contracts identified in Confidential Exhibit G.
- GGG. “Triple Quad Vacuum Pump Supply Agreement” means an agreement between the Triple Quad Acquirer and Respondent Agilent under which Respondent Agilent will produce vacuum pumps used in the production of the Varian Triple Quad Products, which shall be approved by the Commission and become a part of the Triple Quad Divestiture Agreement.
- HHH. “Vacuum Pump Intellectual Property” means the Varian intellectual property Related To the manufacture and production of the vacuum pump used in the GC-MS 360 Varian Triple Quad Product, currently known as the Dual Flow Turbo Pump for CSB/SMB part number 9300010100, including, but not limited to, Software, computer programs, patents, licenses, know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), protocols (including, but not limited to, operational manuals), research and development, quality control information and the modifications or improvements to such intellectual property.

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III. “Varian Triple Quad Products” means Triple Quad instruments Developed, manufactured, or sold by Varian before the Triple Quad Effective Date including, but not limited to, the Varian products designated as GC-MS 300, GC-MS 320, and GC-MS 360, which also can be modified for use as a single quadropole gas chromatograph/mass spectrometer.

JJJ. “Varian Triple Quad Business” means:

1. Varian Triple Quad Tangible Assets;
2. Varian Triple Quad Information;
3. Varian Triple Quad Intellectual Property;

*Provided, however,* that the Varian Triple Quad Intellectual Property does not include Varian Triple Quad Shared Intellectual Property;

*Provided, further, however,* that the Varian Triple Quad Intellectual Property does not include the corporate names or corporate Trade Dress of Varian, or the related logos thereof or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent Agilent or the related logos thereof; and

4. Varian Triple Quad Inventory.

KKK. “Varian Triple Quad Information” means all information owned by, or in the possession or control of, Varian, that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of

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the Varian Triple Quad Products including but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Varian's approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Varian Triple Quad Products including, without limitation, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Varian in any location Relating To the Varian Triple Quad Products.

LLL. "Varian Triple Quad Intellectual Property" means all of the following Related To each Varian Triple Quad Product owned by Varian or for which Varian has the right to sub-license to third parties as of the Acquisition Date including but not limited to:

1. Copyrights;
2. Patents;
3. Software;
4. Trademarks;
5. Trade Dress;
6. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research,

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Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;

7. rights to obtain and file for Patents and Copyrights and registrations thereof;
8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
9. the exclusive right to all Varian Triple Quad intellectual property used solely in the research, Development, manufacturing, storage, distribution and sale of Varian Triple Quad Products including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to software modified by Varian), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

MMM. "Varian Triple Quad Inventory" means all inventory of raw materials, intermediate work in progress, spare

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parts, prototypes, and finished Varian Triple Quad Products, wherever located. *Provided, however,* that spare parts inventory, and demonstration and research inventory Related To Varian Triple Quad Products shall be allocated between the Varian Triple Quad Acquirer and Respondent Agilent in a manner that is approved by the Commission and the Monitor.

NNN. “Varian Triple Quad Shared Intellectual Property” means the Varian Triple Quad Intellectual Property that is not used by Varian exclusively for the Varian Triple Quad Business, including but not limited to, Vacuum Pump Intellectual Property.

OOO. “Varian Triple Quad Tangible Assets” means all of Varian’s rights, title, and interest in the physical assets and businesses located at or Relating To a facility owned and operated by Varian at 2700 Mitchell Drive, Walnut Creek, California, and Relating To the research, Development, manufacture, sale, and distribution of the Varian Triple Quad Products including, but not limited to, the assets identified in the Triple Quad Divestiture Agreement. *Provided, however,* that the Varian Triple Quad Tangible Assets does not include any real property, plant facilities, or buildings located at Varian’s facility in Walnut Creek, California.

**[ICP-MS Definitions]**

PPP. “Agilent ICP-MS Products” means ICP-MS instruments Developed, manufactured, or sold by Agilent, including but not limited to, the Agilent 7700 product series.

QQQ. “ICP-MS” means instruments that combine inductively coupled plasma technology and mass spectrometry technology, used for the analysis of inorganic

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materials.

RRR. "Remedial ICP-MS Agreement" means the following:

1. the Agilent-Bruker Divestiture Agreement, if such agreement has not been rejected by the Commission pursuant to Paragraph IV.F of this Order; and
2. any agreement between Respondent Agilent and a Commission-approved ICP-MS Acquirer (or between a Divestiture Trustee and a Commission-approved ICP-MS Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.

SSS. "Varian ICP-MS Products" means ICP-MS instruments Developed, manufactured, or sold by Varian before the ICP-MS Effective Date including, but not limited to, the Varian products designated as 810-MS and 820-MS.

TTT. "Varian ICP-MS Business" means:

1. Varian ICP-MS Tangible Assets;
2. Varian ICP-MS Information;
3. Varian ICP-MS Intellectual Property;

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*Provided, however,* that the Varian ICP-MS Intellectual Property does not include Varian ICP-MS Shared Intellectual Property;

*Provided, further, however,* that the Varian ICP-MS Intellectual Property does not include the corporate names or corporate Trade Dress of Varian, or the related logos thereof or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent Agilent or the related logos thereof; and

4. Varian ICP-MS Inventory.

UUU. "Varian ICP-MS Information" means all information owned by, or in the possession or control of, Varian, that is not in the public domain and that is Related To the Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Varian ICP-MS Products including but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Varian's approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Varian ICP-MS Products including, without limitation, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Varian in any location Relating To the Varian ICP-MS Products.

VVV. "Designated ICP-MS Employee" means the employee or person filling the job descriptions listed in

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Confidential Exhibit H to this Order. “Designated ICP-MS Employee” may include any other person not listed on Confidential Exhibit H to this Order who has been identified by the Triple Quad Acquirer and the Monitor, and determined by Commission staff to have devoted more than 25% of his/her time to Varian ICP-MS Products in the twelve (12) months preceding the Acquisition Date.

WWW. “Varian ICP-MS Intellectual Property” means all of the following Related To each Varian ICP-MS Product owned by Varian or for which Varian has the right to sub-license to third parties as of the Acquisition Date including but not limited to:

1. Copyrights;
2. Patents;
3. Software;
4. Trademarks;
5. Trade Dress;
6. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
7. rights to obtain and file for Patents and Copyrights and registrations thereof;

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8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
9. the exclusive right to all Varian ICP-MS intellectual property used solely in the research, Development, manufacturing, storage, distribution and sale of Varian ICP-MS Products including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to software modified by Varian), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

XXX. "Varian ICP-MS Shared Intellectual Property" means the Varian ICP-MS Intellectual Property that is not used by Varian exclusively for Varian ICP-MS Products.

YYY. "Varian ICP-MS Tangible Assets" means all of Varian's rights, title, and interest in the physical assets located at or Relating To a facility owned and operated by Varian at 679 Springvale Road, Mulgrave, Victoria,

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(Melbourne), Australia and Relating To the Development, manufacture, sale, and distribution of the Varian ICP-MS Products including, without limitation, the assets identified in the ICP-MS Divestiture Agreement. *Provided, however*, that the Varian ICP-MS Tangible Assets does not include any real property, plant facilities, or buildings located at Varian's facility in Melbourne, Australia.

ZZZ. "ICP-MS Acquirer" means the Person specified by name in this Order, or the Person approved by the Commission, to acquire the Varian Triple Quad Business pursuant to Paragraph IV or Paragraph VII of this Order. The ICP-MS Acquirer may be the same Person as the Micro GC Acquirer or the Triple Quad Acquirer.

AAAA. "ICP-MS Contracts" means:

1. ICP-MS Customer Contracts;
2. ICP-MS Sales and Distribution Contracts;
3. ICP-MS Service Contracts; and
4. ICP-MS Supply Contracts.

BBBB. "ICP-MS Customer Contracts" means the customer contracts for the Varian ICP-MS Products. ICP-MS Customer Contracts shall include contracts between Varian and a customer that are not exclusively for Varian ICP-MS Products, but may also include other Varian products to the extent that such contracts Relate To the purchase and sale of Varian ICP-MS Products.

CCCC. "ICP-MS Sales and Distribution Contracts" means the contracts between Varian and Persons who sell and

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distribute the Varian ICP-MS Products, including but not limited to, those contracts identified in Confidential Exhibit I.

DDDD. "ICP-MS Divestiture Agreement" means all the divestiture agreements, licenses, assignments, and other agreements entered into by the ICP-MS Acquirer and Respondent Agilent including the Agilent-Bruker Divestiture Agreement pursuant to Paragraph IV of this Order.

EEEE. "ICP-MS Effective Date" means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph IV or Paragraph VII of this Order, are consummated.

FFFF. "ICP-MS Inventory" means all inventory of raw materials, intermediate work in progress, spare parts, prototypes, and finished Varian ICP-MS Products, wherever located. *Provided, however,* that spare parts inventory, and demonstration and research inventory Related To Varian ICP-MS Products shall be allocated between the Varian ICP-MS Acquirer and Respondent Agilent in a manner that is approved by the Commission and the Monitor.

GGGG. "ICP-MS Service Contracts" means the contracts under which Varian provides repair and maintenance services for the Varian ICP-MS Products.

HHHH. "ICP-MS Supply Contracts" means the contracts for the supply of inputs used in the manufacture and production of the ICP-MS Products. including, but not limited to, the contracts identified in Confidential Exhibit J.

IIII. "ICP-MS Rotary Pump Supply Agreement" means an agreement between the ICP-MS Acquirer and

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Respondent Agilent under which Respondent Agilent will produce rotary pumps used in the production of the Varian ICP-MS Products, which shall be approved by the Commission and become a part of the ICP-MS Divestiture Agreement.

- JJJJ. "ICP-MS Turbo Pump Supply Agreement" means an agreement between the ICP-MS Acquirer and Respondent Agilent under which Respondent Agilent will produce turbo pumps used in the production of the Varian ICP-MS Products, which shall be approved by the Commission and become a part of the ICP-MS Divestiture Agreement.

**II.****[Micro GC Divestiture]****IT IS FURTHER ORDERED** that:

- A. Within ten (10) days of the Acquisition Date, Respondent Agilent shall divest the Agilent Micro GC Business and assign the Micro GC Contracts, absolutely and in good faith, to Inficon, pursuant to, and in accordance with, the Agilent-Inficon Micro GC Divestiture Agreements. The Agilent-Inficon Micro GC Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and licenses) between Respondent Agilent and Inficon shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Inficon, or to reduce any obligations of Respondent Agilent under such agreements, and such agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

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*Provided, however,* with respect to assets that are to be divested or agreements entered into pursuant to Paragraphs II.B., II.C., and II.D., at the Micro GC Acquirer's option, Respondent Agilent need not divest such assets or enter into such agreements only if the Micro GC Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

*Provided, further, however,* that if any of the Micro GC Customer Contracts, or the Micro GC Sales and Distribution Contracts, or the Micro GC Supply Contracts are not assignable or the contracting Person refuses to accept the Micro GC Acquirer, Respondent Agilent shall use reasonable best efforts to facilitate the Micro GC Acquirer's acquisition of a similar contract with similar terms from the customer, distributor, seller, or Person, respectively. Any such contracts shall be subject to the restrictions set forth in Paragraph II.E. of this Order.

*Provided, further, however,* that if any of the Micro GC Service Contracts are not wholly assignable, Respondent Agilent shall enter into a transition services agreement to assign the rights to provide repair and maintenance services for the Agilent Micro GC Products to the Micro GC Acquirer.

- B. Respondent Agilent shall, at the Micro GC Acquirer's option, grant to the Micro GC Acquirer a fully paid-up, irrevocable, royalty-free license to the Shared Micro GC Intellectual Property in the Micro GC field of use.
- C. Respondent Agilent shall, at the Micro GC Acquirer's option, enter into a Manifold Supply Agreement absolutely and in good faith, to supply the Micro GC Acquirer with the manifold plates used in the

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production of the Agilent Micro GC Products. The Manifold Supply Agreement shall be subject to the prior approval of the Commission and become a part of the Micro GC Divestiture Agreement. The Manifold Supply Agreement shall include, among other things:

1. no minimum or maximum purchase requirements;
  2. an option for the Micro GC Acquirer to terminate the Manifold Supply Agreement with six (6) months notice;
  3. an option for the Micro GC Acquirer to make an initial purchase of a sufficient quantity of manifold plates to assure a supply for twelve (12) months; and
  4. priority for fulfilment of the Micro GC Acquirer's requirements for manifold plates before any of Respondent Agilent's internal requirements, or any other of Respondent Agilent's external commitments.
- D. Respondent Agilent shall, not later than the Micro GC Effective Date and at the Micro GC Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent Agilent to the Micro GC Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the Micro GC Divestiture Agreement.
1. Such agreements may include, among other things:
    - a. an agreement for sales training and support;

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- b. an agreement for technical assistance. Such technical assistance agreement may include, among other things, training in the assembly and service of Agilent Micro GC Products.
  - c. an agreement for information technology services, including but not limited to, data migration services; and
  - d. a supply of columns and other consumables used by the Agilent Micro GC Products.
- 2. Respondent Agilent shall not terminate any transition services agreement before the end of the term approved by the Commission without:
  - a. the written agreement of the Micro GC Acquirer and thirty (30) days prior notice to the Commission; or,
  - b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the Micro GC Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall be given only after the parties have:
    - (1) attempted to settle the dispute between themselves, and
    - (2) engaged in arbitration and received an arbitrator's decision, or
    - (3) received a final court decision after all appeals.
- E. Respondent Agilent shall, within three (3) days of the

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Micro GC Effective Date, (1) notify all parties to Micro GC Sales and Distribution Contracts that Agilent waives any and all rights to exclusivity that would limit sales to only products manufactured and sold by Agilent, thereby enabling sales of the Agilent Micro GC Products after their acquisition by the Micro GC Acquirer; and (2) refrain from selling Varian Micro GC Products to or through the other parties to said Micro GC Sales and Distribution Contracts for a period of one (1) year.

- F. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agilent that Inficon is not an acceptable acquirer of the Agilent Micro GC Business or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:
1. Respondent Agilent shall immediately notify Inficon of the notice received from the Commission and shall as soon as practicable effect the rescission of the Agilent-Inficon Divestiture Agreement; and
  2. Respondent Agilent shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Agilent Micro GC Business and assign the Micro GC Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to a Micro GC Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- G. Any Remedial Micro GC Agreement that has been approved by the Commission between Respondent

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Agilent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Agilent Micro GC Business shall be deemed incorporated into this Order, and any failure by Respondent Agilent to comply with any term of such Remedial Micro GC Agreement related to the Agilent Micro GC Business shall constitute a failure to comply with this Order.

- H. The purposes of this Paragraph II of the Order are: (1) to ensure the continuation of the Agilent Micro GC Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the Micro GC Acquirer has the intention and ability to produce Agilent Micro GC Products at facilities independent of Respondent Agilent, and (3) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**III.****[Varian Triple Quad Divestiture]**

**IT IS FURTHER ORDERED** that,

- A. Within ten (10) days of the Acquisition Date, Respondent Agilent shall divest the Varian Triple Quad Business and assign the Triple Quad Contracts absolutely and in good faith, to Bruker pursuant to, and in accordance with, the Agilent-Bruker Divestiture Agreement. The Triple Quad Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and licenses) between Respondent Agilent and Bruker shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Bruker or to reduce any obligations of Respondent Agilent under such agreements, and such

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agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

*Provided, however,* that for the divestiture of the Varian Triple Quad Business to Bruker pursuant to this Paragraph III.A., the Varian Triple Quad Business shall not include the excluded assets identified in Section 2.2 of the Agilent-Bruker Divestiture Agreement, attached as Confidential Exhibit L.

*Provided, further, however,* with respect to assets that are to be divested or agreements entered into pursuant to Paragraphs III.B., III.C., and III.D., at the Triple Quad Acquirer's option, Respondent Agilent need not divest such assets or enter into such agreements only if the Triple Quad Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

*Provided, further, however,* that if any of the Triple Quad Customer Contracts, or Triple Quad Sales and Distribution Contracts, or the Triple Quad Supply Contracts are not assignable or the contracting Person refuses to accept the Triple Quad Acquirer, Respondent Agilent shall use reasonable best efforts to facilitate the Triple Quad Acquirer's acquisition of a similar contract with similar terms from the customer, distributor, seller, or Person, respectively. Any such contracts shall be subject to the restrictions set forth in Paragraph III.E of this Order.

*Provided, further, however,* that if any of the Triple Quad Service Contracts are not wholly assignable, Respondent Agilent shall assign the rights to provide

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repair and maintenance services for the Triple Quad Products to the Triple Quad Acquirer.

- B. Respondent Agilent shall, at the Triple Quad Acquirer's option, grant to the Triple Quad Acquirer a fully paid-up, irrevocable, royalty-free license to the Triple Quad Shared Intellectual Property in the Triple Quad field of use. The license shall include the right to modify the Varian Triple Quad to create a single-quadrupole mass spectrometer.
- C. Respondent Agilent shall, at the Triple Quad Acquirer's option, enter into a Triple Quad Laboratory GC Supply Agreement and a Triple Quad Vacuum Pump Supply Agreement, absolutely and in good faith, to supply the Triple Quad Acquirer with the laboratory gas chromatographs and vacuum pumps used in the production of the Varian Triple Quad Products. The Triple Quad Laboratory GC Supply Agreement and the Triple Quad Vacuum Pump Supply Agreement shall be subject to the prior approval of the Commission and become a part of the Triple Quad Divestiture Agreement.
  - 1. The Triple Quad Vacuum Supply Contract shall include, among other things:
    - a. no minimum or maximum purchase requirements;
    - b. an option for the Triple Quad Acquirer to terminate the Triple Quad Vacuum Supply Contract with sixty (60) days notice;
    - c. a provision that the Triple Quad Acquirer's requirements for vacuum pumps be given priority and met before fulfilling any of Respondent Agilent's internal requirements, or

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any other of Respondent Agilent's external commitments; and

- d. six (6) months notice to the Triple Quad Acquirer of any anticipated changes to production capacity, output, or to changes in the performance or quality of the laboratory gas chromatographs.
2. The Triple Quad Laboratory GC Supply Agreement shall include, among other things:
    - a. no minimum or maximum purchase requirements;
    - b. an option for the Triple Quad Acquirer to terminate the Triple Quad Laboratory GC Supply Contract with sixty (60) days notice;
    - c. a provision that the Triple Quad Acquirer's requirements for laboratory gas chromatographs be given priority and met before fulfilling any of Respondent Agilent's internal requirements, or any other of Respondent Agilent's external commitments; and
    - d. six (6) months notice to the Triple Quad Acquirer of any anticipated changes to production capacity, output, or to changes in the performance or quality of the vacuum pump.
  3. During the terms of the Triple Quad Laboratory GC Supply Agreement and the Triple Quad Vacuum Pump Supply Agreement, Respondent Agilent shall not terminate such contracts before

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the end of the term approved by the Commission without:

- a. the written agreement of the Triple Quad Acquirer and thirty (30) days prior notice to the Commission; or,
- b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the Triple Quad Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall be given only after the parties have:
  - (1) attempted to settle the dispute between themselves, and
  - (2) engaged in arbitration and received an arbitrator's decision, or
  - (3) received a final court decision after all appeals.

D. Respondent Agilent shall, not later than the Triple Quad Effective Date and at the Triple Quad Acquirer's option, enter into one or more transition agreements for the provision of services and supplies to be provided by Respondent Agilent to the Triple Quad Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the Triple Quad Divestiture Agreement.

1. Such agreements may include, among other things:
  - a. an agreement for technical assistance;
  - b. assistance in the transfer of the Varian Triple

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## Quad Business;

- c. training for employees of the Triple Quad Acquirer; and
  - d. a supply of columns and other consumables used by the Varian Triple Quad Products.
2. Respondent Agilent shall not terminate any transition services agreement before the end of the term approved by the Commission without:
- a. the written agreement of the Triple Quad Acquirer and thirty (30) days prior notice to the Commission; or,
  - b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the Triple Quad Acquirer, sixty (60) days notice of such termination. *Provided, however*, such sixty (60) days notice shall be given only after the parties have:
    - (1) attempted to settle the dispute between themselves, and
    - (2) engaged in arbitration and received an arbitrator's decision, or
    - (3) received a final court decision after all appeals.
- E. Respondent Agilent shall, within three (3) days of the Triple Quad Effective Date:
- 1. notify all parties to the Triple Quad Sales and

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Distribution Contracts that Agilent waives any and all rights to exclusivity that would limit sales to only products manufactured and sold by Agilent, thereby enabling sales of the Varian Triple Quad Products after the acquisition by the Triple Quad Acquirer, and

2. refrain from selling Agilent Triple Quad Products to or through the other parties to said Triple Quad Sales and Distribution Contracts for a period of one (1) year.

F. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agilent that Bruker is not an acceptable acquirer of the Varian Triple Quad Business or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:

1. Respondent Agilent shall immediately notify Bruker of the notice received from the Commission and shall as soon as practicable effect the rescission of the Agilent-Bruker Divestiture Agreement; and
2. Respondent Agilent shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Varian Triple Quad Business and assign the Triple Quad Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to a Triple Quad Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

G. Any Remedial Triple Quad Agreement that has been approved by the Commission between Respondent

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Agilent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Varian Triple Quad Business shall be deemed incorporated into this Order, and any failure by Respondent Agilent to comply with any term of such Remedial Triple Quad Agreement related to the Varian Triple Quad Business shall constitute a failure to comply with this Order.

- H. The purposes of this Paragraph III of the Order are: (1) to ensure the continuation of the Varian Triple Quad Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the Triple Quad Acquirer has the intention and ability to produce the Varian Triple Quad Products at facilities independent of Respondent Agilent, and (3) and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**IV.****[Varian ICP MS Divestiture]****IT IS FURTHER ORDERED** that:

- A. Within ten (10) days of the Acquisition Date, Respondent Agilent shall divest the Varian ICP-MS Business and assign the ICP-MS Contracts, absolutely and in good faith, to Bruker pursuant to, and in accordance with, the Agilent-Bruker Divestiture Agreement. The ICP-MS Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and licenses) between Respondent Agilent and Bruker shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Bruker or to reduce any obligations of

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Respondent Agilent under such agreements, and such agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

*Provided, however,* that for the divestiture of the Varian ICP-MS Business to Bruker pursuant to this Paragraph IV.A., the Varian ICP-MS Business shall not include the excluded assets identified in Section 2.2 of the Agilent-Bruker Divestiture Agreement, attached as Confidential Exhibit L.

