

Complaint

IN THE MATTER OF

FIDELITY NATIONAL FINANCIAL, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4300; File No. 091 0032**Filed September 13, 2010 — Decision, September 13, 2010*

The consent order addresses allegations that Fidelity National Financial, Inc.'s ("Fidelity") 2008 acquisition of three LandAmerica title insurance subsidiaries reduced competition in certain parts of Oregon and Michigan. The consent order requires Fidelity to divest assets and data relating to its Oregon business to Northwest Title, and to divest data relating to its Michigan business to an FTC-approved buyer. The consent order also requires Fidelity to notify the Commission prior to acquiring a majority interest in any collection of title data in California, Colorado, Nevada, New Mexico, Oregon, or Texas, without providing advance notification to the Commission.

Participants

For the *Commission*: Joe Lipinsky and Danica Noble.

For the *Respondent*: Joe Simons, Paul, Weiss, Rifkind, Wharton, Garrison LLP.

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The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Fidelity National Financial, Inc. ("Fidelity"), a corporation subject to the jurisdiction of the Commission, has purchased three title insurance underwriters – Commonwealth Land Title Insurance Company ("Commonwealth"), Lawyers Title Insurance Corporation ("Lawyers"), and United Capital Title Insurance Company ("United") – from LandAmerica Financial Group, Inc. ("LandAm"), 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

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the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Title Plant” means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

2. “Title information services” means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

3. “Acquisition” means the acquisition by Fidelity of Commonwealth, Lawyers, and United (collectively, the “LFG Underwriters”) from LandAm pursuant to an amended stock purchase agreement dated November 25, 2008.

4. “Respondent” or “Fidelity” means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups and affiliates in each case controlled by Fidelity (including, but not limited to, the LFG Underwriters, Security Title Guaranty Co., and Ticor Title Insurance Company), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

II. RESPONDENT

5. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside Avenue, Jacksonville, FL 32204. Respondent, among other things, is engaged in the sale of title insurance and the provision of title information services.

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6. Respondent is a person subject to the jurisdiction of the Commission.

7. 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.

III. THE ACQUIRED SUBSIDIARIES

8. Commonwealth and Lawyers were title insurance underwriters with their executive offices located at 5600 Cox Road, Glen Allen, VA 23060, while United was a title insurance underwriter with its executive office located at 3250 Wilshire Boulevard, Los Angeles, CA 90010. Commonwealth, Lawyers, and United were engaged, among other things, in the sale of title insurance and the provision of title information services.

IV. THE ACQUISITION

9. On November 25, 2008, Respondent and LandAm entered into an Acquisition Agreement under which Fidelity acquired three of LandAm’s title insurance underwriters for an amount valued, at the time of entering into the Acquisition Agreement, at approximately \$258 million (“Acquisition”).

V. THE RELEVANT MARKETS

10. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the provision of title information services.

11. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition in the relevant line of commerce are the following counties or other local jurisdictions in the United States: tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon; Benton County, Oregon; Jackson County, Oregon; Linn County, Oregon; Marion County, Oregon; Oakland County, Michigan; Macomb County,

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Michigan; and Wayne County, Michigan. Title information is generated and collected on a county level and because of the highly local character of the real estate markets in which the title information services are used, geographic markets for title information services are highly localized.

VI. THE STRUCTURE OF THE MARKETS

12. The markets for title information services in the geographic areas listed under Paragraph 11 are highly concentrated. The Acquisition significantly increases concentration in the relevant markets.

VII. BARRIERS TO ENTRY

13. Entry into the market for providing title information services is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 14, because of, among other things, the time and expense necessary to develop effective data collection technology and the time necessary to develop historical data, and the importance of an established reputation for accuracy.

VIII. EFFECTS OF THE ACQUISITION

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

- a. by eliminating actual, direct and substantial competition between Respondent and Commonwealth and Lawyers in the relevant markets;
- b. by increasing the likelihood that Respondent will unilaterally exercise market power in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon, and in the Detroit, Michigan counties of Oakland, Macomb, and Wayne, and;

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- c. by increasing the likelihood of collusion or coordinated interaction in Benton, Jackson, Marion, and Linn Counties in Oregon, where the acquisition reduced the number of title plants from four to three.

IX. VIOLATIONS CHARGED

15. The allegations contained in paragraphs 1-14 are repeated and re-alleged as though fully set forth here.

16. The Acquisition Agreement described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

17. The Acquisition described in Paragraph 9 constituted 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 thirteenth day of September, 2010, issues its Complaint against said Respondent.

By the Commission.

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The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. ("Fidelity") of three title insurance underwriters from LandAmerica Financial Group, Inc. ("LandAmerica"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal

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Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

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

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

1. Respondent Fidelity is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside Avenue, Jacksonville, FL 32204.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. "Respondent" or "Fidelity" means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups and affiliates in each case controlled by Fidelity (including, but not limited to, the LFG Underwriters, Security Title Guaranty Co., and Ticor Title Insurance Company), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "LandAmerica" means LandAmerica Financial Group, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia with its office and principal place of business located at 5600 Cox Road, Glen Allen, VA 23060.
- C. "Commission" means the Federal Trade Commission.
- D. "Acquirer(s)" means the acquirer(s) approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph IV.) of this Order. If approved by the Commission, "Acquirer(s)" includes Northwest Title and Datatrace.
- E. "Acquisition" means the acquisition by Fidelity of Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation, and United Capital Title Insurance Company (collectively, the "LFG Underwriters") from LandAmerica pursuant to an amended stock purchase agreement dated November 25, 2008.
- F. "Copy" means a reproduction of a Title Plant that will enable an Acquirer to use the reproduction in a

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qualitatively similar way to the original Title Plant. A Copy will reproduce all of the records, indices, documents and other information contained in the original Title Plant and enable such information to be accessed no less quickly and no less conveniently than it could be using the original Title Plant.

- G. “Datatrace” means Datatrace Information Services LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4 First American Way, Santa Ana, CA 92707.
- H. “Datatrace Access Agreement” means the Title Plant Services, Access and Marketing Agreement, dated as of July 31, 2000, between Datatrace and LandAmerica.
- I. “Divestiture Agreement(s)” means any and all agreement(s) between the Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer, and all amendments, exhibits, attachments, agreements and schedules thereto, that have been approved by the Commission pursuant to Paragraph II. and/or Paragraph III. (or Paragraph IV.) of this Order. All Divestiture Agreements are incorporated by reference into this Order and made a part hereof as a confidential appendix. If approved by the Commission, “Divestiture Agreement(s)” includes the Northwest Title TriPlant Divestiture Agreement and the Northwest Title Downstate Divestiture Agreement.
- J. “Divestiture Assets” means, individually and collectively: (1) with respect to Paragraph II. of this Order, the TriCounty Title Plant Divestiture Interest and the Downstate Title Plant Assets; and (2) with respect to Paragraph III. of this Order, the Michigan Title Plant Assets.

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- K. “Divestiture Date(s)” means the date(s) on which Respondent (or a Divestiture Trustee) fully completes the divestiture of each of the Divestiture Assets, as applicable, as required by Paragraph II. and/or Paragraph III. (or Paragraph IV.) of this Order.
- L. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph IV. of this Order.
- M. “Downstate Title Plant Assets” means, for each of the counties or local jurisdictions listed below: (1) all rights, title, and Interest owned or otherwise held either by Fidelity prior to the Acquisition or by the LFG Underwriters prior to the Acquisition in all Title Plants serving each such county or local jurisdiction, or (2) a Copy of all Title Plants owned or otherwise held either by Fidelity prior to the Acquisition or by the LFG Underwriters prior to the Acquisition and serving each such county or local jurisdiction:
- Benton County, Oregon
Jackson County, Oregon
Linn County, Oregon
Marion County, Oregon
- N. “Interest” means any and all rights, present or contingent, to hold any membership or partnership share, voting or nonvoting stock, share capital, equity or other interests, and/or beneficial ownership in a Title Plant.
- O. “Michigan Title Plant Assets” means a Copy of the Title Plants owned or otherwise held by the LFG Underwriters immediately prior to the Acquisition, as more particularly set out in the Datatrace Access Agreement, and serving each of the following counties or local jurisdictions:
- Macomb County, Michigan
Oakland County, Michigan
Wayne County, Michigan

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- P. “Northwest Title” means Northwest Title, LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3000 A Street, Suite 200, Anchorage, AK 99503.
- Q. “Northwest Title Downstate Divestiture Agreement” means any and all agreement(s) between the Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and Northwest Title for the divestiture of the Downstate Title Plant Assets, and all amendments, exhibits, attachments, agreements and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.
- R. “Northwest Title TriPlant Divestiture Agreement” means any and all agreement(s) between the Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and Northwest Title for the divestiture of the TriCounty Title Plant Divestiture Interest, and all amendments, exhibits, attachments, agreements and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.
- S. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business entity, and any subsidiaries, divisions, groups or affiliates thereof.
- T. “Third Party(ies)” means any non-governmental Person other than the Respondent or the Acquirer(s).
- U. “Title Plant” means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public

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records, as well as such collections of information that are not regularly updated.