*Provided, further, however,* with respect to assets that are to be divested or agreements entered into pursuant to Paragraphs IV.B. and IV.D at the ICP-MS Acquirer's option, Respondent Agilent need not divest such assets or enter into such agreements only if the ICP-MS Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

*Provided, further, however,* that if any of the Varian ICP-MS Customer Contracts, or ICP-MS Sales and Distribution Contracts, or ICP-MS Supply Contracts are not assignable or the contracting Person refuses to accept the ICP-MS Acquirer, Respondent Agilent shall use reasonable best efforts to facilitate the ICP-MS Acquirer's acquisition of a similar contract with similar terms from the customer, distributor, seller, or similar Person supplying such service. Any such contract shall be subject to the restrictions set forth in Paragraph IV.E of this Order.

*Provided, further, however,* that if any of the Varian ICP-MS Service Contracts are not wholly assignable, Respondent Agilent shall assign the rights to provide

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repair and maintenance services for the Varian ICP-MS Products to the ICP-MS Acquirer.

- B. Respondent Agilent shall, at the ICP-MS Acquirer's option, grant to the ICP-MS Acquirer a fully paid-up, irrevocable, royalty-free license to the ICP-MS Shared Intellectual Property in the ICP-MS field of use.
- C. Respondent Agilent shall enter into an ICP-MS Rotary Pump Supply Agreement and an ICP-MS Turbo Pump Supply Agreement with the ICP-MS Acquirer absolutely and in good faith. The ICP-MS Rotary Pump Supply Agreement and the ICP-MS Turbo Pump Supply Agreement shall become a part of the ICP-MS Divestiture Agreement.
  - 1. The ICP-MS Rotary Pump Supply Agreement and ICP-MS Turbo Pump Supply Agreement shall include, among other things:
    - a. no minimum or maximum purchase requirements;
    - b. an option for the ICP-MS Acquirer to terminate the ICP-MS Rotary Pump Supply Agreement and the ICP-MS Turbo Pump Supply Agreement with sixty (60) days notice; and
    - c. a provision that the ICP-MS Acquirer's requirements for rotary pumps and turbo pumps be given priority and met before fulfilling any of Respondent Agilent's internal requirements, or any other of Respondent Agilent's external commitments.
  - 2. During the terms of the ICP-MS Rotary Pump Supply Agreement and the ICP-MS Turbo Pump

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## Supply Agreement:

- a. Respondent Agilent shall not terminate the ICP-MS Rotary Pump Supply Agreement or the ICP-MS Turbo Pump Supply Agreement before the end of the terms approved by the Commission without:
  - (1) the written agreement of the ICP-MS Acquirer and thirty (30) days prior notice to the Commission; or,
  - (2) in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the ICP-MS Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
    - (a) attempted to settle the dispute between themselves, and
    - (b) engaged in arbitration and received an arbitrator's decision, or
    - (c) received a final court decision after all appeals.
- D. Respondent Agilent shall, not later than the ICP-MS Effective Date and at the ICP-MS Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent Agilent to the ICP-MS Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the ICP-MS Divestiture Agreement.

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1. Such agreements may include, but are not limited to an agreement for technical assistance. Such transition services agreements shall include, among other things, assistance in the transfer of the Varian ICP-MS Business and providing training for employees of the ICP-MS Acquirer.
  2. Respondent Agilent shall not terminate any transition services agreement before the end of the term approved by the Commission without:
    - a. the written agreement of the ICP-MS Acquirer and thirty (30) days prior notice to the Commission; or,
    - b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the ICP-MS Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
      - (1) attempted to settle the dispute between themselves, and
      - (2) engaged in arbitration and received an arbitrator's decision, or
      - (3) received a final court decision after all appeals.
- E. Respondent Agilent shall, within three (3) days of the ICP-MS Effective Date (1) notify all parties to the ICP-MS Sales and Distribution Contracts that Agilent waives any and all rights to exclusivity that would limit sales to only products manufactured and sold by

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Agilent, thereby enabling sales of the Varian ICP-MS Products after their acquisition by the ICP-MS Acquirer and (2) refrain from selling Agilent ICP-MS Products to or through the other parties to said ICP-MS Sales and Distribution Contracts for a period of one (1) year.

- F. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agilent that Bruker is not an acceptable acquirer of the Varian ICP-MS Business or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:
1. Respondent Agilent shall immediately notify Bruker of the notice received from the Commission and shall as soon as practicable effect the rescission of the Agilent-Bruker Divestiture Agreement; and
  2. Respondent Agilent shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Varian ICP-MS Business, assign the ICP-MS Customer Contracts and the ICP-MS Sales and Distribution Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to an ICP-MS Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- G. Any Remedial ICP-MS Agreement that has been approved by the Commission between Respondent Agilent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Varian ICP-MS Business shall be deemed incorporated into this Order, and any failure by Respondent Agilent to comply with any term of such Remedial ICP-MS Agreement related

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to the Varian ICP-MS Business shall constitute a failure to comply with this Order.

- H. The purposes of this Paragraph IV of the Order are: (1) to ensure the continuation of the Varian ICP-MS Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the ICP-MS Acquirer has the intention and ability to produce the Varian ICP-MS Products at facilities independent of Respondent Agilent, and (3) and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Except in the course of performing its obligations under the Micro GC Divestiture Agreement, the Triple Quad Divestiture Agreement, the ICP-MS Divestiture Agreement, or as expressly allowed pursuant to this Order:
1. Respondent Agilent shall not provide, disclose or otherwise make available any Confidential Business Information Relating To the Agilent Micro GC Business, the Varian Triple Quad Business, or the Varian ICP-MS Business to any Person; and
  2. Respondent Agilent shall not use any Confidential Business Information Relating To the Agilent Micro GC Business, the Varian Triple Quad Business, or the Varian ICP-MS Business for any reason or purpose. Among other things, Respondent Agilent shall not use such Confidential

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## Business Information:

- a. to assist or inform Respondent Agilent employees who Develop, manufacture, solicit for sale, sell, or service Respondent Agilent products that compete with the products divested pursuant to this Order. For example, Respondent Agilent employees who had positions Related To the sale of Agilent Micro GC Products shall not be allowed to use any Confidential Business Information they may have about customers or the Agilent Micro GC Products to assist Respondent Agilent in the sale of the Varian Micro GC products Respondent Agilent is acquiring in the Acquisition;
  - b. to interfere with any suppliers, distributors, resellers, or customers of the Persons who acquired the divested businesses;
  - c. to interfere with any contracts divested or assigned pursuant to this Order; or
  - d. to interfere in any other way with the Persons who acquired the divested businesses pursuant to this Order or with the businesses divested pursuant to this Order.
- B. The requirements of this Paragraph V do not apply to Confidential Business Information that Respondent Agilent demonstrates:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent Agilent, or
  2. was available, or becomes available, to Respondent

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Agilent on a non-confidential basis, but only if, to the knowledge of Respondent Agilent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

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

- A. Mr. Mark Byers of Grant Thornton, United Kingdom (with the direct assistance of Ms. Marti Kopacz of Grant Thornton, United States and Mr. Greg Keith, Grant Thornton, Australia) shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Agilent and attached as Exhibit K ("Monitor Agreement") and Confidential Exhibit K-1 (Monitor compensation). The Monitor is appointed to assure that Respondent Agilent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent Agilent transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Asset Maintenance Order, and consistent with the purposes of the Decision and Order.
- C. No later than one (1) day after the Acquisition Date, Respondent Agilent shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to and consistent with, the purposes of the Decision and

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Order.

- D. Respondent Agilent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent Agilent's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
    - a. Assuring that Respondent Agilent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
    - b. Monitoring any agreements between Respondent Agilent and the Micro GC Acquirer, the Triple Quad Acquirer, or the ICP-MS Acquirer.
  2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Agilent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent Agilent's compliance with its obligations under the Order. Respondent Agilent shall cooperate with any reasonable request of the Monitor and shall

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take no action to interfere with or impede the Monitor's ability to monitor Respondent Agilent's compliance with the Order.

4. The Monitor shall serve, without bond or other security, at the expense of Respondent Agilent on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Agilent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent Agilent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.
6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent Agilent of its obligations under the Order.

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7. Respondent Agilent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Agilent, which consent shall not be unreasonably withheld. If Respondent Agilent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Agilent of the identity of any proposed Monitor, Respondent Agilent shall be deemed to have consented to the selection of the proposed Monitor.
  2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent Agilent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to

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permit the Monitor to monitor Respondent Agilent's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.

- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondent Agilent has not fully complied with the obligations as required by Paragraphs II, III, and IV of this Order, the Commission may appoint a Divestiture Trustee to divest the Agilent Micro GC Business, the Varian Triple Quad Business, and the Varian ICP-MS Business (if not divested), and enter into other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Agilent shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraphs II, III, and IV. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII shall

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preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Agilent to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Agilent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Agilent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Agilent of the identity of any proposed Divestiture Trustee, Respondent Agilent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Agilent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestitures required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII, Respondent Agilent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission,

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the Divestiture Trustee shall have the exclusive power and authority to divest the Agilent Micro GC Business, divest the Varian Triple Quad Business, and/or divest the Varian ICP-MS Business, and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and IV of this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the Agilent Micro GC Business, divest the Varian Triple Quad Business, and/or divest the Varian ICP-MS Business, and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and IV of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *provided, however,* the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Agilent shall develop such financial or other information as the Divestiture Trustee may request and shall

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cooperate with the Divestiture Trustee. Respondent Agilent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Agilent shall extend the time for divestiture under this Paragraph VII in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Agilent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order.

*Provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets and businesses to be divested pursuant to Paragraph II, Paragraph III, and Paragraph IV, respectively, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Agilent from among those approved by the Commission;

*Provided further, however,* that Respondent Agilent shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Agilent, on such reasonable and customary terms and conditions as the Commission

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or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Agilent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent Agilent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Agilent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets

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required to be divested by this Order.

8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
  9. The Divestiture Trustee shall report in writing to Respondent Agilent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
  10. Respondent Agilent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
  11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be

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necessary or appropriate to accomplish the obligations under Paragraphs II, III, and IV of this Order.

- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person appointed as the Monitor pursuant to Paragraph V of this Order.

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

- A. Beginning no later than the Acquisition Date until ninety (90) days after each of the Micro GC Effective Date, the Triple Quad Effective Date, and the ICP-MS Effective Date, Respondent Agilent shall, in a manner consistent with local labor laws:
1. facilitate employment interviews between each Designated Micro GC Employee and the Micro GC Acquirer, between each Designated Triple Quad Employee and the Triple Quad Acquirer, and between each Designated ICP-MS Employee and the ICP-MS Acquirer, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Micro GC Acquirer, the Triple Quad Acquirer, or the ICP-MS Acquirer, respectively, and shall not discourage such employee from participating in such interviews;
  2. not interfere in employment negotiations between each Designated Micro-GC Employee and the Micro-GC Acquirer, or between each Designated Triple Quad Employee and the Triple Quad Acquirer; or between each Designated ICP-MS

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Employee and the ICP-MS Acquirer;

3. with respect to each Designated Micro GC Employee, Designated Triple Quad Employee, or Designated ICP-MS Employee who receives an offer of employment from the Micro GC Acquirer, the Triple Quad Acquirer or the ICP-MS Acquirer, respectively:
  - a. not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict:
    - (1) the Designated Micro GC Employee from being employed by the Micro GC Acquirer, and shall not offer any incentive to the Designated Micro GC Employee to decline employment with the Micro GC Acquirer; or
    - (2) the Designated Triple Quad Employee from being employed by the Triple Quad Acquirer, and shall not offer any incentive to the Designated Triple Quad Employee to decline employment with the Triple Quad Acquirer, or
    - (3) the Designated ICP-MS Employee from being employed by the ICP-MS Acquirer, and shall not offer any incentive to the Designated ICP-MS Employee to decline employment with the ICP-MS Acquirer.
  - b. cooperate with:
    - (1) the Micro GC Acquirer in effecting transfer of the Designated Micro GC Employee to the employ of the Micro GC Acquirer, if the Designated Micro GC Employee

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accepts an offer of employment from the Micro GC Acquirer;

- (2) the Triple Quad Acquirer in effecting transfer of the Designated Triple Quad Employee to the employ of the Triple Quad Acquirer, if the Designated Triple Quad Employee accepts an offer of employment from the Triple Quad Acquirer; and
  - (3) the ICP-MS Acquirer in effecting transfer of the Designated ICP-MS Employee to the employ of the ICP-MS Acquirer, if the Designated ICP-MS Employee accepts an offer of employment from the ICP-MS Acquirer.
- c. eliminate any contractual provisions or other restrictions entered into or imposed by Respondent Agilent that would otherwise prevent the Designated Micro GC Employee, Designated Triple Quad Employee, or Designated ICP-MS Employee from being employed by the Micro GC Acquirer, Triple Quad Acquirer, or ICP-MS Acquirer, respectively;
  - d. eliminate any confidentiality restrictions that would prevent:
    - (1) the Designated Micro GC Employee who accepts employment with the Micro GC Acquirer from using or transferring to the Micro GC Acquirer any information Relating To the operation of the Agilent Micro GC Business;

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- (2) the Designated Triple Quad Employee who accepts employment with the Triple Quad Acquirer from using or transferring to the Triple Quad Acquirer any information Relating To the operation of the Varian Triple Quad Business; and
  - (3) the Designated ICP-MS Employee who accepts employment with the ICP-MS Acquirer from using or transferring to the ICP-MS Acquirer any information Relating To the operation of the Varian ICP-MS Business.
- e. unless alternative arrangements are agreed upon with the Micro GC Acquirer, the Triple Quad Acquirer, or the ICP-MS Acquirer, retain the obligation for the benefit of:
  - (1) any Designated Micro GC Employee who accepts employment with the Micro GC Acquirer, all accrued bonuses, vested pensions, and other accrued benefits;
  - (2) any Designated Triple Quad Employee who accepts employment with the Triple Quad Acquirer, all accrued bonuses, vested pensions, and other accrued benefits; and
  - (3) any Designated ICP-MS Employee who accepts employment with the ICP-MS Acquirer, all accrued bonuses, vested pensions, and other accrued benefits.
- B. Respondent Agilent shall not, for a period of two (2) years following the Micro GC Effective Date, Triple Quad Effective Date, and ICP-MS Effective Date, respectively, directly or indirectly, solicit, induce, or

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attempt to solicit or induce:

1. any Designated Micro GC Employee who is employed by the Micro GC Acquirer or any Micro GC Acquirer Employee to terminate his or her employment relationship with the Micro GC Acquirer, unless that employment relationship has already been terminated by the Micro GC Acquirer; *provided, however*, Respondent Agilent may place general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Micro GC Acquirer's employees; *provided further, however*, Respondent Agilent may hire Designated Micro GC Employees who apply for employment with Respondent Agilent as long as such employees were not solicited by Respondent Agilent in violation of this Paragraph.
2. any Designated Triple Quad Employee who is employed by the Triple Quad Acquirer or any Triple Quad Acquirer Employee to terminate his or her employment relationship with the Triple Quad Acquirer, unless that employment relationship has already been terminated by the Triple Quad Acquirer; *provided, however*, Respondent Agilent may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Triple Quad Acquirer's employees; *provided, further, however*, Respondent Agilent may hire Designated Triple Quad Employees who apply for employment with Respondent Agilent as long as such employees were not solicited by Respondent Agilent in violation of this Paragraph.

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3. any Designated ICP-MS Employee who is employed by the ICP-MS Acquirer or any ICP-MS Acquirer Employee to terminate his or her employment relationship with the ICP-MS Acquirer, unless that employment relationship has already been terminated by the ICP-MS Acquirer; *provided, however*, Respondent Agilent may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the ICP-MS Acquirer's employees; *provided further, however*, Respondent Agilent may hire Designated ICP-MS Employees who apply for employment with Respondent Agilent as long as such employees were not solicited by Respondent Agilent in violation of this Paragraph.

**IX.**

**IT IS FURTHER ORDERED** that for a period of ten (10) years from the date this Order becomes final:

- A. Respondent Agilent shall not, without the prior approval of the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order; and
- B. Respondent Agilent shall not, without providing advance written notification to the Commission in the manner described in this Paragraph IX.B., directly or indirectly, acquire:
  1. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that produces, designs, manufactures, or sells Micro GC instruments, Triple Quad instruments, or ICP-MS instrument in or into the United States; or

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2. any assets used at the time of the acquisition, or during the six (6) month period prior to the acquisition, in the design, manufacture, production, or sale of Micro GC instruments, Triple Quad instruments, or ICP-MS instruments in or into the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Agilent and not of any other party to the transaction. Respondent Agilent shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Agilent shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

*Provided, however,* that prior notification shall not be required by this paragraph for a transaction for

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which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

*Provided, further, however,* that prior notification shall not be required by this Paragraph IX.B. for any acquisition after which Respondent Agilent would not hold more than one percent of the outstanding securities or other equity interest in any Person described in this Paragraph IX.B.

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

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Agilent has fully complied with Paragraphs II, III, IV, and VIII.A. of this Order, Respondent Agilent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent Agilent shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent Agilent shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondent Agilent shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

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- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent Agilent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent Agilent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons Relating To this Order. Additionally, Respondent Agilent shall include in its compliance report whether or not it (i) made any notifiable acquisitions pursuant to Paragraph IX. Respondent Agilent shall include a description of such acquisitions including, but not limited to, the identity of the Person or assets acquired, the location of the Person or assets, and a detailed description of the assets or Person and its Micro GC, Triple Quad, or ICP-MS sales or manufacturing.

## XI.

**IT IS FURTHER ORDERED** that:

- A. Until the Effective Date of a Divested Business, Respondent Agilent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Divested Business to minimize any risk of loss of competitive potential for the Divested Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divested Business, except for ordinary wear and tear. Respondent Agilent shall not

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sell, transfer, encumber or otherwise impair the Divested Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Divested Business.

- B. Respondent Agilent shall retain all of Respondent Agilent's rights, title, and interest in a Divested Business until the Effective Date of such Divested Business.
- C. Until the Effective Date of a Divested Business, Respondent Agilent shall maintain the operations of the Divested Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divested Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the Divested Business.
- D. Until the Effective Date of a Divested Business, Respondent Agilent shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the Divested Business as of its Effective Date.
- E. Until the Effective Date of a Divested Business, Respondent Agilent shall provide the Designated Employees of the Divested Business with reasonable financial incentives to continue in their positions and to Develop, and manufacture the Divested Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and

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competitiveness of the Divested Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Agilent until the Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the Divested Business.

- F. The purpose of this Paragraph XI is to maintain the full economic viability, marketability and competitiveness of each Divested Businesses until its Effective Date, to minimize any risk of loss of competitive potential for each Divested Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of each Divested Business, except for ordinary wear and tear.

**XII.**

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

- A. dissolution of the Respondent Agilent;
- B. acquisition of, merger with, or consolidation by Respondent Agilent; or
- C. other change in the Respondent Agilent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

## Decision and Order

**XIII.**

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent Agilent, Respondent Agilent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent Agilent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent Agilent related to compliance with this Order, which copying services shall be provided by Respondent Agilent at its expense; and
- B. to interview officers, directors, or employees of Respondent Agilent, who may have counsel present, regarding such matters.

**XIV.**

**IT IS FURTHER ORDERED** that this Order shall terminate on June 25, 2020.

By the Commission.

**CONFIDENTIAL EXHIBITS  
A THROUGH M**

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

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted from Agilent Technologies, Inc. (“Agilent”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Agilent’s proposed acquisition of Varian, Inc. (“Varian”). Under the terms of the Consent Agreement, Agilent will: (1) divest the assets of its Micro Gas Chromatography (“Micro GC”) instruments business to Inficon Group (“Inficon”), a subsidiary of Inficon Holding AG; and (2) divest the assets of Varian’s Triple Quadrupole Gas Chromatography-Mass Spectrometry (“3Q GC-MS”) and Inductively Coupled Plasma-Mass Spectrometry (“ICP-MS”) instruments businesses to Bruker Corp. (“Bruker”), within ten days of closing its acquisition of Varian.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

Pursuant to an Agreement and Plan of Merger dated July 26, 2009, Agilent plans to acquire Varian for approximately \$1.5 billion. The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by lessening competition in the markets for Micro GC, 3Q GC-MS and ICP-MS instruments (“the Products”).

## Analysis to Aid Public Comment

**II. The Parties**

Agilent, headquartered in Santa Clara, California, is a global supplier of scientific measurement instruments and related products and services. Agilent's broad range of products and services includes equipment used to test cell phones and communications equipment, machines that determine the contents of human tissue and environmental samples, and microarrays that are used to analyze gene expression, which are commonly used in cancer research.

Varian is headquartered in Palo Alto, California, and supplies scientific instruments and chemical analysis technologies to customers worldwide. Varian's products, which employ various analytical techniques to test samples of many types, are used by academic researchers, forensics laboratories, food safety and agriculture laboratories, pharmaceutical companies, and chemical and oil and gas firms. Varian also offers a line of vacuum pumps, which are important components in a variety of scientific instruments and industrial processes.

**III. The Products and Structure of the Markets**

Micro GCs are portable gas chromatography instruments that are used primarily in the oil, mining, and waste disposal industries to detect the presence of toxins in the air or in emissions. Micro GC instruments are designed for field use and, accordingly, must be small and light enough to be portable and sufficiently robust to withstand travel and use in a variety of environments. Because Micro GC customers strongly value portability, they would not switch to any other analytical technique or product if the price of Micro GCs were to increase by five to ten percent. In the United States, Agilent and Varian are the sole competitors in the market for Micro GC instruments. Agilent and Varian account for approximately 75 percent and 25 percent of the market by revenue, respectively, and directly compete for sales on the basis of price, service, and product innovation.

## Analysis to Aid Public Comment

3Q GC-MS instruments combine a front-end gas chromatograph with a triple quadrupole mass spectrometer. 3Q GC-MSs offer extraordinarily high sensitivity and are used to identify and quantify trace amounts of substances in a wide variety of samples, such as performance-enhancing drugs in blood and pesticides in food. Less sensitive GC-MSs are widely available, and substantially less expensive, but they are not substitutes for 3Q GC-MSs because they lack the capability to detect compounds at very low concentrations and cannot differentiate among structurally-similar compounds. Where the significantly greater performance of a 3Q GC-MS is required, customers would not switch to other instruments or technologies even if the price of 3Q GC-MSs increased by five to ten percent. In the United States, there are four competitors supplying 3Q GC-MS instruments. Post-acquisition, the combined Agilent and Varian would have in excess of a 48 percent share of the U.S. market by revenue. The other two competitors, Thermo Fisher Scientific, Inc. ("Thermo") and Waters Corp., have market shares of approximately 36 percent and 16 percent, respectively.

ICP-MS instruments combine inductively coupled plasma technology and mass spectrometry technology and are used for the analysis of inorganic materials. The most common application for ICP-MS is testing water samples, such as drinking, ground or waste water, for the presence of toxic metals, like arsenic, mercury, or lead. ICP-MS is the only technology approved by the Environmental Protection Agency for testing drinking water. Because customers require the sensitivity provided by ICP-MS, and because many customers perform tests pursuant to regulatory guidelines, they would not switch to any other technique or device if the price of ICP-MS instruments were to increase by five to ten percent. In the United States, there are only four suppliers of ICP-MS instruments. Agilent accounts for 40 percent of the ICP-MS market by revenue, and a combined Agilent and Varian would have in excess of a 48 percent share of the U.S. market. The other two competitors, Thermo and

*Analysis to Aid Public Comment*

PerkinElmer, Inc. have market shares of approximately 14 percent and 37 percent, respectively.

The relevant geographic area in which to evaluate the markets for Micro GC, 3Q GC-MS, and ICP-MS instruments is the United States. Because Micro GC, 3Q GC-MS, and ICP-MS customers require local sales, service, and support, a supplier that lacks the local infrastructure necessary to provide these services is not a viable alternative for U.S. customers.

**IV. Entry**

Neither new entry nor repositioning and expansion sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is likely to occur within two years. A new entrant to the Micro GC, 3Q GC-MS, or ICP-MS instrument markets would face significant barriers to entry. A new entrant would have to design, develop, and test a product, and would have to establish a service and support infrastructure in the United States. Perhaps most importantly, a new entrant would have to develop a reputation for quality and reliability, and it would take at least several years to acquire a reputation on par with the current Micro GC, 3Q GC-MS, and ICP-MS suppliers. Accordingly, new entry by a domestic or foreign firm would not be timely, likely, or sufficient to counteract the anticompetitive effects that would arise as a result of the acquisition.

**V. Effects of the Acquisition**

Agilent and Varian are the only two competitors in the market for Micro GC instruments. By creating a monopoly and eliminating the substantial competition between Agilent and Varian, the proposed acquisition would cause the purchasers of Micro GC instruments to pay higher prices and experience reduced levels of service and slower innovation rates.

With only four suppliers, the market for 3Q GC-MS instruments is highly concentrated. 3Q GC-MSs are generally

*Analysis to Aid Public Comment*

purchased through a competitive evaluation process, which fosters competition for features, reliability, performance, price, and service. Agilent and Varian's 3Q GC-MSs are positioned similarly in terms of their features, price, and performance. The elimination of the direct competition between the Agilent and Varian 3Q GC-MS products would allow Agilent to increase prices, slow the pace of innovation, and/or decrease service levels. In addition, the fact that there would be only three suppliers after the proposed acquisition leads to an increased likelihood of coordination among the remaining competitors.

The market for ICP-MS instruments is also highly concentrated, and Agilent's acquisition of Varian would leave only three suppliers. The ICP-MS instruments of the various suppliers compete on the basis of reliability, price, product features, performance, and service. Because Agilent and Varian directly compete with each other for many sales, and because Varian is frequently the low-priced competitor, Agilent would have a strong post-acquisition incentive to increase ICP-MS prices. The transaction would also facilitate coordination among the three remaining firms.

**VI. The Consent Agreement**

The proposed Consent Agreement eliminates the competitive concerns raised by Agilent's proposed acquisition of Varian by requiring the divestiture of Agilent's assets relating to the manufacture and sale of Micro GC instruments and Varian's assets relating to the manufacture and sale of 3Q GC-MS and ICP-MS instruments. Agilent and Varian have reached agreements to sell the Micro GC assets to Inficon and the 3Q GC-MS and ICP-MS assets to Bruker, within ten days of closing the acquisition.

Inficon possesses the resources and capability to acquire the Micro GC assets and replace Agilent as an effective competitor in the Micro GC market. Inficon, headquartered in Switzerland,

## Analysis to Aid Public Comment

manufactures analytical instruments for gas analysis, measurement, and control. Inficon currently supplies several products complementary to Micro GC instruments, including portable GC-MS analyzers. Inficon has an existing worldwide infrastructure for the marketing and sales of its analyzers, and therefore is well-positioned to replace the competition that will be lost as a result of the proposed transaction.

Headquartered in Billerica, Massachusetts, Bruker is a global provider of life-sciences scientific instruments, as well as solutions for molecular and materials research and industrial and applied analysis. Bruker's acquisition of the Varian 3Q GC-MS and ICP-MS product lines will complement Bruker's existing strengths in the analytical instruments market. Bruker manufactures a variety of high-performance mass spectrometry instruments, including product lines adjacent to the 3Q GC-MS and ICP-MS businesses. As a result, Bruker has a significant existing global infrastructure that will enable it to quickly support additional business expansion and replace the loss of competition posed by Agilent's acquisition of Varian.

Pursuant to the Consent Agreement, Inficon will receive the assets necessary to replicate Agilent's Micro GC instrument business, and Bruker will receive the assets necessary to replicate Varian's 3Q GC-MS and ICP-MS instrument businesses. In addition to ensuring that the employees of the relevant businesses will continue their employment with the acquirers, the Consent Agreement requires Agilent to provide Inficon and Bruker with access to additional Agilent employees who may be needed to facilitate the transition of the assets associated with each of the Products. The Consent Agreement also requires Agilent to transfer all relevant intellectual property and all contracts and confidential business information associated with each of the Products. Combined, these provisions ensure that Inficon and Bruker fully and immediately restore the competition that will be eliminated by the acquisition.

*Analysis to Aid Public Comment*

The Commission may appoint an interim monitor to oversee the divestiture of the Products at any time after the Consent Agreement has been signed. In order to ensure that the Commission remains informed about the status of the proposed divestitures, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished. If the Commission determines that Agilent has not fully complied with its obligations under the Decision and Order within ten days after the date the Decision and Order becomes final, the Commission may appoint a divestiture trustee to divest the Micro GC, 3Q GC-MS, and ICP-MS assets to a Commission-approved acquirer.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

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**INTERLOCUTORY, MODIFYING, VACATING,  
AND MISCELLANEOUS ORDERS**

**INTEL CORPORATION**

*Docket No. 9341.      Order, January 19, 2010*

Opinion and Order denying respondent's motion to disqualify Commissioner Rosch with respect to any adjudicative proceeding against Intel.

**OPINION AND ORDER OF THE COMMISSION  
DENYING MOTION FOR DISQUALIFICATION**

By Leibowitz, Chairman:

Intel Corporation interacted with Commissioner Rosch for many months, attempting to persuade him to vote against a complaint in this matter without ever voicing a concern about his involvement in the case. But on December 15, after being informed of the Commissioner's tentative views on the matter and within hours of the Commission's vote to initiate the present case, it filed a motion to disqualify him on the ground that he served as Intel's primary outside antitrust counsel from about 1987 until mid-1993 ("Motion").<sup>1</sup> In its Motion, Intel neither specifies any relevant confidential information that Commissioner Rosch possesses as a result of his representation, nor makes any

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<sup>1</sup> The Motion sought to disqualify Commissioner Rosch both from participating in the current adjudication and from voting on whether to issue a complaint. Because the latter act is non-adjudicative, it does not fall under FTC Rule 4.17, 16 C.F.R. § 4.17, and, therefore, Commissioner Rosch's denial of that request was final. The denial was also understandable in light of the eleventh-hour nature of the request, its apparent tactical nature in light of the many hours of meetings Commissioner Rosch held with Intel over an extended period of time at Intel's request with no hint of disqualification being raised, and the absence of a connection between the current matter and the work Commissioner Rosch did for Intel over a decade and a half ago.

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allegation of partiality by Commissioner Rosch against Intel. Instead, the bulk of the Motion is dedicated to showing simply that Commissioner Rosch represented Intel before the Commission in another antitrust matter a number of years ago. After careful consideration, we find as follows: the matters upon which Commissioner Rosch previously advised Intel are so distant in time – and concern technology, allegations, and business relationships that are so dissimilar to those relevant to the present matter<sup>2</sup> – that they are not at all “substantially related” to the current proceeding. Further, Intel has identified no basis for a reasonable person to question Commissioner Rosch’s ability to be impartial in adjudicating this proceeding. Accordingly, we deny Intel’s motion to disqualify Commissioner Rosch.<sup>3</sup>

Background:

Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Federal Trade Commission issued a Complaint on December 16, 2009. The Complaint alleges that, since 1999, Intel has illegally used its dominant market position to stifle competition and strengthen its monopoly in the markets for Central Processing Units (“CPUs”)<sup>4</sup> and to create a monopoly for

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<sup>2</sup> The present matter concerns conduct from 1999 to the present.

<sup>3</sup> Commissioner Rosch has declined to recuse himself from further participation in the Intel proceeding (Docket No. 9341). Commissioner Rosch’s statement concerning Intel’s disqualification motion is hereby placed on the public record as Attachment A to this opinion (“Statement”).

<sup>4</sup> The Complaint describes a CPU as a type of microprocessor used in a computer system; that is, as an integrated circuit chip that is often described as the “brains” of a computer system. The Complaint alleges that the microprocessor performs the essential functions of processing system data and controlling other devices integral to the computer system. According to the Complaint, a CPU requires a chipset to communicate with other parts of the computer.

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Intel in the markets for graphics processing units (“GPUs”).<sup>5</sup> The Complaint alleges that Intel’s primary competitors in the CPU markets include Advanced Micro Devices (“AMD”) and Via Technologies (“Via”). Other key players allegedly include original equipment manufacturers (“OEMs”) that use CPUs such as Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu. The Complaint alleges that Intel’s primary competitors in the GPU markets include Nvidia and ATI, an affiliate of AMD.

The Complaint alleges, among other things, that Intel carried out an anticompetitive campaign using threats and rewards aimed at the world’s largest OEMs to coerce them not to buy rival CPUs and used exclusive or restrictive dealing to prevent OEMs from marketing machines with rival CPUs. In addition, the Complaint alleges, Intel secretly redesigned key software, known as a compiler, in a way that deliberately stunted the performance of competitors’ CPUs, and then told its customers and the public that software performed better on Intel’s CPUs than on those of its rivals, failing to disclose that the difference was largely or entirely due to Intel’s creation of a compiler designed to deceive consumers about competing products.

The Complaint also alleges that Intel’s CPU dominance was threatened by the innovation of GPU manufacturers, prompting Intel to engage in similar unfair practices that will create a dangerous possibility that Intel will obtain a monopoly in the relevant GPU markets. For example, the Complaint alleges that Intel has, among other things: engaged in deceptive practices relating to competitors’ efforts to enable their GPUs to interoperate with Intel’s newest CPUs; adopted a new policy of denying interoperability for certain competitive GPUs; established

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<sup>5</sup> The Complaint alleges that GPUs originated as specialized integrated circuits for the processing of computer graphics, but that as they have evolved, they have taken on greater functionality. The Complaint alleges that computers may achieve faster performance by offloading other computationally intensive needs from CPUs to GPUs.

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various barriers to interoperability; degraded certain connections between GPUs and CPUs; made misleading statements to industry participants about the readiness of Intel's GPUs; and engaged in unlawful bundling or tying of Intel's GPUs with its CPUs, resulting in below-cost pricing of relevant products.

Intel now moves to disqualify Commissioner Rosch, stating that "Commissioner Rosch served as Intel's primary outside antitrust counsel from about 1987 until Intel decided to change antitrust counsel in mid-1993." Motion at 2. Intel claims that Commissioner Rosch's previous work as Intel's chief antitrust outside counsel – including in connection with a "similar investigation" by the FTC – is "substantially related" to the Intel matter presently before the Commission. *Id.* at 8.

Specifically, Intel asserts that Commissioner Rosch "obtained substantial confidential information by reason of his representation of Intel, including information regarding Intel's business practices, legal strategies, and approach to antitrust compliance." Murray Declaration, ¶ 12.<sup>6</sup> To support its disqualification motion, Intel has submitted several documents, of which the principal ones may be summarized as follows:<sup>7</sup>

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<sup>6</sup> Although Intel has not revealed specific confidences that were shared with then-Attorney Rosch (Murray Declaration, ¶ 4), in light of the nature of his former representation, we assume its claim is true with respect to the time period during which the former representation took place. Thus, given the limited disclosures made by Intel, our review is necessarily limited to a careful examination at the subject matter level of the scope of the former representation as it relates to the scope of the present Intel proceeding. As we explain below, we conclude, after taking a close look at Intel's submissions regarding the scope of Commissioner Rosch's previous representation, that there is no factual nexus between the matters in which Commissioner Rosch advised and the one presently before the Commission and whatever confidences were obtained are not relevant to the instant proceeding.

<sup>7</sup> Motion, Attachment 5 is not discussed here as it does nothing to support or negate Intel's arguments. A characterization of the FTC's previous investigation by an unnamed newspaper does little to validate the actual matters in dispute at the time. We believe a better source to assess the nature and scope of the

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\* **Motion, Attachment 1 [redacted]**<sup>8</sup>

\* **Motion, Attachment 2 [redacted]**

\* **Motion, Attachment 4 [redacted]**

Discussion:

For the reasons discussed below, we do not believe a reasonable person with knowledge of the relevant facts would question Commissioner Rosch's impartiality. Nor do we find any substantial relationship between the current case and the previous investigation. Finding no basis for recusal, we deny Intel's disqualification motion.

Legal Standard

Pursuant to FTC Rule 4.17, Intel's "motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed." 16. C.F.R. § 4.17(c). Intel argues and Commissioner Rosch has stated his agreement that "Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary." Motion at 6; Statement at 2. In general, we also agree.<sup>9</sup> Although Intel relies upon three different authorities, the federal judicial recusal

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previous proceeding is the investigative subpoena, which Intel has submitted as Attachment 3, which we discuss along with Attachment 6 at pp.7-8, *infra*.

<sup>8</sup> [redacted]

<sup>9</sup> We find one significant difference between judicial disqualification standards and agency disqualification standards to be noteworthy. Namely, the separation of functions provisions of the Administrative Procedure Act allow an agency or its members to vote on whether to initiate a case or proceeding after reviewing pertinent information. 5 U.S.C. § 554(d). Federal judges, in contrast, may not participate in a decision to initiate any case they may later decide.

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standard, 18 U.S.C. § 455, is the relevant standard here.<sup>10</sup> That standard provides in relevant part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy. . . .

28 U.S.C. § 455.

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<sup>10</sup> As a Federal employee, Commissioner Rosch is subject to the “Standards of Ethical Conduct for Employees of the Executive Branch,” 5 C.F.R. § 2635 (“Standards of Conduct”). *See also* FTC Rule 5.1, 16 C.F.R. § 5.1. We do not separately assess the impact of the Standards of Conduct because the reasonable person impartiality assessment therein mirrors what is contained in 28 U.S.C. 455(a). (The federal statute arguably raises the bar higher by requiring recusal unless the parties’ consent is obtained and, unlike the Standards of Conduct, there is no provision for authorizing one’s participation in certain circumstances. Because we have determined a reasonable person would not question Commissioner Rosch’s ability to be impartial, we do not address whether his participation is otherwise appropriate under the Standards of Conduct.) Moreover, Intel’s reliance upon Rule 3-310(E) of the California Rules of Professional Conduct is misguided. On its face, the rule bars attorneys from representing “adverse interests” and thus deals with attorney, not judicial, disqualification. Intel has not explained how or why provided a rational basis for Congress, the FTC, or even the state of California may have intended intending for Rule 3-310(E) (or comparable state bar rules, generally) to apply in these circumstances, and we can perceive no such reason..

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Application of Section 455(a)

We are principally concerned with the Section 455(a) basis for disqualification,<sup>11</sup> which arguably could be invoked if Commissioner Rosch served as counsel for Intel in connection with a *substantially related* matter.<sup>12</sup> As discussed below, we find no such substantial relationship. With no other viable potential impediments to his participation, we deny Intel's motion.

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<sup>11</sup> With respect to the Section 455(b)(1) basis for disqualification, Intel has failed to provide any evidence of personal bias or prejudice. It is not even clear that Intel intended to make such an allegation. Although it references case law on the subject, Intel has not provided any facts that might be in any way relevant to this issue. The theory that Commissioner Rosch may have personal knowledge of disputed evidentiary facts relevant to the present Intel proceeding is similarly unsupported. Commissioner Rosch denies having such knowledge. Statement at 7-8. Given the nature of the prior representation, Intel presumably shared confidential information with its attorney. Nonetheless, the key is whether and to what extent such information relates to the present proceeding. Consequently, Intel's concerns in this vein are addressed by our inquiry into whether the matters are substantially related. With respect to the Section 455(b)(2) basis for disqualification—as Intel itself concedes—the present matter before the Commission is not the *same* matter in which Commissioner Rosch represented Intel. *See, e.g.*, Motion at 8 (Commissioner Rosch served as lead outside counsel “in a similar [FTC] investigation”). The current Complaint concerns alleged practices that took place from 1999 to the present. Thus, the events which give rise to the present proceeding took place long after (that is, from 6 to 16 years after) Commissioner Rosch ceased to be Intel's chief antitrust outside counsel. Accordingly, recusal is not warranted under 28 U.S.C. § 455(b)(2).

<sup>12</sup> We note that, although the federal cases Commissioner Rosch discusses with respect to the Section 455(a) standard do not use the term “substantially related,” *see* Statement 8-9, they do address whether the proceedings in question concern related matters. *See, e.g.*, *Cippollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986) (length of time between matters, difference in parties and legal issues presented, as well as lack of factual nexus between matters, serve as basis for determination that there was no reason to question the judge's impartiality); *Renteria v. Schellpeper*, 936 F.Supp. 691, 694 (D. Neb. 1996) (no reasonable basis to question impartiality absent a showing that “the earlier case was ‘sufficiently related’ to the ‘issues in dispute’ before the judge in the pending case”).

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In considering whether matters are substantially related for purposes of judicial recusal, courts have considered both the facts and the legal issues involved. “Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation.” *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d, 221, 225 (7<sup>th</sup> Cir. 1978). If there is a factual nexus, courts must consider “whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters.” *Id.* If it is apparent such confidences were shared, the court must determine whether it “is relevant to the issues raised in the litigation pending against the former client.” *Id.* If all three indicators are present, the matters are substantially related and essentially deemed the same for conflicts purposes, with doubts to “be resolved in favor of disqualification.” *Id.*<sup>13</sup>

Our review of Intel’s submissions in support of its motion demonstrates to us that Commissioner Rosch’s participation in the prior Commission investigation was limited in scope to addressing the implications of specific licensing disputes and arrangements based on events that took place at various times between approximately 1983 and 1993.<sup>14</sup> These discrete matters are wholly unrelated to the present Intel proceeding, which concerns conduct since 1999. Intel has not demonstrated how the previous licensing disputes relate to the present proceeding beyond potential overlap in broad legal categories. Antitrust

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<sup>13</sup> The Federal agency ethics regulations provide similar guidance addressing when seemingly separate proceedings should be considered the same matter. *See, e.g.*, 5 C.F.R. § 2641.201(h)(5) (factors to consider include whether there is a nexus between the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed); FTC Rule 4.1(b)(1), n.1, 16 C.F.R. § 4.1(b)(1), n.1.

<sup>14</sup> [redacted]

Instead, that letter indicates a certain skepticism towards allegations made by AMD that Intel should consider useful. In any event, as discussed *infra*, its context is limited to factual patterns not relevant to the present proceeding.

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matters generally, and in technology industries specifically, often involve similar theories of wrongdoing, such as economic tying, applied to a variety of factual circumstances. However, prior familiarity with legal theories is not enough to disqualify Commissioner Rosch. See *Michael v. Intracorp., Inc.*, 179 F.3d 847 (10<sup>th</sup> Cir. 1999) (prior knowledge of the type of case or the defenses presented is insufficient to justify recusal). If recusal were automatically to follow such tangential commonalities, the Commission would be unable to rely upon experienced, well-informed professionals to decide complex matters. See *Cipollone*, 802 F.2d at 659-660 (“If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could be appointed to the bench.”). Further, there are significant differences in time. As stated above, the present Complaint concerns behavior from 1999 to the present, whereas the FTC’s previous investigation in which Commissioner Rosch represented Intel principally focused on conduct that took place from 1985 through 1990. A closer examination of the relevant investigative subpoenas reveals a larger time gap with respect to certain issues. See, e.g., Motion, Attachment 6, ¶ 3 [redacted] as compared to Motion, Attachment 3, ¶ 3 [redacted].

Of course, there is commonality with respect to several interested parties—namely Intel, AMD, and the FTC. However, there are also important differences. For example, a number of CPU manufacturers have exited the marketplace over the last decade. Moreover, any common ground in terms of interested parties is negated by key differences in the products and allegations at issue. Although the term “microprocessor” was used by Intel then and now, we are not dealing with the same product. Information about a putative “television sets” market two decades ago would have little relevance to the competitive dynamics of the market for the products currently sitting (perhaps it is more accurate to say ‘mounted’) in American family rooms today, though the same words may be used to describe the products. Similarly, there is no *a priori* reason to believe that any

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information Commissioner Rosch may have gained about the markets for the products at issue—in the matters on which he represented Intel—is relevant to the present matter, and we have searched the Motion in vain for evidence from which to infer such a relationship. Indeed, in the course of this proceeding, Intel has repeatedly asserted that the relevant technologies are constantly evolving. See Intel Submission to Commission at 4, 5, 7, 30, and 38 (Nov. 27, 2009). Further, in the sixteen years since Commissioner Rosch advised Intel, eight generations of Moore's law (the seminal statement on the evolution of computer chips) have passed. See Wikipedia, Moore's Law, [http://www.en.wikipedia.org/wiki/Moore's\\_law#cite](http://www.en.wikipedia.org/wiki/Moore's_law#cite).<sup>15</sup> The eight iterations of Moore's law have produced microprocessors that are approximately 250 times more powerful, and in that time span, competitors and customers have emerged, have vanished, or have been unrecognizably transformed.<sup>16</sup>

Taking into account these differences, we find there is no pertinent nexus between the facts at issue in the prior representation and the present Intel matter. Thus, whatever confidences Commissioner Rosch may have obtained in the course of his prior representation, Intel has presented no evidence that they are relevant to the current proceeding. Furthermore, Intel was aware of its prior relationship with Commissioner Rosch when it first learned of the present matter at least 18 months ago, and nevertheless willingly chose to repeatedly interact with him and other FTC officials throughout the investigative phase without questioning Commissioner Rosch's involvement or

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<sup>15</sup> Moore's law, which states that the number of transistors that can be inexpensively placed on an integrated circuit has doubled approximately every two years, is of course named after Gordon Moore, a long-term executive at Intel.