- V. “TriCounty Title Plant” means the joint venture Title Plant established pursuant to the TriCounty Title Plant Partnership Agreement that covers records and/or indices regarding the ownership of and interests in real property located in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon, in which both Fidelity and LandAmerica owned Interests prior to the Acquisition.
- W. “TriCounty Title Plant Divestiture Interest” means a membership share and Interest representing Security Title Guaranty Co.’s Interest in the TriCounty Title Plant, including any and all voting and other rights and privileges, tangible and intangible, present or contingent, associated with such membership share and Interest.
- X. “TriCounty Title Plant Partnership Agreement” means the TriCounty Title Plant Partnership Agreement, effective as of October 15, 1992, and all amendments, exhibits and attachments thereto.

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

- A. Not later than ten (10) days after the date this Order becomes final, Respondent shall divest the TriCounty Title Plant Divestiture Interest and the Downstate Title Plant Assets, absolutely and in good faith, at no minimum price, to Northwest Title, pursuant to and in accordance with the Northwest Title TriPlant Divestiture Agreement and the Northwest Title Downstate Divestiture Agreement (which agreements shall not limit or contradict, or be construed to limit 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 Northwest Title or to reduce

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any obligations of Respondent under such agreements), and each such agreement, if it becomes a Divestiture Agreement for the TriCounty Title Plant Divestiture Interest and/or the Downstate Title Plant Assets, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the TriCounty Title Plant Divestiture Interest and/or the Downstate Title Plant Assets (“Divestiture Assets”) to Northwest Title prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:

1. The Commission determines and notifies Respondent that Northwest Title is not an acceptable acquirer of one or both of the Divestiture Assets, then Respondent shall immediately rescind the relevant transaction(s) with Northwest Title and shall divest the relevant Divestiture Asset(s) no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondent that the manner in which one or both of the divestitures was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee pursuant to Paragraph IV. of this Order, to effect such modifications to the manner of divesting the relevant Divestiture Asset(s) to Northwest Title (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. Prior to the Divestiture Date, Respondent shall obtain all consents, approvals and waivers from all Third Parties that are necessary to permit Respondent to

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divest the relevant Divestiture Assets and transfer all associated rights to the Acquirer(s).

- C. Until Respondent fully complies with Paragraphs II.A. and B. (or Paragraph IV., if applicable) of this Order, Respondent:
1. shall take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets except for ordinary wear and tear;
 2. shall not sell, transfer, encumber or otherwise impair the Divestiture Assets (other than as required by this Order) nor take any action that lessens their viability, marketability or competitiveness; and
 3. shall maintain the operations of the Downstate Title Plant Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Downstate Title Plant Assets. Among other things as may be necessary, with respect to the Title Plants comprising the Downstate Title Plant Assets, Respondent shall cause the Title Plants to be maintained, including but not limited to updating the records and/or indices contained in the Title Plants, to the extent and in the manner maintained prior to the Acquisition.
- D. Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, exercise any of its voting rights under Section 11.01(f) of the TriCounty Title Plant Partnership Agreement to expel

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the Acquirer of the TriCounty Title Plant Divestiture Interest.

- E. The purpose of the divestiture:
1. of the TriCounty Title Plant Divestiture Interest is to remedy the lessening of competition in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon, resulting from the Acquisition as alleged in the Commission's Complaint; and
 2. of the Downstate Title Plant Assets is to remedy the lessening of competition in Benton County, Jackson County, Linn County, and Marion County, Oregon, resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Not later than one-hundred twenty (120) days after the date the Consent Agreement is accepted by the Commission for public comment, Respondent shall divest the Michigan Title Plant Assets, absolutely and in good faith, at no minimum price, to an Acquirer, and in a manner (including execution of a Divestiture Agreement with the Acquirer), that receives the prior approval of the Commission. Respondent shall comply with all provisions of any Divestiture Agreement approved by the Commission (which agreement shall not limit or contradict, or be construed to limit 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 the Acquirer or to reduce any obligations of Respondent under such agreements), and failure by Respondent to comply with any provision of a Divestiture Agreement shall constitute a failure to comply with this Order. Such agreement, if it becomes a Divestiture

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Agreement, is incorporated by reference into this Order and made a part hereof.

- B. Prior to the Divestiture Date, Respondent shall obtain all consents, approvals and waivers from all Third Parties that are necessary to permit Respondent to divest the Michigan Title Plant Assets and transfer all associated rights to the Acquirer.
- C. Until Respondent fully complies with Paragraphs III.A. and B. (or Paragraph IV., if applicable) of this Order, Respondent shall not sell, transfer, encumber or otherwise impair the Michigan Title Plant Assets (other than as required by this Order) nor take any action that lessens their viability, marketability or competitiveness.
- D. The purpose of the divestiture of the Michigan Title Plant Assets is to remedy the lessening of competition in Macomb County, Oakland County, and Wayne County, Michigan, resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. If Respondent Fidelity has not fully complied with its obligations to divest the Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest, grant, license, transfer or otherwise convey such assets and rights and effectuate such provisions 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, Fidelity shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the

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

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent 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 of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture(s), license grant or other specified transaction(s) required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest, grant, license, transfer or otherwise convey the assets and/or rights that are required by this Order to be

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divested, granted, licensed, transferred or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the specified divestiture, which shall be subject to 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 may be extended by the Commission.
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 and/or rights that are required to be divested, granted, licensed, transferred or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture or license. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent'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

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Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within 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, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, 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 Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondent 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

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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 required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the specified divestiture.
 9. Respondent 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.
- 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.
- 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 necessary or appropriate to accomplish the divestiture(s), license grant or other specified transactions required by this Order.

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V.

IT IS FURTHER ORDERED that Respondent shall comply with all terms of any Divestiture Agreement(s), and any breach by Respondent of any term of a Divestiture Agreement shall constitute a violation of this Order. If any term of a Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Divestiture Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order.

VI.

IT IS FURTHER ORDERED that:

- A. For a period of ten (10) years from the date this Order becomes final, Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission, acquire any Interest in any joint Title Plant serving any county or other local jurisdiction in the states listed below where, as a result of such acquisition (including as aggregated with any Interest(s) already owned or otherwise held by Respondent), Respondent would own or otherwise hold an Interest of fifty (50) percent or more in such joint Title Plant:

California
Colorado
Nevada
New Mexico
Oregon
Texas

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- B. The prior notification required by this Paragraph VI. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. In addition to the information required to be supplied on such Notification and Report Form pursuant to the above-referenced regulation, Respondent shall submit the following supplemental information in Respondent's possession or reasonably available to Respondent:
1. The name of each county or local jurisdiction to which the terms of Paragraph VI.A. are applicable;
 2. A description of the Title Plant assets or interests that are being acquired; and
 3. With respect to each Title Plant serving each county or local jurisdiction to which the terms of Paragraph VI.A. are applicable (including all Title Plants in which the Respondent owns or otherwise holds a direct or indirect Interest as well as other Title Plants known to the Respondent), the names of all Persons that own or otherwise hold any direct or indirect Interest in the Title Plant and the percentage Interest held by each Person; the time period covered by each category of title records contained in the Title Plant; whether the respective categories of title records are regularly being updated; the indexing system or systems used with respect to each category of title records; and the names of all Persons, including but not limited to title insurers or agents, who have access to the Title Plant.

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- C. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph VI. may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II., III. and IV. of this Order, Respondent 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 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 Paragraphs II., III. and IV. of this Order, including a description of all substantive contacts or negotiations for accomplishing the specified actions and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal

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memoranda, and all reports and recommendations concerning the accomplishment of the specified actions and obligations.

- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

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

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

IX.

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

- A. Access, during business office hours and in the presence of counsel, to all facilities and 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 relating to compliance with this Order, which copying services

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shall be provided by the Respondent at its expense;
and

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

X.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date on which this Order becomes final.

By the Commission.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT**

I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Fidelity National Financial, Inc. (“Fidelity”). Fidelity purchased three title insurance subsidiaries from LandAmerica Financial, Inc. (“LandAmerica”). The subsidiaries were Commonwealth Land Title Insurance Company (“Commonwealth”), Lawyers Title Insurance Company (“Lawyers”), and United Capital Title Insurance Company (“United”). Fidelity’s acquisition of Commonwealth and Lawyers created likely anticompetitive effects that the proposed Consent Agreement resolves. Under the terms of the proposed Consent Agreement, Fidelity is required, among other things, to divest one share of its ownership interest in a joint title plant serving the Portland, Oregon, metropolitan area, and divest a copy of its title data serving Benton, Jackson, Linn, and Marion Counties, in Oregon. Additionally, Fidelity will sell a copy of title data that LandAmerica had provided to a third party,

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Data Trace, to a pre-approved purchaser to remedy the competitive concern in three counties in the Detroit, Michigan, metropolitan area.