<sup>16</sup> To take only a handful of examples of how these markets have changed, **[redacted]**. The products of these major mainframe manufacturers in the 1980s now exist only in virtual form on the website of the IPSJ Computer Museum. See <http://www.museum.ipsj.or.jp/en/computer/main/0079.html> and <http://museum.ipsj.or.jp/en/computer/os/fujitsu/0013.html>.

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whether he might possess confidential information that should not be shared with the staff during the investigative phase. Statement 1, 9-10. As a consequence, it is highly doubtful that, in Intel's own view, Commissioner Rosch actually possesses any confidential information relevant to this matter.

Absent a factual nexus between the matters—and with no evidence of confidential information shared that would be relevant to the instant proceeding—we have determined that the matters in which Commissioner Rosch formerly represented Intel are not substantially related to the present proceeding. Accordingly, we have concluded that a reasonable person with knowledge of the relevant facts would not question Commissioner Rosch's ability to be impartial. Accordingly,

**IT IS ORDERED THAT** the motion of Intel seeking Commissioner Rosch's disqualification with respect to any adjudicative proceeding against Intel is denied.

By the Commission, Commissioner Kovacic recused, and Commissioner Rosch not participating.

## **ATTACHMENT A**

### **STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON RESPONDENT'S MOTION FOR DISQUALIFICATION [REDACTED PUBLIC VERSION]**

Approximately 18 months ago, the Federal Trade Commission authorized the use of compulsory process to investigate the alleged conduct of Intel Corporation ("Intel") in the microprocessor markets. Since that time, this Commissioner met

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with Intel officials on at least three occasions and spent hundreds of hours considering, among other things, the staff's theories, the applicable case law, and the underlying documents involved in this case in order to determine whether there was a "reason to believe" that a complaint should issue and on what bases. During that period, although it willingly provided the Commission numerous white papers and participated in nearly six hours of meetings with this Commissioner, Intel never suggested (nor did any other participant for that matter) that there was any basis for disqualification. Notwithstanding that fact, on the day before the Commission's final vote to pursue administrative litigation, Intel moved to disqualify this Commissioner pursuant to 16 C.F.R. § 4.17, "from participation in any adjudicative proceeding against Intel, including voting on whether to issue a complaint." (Mot. of Intel Corp. for Disqualification of Commissioner J. Thomas Rosch ("Mot.") at 2.)

Although Intel relies on three different authorities to try to make its case (the federal judicial recusal standard, the Office of Government Ethics regulations, and the California Rules of Professional Conduct), the crux of Intel's argument is that a reasonable person would conclude that, because this Commissioner served as Intel's primary outside antitrust counsel from 1987 until mid-1993 – including in conjunction with an FTC investigation opened in 1991 – this Commissioner cannot impartially consider whether Intel's alleged conduct since 1999 should create antitrust liability. Intel points to no confidential information that this Commissioner possesses from the 1987-1993 representation that is relevant to the Commission's recently issued complaint, which concerns alleged conduct from 1999 forward. Intel points to no public statements that this Commissioner has made that supply any evidence of prejudgment. And Intel does not and cannot show that the Commission's recently issued administrative complaint constitutes the same matter in controversy as the investigation that this Commissioner handled on Intel's behalf more than a decade and a half ago. For these

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reasons and others discussed below, disqualification is not warranted.

**DISQUALIFICATION IS NOT WARRANTED UNDER  
ANY OF THE GOVERNING STANDARDS**

Intel argues that this Commissioner is subject to disqualification under three authorities: (1) the recusal standards “applicable to judges and FTC Commissioners alike;” (2) the Office of Government Ethics (OGE) regulations; and (3) Rule 3-310(E) of the California Rules of Professional Conduct. (Mot. at 2, 4-10.) None of these arguments supports disqualification of this Commissioner.

**A. Federal Judicial Recusal Standard**

Pursuant to Rule 4.17 of the Commission’s Rules of Procedure, Intel’s “motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.” 16 C.F.R. § 4.17(c). As Intel acknowledges, “Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary.” (Mot. at 6 (emphasis added).) Under that standard, set forth in 28 U.S.C. § 455 (“Disqualification of justice, judge, or magistrate”), disqualification is appropriate where (1) “in private practice he served as lawyer in the matter in controversy,” 28 U.S.C. § 455(b)(2); (2) “he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,” *id.* § 455(b)(1); or (3) his “impartiality might reasonably be questioned,” *id.* § 455(a). None of those considerations supports disqualification on the facts here.

1. First, Intel does not assert that this Commissioner served as a lawyer “in the matter in controversy” here. *Id.* § 455(b)(2). That would be impossible because the Commission only opened its formal investigation into this matter in 2008 – nearly a decade and a half after Intel says this Commissioner stopped representing Intel. (Mot. at 2.) Moreover, the FTC staff’s 1991 investigation,

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upon which Intel principally relies (Mot. at 3, 8, 9; Murray Declaration (“Murray Decl.”) ¶¶ 5-9, Attach. 1-5) and in which this Commissioner represented Intel, was a completely separate case from the case initiated by the current complaint. At issue in the investigation initiated in 1991 – nearly eighteen years ago – was whether Intel had illegally acquired monopoly power in the central processing unit (“CPU”) markets. (See Mot. Attach. 5 (describing investigation as inquiry into whether Intel “broke any antitrust laws in becoming the dominant supplier of microprocessors”).) That is a fundamentally different question from whether, as the current complaint now alleges, Intel has engaged in a course of conduct designed to (1) illegally maintain its monopoly power in those CPU markets, and (2) attempt to monopolize the graphics markets. See Administrative Complaint, *In the Matter of Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009). This Commissioner’s representation of Intel during the investigation initiated in 1991 had nothing to do with monopoly maintenance based on alleged conduct respecting microprocessors, which allegedly began in 1999, and that investigation did not involve the graphics markets alleged in the current complaint at all.

Beyond that, to this Commissioner’s knowledge, Intel did not engage in [redacted] during this Commissioner’s representation, and the motion does not contain any evidence that this Commissioner made representations to the Commission staff or anyone else about those practices. (Mot. at 2.) To be sure, when the FTC initiated its investigation in 1991, this Commissioner did attempt to define the relevant market for microprocessors in which Intel participated (*id.*) as a market in which numerous other microprocessor producers, including IBM and Sun participated. (Likewise, in the FTC’s 1997 suit against Intel, Intel’s then-counsel also defined the relevant market as one in which there were numerous participants beside Intel.) This Commissioner never, however, asserted that the market would remain as it was defined at that time. Similarly, in the investigation initiated in 1991, the Commission staff did inquire about “exclusive dealing”

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and “bundling,” including “economic tying,” as well as whether Intel engaged in a refusal to license to AMD, but this Commissioner specifically told the Commission staff that antitrust liability would depend on the facts relevant to the particular practice at issue, not that those practices were either legal or illegal under all circumstances. (Compare Mot. at 2 with Attach. 1 at 3-9 and Attach. 4 at 3, 5.)

Moreover, even if the facts involved in the 1991 investigation and the current complaint were the same, the law governing those facts has not stood still. For example, the principal predatory pricing cases that Intel has thus far invoked in white papers and discussions preceding the current complaint, *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), were not decided until after the 1991 investigation. Judge Wilken’s decision suggesting a modification of predatory pricing standards in *Meijer, Inc. v. Abbott Labs*, 544 F. Supp. 2d 995 (N.D. Cal. 2008), likewise came at a later date. Additionally, since this Commissioner’s representation of Intel ended, there have been several important decisions regarding loyalty discounts and economic tying. See, e.g., *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (2000); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2009 U.S. App. LEXIS 23765 (9th Cir. Oct. 29, 2009); *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). Finally, the courts have supplied important decisions regarding refusals to license and the implications of product design decisions. See *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997); *C. R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340 (Fed. Cir. 1998). Thus, both the facts and the law applied to those facts have evolved during the ensuing period spanning more than a decade and a half.

Of course, the investigations initiated in 1991 and 2008 respectively were not without certain broad factual similarities: the Commission (as opposed to DOJ or private plaintiffs) initiated both investigations; Intel was the subject of both investigations; both investigations were based on alleged antitrust violations; and

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both investigations involved markets related to the CPU industry (and the associated market definition questions). But simply because two cases have factual similarities at a high level of factual and/or legal generality does not mean that they qualify as the same “matter in controversy.” If that were so, anytime a Commissioner provided counsel to a firm with monopoly power while in private practice, that firm could always invariably move to disqualify that Commissioner in a future investigation – even more than a decade and a half later – on the ground that the Commissioner was involved in a representation involving the same “matter in controversy.” That is not the law.

Intel implies otherwise. It asserts that disqualification is appropriate because the current action is “substantially related” to this Commissioner’s prior representation of Intel in conjunction with the Commission’s 1991 investigation (Mot. 6-7, Attach. 1). Intel’s claim that the disqualification of a federal judge should turn on a “substantially related” analysis is without any precedent. Indeed, after admitting that “Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary,” (Mot. at 6 (emphasis added)), Intel cites two state court decisions (from 1978 and 1992, respectively) that applied the “substantially related” analysis. (Mot. at 7 (citing *Rushing v. City of Georgiana*, 361 So.2d 11 (Ala. 1978) and *Davis v. Neshoba County General Hospital*, 611 So.2d 904 (Miss. 1992).) Intel’s reliance on these state court decisions is not accidental: Intel does not cite a single federal case applying the “substantially related” standard to evaluate the disqualification of a federal judge or Commissioner because, as far as this Commissioner can ascertain, there are no such cases. See generally *River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1299, 1302 (Cal. Ct. App. 1987) (explaining that “substantial relationship” is a “legal point of significance in attorney disqualification” that is “used in identifying an impermissible conflict of interest in an attorney’s representation of successive clients”) (emphasis added).

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In any event, as discussed above, for the same reasons that the 2009 complaint and the investigation initiated in 1991 do not present “the same matter in controversy,” they cannot be said to be “substantially related”: the two separate matters were based on different alleged conduct during different time periods and involved different theories of liability.

2. Second, along the same lines, this Commissioner does not have “personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b)(1). As to “personal bias or prejudice,” Intel contends that disqualification is warranted under *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), because this Commissioner “has in some measure adjudged the facts” in advance of this case. (Mot. at 6.) However, in contrast to the prejudgment cases that Intel cites, Intel does not cite any evidence of prejudgment here.

In *Texaco, Inc. v. FTC*, 336 F.2d 754, 759 (D.C. Cir. 1964), *rev’d on other grounds*, 381 U.S. 739 (1965), for example, the D.C. Circuit held that then-Chairman Paul Rand Dixon was disqualified from participating in an appeal where he delivered a speech that said “[w]e are well aware of the practices that plague you . . . you know the practices – price fixing, price discrimination, . . . you know the companies” and named the respondents. *See also id.* at 760 (“In this case, a disinterested reader of Chairman Dixon’s speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.”). Likewise, in *Cinderella Career & Finishing Schools*, the D.C. Circuit reached the same conclusion in light of a speech that Chairman Dixon gave during the pendency of another appeal before the Commission that, again, strongly implied that the respondent had engaged in the deception at issue in the appeal. 425 F.2d at 589-91 (finding that “Commissioner Dixon has exercised questionable discretion and very poor judgment indeed, in directing his shafts and squibs at a case awaiting his official action”). These cases do not help Intel. To the contrary, Intel asserts that prior to the current complaint this Commissioner had

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argued that Intel's previous conduct was lawful. (Mot. at 3, Murray Decl. ¶¶ 5-11, Attach. 1-5.)

Nor does Intel adduce any evidence that this Commissioner has "personal knowledge of disputed evidentiary facts" concerning "this proceeding." 28 U.S.C. § 455(b)(1). Indeed, as previously noted, such knowledge would be impossible because the conduct that was the subject of the investigation initiated in 1991 is not the subject of the current complaint, which only goes back to 1999. This Commissioner has no knowledge – beyond what the staff has adduced during its Part 2 investigation and what Intel has asserted – about any of Intel's alleged conduct during the relevant time period. Indeed, it is ironic for Intel to claim that the facts relating to practices that were investigated a decade and a half ago (or the "confidential" information allegedly shared with this Commissioner at or about that time) are the same or even similar to the facts or other information relating to the practices alleged in the current complaint, given Intel's repeated assertions that the technology and products in these markets have constantly "evolved" over the years. (See Intel Submission to Commission at 4, 5, 7, 30 38 (Nov. 27, 2009).)

Moreover, even if this Commissioner had acquired personal knowledge of disputed evidentiary facts (which, again, he did not), numerous federal courts have held that the passage of a substantial period of time – here more than a decade and a half since his representation of Intel ended – if not determinative, militates against the disqualification of a federal judge. See, e.g., *Cipollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986) ("Even if American Tobacco Company were a party to [this] case, the long passage of time [9 years] since Judge Hunter's last representation of that Company requires the conclusion that no reasonable person could question his impartiality."); *Renteria v. Schellpeper*, 936 F. Supp. 691, 696-697 (D. Neb. 1996) (refusing to disqualify federal judge based on representation of parties in prior litigation where same claims were not involved and where the case at issue did not arise until "long after the judge left

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private practice”). And with good reason: it would be unreasonable to conclude that a decade and a half after his representation of Intel ended, this Commissioner has retained any relevant confidential information in an industry as prone to innovation and research and development as this one.

Numerous other federal courts have likewise so held. See *Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*, 690 F.2d 1157, 1166 (5th Cir. 1982) (recusal not warranted where judge had represented the defendant in unrelated matters at least six years earlier); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-67 (6th Cir. 1979) (recusal not required where trial judge had prosecuted defendant for several unrelated crimes during the period four to thirteen years prior to the time of trial); *Gravenmier v. United States*, 469 F.2d 66, 67 (9th Cir. 1972) (where trial judge was of counsel in prior prosecution six years before present unrelated prosecution, recusal not required); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir. 1959) (recusal not warranted where trial judge had represented defendant in unrelated matters for a period of four to five years which ended three to four years before judge's decision); *Royal Air Maroc v. Servair, Inc.*, 603 F. Supp. 836 (S.D.N.Y. 1985) (prior representation by trial judge of defendant's parent corporation in unrelated matter twelve years earlier no basis for recusal). Cf. *Schurz Communs. v. FCC*, 982 F.2d 1057, 1061 (7th Cir. 1992) (Posner, J.) (noting that in ruling on a recusal motion based on the judge's involvement in a previous matter, “[t]he lapse of time is of course one factor”).

3. Finally, because this Commissioner did not represent Intel in the same matter in controversy and has not otherwise retained relevant confidential information, there is no basis to conclude that this Commissioner's impartiality more generally can reasonably be questioned. Intel itself offers no other independent arguments regarding this Commissioner's impartiality. To the contrary, its past behavior speaks volumes. Indeed, the timing of this motion to disqualify establishes that Intel itself – arguably the “most interested” person – does not truly believe that

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disqualification is proper. For nearly 18 months, Intel did not question the propriety of this Commissioner's participation (or the FTC's integrity if he were to participate), even though Intel was on notice of the FTC's investigation and this Commissioner's active participation. More specifically:

- Intel's CEO, its current General Counsel, as well as its lead outside counsel, all met with this Commissioner as a prospective decision-maker in this matter in mid-July of 2008. At no time during that meeting did any of the Intel people suggest that there was anything improper about this Commissioner's participation.
- Later, in May of 2009, Intel's lead outside counsel spoke with this Commissioner as a decision-maker in this matter. No suggestion was made during that conversation that there was anything improper about this Commissioner's participation.
- Recently, on December 3, Intel's current General Counsel and its lead outside counsel met again with this Commissioner as a prospective decision-maker, this time for about two hours. At that meeting, this Commissioner informed Intel that he had tentatively formed a "reason to believe" that a complaint should issue. Again, no suggestion was made that there was anything improper about this Commissioner's participation in this matter.
- Finally, it is this Commissioner's understanding that in the several days leading up to the Commission's decision to vote out a complaint, Intel's General Counsel had a number of conversations with the Chairman about this matter – including a conversation just a few hours before this motion was filed. At no time during those conversations did Intel ever suggest that this Commissioner's participation in the matter was in any way improper.

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It was not until the day before the Commission issued the administrative complaint – more than 18 months after the Commission authorized the use of compulsory process – that Intel, having unsuccessfully rolled the dice that this Commissioner’s participation would prevent the issuance of a complaint, moved to disqualify this Commissioner from participating.

The law is well established, however, that Intel cannot have its cake and eat it too. Motions to disqualify must be “filed with reasonable promptness after the ground for such a motion is ascertained.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *see also Santiago v. Ford Motor Co.*, 206 F. Supp. 2d 294, 298 (D.P.R. 2002) (“Section 455(a) requires that a party raise the issue of disqualification of the judge at the earliest moment after acquiring knowledge of the facts providing a basis for disqualification.”). This rule exists to prohibit parties from gaming the system. *Schurz Communs.*, 982 F.2d at 1060 (Posner, J.) (“Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them.”); *E. & J. Gallo Winery*, 967 F.2d at 1295 (noting that, although a judge has a self-enforcing duty to recuse himself, “it does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment before bringing the information to the court’s attention”). The Commission therefore “should be less inclined to grant a recusal when,” as here, “the movant has waited until the last possible moment to bring up the recusal.” *Santiago*, 206 F. Supp. 2d at 298.

For the foregoing reasons, the standards applicable to the disqualification of federal judges (and to FTC Commissioners) do not support disqualification here.

## B. Office of Government Ethics Regulations

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Intel also argues that the applicable OGE regulations, which the Commission's Rules of Practice incorporate by reference, 16 C.F.R. § 5.1, require this Commissioner's disqualification.

1. To begin with, those regulations apply the same "reasonable person" standard set forth in the body of law governing federal judicial disqualifications described above. See 5 C.F.R. § 2635.502(d) (requiring disqualification where an employee's participation in a particular matter "would raise a question in the mind of a reasonable person about his impartiality"). For the reasons discussed above, disqualification is not warranted.

2. Additionally, even if there were a basis to conclude that a reasonable person might question the Commissioner's impartiality, the OGE regulations establish that disqualification would nevertheless be improper for another reason. As Intel concedes, the OGE regulations specifically treat "the interest of the Government in the employee's participation" as a consideration that trumps even whether "a reasonable person may question the integrity of the agency's programs and operations." (Mot. at 4.) Given the circumstances in this case, this second consideration is also fatal to Intel's motion.

When former Chairman Majoras left the Commission in April 2008, the agency was left with just four Commissioners. Additionally, because Commissioner Kovacic recused himself from voting on the motion to issue the administrative complaint, the agency was left with just three participating Commissioners on this important matter. The disqualification of this Commissioner, based on his representation of Intel more than a decade and a half ago, not only would deprive the Commission of his expertise and experience in handling complex antitrust litigation, but would also leave the Commission with just two active Commissioners as decision-makers on this very important matter. Moreover, there is no guarantee that those two Commissioners would agree, thus creating the risk that the

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Commission would be left with a 1-1 split on decisions that must be made at the Commission level. Not only would such an outcome be contrary to the public interest, but the result of having just two Commissioners (whether they agree or not) consider a matter of such importance far outweighs whatever impartiality Intel believes lingers here based on a representation that occurred a decade and a half ago.

The circumstances on the horizon will not necessarily improve in this regard. Commissioner Harbour's term expired in September 2009. For the time being, Commissioner Harbour has agreed to hold over until her successor is sworn in. Commissioner Harbour, however, is free to leave at any point regardless of whether her successor is sworn in. Moreover, although the President has nominated two new Commissioners and their hearings have taken place, it is unknown at this time (1) when their confirmations will take place, and (2) whether either of those Commissioners will have her own conflict (based on prior employment or financial assets) with this matter.

As the federal courts have recognized, these circumstances can and should factor into the calculus of whether the disqualification of a presidential appointee is appropriate. See, e.g., *Cheney v. United States Dist. Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J., in chambers) (holding that doubts should not be resolved in favor of recusal where recusal would mean the Court would be functioning with fewer than all nine justices and where it would risk the possibility of a tie vote); *Center for Auto Safety v. FTC*, 586 F. Supp. 1245, 1250 (D.D.C. 1984) (noting, in the context of a regulatory commission, "if one member of such a commission is disqualified or recused, he cannot, under the law, be replaced, and the body may thus be left, as in this case, unable to make an effective decision by virtue of an even split" and that such a consideration should, in appropriate circumstances, bear on the disqualification analysis).

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### C. California Rules of Professional Conduct

Third and finally, Intel assert that Rule 3-310(E) of the California Rules of Professional Conduct (the bar to which this Commissioner is admitted) requires disqualification. This claim also fails for at least three different reasons.

1. First, the text of the Commission's Disqualification Rule provides that a motion to disqualify "shall be determined in accordance with legal standards applicable to the proceeding in which the motion was filed." 16 C.F.R. § 4.17(c). Intel does not cite (and, after much searching, this Commissioner has been unable to locate) any authority that supports Intel's claim that the standard for a motion to disqualify should be governed by state ethics rules. Instead, the federal common law, see, e.g., *Cinderella Career & Finishing Schools*, 425 F.2d at 591, and the text of the applicable federal regulations, see 16 C.F.R. § 5.1 (incorporating OGE regulations by reference), supply the sum total of the law that governs this motion. There is no authority to show that Congress or the FTC intended for the disqualification of Commissioners of federal agencies to turn on the varying state bar rules, state advisory opinions, and state common law – particularly given that membership in any state bar (or any legal training) is not even a prerequisite to serve as a Commissioner in the first place.

2. Second, California did not intend for Rule 3-310(E) to apply in these circumstances. To start with, the rule's text provides that a bar member "shall not, without the informed written consent of [a] former client, accept employment adverse to the . . . former client where, by reason of the representation of the . . . former client, the member has obtained confidential information material to the employment." CRPC 3-310(E). This Commissioner, of course, accepted his "employment" as a Commissioner before the compulsory process was authorized in this matter. It was therefore impossible for this Commissioner to obtain Intel's consent at that time. Even if such consent had been

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possible to obtain, however, Rule 3-310(E) does not clearly contemplate such “consent” in a situation where, in adjudicative proceedings, the Commissioner does not represent anyone, but is instead an arbiter. Here, the drafters intended for the rule to apply to a practicing lawyer who takes on a “representation” “adverse to a former” client.