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

On November 25, 2008, Fidelity and LandAmerica entered into an acquisition agreement under which Fidelity acquired LandAmerica's title insurance subsidiaries for an amount valued, at the time of entering into the acquisition agreement, at approximately \$258 million ("Acquisition"). The Commission's Complaint alleges that Fidelity's acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating an actual, direct, and substantial competitor from certain local markets in the United States.

II. Description of the Parties and the Acquisition

Fidelity, a publicly traded company, is based in Jacksonville, Florida. Its title insurance services facilitate the purchase, sale, transfer, and finance of residential and commercial real estate. Fidelity provides title insurance to residential and commercial property buyers and sellers, real estate agents and brokers, developers, attorneys, mortgage brokers and lenders, and title insurance agents through its subsidiaries, Fidelity National Title Company, Title Insurance Company, Ticor Title Insurance Company, Commonwealth, and Lawyers.

LandAmerica was a publicly traded company based in Glen Allen, Virginia, that operated through wholly owned subsidiaries. LandAmerica generated the majority of its income from its title insurance subsidiaries, Commonwealth and Lawyers.

On Tuesday, December 16, 2008, the United States Bankruptcy Court for the Eastern District of Virginia held a

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hearing on LandAmerica's motion to sell its subsidiaries to Fidelity. The bankruptcy court took testimony from LandAmerica, Fidelity, the unsecured creditors committee, the secured creditors committee, and the FTC. The court found that Fidelity's purchase of the LandAmerica title insurance subsidiaries was in the best interest of the estate, and approved the sale of the subsidiaries to Fidelity.

III. Title Information Services

Title insurance companies insure clients against the risk that clear title is not transferred during the sale of property. Risks include failure to detect defective deeds or to discover liens, adverse court judgments, or encumbrances created by other security interests. In order to conduct title searches in a timely fashion, title insurers need access to the most accurate, up-to-date, and conveniently arranged title information. That information is found, among other places, in title plants, which are private collections of historic and current information about the status of title to real property. Because title information is essential to conducting a title search, ownership of, or access to, a title plant is a title insurer's primary competitive asset.

IV. The Complaint

The Commission's Complaint alleges that Fidelity's acquisition of LandAmerica's title insurance subsidiaries may substantially lessen competition in the provision of title information services in several counties in Oregon, and three counties making up the Detroit, Michigan, metropolitan area, 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.

The Complaint alleges that the relevant product market in which to analyze the effects of the acquisition is the provision of title information services. "Title information services" means access to selected information contained in a title plant that is used to determine ownership of, and interests in, real property in connection with the underwriting and issuance of title insurance policies.

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The Complaint also alleges that the relevant geographic markets are local in nature. Title information is generated and collected on a county level and, because of the highly local character of the real estate markets in which the title information services are used, geographic markets for title information services are highly localized and consist of the county or other local jurisdiction embraced by the real property information contained in the title plant. The three geographic areas of concern outlined in the Complaint are: (1) the tri-county Portland, Oregon, metropolitan area consisting of Clackamas, Multnomah, and Washington Counties; (2) Benton, Jackson, Linn, and Marion Counties, in Oregon; and (3) the tri-county Detroit, Michigan, metropolitan area consisting of Oakland, Macomb, and Wayne Counties.

In the Portland, Oregon, metropolitan area, the acquisition of LandAmerica's subsidiaries vested Fidelity with a controlling interest in the sole title plant providing title insurance information services. Absent the proposed relief regarding the title plant serving the Portland metropolitan area, Fidelity's acquisition of LandAmerica's subsidiaries increases the risk that Fidelity would unilaterally restrict or withhold access to title information, thus eliminating the potential for a new title insurance company to enter.

In Benton, Jackson, Linn, and Marion Counties in Oregon, the acquisition of LandAmerica's subsidiaries reduced the number of independent title plants providing title information services in these counties from four to three. Absent the proposed relief in these counties, Fidelity's acquisition would increase the risk of collusion among the remaining market participants to restrict or withhold access to title information, thus eliminating the potential for a new title insurance company to enter.

In three counties in the Detroit, Michigan, metropolitan area, Fidelity's purchase of LandAmerica's subsidiaries may give Fidelity the power to affect the competitive significance of Data Trace, an independent title information services provider. Data Trace, in which LandAmerica once had an ownership interest, is a provider of title plant information services in the Detroit metropolitan area.