Any doubt as to whether the rule applies only to cases where an attorney takes on an adverse representation is resolved by the rule’s heading, which is captioned: “avoiding the representation of adverse interests.” CRPC 3-310(E). Consistent with the rule’s text, nothing in that heading suggests that the rule was ever intended to apply to situations where a lawyer serves in a position akin to a federal judge and, therefore, is not “adverse” to either side. See *Gonzales v. Super. Ct. of Los Angeles County*, 3 Cal. 2d 260, 263 (Cal. 1935) (“It is an elementary rule of construction that chapter and section headings in the codes are entitled to considerable weight in interpreting the various sections and should be given effect according to their import, to the same extent as though they were included in the body of the law.”). Indeed, Intel’s citation to *River West*, 188 Cal. App. 3d at 1302-03 (Mot. at 9 n.4), underscores this point: that decision limits the rule that Intel invokes to “successive adverse representations.”

In short, Intel concedes that trying to apply Rule 3-310(E) to this Commissioner in his role as a Federal Trade Commissioner is like trying to pound a round peg into a square hole; it does not fit. (Mot. at 8 (“[N]o one can know now whether [Commissioner Rosch’s] consideration and decisions in this matter ultimately will be adverse . . . .”)) If the drafters of Rule 3-310(E) had intended for the rule to apply to the disqualification of federal officials sitting as judges, the rule would state as much. It does not. The mental gymnastics that are required to shoehorn California’s ethics rule into the analysis of when disqualification is appropriate under Commission Rule 4.17 prove too much.

3. Third, even if Rule 3-310(E) did supply a basis for disqualification here, Intel cannot prevail on the merits. As a

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threshold matter, this Commissioner must possess “confidential” information related to the merits of the pending case. Given that this Commissioner has not served as Intel’s counsel for more than a decade and a half and Intel’s own repeated descriptions about how quickly the technology and products are evolving, there is no reasonable basis to conclude that this Commissioner possesses any confidential information as Rule 3-310(E) contemplates.

### **CONCLUSION**

For the foregoing reasons, this Commissioner declines to recuse himself from further participation in the Intel proceeding (Docket No. 9341).

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**DANIEL CHAPTER ONE  
AND  
JAMES FEIJO***Docket No. 9329**Order, January 25, 2010*

Order denying respondents' request for reconsideration of the Final Order issued December 18, 2009 and modified Final Order.

**ORDER RULING ON RESPONDENTS' PETITION  
FOR RECONSIDERATION OF FINAL ORDER**

The Commission issued its Opinion and Final Order in this matter on December 18, 2009. Service of the Opinion and Final Order was completed on December 31, 2009, and the Final Order therefore would have become final and effective on March 4, 2010. 16 C.F.R. § 3.56(a); *accord* 15 U.S.C. § 45(g). On January 19, 2010, Daniel Chapter One and James Feijo (Respondents) filed a Petition for Reconsideration of Final Order (Petition). Respondents request the Commission to reconsider the Final Order on the ground that certain deadlines therein run from the date of service of the Final Order, and therefore could be interpreted to impose obligations on Respondents before the Final Order becomes final and effective in accordance with Section 5(g) of the FTC Act, 15 U.S.C § 45(g), and Commission Rule 3.56(a), 16 C.F.R. § 3.56(a). Respondents do not request reconsideration of the Opinion of the Commission. On January 25, 2010, Complaint Counsel filed an Opposition to Respondents' Petition.

The Commission has determined to deny the Petition because it does not comply with Commission Rule 3.55, 16 C.F.R. § 3.55; that is, it fails to raise any new questions "upon which the petitioner had no opportunity to argue before the Commission." The Order which the Chief Administrative Law Judge issued on August 5, 2009, as part of his Initial Decision, contains deadlines which similarly run from the date of service of the Order. Moreover, Paragraphs IV, VI, and IX of the Notice Order

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contained in the Administrative Complaint issued in this matter on September 16, 2008 contain deadlines which similarly run from the date of service of the Order. While the Respondents thus have had a number of opportunities to raise the deadline issue in their briefs and argument before the Commission, they failed to do so. Furthermore, as Complaint Counsel point out, to the extent that Respondents were uncertain as to the date on which each of the initial time periods specified in the Final Order would begin, the email message sent to all counsel of record by the Secretary advised that – consistent with the Commission Rules and Section 45(g) of the FTC Act – all such time periods would begin on the first business day after March 4, 2010; that is, on March 5, 2010.

For these reasons, the Commission has determined to deny the Petition. The Commission has nevertheless determined to modify the Final Order in certain nonsubstantive respects to clarify that the time periods within which the Respondents will be required to take certain actions required by the Modified Final Order will begin no sooner than the date on which the Modified Final Order becomes final and effective; that is, on the sixtieth day after service of the Modified Final Order. Accordingly,

**IT IS ORDERED THAT** the Final Order issued by the Commission on December 18, 2009 be, and it hereby is, modified to read as shown in the attached Modified Final Order;

**IT IS FURTHER ORDERED THAT** the initial time periods prescribed by Commission Rules 3.55 and 3.56(d), 16 C.F.R. §§ 3.55, 3.56(d), will begin on the first business day after service of the Modified Final Order; and

**IT IS FURTHER ORDERED** that the Modified Final Order – as supported and explained by the Opinion of the Commission issued on December 18, 2009 – will become final and effective on the sixtieth day after the Modified Final Order is served, pursuant to Section 5(g) of the FTC Act, 15 U.S.C. § 45(g), and Commission Rule 3.56(a), 16 C.F.R. § 3.56(a).

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By the Commission.

### **MODIFIED FINAL ORDER**

The Commission has heard this matter on the appeal of Respondents from the Initial Decision and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to enter the following order. Accordingly,

#### **I.**

**IT IS HEREBY ORDERED** that for purposes of this Order, the following definitions shall apply:

- A. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
- B. “Covered Product or Service” shall mean any dietary supplement, food, drug, or other health-related product, service, or program, including, but not limited to, BioShark, 7 Herb Formula, GDU, and BioMixx.
- C. “Food” and “drug” shall mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 55.
- D. “Advertisement” means any written or verbal statement, illustration, or depiction that is designed to effect a sale or to create interest in the purchasing of

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goods or services, whether it appears in a book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in any other medium.

- E. Unless otherwise specified, "Respondents" shall mean Daniel Chapter One and its successors and assigns, affiliates, or subsidiaries, and its officer, James Feijo, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.
- F. "Commerce" shall mean "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- G. "Endorsement" shall mean "endorsement" as defined in 16 C.F.R. § 255.0(b).

## II.

**IT IS HEREBY ORDERED** that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of BioShark, 7 Herb Formula, GDU, and BioMixx, or any substantially similar health-related program, service, or product, or any other Covered Product or Service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of product or program names or endorsements, that such health-related program, service, product, or Covered Product or Service prevents, treats, or cures or assists in the prevention, treatment, or

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cure of any type of tumor or cancer, including but not limited to representations that:

1. BioShark inhibits tumor growth;
2. BioShark is effective in the treatment of cancer;
3. 7 Herb Formula is effective in the treatment or cure of cancer;
4. 7 Herb Formula inhibits tumor formation;
5. GDU eliminates tumors;
6. GDU is effective in the treatment of cancer;
7. BioMixx is effective in the treatment of cancer; or
8. BioMixx heals the destructive effects of radiation or chemotherapy;

unless the representation is true, non-misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

### III.

**IT IS FURTHER ORDERED** that Respondents, directly or through any person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product or Service, in or affecting commerce, shall not make any representation, in any manner, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any Covered Product or Service unless the representation is true, non-misleading, and, at the time it is made, Respondents possess

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and rely upon competent and reliable scientific evidence that substantiates the representation.

**IV.**

**IT IS FURTHER ORDERED** that:

- A. Nothing in this order shall prohibit Respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Nothing in this order shall prohibit Respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

**V.**

**IT IS FURTHER ORDERED** that:

- A. Respondents shall, within seven (7) days after the final and effective date of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased BioShark, 7 Herb Formula, GDU, and/or BioMixx, on or after January 1, 2005 and until the date this order becomes final and effective. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;

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- B. Within forty-five (45) days after the final and effective date of this order, Respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A., above. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and
- C. Except as provided in this order, Respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any Respondent, at any time and until the date this order becomes final and effective, in connection with the purchase of BioShark, 7 Herb Formula, GDU, and/or BioMixx. *Provided, however,* that Respondents may disclose such identifying information to the FTC pursuant to Part V.A., above, or any law enforcement agency, or as required by any law, regulation, or court order.

## VI.

**IT IS FURTHER ORDERED** that for a period of five (5) years after the last date of dissemination of any representation covered by this order, Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and

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- C. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

## VII.

**IT IS FURTHER ORDERED** that Respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the final and effective date of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## VIII.

**IT IS FURTHER ORDERED** that Respondent Feijo, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the individual Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

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**IX.**

**IT IS FURTHER ORDERED** that Respondent DCO and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which Respondent DCO learns less than thirty (30) days prior to the date such action is to take place, Respondent DCO shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Paragraph shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**X.**

**IT IS FURTHER ORDERED** that Respondents shall, within sixty (60) days after the final and effective date of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

**XI.**

**IT IS FURTHER ORDERED** that this order will terminate on January 25, 2030, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes

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later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any paragraph in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

*Provided further*, that if such complaint is dismissed or a federal court rules that the Respondents did not violate any provision of this order, and the dismissal is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

## **ATTACHMENT A**

### **LETTER TO BE SENT BY FIRST CLASS MAIL**

[To be printed on letterhead of Daniel Chapter One]

[Name and address of recipient] [Date]

Dear [Recipient]:

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Our records show that you bought [**names of products**] from our website [**name of website**] or through a call center using our toll-free number. We are writing to tell you that the Federal Trade Commission (“FTC”) has found our advertising claims for these products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and the FTC has issued an Order prohibiting us from making these claims in the future.

The Order entered against us by the FTC requires that we send you the following information from the FTC about the scientific evidence on these products:

Competent and reliable scientific evidence does not demonstrate that any of the ingredients in BioShark, 7 Herb Formula, GDU or BioMixx, are effective when used for prevention, treatment or cure of cancer.

It is important that you talk to your doctor or health care provider before using any herbal product in order to ensure that all aspects of your medical treatment work together. Some herbal products may interfere or affect your cancer or other medical treatment, may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines, or in high doses. It is also important that you talk to your doctor or health care provider before you decide to take any herbal product instead of taking cancer treatments that have been scientifically proven to be safe and effective in humans.

Sincerely,

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**ATTACHMENT B**

Daniel Chapter One  
1028 East Main Road  
Portsmouth, Rhode Island, 02871

[name and address of purchaser]

**GOVERNMENT ORDERED NOTICE**

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**POLYPORE INTERNATIONAL, INC.***Docket No. 9327**Order, March 19, 2010*

Order granting respondent's request for additional time to file an appeal brief.

ORDER ON RESPONDENT'S MOTION FOR EXTENSION  
OF TIME TO FILE APPEAL BRIEF

Respondent Polypore International, Inc. has filed a Motion for Extension of Time to File an Appeal Brief in which it requests an additional twenty-one days to file its appeal brief to the Commission. Complaint Counsel oppose the motion. For the reasons described below, the Commission grants the parties an additional seven days to file their respective appeal and answering briefs.

Commission Rule 3.52(b), 16 C.F.R. § 3.52(b),<sup>1</sup> gives parties thirty days after service of an Initial Decision to file an appeal brief to the Commission. The time periods prescribed by the Commission Rules of Practice ordinarily should afford parties to FTC proceedings sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. Absent a Commission order granting an extension of time to the parties in this case, Respondent's appeal brief would be due on April 9, 2010.

Respondent has requested that its time to file an appeal brief be extended twenty-one days and for Complaint Counsel's time to file an answering brief likewise be extended an additional twenty-one days. Respondent seeks additional time "due to the

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<sup>1</sup> On May 1, 2009, the Commission published several amendments to its Rules of Practice designed to expedite the Part 3 litigation process. See 74 Fed. Reg. 20205. These rules govern all proceedings initiated on or after May 1, 2009. See *id.*; see also 74 Fed. Reg. 1804 (establishing interim final rules for actions commenced after January 13, 2009). Because the complaint in this matter was issued on September 10, 2008, the Rules of Practice in effect prior to the amendments govern this proceeding.

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complexity of this matter, the length of trial, the size of the corresponding record, and the length of the initial decision.” (Motion ¶ 9.) Respondent notes that it will be challenging findings in four product markets, the remedy, and “certain procedural and evidentiary rulings.” (*Id.* ¶ 10.) Respondent also points out that the Initial Decision is 376 pages long with 1,289 factual findings, and that the month-long trial generated approximately 2,100 exhibits and 6,000 pages of transcript.

Under these circumstances, the Commission is willing to grant Respondent additional time to prepare its appeal brief. Respondent’s request for a twenty-one day extension, however, appears excessive. Respondent has already received more than two weeks of extra time to prepare its appeal brief because of delays in generating the public version of the Initial Decision.<sup>2</sup> In addition, the case will be less complex on appeal as a result of Complaint Counsel not appealing the ALJ’s dismissal of the monopolization count and Respondent not appealing the ALJ’s finding that its non-compete agreement is illegal. Finally, the Commission is mindful that in any litigation involving a consummated merger, unnecessary procedural delays may increase the risk of ongoing injury to consumers and competition. Accordingly,

**IT IS ORDERED THAT** Respondent shall file its appeal brief on or before April 16, 2010 and that Respondent’s appeal shall be deemed perfected for purposes of Rule 3.51(a), 16 C.F.R. § 3.51(a), if Respondent files its appeal brief by that date;

**IT IS FURTHER ORDERED THAT** Complaint Counsel shall file their answering brief on or before May 24, 2010; and

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<sup>2</sup> The ALJ issued and the parties received the *in camera* version of the Initial Decision on February 22, 2010. The redacted public version of the Initial Decision was formally served on Respondent on March 10, 2010.

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**IT IS FURTHER ORDERED THAT** Respondent shall file its reply brief within seven days after service of Complaint Counsel's answering brief.

By the Commission.

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**DANIEL CHAPTER ONE**  
**AND**  
**JAMES FEIJO**

*Docket No. 9329      Order, March 22, 2010*

Order denying respondents' request for a stay of the modified Final Order issued January 25, 2010.

**ORDER DENYING RESPONDENTS' APPLICATION FOR  
STAY OF MODIFIED FINAL ORDER PENDING  
PETITION FOR REVIEW**

The Commission issued its Opinion on December 18, 2009 ("Opinion") and its Modified Final Order ("Order") on January 25, 2010.<sup>1</sup> The Commission's Order was served on Respondents Daniel Chapter One ("DCO") and James Feijo (collectively "Respondents") and counsel by February 1, 2010. Respondents' compliance is required no later than 60 days after service of the Order; that is, by April 2, 2010. 15 U.S.C. § 45(g)(2).

On February 25, 2010, pursuant to Rule 3.56 of the Commission's Rules of Practice, 16 C.F.R. § 3.56, Respondents moved for a stay of the Order until the later of the following: (1) the expiration of the time for filing a petition for review of the Order in a United States Court of Appeals; (2) the issuance of a final order regarding Respondents' petition for review; (3) the denial of a petition for panel rehearing; (4) the denial of a petition

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<sup>1</sup> Citation references to the materials are abbreviated as follows:

"Op." refers to the Opinion of the Commission issued on December 18, 2009;

"Order" refers to the Modified Final Order issued on January 25, 2010;  
and

"R. Mem." refers to Respondents' Memorandum in Support of Respondents' Application for Stay, filed on February 25, 2010.

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for rehearing *en banc*, or the expiration of the time for filing such petitions for rehearing; or (5) the denial of a petition for certiorari in the United States Supreme Court, or the expiration of time to file such petition.

Respondents have failed, however, to justify such relief is warranted. All factors for granting a stay weigh against granting the motion. Respondents have shown neither a likelihood of success on the merits on appeal, nor that they will suffer irreparable harm absent the requested relief. Moreover, given that other parties will be harmed if the stay is granted, it is not in the public interest to grant Respondents' motion. Accordingly, the Commission denies the motion.

### **Background**

Respondents, DCO, a corporation sole organized under the laws of the State of Washington, and its overseer and trustee, James Feijo, advertise and sell four DCO products to the public – Bioshark, 7 Herb Formula, GDU, and BioMixx (“Challenged Products”).<sup>2</sup> Respondents claim the Challenged Products can prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. Respondents made these claims during their radio shows, over the internet, and through print media. Respondents' sales of the Challenged Products constitute 20 or 30 percent of the approximately \$2 million in annual sales of DCO products for the years 2006, 2007, and 2008.

The Commission's Opinion considered the record and arguments of counsel. The Commission analyzed whether the FTC has jurisdiction over Respondents; the claims Respondents made within their advertisements; whether Respondents' claims were properly substantiated; and Respondents' defenses and

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<sup>2</sup> DCO currently sells 150 to 200 products, including the four products challenged in the Complaint.

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constitutional arguments. After finding the Commission has jurisdiction over Respondents and considering the record evidence presented by both parties, we concluded that Respondents did not have competent or reliable evidence to substantiate their claims that the Challenged Products treat, cure or prevent cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy.

Accordingly, the Commission issued a cease-and-desist Order against Respondents. Among other requirements, Respondents may make efficacy claims for products they sell only so long as the representations are true, non-misleading, and, at the time they are made, Respondents possess and rely on competent and reliable scientific evidence to substantiate their claims. The Order limits what they may say relating to the sale of certain products, but it does not otherwise limit their speech or religious practices. The Order also requires Respondents to send to all consumers who have bought the Challenged Products a letter notifying them the FTC found DCO's advertising claims for the Challenged Products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and that the FTC has issued an Order prohibiting Respondents from making the claims in the future.

Before us now is Respondents' Application for Stay of Modified Final Order Pending Judicial Review.

### **Applicable Standard**

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by ... the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, 15 U.S.C. §

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45(g)(2)(A), (B)(ii). Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R. § 3.56(c); *see, e.g., In the Matter of Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). We consider these factors below.

## Analysis

### 1. Likelihood of Respondents' Success on Appeal

Respondents correctly note that in assessing the likelihood of their success on the merits on appeal, the Commission need not "harbor doubt about its decision in order to grant the stay." *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at \*10 (May 22, 1996). Respondents also correctly state they may satisfy the "merits" factor if their argument on at least one claim is 'substantial' – so long as the other three factors weigh in their favor." R. Mem. at 1 (*citations omitted*). Finally, if the equities decidedly tip in favor of the Respondents it is enough that they "raise questions sufficiently serious and substantial to constitute 'fair ground for litigation.'" R. Mem. at 1-2 (*citations omitted*). Respondents' arguments, however, merely disagree with the Opinion of the Commission and raise no serious or substantial questions on the merits; disagreement does not establish a likelihood of success on appeal.

#### *a. Jurisdiction*

Respondents argue that the Commission does not have jurisdiction because DCO is a corporation sole operating under the laws of Washington, and as such is dedicated to religious, nonprofit purposes. They assert the Commission misapplied *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405

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F.2d 1011 (8<sup>th</sup> Cir. 1969) when it found DCO's members derived a profit from DCO's activities. Respondents raised these arguments on appeal to the Commission and the Commission rejected them. See Op. at 6-8 (summarizing Respondents' same jurisdictional arguments).<sup>3</sup> As we stated in *North Texas Specialty Physicians*, Docket No. 9312 (Jan. 20, 2006), merely repeating arguments the Commission rejected before does not provide the Commission with "sufficient reason to question its prior decision or any of the bases for it, and Respondent[s'] renewal of its legal arguments, without more, is insufficient to justify granting a stay." *Id.* at 3 (*citations omitted*).

The Commission does not question the seriousness of Respondents' religious beliefs, but controlling authorities refute their legal arguments. *California Dental Ass'n v. FTC*, 526 U.S. 756, 766-67 (1999) and *Community Blood Bank*, 405 2d at 1022, both hold the Commission's jurisdiction extends to a corporation organized to carry on business for its own profit or that of its members. The record here establishes that DCO carries on a business that inures to the economic benefit of Respondent James Feijo, its sole overseer and trustee of DCO's assets. DCO sells its products through publications, a call center, radio shows, and over the Internet. In addition, a number of retail stores and chiropractic centers in various states sell DCO products. Any consumer may purchase DCO's products. James Feijo's wife, Patricia Feijo, is a signatory to DCO's bank accounts and had check writing authority. DCO's revenue covered all of the Feijos' living expenses including two houses, cars, pool and gardening expenses, tennis and golf club expenses, and expenditures on retail items and restaurant bills. The evidence supports a finding

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<sup>3</sup> The Commission's factual findings must be accepted if they are supported by relevant evidence sufficient so that a reasonable mind might agree with the conclusions. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). See also Section 5(c) of the Act, 15 U.S.C. § 45(c), which provides that "(t)he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" upon review in the Court of Appeals.

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that DCO was engaged in commercial activities and that the beneficiary of DCO's profit was James Feijo. Op. at 7, 8.

*b. Substantiation*

Respondents also question the propriety of the FTC's substantiation doctrine. They argue that the reasonable basis theory creates presumptions that violate both Sections 5 and 12 of the FTC Act, as well as the First Amendment commercial speech doctrine. Respondents raised these same arguments below and we continue to find them without merit.

Longstanding case law has consistently held that advertising claims can be found deceptive under Sections 5 and 12 of the FTC Act if they are shown either to be false or to lack a reasonable basis substantiating the claims made in the advertisement. See, e.g., *FTC v. National Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11<sup>th</sup> Cir. 2009); *FTC v. Pantron I*, 33 F.3d 1088, 1096 n.23 (9<sup>th</sup> Cir. 1994); *In the Matter of Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Under the reasonable basis standard, claims about a product's attributes, performance or efficacy carry with them the express or implied representation that the advertiser possessed a reasonable basis substantiating the claims at the time they were made. See *Thompson*, 104 F.T.C. 648, at 813; *FTC v. Direct Mktg. Concepts*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008); *In the Matter of Kroger Co.*, Docket No. C-9102, 1978 FTC LEXIS 332, at \*15 (May 17, 1978). Although Respondents may not like the case law, they cannot dispute that courts continue to hold the FTC may show a respondent made deceptive claims if it did not have a reasonable basis for their advertisements. Applying that standard in the matter before us now and after reviewing the evidence, the Administrative Law Judge ("ALJ") and the Commission found Respondents did not possess any adequate substantiation for their health-related efficacy claims.