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Based on the facts above, the Complaint alleges that Fidelity's acquisition of LandAmerica's subsidiaries could eliminate actual, direct, and substantial competition between Fidelity and LandAmerica's subsidiaries in the relevant markets; increase Fidelity's ability to unilaterally exercise market power in the Detroit and Portland metropolitan areas; and substantially increase the level of concentration and enhance the probability of coordination in Benton, Jackson, Linn, and Marion Counties, in Oregon.

As stated in the Complaint, entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of this acquisition. There are relatively long time frames and large capital expenses associated with building and maintaining title plants. Among other things, intensive time and labor are required in each local jurisdiction to develop effective data collection technology and to compile historical data.

V. The Terms of the Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns resulting from Fidelity's acquisition in each of the relevant markets discussed above. Pursuant to the proposed Consent Agreement, Fidelity will divest one share of its ownership interest in a joint title plant that serves the Portland, Oregon, metropolitan area to Northwest Title. This will remedy the competitive harm in that local market by ensuring that Fidelity no longer owns a majority of the only joint title plant serving that market. The proposed Consent Agreement also requires Fidelity to divest a copy of each of the title plants serving Benton, Jackson, Linn, and Marion Counties, in Oregon to Northwest Title. The sale of the title plants in Benton, Jackson, Linn, and Marion counties will eliminate the competitive harm that otherwise would have resulted in those markets by restoring the number of independent title plant owners within each county to the pre-acquisition level.

Northwest Title is a privately-held company that is part of a family of six companies involved in real estate. Although the company will be a new entrant in the relevant markets, it does

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have experience in the title insurance business, and has pre-existing relationships with entities and individuals in the real estate market, mortgage banking industry, and related businesses. Moreover, Northwest Title is financially viable and is positioned to quickly achieve the remedial purposes of the proposed Consent Agreement.

Additionally, pursuant to the proposed Consent Agreement, Fidelity will sell a copy of the title data that LandAmerica's subsidiaries had provided to Data Trace to a pre-approved purchaser, for the three counties making up the Detroit, Michigan, metropolitan area.

Finally, the proposed Consent Agreement requires Fidelity to provide the Commission with prior written notice before acquiring fifty (50) percent or more of any joint title plant in the following states: California, Colorado, Nevada, New Mexico, Oregon, and Texas. In all of these states, Fidelity's acquisition of LandAmerica's subsidiaries increased Fidelity's ownership interest in joint title plants. Without this prior notification provision, in the future Fidelity could gain a controlling interest in joint plants serving these states without the FTC's knowledge.

VI. Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement again and the comments received and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final. By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to inform and invite public comment on the Consent Agreement, including the proposed divestitures, and to aid the Commission in its determination of whether to make the Consent Agreement final. This analysis is not intended to constitute an official interpretation of the Consent Agreement, nor is it intended to modify the terms of the Consent Agreement in any way.

Complaint

IN THE MATTER OF

PEPSICO, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4301; File No. 091 0133**Filed September 27, 2010 — Decision, September 27, 2010*

The complaint alleges that acquisition by PepsiCo, Inc. (“PepsiCo”) of certain assets of Dr. Pepper Snapple Group (“Snapple”) would result in reduced competition in the sale and distribution of branded soft drink concentrate and carbonated soft drinks. The consent order requires PepsiCo, Inc. (“Pepsi”) to set up a firewall to ensure that its ownership of the bottling companies does not give certain Pepsi employees access to commercially sensitive confidential marketing and brand plans for Dr. Pepper Snapple Group.

Participants

For the *Commission*: Joseph Brownman and W. Stephen Sockwell.

For the *Respondent*: Deborah Feinstein and Michael Sohn, Arnold & Porter; James Long, Briggs and Morgan; Michael Knight, Jones Day; and Jay Brown and Richard Steuer, Mayer Brown.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent PepsiCo, Inc. (“PepsiCo”), a corporation, has entered into agreements to acquire, and subsequently did acquire, the outstanding voting securities of three of its independent bottlers, Pepsi Bottling Group, Inc. (“PBG”), PepsiAmericas, Inc. (“PAS”), and Pepsi-Cola Bottling Co. of Yuba City, Inc. (“PYC”), and subsequently obtained a license agreement to continue to produce and distribute several carbonated soft drink brands of Dr Pepper Snapple Group, Inc. (“DPSG”) that bottlers PBG, PAS, and PYC had produced and distributed, and that the agreements violate Section 5 of the