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Respondents assert the ALJ and the Commission misapplied the FTC Guide, *Dietary Supplements: An Advertising Guide for Industry*, (“Guide”) contending that the ALJ and the Commission applied the Guide as a fixed rule of law rather than a flexible standard. The standard’s flexibility, however, lies in its tailoring the level of substantiation required to the nature of the product claims at issue. Here, Respondents claimed that the Challenged Products could prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. As the Guide itself notes, such claims about efficacy typically should be supported with competent and reliable scientific evidence. See Guide at 9. Further, case law supports holding the Respondents to a competent and reliable scientific standard for the efficacy claims they made. See *FTC v. Natural Solution, Inc.*, No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at \*11-12 (C.D. Cal. Aug. 7, 2007); *Nat’l Urological Group*, 645 F. Supp. 2d at 1189; *Direct Mktg.*, 569 F. Supp. 2d at 300, 303; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006), *aff’d*, 512 F. 3d 858 (7<sup>th</sup> Cir. 2008). Finally, the ALJ and the Commission relied on expert testimony to determine what competent and reliable scientific evidence would adequately substantiate Respondents’ claims.

*c. First Amendment Arguments*

Respondents argue the Commission’s Opinion and Order unconstitutionally deprives them of free exercise of religion and freedom of speech, denies Respondents’ liberty and property without due process, and erroneously dismissed their Religious Freedom Restoration Act Claim. Respondents’ arguments are without merit.

The evidence established the primary purpose and effect of the speech at issue here – Respondents’ representations relating to the Challenged Products – was to sell those products, not to solicit charitable contributions. Op. at 13. Such commercial speech is accorded less protection than other constitutionally protected forms of speech. See *Central Hudson Gas & Elec. Corp. v. Pub.*

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*Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980). Specifically, misleading or deceptive commercial speech is afforded no protection under the First Amendment. See, e.g., *Cent. Hudson*, 447 U.S. 557; *Edenfield v. Fane*, 507 U.S. 761 (1993); and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999). Respondents' claims about the efficacy of the Challenged Products were not substantiated and were, therefore, deceptive. Op. at 11, 14.

Respondents argue their due process rights were violated because two of the sitting Commissioners pre-judged the matter. Respondents point to a speech made by Commissioner Rosch in 2008<sup>4</sup> and Commissioner Harbour's statements during oral argument. Respondents' reliance on *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) is misplaced. In that case, the court noted that the statements relied on to show prejudgment were made while the appeal was pending before the Commission; here Commissioner Rosch made these general statements about a "bogus cancer cure" sweep as only a small part of a larger speech on self-regulation. Commissioner Rosch delivered this speech almost a full year before Respondents had even filed their appeal in this case, before evidence was entered in the matter, and before the ALJ issued his Initial Decision (August 2009). Further, if Respondents had wanted to disqualify Commissioner Rosch, they should have sought his disqualification before now by the filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. § 556(b). They have never made such a filing.

Nor is there any merit to Respondent's arguments based on Commissioner Harbour's comments during the oral argument before the Commission. Like any appellate tribunal, the Commission may properly probe and even challenge the positions

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<sup>4</sup> J. Thomas Rosch, *Self-Regulation And Consumer Protection: A Complement To Federal Law Enforcement*, before the 2008 National Advertising Division Annual Conference, at 16-17 (Sept. 23, 2008).

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being argued to it, as well as the practical ramifications of its ruling. In the present case, for example, there is no impropriety in inquiring into the potential that the continued sale of “cancer cures” whose efficacy is unsubstantiated could harm consumers who might turn to such products in place of other medical treatment. In any event, none of the statements to which Respondents refer could lead “a disinterested observer [to] conclude that (a commissioner) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959) (describing the grounds for disqualification). Moreover, there was ample evidence in the record to support the Commission’s decision in this matter.

Respondents’ final two arguments supporting their assertion that they are likely to succeed on the merits are that the FTC erroneously dismissed the Respondents’ Religious Freedom Restoration Act claim (“RFRA”) and that the FTC is forcing the Respondents to send a letter to consumers to which Respondents object for moral, ethical, and religious reasons. Respondents’ arguments again misapply the law to the facts in this matter. RFRA applies when the government substantially burdens a person’s exercise of religion. The case upon which Respondents rely is *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In that case, the use of a hallucinogenic tea was central to the entity’s core beliefs, the tea was not sold or otherwise provided to non-believers, and the tea was only used during the sacramental rite of communion. Nothing in the record before us reveals similar facts. DCO was engaged in commercial activity by selling the Challenged Products and DCO engaged in deception to make those sales. DCO’s sales were not dependent upon a consumer’s belief system or whether they had any religious affiliation at all. DCO sold their products completely outside of any religious ceremony or sacrament.

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The Commission has not burdened Respondents' exercise of religion; it has only limited how DCO can sell its products. The Commission found the Respondents violated Section 5 of the FTC Act, which provides the Commission with the authority to fashion an order requiring respondents to cease and desist from such acts and practices. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). The Commission took great care in issuing the Order in this matter and making it clear that the letter informing consumers of the FTC's Opinion and Order plainly state it is the FTC's Order that requires Respondents to transmit the information. The Order does not require that Respondents profess to agree with the FTC or that Respondents modify their religious ministry in any way.

## 2. Irreparable Injury

Respondents argue that compliance with the Order "would be nearly fatal to the DCO ministry, imposing incalculable losses that can neither be accurately measured nor compensated, and causing serious harm to its 'good will.'" R. Mem. at 23. Respondents base this argument on the provisions of Paragraphs II and III which prohibit Respondents from making any representation about the efficacy of any of their products "unless the representation is true, non-misleading, and, at the time it is made, [DCO] possess[es] and rel[ies] upon competent and reliable scientific evidence that substantiate[s]" their claims. R. Mem. at 25 (*quoting* Paragraph III of the Order). These limitations, Respondents argue, will prevent them from selling any of their products, essentially shut down DCO, and injure the business's goodwill with its steady customers.<sup>5</sup>

Respondents may not recognize it, but the Commission's Order merely requires Respondents to follow the law. Paragraphs II and III of the Order cover both the Challenged Products as well as other products sold by Respondents and permit Respondents to

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<sup>5</sup> We accept Respondents' Declarations submitted for the purposes of supporting their irreparable harm argument, but do not find they are sufficient to meet their burden of showing irreparable injury.

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make efficacy claims relating to those products so long as the representations are true, non-misleading, and substantiated. Op. at 24. “In other words, Respondents are only obliged to do that which the case law under Sections 5 and 12 of the FTC Act has defined as necessary to avoid deception.” *Id.* The Commission would be hard pressed to find that irreparable injury results from an Order requiring marketers of health-related programs to make only true, substantiated representations about the products they are selling, especially after finding those marketers engaged in deceptive advertising for untested cancer cures. The Order has been tailored narrowly to apply only to their commercial advertising and only to the type of speech that has been found to be deceptive; the Order does not otherwise reach into Respondents’ religious speech or practices.

Paragraph V of the Order requires Respondents to send a letter to their customers notifying them of the Commission’s Opinion and Order and the findings therein. Respondents assert they will be irreparably harmed if they are compelled to send this letter on their letterhead to certain customers because such a requirement will violate their First Amendment freedoms of speech and religion. Respondents note, however, that if the government can demonstrate “that its mandate is ‘a narrowly tailored means of serving a compelling state interest,’” then a speaker can be required to make disclosures. R. Mem. at 22 (*quoting Pacific Gas & Electric Co. v. Cal. P.U.C.*, 475 U.S. 1, 19 (1986)). The compelling interest here is protecting cancer patients from deceptive advertising claims. The required letter is carefully limited to address only the issues in this matter. In particular, the letter is to be sent only to Respondents’ customers who purchased the four Challenged Products; it is drafted to show that the FTC found DCO’s advertising claims for those products to be deceptive and that the information about the scientific evidence relating to the products is from the FTC; and it is not drafted to force Respondents to say they agree with the FTC’s findings. The letter does not mention Respondents’ religious beliefs or teachings. The letter does not compel Respondents to state they

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have repudiated their faith or endorsed the FTC's Opinion. The letter is narrowly crafted to inform consumers about the FTC's Opinion and Order.

### 3. Degree of Injury to Other Parties and the Public Interest

The final remaining questions are whether a stay would harm other parties and whether it is in the public interest. *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at \*7-8. These two factors are stated separately, but the FTC considers them together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *See Id.* at \*8.

Respondents argue that a stay would not harm any party because they assert there is no evidence that any consumer was economically harmed or misled by Respondents' representations, and that there is no evidence in the record that the four Challenged Products have actually harmed anyone's medical or cancer treatment.

Respondents' argument ignores all the record evidence showing that Respondents engaged in deceptive advertising. And while Respondents may not believe that deception constitutes a "bona fide injury to any consumer," the Commission does. Consumers are harmed when they purchase products that are marketed to prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy, and there is no substantiation for those claims. As the findings of fact show, this harm arises if consumers forego beneficial and effective therapy for untested therapies like the ones at issue here. This harm comes from consumers risking their health to potential side effects and harmful interactions between Respondents' products and other therapies. These harms are real and they are substantial. Because of the nature of the harm, issuing a stay is not in the public interest.

### **Conclusion**

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Taking all of these factors into consideration, the Commission has determined that a stay is inappropriate. Respondents are unlikely to succeed on the merits and in the Commission's judgment the potential harm to consumers from granting a stay substantially outweighs the potential harm to Respondents from denying the request for a stay. We find that DCO and James Feijo have not met their burden for showing a stay of the Modified Final Order pending judicial review is warranted. Accordingly,

**IT IS ORDERED THAT** the Respondents' Application for Stay of Modified Final Order Pending Judicial Review is **DENIED**.

By the Commission.

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## **CARILION CLINIC**

*Docket No. 9338*

*Order, March 26, 2010*

Order approving respondent's application for Commission approval of proposed divestiture of the Center for Surgical Excellence, in accordance with the Commission's order.

### LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Lutes:

This letter responds to the January 19, 2010, Application for Approval of Divestiture of the Center for Surgical Excellence ("Application") requesting that the Commission approve Carilion Clinic's ("Carilion") divestiture of the Center for Surgical Excellence ("CSE") to Fairlawn Surgery Center, LLC ("Fairlawn") pursuant to the order in this matter. The Application was placed on the public record for comments for thirty days, until February 18, 2010, and two comments were received.

After consideration of the proposed transaction as set forth in the Application and supplemental documents, as well as other available information, the Commission has determined to approve the divestiture of CSE to Fairlawn. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Carilion's Application, and has assumed them to be accurate and complete.

By direction of the Commission

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**DANIEL CHAPTER ONE**  
**AND**  
**JAMES FEIJO**

*Docket No. 9329*

*Order, April 26, 2010*

Order denying respondents' request for a an extension of time to comply with Paragraph V. A of the Modified Final Order issued January 25, 2010.

ORDER

On April 13, 2010, pursuant to Commission Rule 3.22, Counsel for the Respondents filed a Motion For Extension of Time to Fully Comply With Paragraph V.A of Modified Final Order ('Motion'). The Motion requests that the Commission extend by fourteen days the time within which Respondents must fully comply with Paragraph V.A of the Modified Final Order issued by the Commission on January 25, 2010. The Modified Final Order became effective on April 2, 2010. Paragraph V.A of the Modified Final Order therefore required the Respondents to produce, by April 13, 2010, a list of all consumers who purchased – from January 1, 2005 through April 2, 2010 – one or more of the four Challenged Products from the Respondents. Respondents' Motion states that the Respondents have partially complied with this provision of the Modified Final Order.

On April 15, 2010, Complaint Counsel filed a Response to Respondents' Motion stating that the Motion was procedurally flawed in that it "is incorrectly styled as a motion for an extension pursuant to Commission Rule of Practice 3.22, rather than as a motion to modify the requirements of the Modified Final Order pursuant to Rule 2.51." Complaint Counsel state that as a consequence, the Respondents failed to provide, pursuant to Commission Rule 2.51(b), the required affidavit demonstrating in detail, *inter alia*, changed conditions of law or fact. Nonetheless, Complaint Counsel do not object to a brief extension as long as

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none of the other requirements or deadlines in the Modified Final Order are changed or extended.

The Commission has jurisdiction to determine whether to reopen the proceeding and modify the order. 16 C.F.R. § 3.72(a). The Commission has determined, however, that the Respondents have not provided the justification under the Commission Rules required to support granting the Motion. The Commission has therefore determined to deny the Respondents' Motion. However, the Commission has determined in its discretion to take no action to seek relief for Respondents' failure to comply by April 13, 2010 with Paragraph V.A, as long as Respondents fully comply with that provision on or before April 27, 2010. Accordingly,

**IT IS ORDERED** that Respondents' Motion For Extension of Time to Fully Comply With Paragraph V.A of Modified Final Order be, and it hereby is, denied.

By the Commission.

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**DANIEL CHAPTER ONE  
AND  
JAMES FEIJO**

*Docket No. 9329      Order, May 6, 2010*

Order granting the joint motion to correct the transcript of the oral argument.

**ORDER GRANTING JOINT MOTION TO CORRECT  
TRANSCRIPT OF ORAL ARGUMENT**

Respondents and Complaint Counsel in this matter have filed a Joint Motion To Correct the December 3, 2009 Oral Argument Transcript. The Commission has determined to grant the Joint Motion, and to effect some additional corrections of typographical errors in the Oral Argument Transcript. Accordingly,

**IT IS ORDERED THAT** the Oral Argument Transcript be, and it hereby is, modified to effect the correction of typographical errors, and to read as shown in the attached corrected copy.

By the Commission.

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**GEMTRONICS, INC.**  
**AND**  
**WILLIAM H. ISELY***Docket No. 9330**Order, May 12, 2010*

Order granting the respondents' motion for an extension of time in which to file an appeal brief until June 12, 2010.

**ORDER GRANTING RESPONDENTS' MOTION FOR  
EXTENSION OF TIME TO FILE APPEAL BRIEF**

On April 27, 2010, the Chief Administrative Law Judge issued an Initial Decision and Order Denying Respondents' Application For An Award of Attorney Fees and Other Expenses ("Initial Decision") in this matter. The Initial Decision was served on Respondents on May 3, 2010, and on May 5, 2010, Respondents timely filed a Notice of Appeal, pursuant to Commission Rule 3.83(h), 16 C.F.R. § 3.83(h), advising that they would appeal the Initial Decision. On May 10, 2010, Respondents filed a Motion requesting an extension of the deadline for filing their appeal brief until June 12, 2010. Complaint Counsel do not oppose the motion.

The Commission Rules applicable to this proceeding give the parties thirty days after service of the Initial Decision within which to perfect an appeal by filing an appeal brief before the Commission.<sup>1</sup> The time periods prescribed by the Commission Rules ordinarily should afford parties to Commission proceedings

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<sup>1</sup> On May 1, 2009, the Commission published several amendments to its Rules of Practice designed to expedite the Part 3 litigation process. See 74 Fed. Reg. 20205. These rules govern all proceedings initiated on or after May 1, 2009. See *id.*; see also 74 Fed. Reg. 1804 (January 13, 2009) (establishing interim final rules for actions commenced after January 13, 2009). However, "[t]he rules that were in effect before January 13, 2009 . . . govern all . . . Commission adjudicatory proceedings [pending on January 13, 2009].". 74 Fed. Reg. 1804. Because this matter was already pending on January 13, 2009, the Rules of Practice in effect prior to the amendments govern this proceeding.

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sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. In this instance, however, Respondent William Isely states in the Respondents' Motion that more time is necessary due to pressing personal issues, including in particular the need to care for his ailing wife, and the Commission is persuaded that these circumstances warrant granting the Motion. Because June 12, 2010, falls on a Saturday, the Commission has determined to extend the time for the Respondents to file their appeal brief until June 14, 2010. Accordingly,

**IT IS ORDERED THAT** Respondents shall file their appeal brief on or before June 14, 2010, and that Respondents' appeal shall be deemed perfected for purposes of Rule 3.52(b)(2), 16 C.F.R. § 3.52(b)(2), if Respondents file their appeal brief by that date;

**IT IS FURTHER ORDERED THAT** Complaint Counsel shall file their answering brief on or before July 26, 2010; and

**IT IS FURTHER ORDERED THAT** Respondents shall file their reply brief on or before August 4, 2010.

By the Commission.

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**GEMTRONICS, INC.**  
**AND**  
**WILLIAM H. ISELY**

*Docket No. 9330*

*Order, June 16, 2010*

Order granting S.M. Oliva's motion for leave to file a brief *amicus curiae* in support of Respondents William Isely and Gemtronics in this matter.

ORDER GRANTING MOTION FOR LEAVE TO FILE  
BRIEF *AMICUS CURIAE*

On June 7, 2010, S.M. Oliva filed a timely motion for leave to file a brief *amicus curiae* in support of Respondents William Isely and Gemtronics in this matter, and attached a copy of the brief that he proposes to file. Neither Respondents nor Complaint Counsel filed an opposition to the motion.

Pursuant to Commission Rule 3.52(j), 16 C.F.R. § 3.52(j), the Commission has determined to grant the motion. Accordingly,

**IT IS ORDERED THAT** the motion of S.M. Oliva for leave to file a brief *amicus curiae* in this matter be, and it hereby is, **GRANTED**.

By the Commission.

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**WHOLE FOODS MARKET, INC.**

*Docket No. 9324*

*Order, June 18, 2010*

Order approving respondent's application for Commission approval of proposed divestitures to in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Morris:

This is in response to the Petition for Approval of Proposed Divestiture to A-M Holdings, LLC which you filed on February 23, 2010 ("A-M Petition"), the Petition for Approval of Proposed Divestiture to Healthy Investments, LLC which you filed on February 23, 2010 ("Healthy Investments Petition"), the Petition for Approval of Proposed Divestiture to Trader Joe's East, Inc. which you filed on March 4, 2010 ("Trader Joe's Petition"), the Petition for Approval of Proposed Divestiture to Luberski, Inc. which you filed on March 8, 2010 ("Luberski Petition"), and the Petition for Approval of Proposed Divestiture to Topco Associates LLC which you filed on March 8, 2010 ("Topco Petition") pursuant to the Order in Docket N. 9324 ("Order"). Each of the Petitions was subject to a thirty day public comment period. Public comments were filed with regard to the Trader Joe's Petition and the A-M Petition.

The Commission has determined to approve the A-M Petition, the Healthy Investments Petition, the Trader Joe's Petition, and the Luberski Petition, and to deny the Topco Petition.

A-M Holdings, LLC ("A-M") and Healthy Investments, LLC ("Healthy Investments") each intend to acquire a currently operating store from Whole Foods and operate a premium natural and organic supermarket at the location. They each have demonstrated the financial resources needed to acquire and

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operate the store in a viable manner. Divestiture to A-M and Healthy Investments is consistent with the purposes of the Order.

Trader Joe's East, Inc. ("Trader Joe's") intends to acquire a closed store location from Whole Foods. Whole Foods closed this location prior to the entry of the Order and has not operated a premium natural and organic supermarket at the location since the Order was entered. Under the Order, if the Commission does not approve the Trader Joe's Petition, no divestiture of this location will occur. Although Trader Joe's does not compete directly with Whole Foods in the premium natural and organic supermarket market, it does provide some level of competition to Whole Foods. Because the store location is currently closed, and is thus not competing in the market, the Commission has determined that approving the Trader Joe's Petition would better serve the purposes of the Order than having the location remain closed.

The A-M Petition and the Topco Petition each involve, in part, the acquisition of the rights to the "Alfalfa's" name and associated intellectual property. A-M also proposes to acquire the store at 1651 Broadway in Boulder, Colorado. That store currently operates under the "Alfalfa's" name. A-M proposes to continue to operate the store under the "Alfalfa's" name by acquiring the rights to the name as well as the store location. Topco Associates LLC ("Topco") does not propose to acquire any store locations in addition to the intellectual property it proposes to acquire. Topco proposes to use the "Alfalfa's" intellectual property to allow its member-owners to brand the natural and organic sections of their stores with the intellectual property, allowing its member-owners to create Alfalfa's cafes in their stores, and creating a group of products branded using the Alfalfa's intellectual property. Topco Petition at 3. Paragraph II.I. of the Order states "The purpose of the divestiture of the Assets To Be Divested is to ensure the viable and competitive operation of the Assets To Be Divested in the same business and in the same manner in which the Assets To Be Divested were engaged at the time of the announcement of the proposed acquisition of Wild Oats by Whole Foods and to remedy

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the lessening of competition alleged in the Commission's complaint." The Complaint alleged that the acquisition lessened competition in the operation of premium natural and organic supermarkets. The Commission has determined that the A-M Petition better satisfies the purposes of the divestiture than does the Topco Petition with regard to the "Alfalfa's" intellectual property. A-M intends to use the "Alfalfa's" intellectual property in the operation of a premium natural and organic supermarket. It will also use the intellectual property in the same manner as it was used at the time of the announcement of the proposed acquisition. Topco does not intend to use the "Alfalfa's" intellectual property in the operation of premium natural and organic supermarkets. It also does not intend to use the intellectual property in the same manner as it was used at the time of the announcement of the proposed acquisition. Accordingly, the Topco Petition does not satisfy the purposes of the divestiture of the "Alfalfa's" intellectual property. Therefore, the Commission has determined to approve the A-M Petition and to deny the Topco Petition as to the "Alfalfa's" intellectual property.

The Luberski Petition and the Topco Petition each involve, in part, the acquisition of the "Wild Oats" name and associated intellectual property. Luberski, Inc. ("Luberski") intends to develop and supply a Wild Oats labeled brand of natural and organic packaged food products. Luberski Petition at 2. Luberski also intends to use the Wild Oats intellectual property to open Wild Oats stores by licensing the name to developers. Letter from Charles F. Rule, Esq., to Kenneth A. Libby, Esq., April 19, 2010, at 4. Topco proposes to use the Wild Oats intellectual property to allow its member-owners to brand the natural and organic sections of their stores with the intellectual property, allowing its member-owners to create Wild Oats's cafes in their stores, and creating a group of products branded using the Wild Oats intellectual property. Topco Petition at 3. At the time of the announcement of the proposed acquisition, the "Wild Oats" intellectual property was used on products sold to third party retailers and as the name of stores. It was not used as the name of the natural and organic

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sections of other stores or as the name of cafes in other stores. Topco also has not shown how its proposed use of the “Wild Oats” intellectual property will remedy the lessening of competition alleged in the Commission’s complaint. The Commission has determined that Luberski’s proposed use of the “Wild Oats” intellectual property better satisfies the purposes of the divestiture than does Topco’s proposed use of the “Wild Oats” intellectual property. Therefore, the Commission has determined to approve the Luberski Petition and to deny the Topco Petition as to the “Wild Oats” intellectual property.

In granting its approval, the Commission relied on the information you submitted and the information submitted by the proposed acquirers and assumed it to be accurate and complete.

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

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## INTEL CORPORATION

*Docket No. 9341.*

*Order, June 21, 2010*

Order withdrawing the matter from adjudication to allow the Commission to consider a proposed consent agreement.

### ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel and Respondent having jointly moved that this matter be withdrawn from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Respondent having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondent and by Complaint Counsel and approved by the Director of the Bureau of Competition which, if accepted by the Commission, would resolve this matter in its entirety;

**IT IS ORDERED**, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C. F.R. § 3.25(c) (2010), that this matter in its entirety be, and it hereby is, withdrawn from adjudication until 12:01 a.m. on Friday, July 23, 2010, and that all proceedings before the Administrative Law Judge are hereby stayed during that time as the Commission evaluates the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C. F.R. § 3.25(f); and

**IT IS FURTHER ORDERED**, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

# **RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS**

## **LIQUIFIED PETROLEUM GAS INVESTIGATION**

*FTC File No. 091 0115      Decision, January 8, 2010*

### **RESPONSE TO RAMÓN GONZÁLEZ CORDERO'S AND RAMÓN GONZÁLEZ SIMONET'S PETITION TO QUASH OR MODIFY CIVIL INVESTIGATIVE DEMAND AND SUBPOENA AD TESTIFICANDUM**

Dear Mr. Méndez-Gómez:

This letter advises you of the Commission's disposition of Petitioners' Request for Rehearing of Denial of Petition to Quash or Limit Compulsory Process in the Matter of Empire Gas Inc. and Liquilux Gas Corp. filed on December 10, 2009 ("Request"). On November 19, 2009, Petitioners Ramón González Cordero and Ramón González Simonet, officers, directors, and stockholders of Empire and Liquilux, timely filed a petition to quash or modify civil investigative demands ("CIDs") and subpoenas ad testificandum ("Petition") on the ground that the FTC Act does not give the FTC jurisdiction to investigate the conduct of Empire and Liquilux based on the state action doctrine. On December 3, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying the Petition on the grounds that the state action doctrine, if applicable, is an affirmative defense that must be asserted during the trial of any FTC claims alleging antitrust or FTC Act<sup>1</sup> violations.<sup>2</sup>

Petitioners now request a rehearing of the issues raised by the Petition before the full Commission. No new evidence or arguments are presented in support of this rehearing request.

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<sup>1</sup> 15 U.S.C. § 45, as amended.

<sup>2</sup> The Petition also requested that the subpoenas be made returnable in Puerto Rico. Petitioners do not seek a rehearing on the denial of that request. Request at 1.

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Additionally, you ask the Commission to stay the return of the subpoenas until: (1) the Commission's decision on the Request; and (2) the Commission's compliance with Rule 2.6, 16 C.F.R. § 2.6, which directs that subpoena recipients be "advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation." Request at 2. For the reasons set forth herein, the Letter Ruling is affirmed; and the request for stay is denied as moot.

**The State Action Doctrine Is An Affirmative Defense.**

The Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), the progenitor of the state action doctrine, that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. Subsequent cases have applied the doctrine to the FTC Act. See, e.g., *FTC v. Ticor Ins. Co.*, 504 U.S. 621 (1992). Petitioners incorrectly frame their state action argument as one involving the FTC's jurisdiction. See Petition at 1, 12. The state action doctrine is an affirmative defense, not a jurisdictional limitation. *South Carolina Board of Dentistry v. FTC*, 455 F.3d 436, 444 (4<sup>th</sup> Cir. 2006) (denying an interlocutory appeal from an adverse ruling on respondent's state action defense).

In *FTC v. Monahan*, 832 F. 2d 688 (1<sup>st</sup> Cir. 1987) (Breyer, J.), the First Circuit held that a state action claim could not be used to deprive the Commission of the opportunity to investigate because doing so would improperly limit the Commission's ability to evaluate the facts that might form the basis for such a defense and allow the FTC to determine for itself whether there was a basis for pursuing a law enforcement action. *Id.* at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of" a state action defense.). The Letter Ruling

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correctly held that the state action doctrine, if applicable, would only be an affirmative defense that could be raised by Empire during the trial of any FTC allegations of an antitrust or FTC Act violation.<sup>3</sup>

**The Request for A Stay Is Moot.**

Petitioners ask for a stay until the Commission satisfies its obligations under Rule 2.6, and issues a ruling on the Request. The Commission satisfied its obligations under Rule 2.6 when it adopted a resolution fully describing the scope of the investigation. The Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation for this investigation states that the nature and scope of the investigation is:

To Determine whether Empire Gas ("Empire"), Tropigas de Puerto Rico, Liquilux Gas Corporation ("Liquilux"), or other unnamed persons, partnerships, or corporations have engaged or are engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, through various acts or practices, including but not limited to, agreements to fix prices or allocate customers, exclusive dealing, or other

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<sup>3</sup> Even if Petitioners' state action arguments were jurisdictional, investigations by administrative agencies should not be bogged down unnecessarily with jurisdictional challenges. *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001); *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996) ("[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until [a substantive law] enforcement action is brought against the subpoenaed party."); *Monahan*, 832 F. 2d at 690; *FTC v. Swanson*, 560 F.2d 1, 2 (1<sup>st</sup> Cir. 1977) ("An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious."). The Letter Ruling correctly held that the state action doctrine is not an immunity from investigation.

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conduct regarding liquified petroleum gas or related products in Puerto Rico; and to determine whether Empire or Liquilux has engaged or is engaging in unlawful acquisitions in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.<sup>4</sup>

Petitioners' only remaining justification for a stay, the Commission's ruling on the Request, is mooted by the issuance of this letter disposing of the Request.<sup>5</sup>

**Conclusion and Order**

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

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<sup>4</sup> Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, FTC File No. 091-0115 (Sept. 15, 2009) ("Resolution"). The Resolution was attached to the CIDs and subpoenas, copies of which can be found in the Request, Appendix B.

<sup>5</sup> Petitioners waived any claim that the CIDs or subpoenas should be quashed because the Resolution did not comply with Rule 2.6 when they failed to raise that claim in their Petition. *Wellness Support Network*, FTC File No. 072-3179 at 2 (Apr. 24, 2008) (Letter Ruling dismissing appeal from denial of petition to quash CID) ("The rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID."). Petitioners have offered no explanation for not having raised this issue in the Petition.

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**DEBT RELIEF USA, INC.***FTC File No. 092 3052      Decision, January 8, 2010*RESPONSE TO DEBT RELIEF USA, INC.'S PETITION TO QUASH CIVIL  
INVESTIGATIVE DEMANDS FOR TESTIMONY

Dear Messrs. Reilly, Wojcik, and Bell:

The Commission is investigating whether Debt Relief USA, Inc. ("DRUSA") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the advertisement and sales of debt relief products and services. On October 23, 2009, the Commission issued separate Civil Investigative Demands for testimony ("CIDs") to each of the Petitioners, individuals who are officers, directors and stockholders of DRUSA. On October 28, 2009, Petitioners filed their Petition to Quash CIDs ("Petition"), citing the pendency of bankruptcy proceedings involving DRUSA and the supposed protection of the "corporate veil" of DRUSA as grounds. Petition at 2. The Petition is wholly without merit; and must, therefore, be denied. In accordance with the provisions of Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioners shall comply with the CIDs on the following dates, at the times and places stated in the CIDs: Mr. Reilly on January 19, 2010; Mr. Wojcik on January 20, 2010; and Mr. Bell on January 21, 2010.

This letter advises you of the Commission's disposition of the Petition. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioners have the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.<sup>1</sup>

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<sup>1</sup> Computation of the time for appeal should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the

## Petitions to Quash or Limit

**I. Petitioners Must Comply with the CIDs.**

Petitioners are officers, directors and stockholders of DRUSA, and appear to possess information regarding DRUSA's sales and marketing of debt relief products and services to consumers. Petitioners have not claimed that the CIDs were issued for an improper purpose, or that the information that would be sought through their testimony would be irrelevant, privileged, or unduly burdensome to provide.<sup>2</sup>

Petitioners' arguments appear to be largely based on the assumption that the Commission's investigation of DRUSA's activities can only result in relief directed at DRUSA itself, and that the liquidation of DRUSA in bankruptcy "would negate the need for this action to continue." Petition at 3. This premise is incorrect. Petitioners may be independently liable for injunctive and monetary relief for the corporate acts of DRUSA in violation of the FTC Act. An individual may be liable for corporate violations of the FTC Act where it can be shown that such individual participated in or had control over corporate practices and had knowledge of such practices. *Fed. Trade Comm'n v. Amy Travel Serv.*, 875 F.2d 564, 573 (7<sup>th</sup> Cir. 1989).<sup>3</sup> There is thus no

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full Commission shall not stay the return date established pursuant to this decision.

<sup>2</sup> See *Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the information sought is reasonably relevant, . . . -or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency], . . . -and not unduly burdensome to produce.") (internal quotations and citations omitted).

<sup>3</sup> "Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them. . . . Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. . . . The

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need to “pierce the corporate veil” to impose liability on petitioners individually.

Accordingly, ascertaining the nature of each petitioner’s actions regarding and knowledge of DRUSA’s activities is plainly a proper subject of the Commission’s investigation. Further, in the absence of any contrary facts or authorities, each Petitioner must be held to be the best available source for evidence regarding that Petitioner’s knowledge of, and involvement in, the business operations of DRUSA. Moreover, it is highly likely that each Petitioner is one of the next best sources of evidence available regarding the other Petitioners’ knowledge of, and involvement in, the business operations of DRUSA.

Petitioners also invoke the automatic stay provided by the Bankruptcy Code as a ground for quashing the CIDs. Petition at 2.<sup>4</sup> This argument is also without merit. The FTC is conducting a law enforcement investigation of the conduct of DRUSA and the petitioners. Pursuant to 11 U.S.C. § 362(b)(4), the stay provisions of 11 U.S.C. § 362(a) do not prevent the FTC from exercising its police and regulatory duties as an agency of the government of the United States regarding the conduct of DRUSA. Furthermore, Petitioners are not themselves in bankruptcy, and are not entitled to any of the protections of the Bankruptcy Code. In short, the Commission’s continuing investigation of DRUSA’s activities, including taking testimony from Petitioners, will not violate any provisions of the Bankruptcy Code.

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FTC must show that the individual had some knowledge of the practices. The knowledge requirement is the key issue in this case.” *Id.* (citations omitted).

<sup>4</sup> Petitioners also claim that the bankruptcy clerk failed to provide notice to all potential creditors of DRUSA in a timely fashion; and that such failure, in turn caused unnoticed creditors to ask the “FTC to protect their assets.” *Id.* Neither the timing or scope of notice provided to DRUSA’s creditors by the bankruptcy clerk nor the source of any complaints that may have alerted the Commission to possible law violations is relevant to the resolution of this Petition.

Petitions to Quash or Limit

## **II. CONCLUSION AND ORDER**

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **DENIED**.

**IT IS FURTHER ORDERED THAT** Petitioners shall comply with the CIDs on the following dates: Mr. Reilly on January 19, 2010; Mr. Wojcik on January 20, 2010; and Mr. Bell on January 21, 2010.

By direction of the Commission.

Petitions to Quash or Limit

**CHURCH & DWIGHT, INC.***FTC File No. 091 0037      Decision, February 16, 2010*RESPONSE TO CHURCH & DWIGHT, INC.'S REQUEST FOR  
REHEARING BY THE FULL COMMISSION OF THE DENIAL OF  
PETITION TO QUASH OR LIMIT SUBPOENA DUCES TECUM AND  
CIVIL INVESTIGATIVE DEMAND

Dear Mr. Hittinger:

This letter advises you of the Commission's disposition of Church & Dwight, Inc.'s ("C&D") Request for Rehearing by the Full Commission of the Denial of C&D's Petition and Request for Leave ("Request for Rehearing"). On November 13, 2009, C&D filed its Petition on the grounds that the subpoena and CID seek irrelevant Canadian marketing documents, and that it would be unduly burdensome for it to produce Canadian marketing documents that are located in Canada. On December 7, 2009, C&D filed its Request for Leave seeking to raise a further ground for quashing or modifying the subpoenas and CIDs in order to permit it to redact "irrelevant" information regarding C&D's non-condom products from otherwise responsive documents. On December 23, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying C&D any of the relief requested in either the Petition or Request for Leave on the grounds that: (1) C&D had allowed the time for filing a petition to quash to lapse before seeking an extension from staff of the deadline for filing a petition to quash; (2) C&D had not offered any credible justification for not having filed its Request for Leave at the same time as the Petition; and (3) even if the Petition and Request for Leave had not been time-barred, the requested relief would have been denied because (a) Canadian marketing documents and information regarding non-condom products are relevant to the investigation, (b) C&D had not proven that it would be unduly burdensome for it to produce its Canadian marketing documents, including those kept and maintained in Canada, and (c) C&D had not advanced any plausible data security justification that could

## Petitions to Quash or Limit

only be remedied by its redaction of information related to its non-condom products from otherwise relevant documents.

On December 28, 2009, C&D filed its Request for Rehearing based on its disagreement with the Letter Ruling denying its Petition and Request for Leave. Request for Rehearing at 1. The Request for Rehearing presents no new evidence or arguments, and does not suggest that Commissioner Harbour's Letter Ruling is based on any mistakes of law or fact. The Request for Rehearing additionally asks the Commission to stay the January 26, 2010, return dates on the subpoena and CID "until such time as the full Commission has reviewed the Petition and Request [for Leave] and has reached a final decision on the important issues raised that have not heretofore been addressed by the Commission or the federal courts." Request for Rehearing at 1.<sup>1</sup>

For substantially the same reasons as those stated in Commissioner Harbour's Letter Ruling of December 23, 2009, the Letter Ruling is affirmed, and the request for a stay of compliance pending the Commission's decision must be denied as moot.

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<sup>1</sup> The alleged issues of first impression raised by C&D's claims for relief are not in fact self-evident. As Commissioner Harbour found, C&D's claims for relief are in most cases not even supported by the authorities cited by C&D in its Petition and Request for Leave. *See, e.g.*, Letter Ruling at 5. Counsel for C&D asks the Commission to decide these "important issues" without providing the Commission with any substantial assistance. Further, the issues that are self-evident from the Petition and Request for Leave are relatively settled. It is self-evident that relevant information has to be produced, even if that production entails some burden. *FTC v. Texaco*, 555 F.2d 862, 871-74, 882 (D.C. Cir. 1976); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). It is also self-evident that the relevance of material to be produced must be measured against the purposes stated in the resolution authorizing the use of process. *Texaco*, 555 F.2d at 874. Finally, it is self-evident that the petitioner bears the burden of proving that the specifications of a subpoena or CID are unreasonable. *FTC v. Rockefeller*, 591 F.2d 182, 190 (2<sup>nd</sup> Cir. 1979). And, as Commissioner Harbour found, it is equally self-evident that C&D has not factually or legally supported its claims for relief.

## Petitions to Quash or Limit

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

**IT IS FURTHER ORDERED THAT** C&D's request for a stay of compliance with the subpoena and CID be, and it hereby is, **DENIED** because it is moot.

By direction of the Commission.

Petitions to Quash or Limit

**D. R. HORTON, INC. / LENNAR CORPORATION**

*FTC File Nos. 102 3050 and 102 3051      Decision, March 9, 2010*

RESPONSE TO D. R. HORTON, INC. AND LENNAR CORP.'S  
PETITIONS TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMANDS

Dear Mr. Kider:

The Commission is investigating whether DRH and LC, both builders and sellers of homes, have engaged, or are engaging, in unfair acts or practices or have violated, or are violating, the Consumer Credit Protection Act, in their marketing and sales of homes, and their related sales mortgage lending acts and practices. The use of compulsory process for the conduct of these investigations was authorized by the Commission based on two separate Commission resolutions which provide detailed statements of the scope and purpose of these investigations; a copy of each resolution was attached to the Civil Investigative Demands ("CIDs") that were separately served on DRH and LC. See DRH and LH Petitions at 2.<sup>1</sup> On December 11, 2009, DRH

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<sup>1</sup> FTC Resolution Directing Use of Compulsory Process In Nonpublic Investigation: Unnamed Violators of the Equal Credit Opportunity Act (Aug. 1, 1994) describes the nature and scope of investigation authorized as follows:

To determine whether certain unnamed persons, partnerships, corporations, associations or other entities have been or may be engaged in acts or practices in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* and Regulation B, 12 C.F.R. § 202 *et seq.*, and to determine whether these persons, partnerships, corporations, associations or other entities have been or are engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such acts and practices may include, but are not limited to, discriminating in the extension of credit on the basis of national origin, color, age, religion, receipt of public assistance income, or because an applicant in good faith

## Petitions to Quash or Limit

and LC timely filed substantially similar petitions to limit or quash the CIDs served upon them on the grounds that the CIDs: (1) seek information that is beyond the scope of the investigation authorized by the resolutions,<sup>2</sup> (2) request information that is too indefinite because the CIDs do “not identify any specific actions

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exercised any right under the Consumer Credit Protection Act. This investigation is also to determine whether Commission Action to obtain redress of injury to consumers, or others would be in the public interest.

*Id.* at 1.

FTC Resolution Directing Use of Compulsory Process In Non-Public Investigations of Various Unnamed Loan Brokers, Lenders, Loan Servicers, and Other Marketers of Loans (Dec. 15, 2008) describes the nature and scope of investigation authorized as follows:

To determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaging in deceptive or unfair acts or practices in or affecting commerce in the advertisement, marketing, sale, or servicing of loans and related products in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether various unnamed loan brokers, lenders, loan servicers, and other marketers of loans have engaged or are engaging in acts or practices in violation of the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq., as amended. The investigation is also to determine whether Commission action to obtain monetary relief, including consumer redress, disgorgement, or civil penalties, would be in the public interest.”

*Id.* at 1. Taken together, those resolutions provide the basis against which the relevance and scope of materials or information being sought from DRH and LC will be determined. *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (“... we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’ [*Fed. Trade Comm’n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)].”).

<sup>2</sup> DRH Petition at 9 (“Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of [sic] home, nor could they reasonably be construed to do so.”); LC Petition at 8 (“Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of homes, nor could they reasonably be construed to do so.”).

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or business practices [sic] it believes [DRH and LC] may have pursued . . .”<sup>3</sup>; (3) require the production of information and materials that are unduly burdensome to produce; and (4) command the production of privileged information.<sup>4</sup> As discussed below, Petitioners have not provided adequate legal or factual support for the relief requested. Accordingly, their Petitions shall be denied, and the CIDs will be returnable on March 24, 2010.

This letter advises you of the Commission’s disposition of the Petitions. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. See 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.<sup>5</sup>

**I. Preliminary Matters and Standard of Review**

Petitioners are substantial, multi-state builders of homes. DRH “is a Fortune 500 company and, during the time period at issue here, was ranked as the largest homebuilder by units sold in the United States since 2003. The company employs approximately 3,000 workers nationwide. [DRH] builds single-family homes in 83 markets in 27 states. . . . The company has

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<sup>3</sup> DRH Petition at 6; LC Petition at 5 (“The CID does not identify any specific actions or business practices [that the Commission] believes [LC] may have pursued . . .”).

<sup>4</sup> DRH Petition at 13 and 33; LC Petition at 12, n.4 and 29.

<sup>5</sup> This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

## Petitions to Quash or Limit

four homebuilding segments: North, South, East, and West, which consist of 33 geographical divisions.”<sup>6</sup> LC “is a Fortune 500 company that was ranked as the nation’s third largest homebuilder in 2008. Currently [LC] builds single-family homes in 41 markets in 16 states. . . . The Company has four homebuilding segments: East, Central, West, and Houston. These segments have homebuilding operations in . . . 14 states.”<sup>7</sup> Each company appears to have a large number offices and facilities spread over a substantial portion of this country, and the managers of each office and facility have some degree of discretion regarding local operations.<sup>8</sup> Each Petitioner has a subsidiary or affiliated company that provides mortgage loans and other loan-related services to Petitioners and buyers of Petitioners’ homes.<sup>9</sup> Many of the objections expressed in the Petitions appear at bottom to be problems created by the business organization and management philosophies of the companies, not by the CIDs. The Commission is aware of no authority that would excuse a company from complying with law enforcement process because that company elected to create an unwieldy array of facilities and/or<sup>10</sup> adopted a decentralized management style.

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<sup>6</sup> DRH Petition at 3.

<sup>7</sup> LC Petition at 2.

<sup>8</sup> See, e.g., DRH Petition at 16 (“. . . a full response to this interrogatory [regarding compliance training of employees] will require the Company to retrieve information from every office that was in existence at any time [during the relevant time period]”; LC Petition at 42 (“. . . due to the decentralized nature of its homebuilding operations, this specification [the performance evaluation process] presents an undue burden because each office has responsibilities for the supervision of its employees and overall operation.”).

<sup>9</sup> DRH Petition, Declaration of Jennifer Hedgepeth (Dec. 11, 2009) at ¶¶ 1-5 (DHI Mortgage Co., Ltd is an indirect subsidiary of DRH) (“Hedgepeth Decl.”); LC Petition, Declaration of Becky L. Moore (Dec. 11, 2009) at ¶¶ 1-3 (Universal American Mortgage Co. (“UAMC”) is a subsidiary of LC) (“Moore Decl.”).

<sup>10</sup> Petitioners object to the CID instruction that requires the words “and” and “or” to be construed both conjunctively and disjunctively, as necessary, in order to insure completeness of responses. DRH Petition at 9-10; LC Petition at 8-9.

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These Petitions raise a recurrent law enforcement problem: the attempt “to get information from those who best can give it and who are most interested in not doing so.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). In *Morton Salt*, the Court recognized that investigatory process should be enforced “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *Id.* at 369. Subsequent court decisions have provided a more fulsome understanding of what it means to be “reasonably relevant” to the investigation. See, e.g., *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (“It is well established that a district court must enforce a federal agency’s investigative subpoena if the information is reasonably relevant . . . or, put differently, not plainly incompetent or irrelevant to any lawful purpose. . . and not unduly burdensome to produce.”) (citations and internal quotation marks omitted). The Courts recognize that

the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. The burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus, courts have refused to modify subpoenas unless compliance threatens to unduly disrupt or seriously

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The Commission prefers to write CID specifications in relatively simple language. Sentences using “and/or” tend to become more cumbersome and/or more difficult to follow and understand. Rather than increasing either burden or uncertainty, the challenged instruction both eliminates uncertainty, and, more importantly, limits the opportunities for semantic obfuscation or evasions on the part of CID respondents and counsel. Almost a century’s experience in process enforcement has taught the Commission that law enforcement benefits from limiting such latter opportunities.

## Petitions to Quash or Limit

hinder normal operations of the business. . . . There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations.<sup>11</sup>

**II. The CIDs Request Information That Is Reasonably Relevant to the Investigation.**

"The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution." *Texaco*, 555 F.2d at 874. Petitioners' claims that the CIDs seek information that is irrelevant to the investigation are based on a mistaken assumption of law and a semantic evasion. Petitioners contend that "[t]he CID does not identify any specific actions or business practices [sic] it believes [DRH or LC] may have pursued."<sup>12</sup> Unlike complaints or indictments, CIDs are not charging documents.<sup>13</sup> CIDs, and the resolutions authorizing them, do not identify suspected unlawful conduct; rather, CIDs identify the subject matters that are being investigated. At this stage of the inquiry the FTC "is under no obligation to propound a narrowly focused theory of a possible future case." *Texaco*, 555 F.2d at 874. "Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance." *Id.* at 877.

Petitioners' claims that the resolutions are not "designed to inquire into homebuilding or the practices related to the sale of

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<sup>11</sup> *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (footnotes omitted).

<sup>12</sup> DRH Petition at 6; LC Petition 5.

<sup>13</sup> Likewise, Petitions to Limit or Quash are not discovery devices in the nature of a more particularized statement of the subject under investigation.

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[homes]” are simply wrong.<sup>14</sup> Almost every residential real estate transaction involves at a minimum a purchase-money mortgage—that is to say, a loan product. Typically, the home being purchased is the collateral that secures the purchase-money mortgage, i.e., a loan related product. Each Petitioner concedes that the resolutions extend at least to “loans and related products.”<sup>15</sup> Further, each resolution directs an inquiry to determine if monetary relief would be in the public interest. This latter inquiry would, at a minimum, include an inquiry into the fiscal integrity of the parties being investigated.

Neither the general objections of DRH and LC nor their particularized objections directed to individual specifications of the CIDs establish that any of the information or materials being sought by the CIDs are irrelevant to the investigation measured by the purposes set forth in the resolutions authorizing the use of process. Stated differently, all of the information sought by the CIDs is reasonably relevant to purposes of the inquiry determined by reference to the resolutions. The law requires nothing more.<sup>16</sup>

**III.DRH and LC Have Provided Insufficient Evidence To Support Their Undue Burden Claim.**

“At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost of meeting

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<sup>14</sup> DRH Petition at 9; LC Petition at 8.

<sup>15</sup> DRH Petition at 9; LC Petition at 8.

<sup>16</sup> Claims that the CIDs are too indefinite in their description of the information and materials to be produced are simply without merit. The Petitions viewed in their entirety actually demonstrate an overarching concern by DRH and LC that the specifications are so definite and inclusive as to preclude substantial room for credible avoidance of production.

## Petitions to Quash or Limit

the particular specifications at issue)." *Nat'l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998). DRH and LC made no reasonable attempt to show factually that their responses to the CIDs would "unduly disrupt or seriously hinder normal operations of [their] business[es]."<sup>17</sup> To the extent that DRH and LC have identified the records and the assumptions on which their claims of undue burden rest, those claims of burden lack credibility because they rest on their own misreadings of the specifications, instructions, and definitions of the CIDs. The assertions that the CIDs require the production of virtually every document generated by them in the last four years, DRH Petition at 9, LC Petition at 6, are based on erroneous constructions of the CIDs that fail to admit that many of the challenged specifications are specifically limited in scope to marketing, sales, or mortgage lending activity. Moreover, as to many specifications, Petitioners' asserted burden results in large part from their own decentralized management style and document storage. Burden caused by Petitioners' own organizational design cannot excuse them from compliance with the CIDs. Further, many of the additional claims of burden, *e.g.*, having to interview every current and former employee, or review every loan file, appear to be overblown. To the extent Petitioners have specific concerns of burden as to certain specifications, those concerns should be addressed to counsel and staff, who in appropriate circumstances and through good-faith negotiations can adjust production schedules, provide additional guidance as to specifications, and even modify certain specifications.<sup>18</sup>

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<sup>17</sup> *Texaco*, 555 F.2d at 882 ("Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.").

<sup>18</sup> In fact, as LC acknowledged in its correspondence with staff dated February 22, 2010, staff has already "provide[d] a prioritization" of the specifications in the CID to LC, and asked that LC "make specific requests for relief" to avoid unnecessary burden on the company. Letter from David M. Souders, counsel for LC, to Rebecca J.K. Gelfond, counsel for FTC, at 3 (Feb. 22, 2010).

## Petitions to Quash or Limit

The production burdens quantified by DRH and LC appear to include unrealistically high estimates of the number of staff hours required to comply because, as discussed above, the companies' estimates are based on erroneous, overblown constructions of the CIDs. Moreover, even if those quantified estimates of burden-hours had any credibility, they seem relatively insignificant when measured against the size of the companies. DRH claims that it would take 960 staff hours to review every document it has generated over the last four years. Hedgepeth Decl. ¶ 17. However, 960 work hours amounts to less than a week's work for 20 people. LC initially claimed that it would take it 1360 hours to conduct document review. Moore Decl. ¶ 13. Similarly, 1360 work hours is about 8½ days' work for 20 people. In *Texaco*, the company claimed that it would have to review over four million documents at a cost of approximately 62 work years and \$4 million. *Texaco*, 555 F.2d at 922 (Wilkey, J. and MacKinnon, J., dissenting). The suggestion that compliance by DRH and LC, Fortune 500 companies, would "unduly disrupt or seriously hinder [their] normal operations" is unsupported by the record.<sup>19</sup>

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<sup>19</sup> On February 22, 2010, LC filed a Supplemental Submission in Support of Its Petition to Limit or Quash Civil Investigative Demand ("LC Supplemental Petition"), in which LC states that it has "reevaluated the burden" of complying with the CID and provides two additional declarations supporting its claims of burden. LC now asserts that it will take approximately 8,700 hours for LC and 19,742 hours for its mortgage subsidiary to comply with the CID. Howard Decl. ¶ 13; Moore Supp. Decl. ¶ 39. The Rules do not address the possibility of filing supplemental materials. Nor did LC file a Motion with the Secretary seeking leave to file these supplemental materials. As a matter of discretion, the Commission will accept this new evidence into the record for what it is worth.

In this instance, the new evidence possesses very little probative value. First, LC does not and cannot reconcile its new assertion that its over 20-times increase in the expected hours of compliance is due to a "more complete understanding of the scope and breadth" of the CID, LC Supp. Petition at 1, with the fact that its original estimate was already based on its overbroad reading of the CID as requiring review of "every document it has produced in the last four years." LC Petition at 6. Accordingly, LC has not adequately explained how any information newly available to it justifies its revised

## Petitions to Quash or Limit

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estimates, and instead repeats in its Supplemental Petition many of the same objections from its original Petition. *Compare, e.g.*, LC Petition at 17 (objecting to Specification R-11 because of purported difficulty in obtaining information on the “[t]housands of [LC’s] employees . . . involved in marketing and sales”), *with* Howard Decl. ¶ 17 (basing estimated time required for compliance on purported difficulty in obtaining information on the “more than two thousand employees who were in direct contact with customers or potential customers”). Additionally, similar to LC’s initial estimate, its revised estimate continues to be based on misreadings of the scope of the CID’s specifications, duplicate compliance efforts, questionable search methodologies, LC’s own decentralized organization, and overstatements of the likely time required for compliance. Thus, particularly in view of the size of LC and the resources available to it, LC has still failed to meet its burden of demonstrating that the CID would “unduly disrupt or seriously hinder [its] normal operations.”

Second, each of these new declarations has internal inconsistencies and redundancies that deprive it of substantial reliability. For instance, Moore’s supplemental declaration claims that the subsidiary will need 19,742 hours, exclusive of redactions, to comply; however, an itemized listing of the hours claimed paragraph-by-paragraph for compliance with those specifications actually adds up to 21,194 hours. The discrepancy between claimed total hours and actual total hours is less striking in the declaration from Howard; that declaration claims 8,700 hours, but the actual total is 8,580. The itemizations in each of these declarations claim that LC will make redundant, seriatim, separate requests for information from each relevant employee in order to comply with the various specifications of the CID. LC’s Petition makes no showing that such redundancy is required.

Third, all of the numbers in the Howard declaration appear to be the product of some type of reverse engineering. Each estimate of the hours to comply with a specification is a multiple of 130 hours. Comparing the hours claimed for compliance with the number of LC’s proposed calendar days for that compliance indicates that it would take a single employee working 5 hours each week on compliance exactly 6 months in order to devote 130 hours to compliance. *See* Howard Decl. ¶ 14. This relationship appears to be constant for the Howard declaration, except for the compliance estimates found in paragraph 22—those employees appear to be twice as productive as other employees since those two employees will complete 1040 hours of work in one year (not two). Fourth, LC has provided no explanation of the time estimating methodology being used to generate these estimates; nor has it provided any evidence demonstrating the reasonableness of these estimates. That said, however, neither these declarations nor the Petition, as supplemented, clearly demonstrate any understanding by LC that a CID recipient is required to comply in a timely manner. *Texaco*, 555 F.2d at 882 (“Some burden on

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**IV. The CIDs Do Not Require the Production of Privileged Materials.**

The CIDs expressly do not require the production of privileged materials. The instructions contained within each CID direct that any material responsive to the CID which is being withheld based on a claim of privilege shall be described in a privilege log that must be served on the Commission in compliance with Commission Rule 2.8A, 16 C.F.R. § 2.8A. It should also be noted that each Petition recites some dubious claims of “privilege.” For example, DRH’s Petition at page 33 (LC’s Petition at page 29) asserts a claim of privilege regarding the production of information “relating to any non-public investigations or ‘proceedings’ by any other ‘governmental and/or law enforcement [entity].’” The Commission is familiar with rules of law that prohibit a public agency conducting a law enforcement investigation from publicly disclosing details of the investigation—the rule protecting the secrecy of grand jury proceedings is one such rule. The Commission is not, however, familiar with rules of law that prohibit the recipient of FTC process from disclosing the fact that such process has been received or the nature of his/her/its responses thereto.

Additionally, both Petitions claim protection from disclosure of confidential business and proprietary information, trade secrets, and the privacy rights of third parties (including the Petitioners’ own current and former employees). DRH Petition at 13; CL Petition at 12, n.4. Petitioners have provided no legal authority that supports either claims of privilege for any such materials or

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subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.”).

## Petitions to Quash or Limit

the standing of the companies to raise such claims on behalf of third parties. Indeed, the putative assertion of the privacy rights of third parties, especially those of their own employees, could easily be supposed to be little more than a thinly-veiled pretext for the corporations to seek to obtain privacy rights to which they were not otherwise entitled. Further, Petitioners have made no showing that the confidentiality provisions of 15 U.S.C. § 57b-2 and Commission Rule 4.10, 16 C.F.R. § 4.10, would be inadequate to protect anyone's legitimate interests in avoiding public disclosure of confidential or sensitive information.

Finally, Petitioners claim that the records of their voluntary compliance programs are protected from disclosure by the "self-evaluative reports privilege" (DRH Petition at 44, LC Petition at 42); however, those claims are not even supported by their own cited authority. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5431 (General Rule—Other Novel Privileges) at 716 (Supp. 2009):

In recent years there has been some recognition by federal courts of a privilege for certain corporate records under the rubric of 'self-evaluative reports.' . . . [It] is generally used to refer to records required to be kept by some administrative regulation and that may contain admissions or statistics of use to an opposing litigant in a suit arising under the regulatory scheme of which the report is a part. The decisions are divided, and there seems little justification for creating a new privilege if the matter sought to be protected falls outside of the required reports privilege. (footnotes omitted).

*Id.* The Petitioners offer no facts or law that would support the conclusion that their voluntary monitoring of compliance with their own sales and marketing policies would, or should, be entitled to protection under the required records privilege.<sup>20</sup>

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<sup>20</sup> These Petitions contain a substantial number of other objections that are wholly without merit. Many of those claims turn upon unreasonable

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**V. CONCLUSION AND ORDER**

For all the foregoing reasons, **IT IS ORDERED THAT** DRH's and LC's Petitions be, and they hereby are, **DENIED**.

**IT IS FURTHER ORDERED THAT** DRH and LC shall comply with the CIDs at issue on March 24, 2010.

By direction of the Commission.

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constructions of the specifications or instructions of the CIDs, including various definitions. For instance, there is an instruction advising DRH and LC to consult with staff prior to compliance, if their responses were likely to contain sensitive, personal information. That instruction was not a direction to redact information. Presumably, during that consultation, there would have been a discussion of whether redaction or encryption would be the appropriate manner of dealing with the problem.

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**MAINEHEALTH / MAINE CARDIOLOGY  
ASSOCIATES / CARDIOVASCULAR  
CONSULTANTS OF MAINE, P.A.***FTC File No. 101 0010      Decision, March 10, 2010***RESPONSE TO MAINEHEALTH'S PETITION TO LIMIT COMPULSORY  
PROCESS; AND CARDIOVASCULAR CONSULTANTS OF MAINE, P.A.  
AND MAINE CARDIOLOGY ASSOCIATES' JOINT PETITION TO LIMIT  
COMPULSORY PROCESS**

Dear Mr. Kopit:

On January 25, 2010, subpoenas duces tecum ("SDTs") and civil investigative demands ("CIDs") were separately served on MaineHealth ("MH"), Cardiovascular Consultants of Maine, PA ("CC"), and Maine Cardiology Associates ("MC")<sup>79</sup> as part of the Commission's investigation to "determine whether the proposed acquisition by [MH] of [MC] and [CC] violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, or Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, have been or will be fulfilled with respect to said transaction."<sup>80</sup> On February 17, 2010, MH's Petition and the Joint Petition of CC and MC ("Joint Petition") were accepted for filing by the Secretary.<sup>81</sup>

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<sup>79</sup> MH Petition at 1; Joint Petition at 1. MH, CC, and MC are collectively referred to herein as "Petitioners."

<sup>80</sup> FTC Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (Jan. 25, 2010).

<sup>81</sup> MH, CC, and MC were granted extensions to file petitions to limit or quash until Friday, February 12, 2010. MH Petition, Attch. C at 1; Joint Petition, Attch. B at 1. On February 12, 2010, the Petitioners attempted to file confidential petitions to limit that did not comply with Rule 4.2(d)(4), 16 C.F.R. § 4.2(d)(4). The FTC Secretary's office refused to accept the confidential petitions for filing because they were accompanied by neither public versions nor express requests for confidential treatment in accordance with Rule 4.2(d)(4). The Secretary advised Petitioners' counsel that the Commission would deem the Petitions to have been timely filed if Petitioners waived the confidential designation and tendered only public versions of the Petitions for filing within a reasonable time. Alternatively, Petitioners could file a motion for leave to file compliant, confidential Petitions out of time. On

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MH petitions to limit the SDT and CID served upon it on the grounds that (1) they are overly burdensome, MH Petition at 3, (2) the demands are unreasonable because the merger will not significantly reduce competition, MH Petition at 8, (3) the FTC has no jurisdiction over either employment contracts or asset acquisitions by non-profit entities such as MH, MH Petition at 10, and (4) state approval of the transaction through the grant of a Certificate of Public Advantage (“COPA”) would immunize the transaction from federal antitrust challenge “by virtue of the State Action Exception.”<sup>82</sup> MH Petition at 9. The Joint Petition seeks to limit the SDTs and CIDs served on CC and MC on the grounds that (1) they are overly burdensome, Joint Petition at 3, (2) the demands are unreasonable because the merger will not significantly reduce competition, Joint Petition at 4, and (3) state approval of the transaction through the grant of a COPA would immunize the transaction from federal antitrust challenge “by virtue of the State Action Exception.” Joint Petition at 6. As discussed below, Petitioners have failed to demonstrate that the SDTs and CIDs are unreasonable, and the Petitions must therefore be denied.

Commissioner Pamela Jones Harbour, acting as the Commission’s delegate, see 16 C.F.R. § 2.7(d)(4), has determined, in her sole discretion, to refer these Petitions to the full Commission for disposition. This Letter Ruling advises you of the Commission’s ruling on your Petitions to Limit Compulsory Process.

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February 17, 2010, Petitioners tendered the public versions of the Petitions to the Secretary for filing.

<sup>82</sup> Presumably, MH is referring to the state action doctrine which owes its genesis to the Supreme Court’s decision in *Parker v. Brown*, 317 U.S. 341 (1943) (holding that Congress did not intend the Sherman Act to apply to state regulation of commerce).

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**Petitioners Have Not Demonstrated that the SDTs and CIDs are Unduly Burdensome**

“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party.” *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1997); *see also United States v. Powell*, 379 U.S. 48, 58 (1964); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3<sup>rd</sup> Cir. 1962) (holding that the subpoena recipient must create a record demonstrating its burden of production rather than merely asking the tribunal to assume it to be so). This burden is not easily met where, as here, the FTC seeks information that is reasonably relevant to its investigation. “At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost of meeting the particular specifications at issue).” *Nat’l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998).

As an initial matter, we note that Petitioners have not offered any factual support for their requests for relief in the form of “affidavits and other supporting documentation” as required by Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1). Instead of offering evidence or other proofs, the Petitions are advanced only by unsupported assertions and conjecture. In particular, Petitioners have made no reasonable attempt to show that responding to the SDTs and CIDs would “unduly disrupt or seriously hinder normal operations of [their] business.”<sup>83</sup> Further, staff’s repeated offers to work with Petitioners to mitigate the burdens of complying with the FTC’s compulsory process have been met with take-or-leave-it proposals and outright refusals to provide staff with a principled basis for evaluating Petitioners’ claims of burden or for devising meaningful counter proposals. This record does not demonstrate any substantial support for Petitioners’ claims that they have

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<sup>83</sup> *Texaco*, 555 F.2d at 882 (“Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”).

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negotiated compliance issues with staff in good faith. MH Petition at 3; Joint Petition at 2.

Petitioners assert—again without any supporting documentation—that it is “beyond impossible” to comply with the SDTs and CIDs by the return date even if their proposed limitations were accepted. Joint Petition at 3; MH Petition at 4. They seek an extension for compliance until April 15, 2010, Joint Petition at 4, and June 1, 2010, MH Petition at 2. As Petitioners are aware, however, a state regulatory review process relating to the proposed transactions is already underway, with a public hearing scheduled for April 6, 2010 and a final decision in May. If, as a result of that proceeding, Petitioners’ request for a COPA is granted, Petitioners will be free to consummate their proposed transactions. Thus, the Commission must gather evidence in an expedited fashion to determine whether there is reason to believe the acquisitions substantially lessen competition.

Additionally, the suggestion that the SDTs and CIDs are burdensome because it cannot be demonstrated that competition will be significantly reduced is an inappropriate attempt to conflate the enforcement of investigatory process with the ultimate merits of the merger claims. Boiled down to its essence, Petitioners’ argument creates a logical tautology destructive of most law enforcement investigations: law enforcement subpoenas cannot seek evidence of unlawful conduct unless unlawful conduct can already be demonstrated.<sup>84</sup>

**Challenges to the FTC’s Jurisdiction Are Premature.**

“With rare exceptions . . . , a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency’s authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced.” *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001). “[A]t the subpoena

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<sup>84</sup> This claim also implies that the FTC has the burden of demonstrating the likelihood of success on the merits of the ultimate claims before its process can be enforced. Petitioners have not directed to Commission to any supporting authority for this proposition, and the Commission is not independently aware of such authority.

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enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996). Investigations should not be bogged down prematurely with jurisdictional challenges. *FTC v. Monahan*, 832 F. 2d 688, 690 (1<sup>st</sup> Cir. 1987) (Breyer); *FTC v. Swanson*, 560 F.2d 1, 2 (1<sup>st</sup> Cir. 1977) ("An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious.").<sup>85</sup>

The Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. This so called "state action doctrine" creates a potential affirmative defense to be asserted in litigation – it does not create an immunity from law enforcement proceedings. *South Carolina Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4<sup>th</sup> Cir. 2006).

The fact that Petitioners may have a good faith basis for asserting a state action doctrine defense in response to an FTC law enforcement action against them does not excuse them from responding to the SDTs and CIDs. Excusing Petitioners from compliance at this point in the FTC's investigation would deprive the Commission of the chance to evaluate the facts that might form the basis for such a defense, and to make its own decision of whether challenging this merger would be in the public interest. *Monahan*, 832 F.2d at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a 'clearly articulated and affirmatively expressed' state policy. . . . Again, we cannot now say, without knowing more facts, whether or not

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<sup>85</sup> The parties in *Swanson* were tour operators who claimed only to be subject to regulation by the Civil Aeronautics Board.

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this additional ‘state supervision’ condition will apply.”<sup>86</sup> Accordingly, Petitioners are not entitled to have their CIDs or subpoenas quashed or modified by reason of the state action doctrine.

In addition to being premature, Petitioners’ claims that the Commission lacks jurisdiction appear at this early stage to lack merit. Section 7 of the Clayton Act applies to both nonprofit and for-profit entities. See *FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8<sup>th</sup> Cir. 1995); *FTC v. Univ. Health*, 938 F.2d 1206, 1224 (11<sup>th</sup> Cir. 1991). MH’s argument that Section 7 does not reach the acquisition of employment agreements, in addition to lacking any supporting legal authority, ignores that MH would obtain control of substantially all of the assets of CC and MC, including existing contracts, facilities, and equipment—all of which fall squarely within Section 7’s ambit.

**CONCLUSION AND ORDER**

For all the foregoing reasons, **IT IS ORDERED THAT** the Petitions be, and they hereby are, **DENIED**.

**IT IS FURTHER ORDERED THAT** Petitioners shall comply with the SDTs and CIDs on March 26, 2010.

By direction of the Commission.

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<sup>86</sup> *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) (“But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency’s adjudication.”); *South Carolina Bd. of Dentistry*, 455 F.3d at 444 (holding that the Board’s state action defense did not qualify for interlocutory appeal because the state action issue would not be “effectively unreviewable” on appeal from the FTC’s final decision).