

Complaint

IN THE MATTER OF
SCANSCOUT, INC.

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

Docket No. C-4344; File No. 102 3185
Filed, December 14, 2011 — Decision, December 14, 2011

This consent order addresses allegations that ScanScout deceived consumers by misrepresenting the extent to which consumers could prevent companies from collecting data about their online browsing activities. The complaint alleges that ScanScout's privacy policy falsely represented that consumers could opt out of receiving ScanScout's cookies by changing their browser settings. However, users could not opt out of receiving the Flash cookies that ScanScout utilized. The complaint alleges that ScanScout's representations regarding consumers' ability to opt out of receiving cookies were false and misleading, in violation of the FTC Act. The order prohibits ScanScout from misrepresenting the extent to which data on its users' online activities is collected, used, disclosed, or shared; and the extent to which users may exercise control over the use of this data. The order further requires ScanScout to notify users that it collects browser activity data to deliver targeted ads and to provide users with the ability to opt out of this feature.

Participants

For the *Commission*: *Jamie Hine and Kandi Parsons.*

For the *Respondent*: *Howard Morse, Cooley LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that ScanScout, Inc. has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent ScanScout, Inc. ("ScanScout") is a Delaware corporation with its principal office or place of business at 295 Devonshire Street, Boston, MA 02110.

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2. The acts and practices of ScanScout as alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

SCANSCOUT’S BUSINESS PRACTICES

3. ScanScout is a video advertising network, which acts as an intermediary between website publishers (“publishers”) and advertisers. ScanScout purchases advertising space on websites and contracts with advertisers to place their video advertisements on these websites. In addition, ScanScout works with other third parties, including ad servers, to deliver advertising campaigns.

4. At times, ScanScout decides which video advertisements should be delivered to users’ browsers by engaging in online behavioral advertising. Online behavioral advertising is the practice of collecting and storing information about users’ online activities in order to deliver advertising targeted to their interests.

5. Online behavioral advertising often utilizes HTTP cookies, which are small text files that can be used to collect and store information about a user’s online activities, including information such as the content or advertisements viewed or the pages visited within a particular website. These cookies contain a unique identification number that allows an advertising network to recognize the user’s computer and correlate the computer to online activity. When a user visits a website within an advertising network’s group of publishers, the advertising network may set a new HTTP cookie in the computer’s browser or automatically receives a previously set HTTP cookie from the computer’s browser. The advertising network then may add information about the user’s web browsing activities to information already collected via the cookie, and may use such information to serve online advertisements that are targeted to the user’s interests as indicated by the user’s web browsing history. Users can delete existing HTTP cookies or block the delivery of new HTTP cookies by changing their browsers’ privacy settings.

6. From April 2007 until September 2009, ScanScout used Flash local shared objects, also known as “Flash cookies”— as opposed to HTTP cookies – to collect and store user data and

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facilitate online behavioral targeting of video advertisements. Flash cookies, like HTTP cookies, can be used to store data correlated with a unique identification number on a computer. Flash cookies store such data in a different location on a computer than HTTP cookies. At the time that ScanScout used Flash cookies, they were not controlled through a computer's browser. Accordingly, if users changed their browsers' privacy settings to delete or block cookies, Flash cookies were unaffected.

7. During the time that ScanScout utilized Flash cookies, from April 2007 until September 2009, users could not prevent Scanscout from collecting data about their online activities or from serving them targeted video advertisements by changing their browser settings to delete or block HTTP cookies.

SCANSCOUT'S STATEMENTS

8. From April 2007 until September 2009, ScanScout disseminated, or caused to be disseminated, a privacy policy on its website, which stated:

General user data, such as your computer's Internet Protocol (IP) address, operating system and browser type, pages you visited, and the date and time of your visit, is automatically collected through the use of "cookies". Cookies are small files that are stored on your computer by a website to give you a unique identification. Cookies also keep track of services you have used, record registration information regarding your login name and password, record your preferences and keep you logged into the Site. You can opt out of receiving a cookie by changing your browser settings to prevent the receipt of cookies. Since each web browser is different, we recommend that you please look through your browser "Help" file to learn the correct way to modify your cookies set up. . . We may use automatically collected information and cookies information for a number of purposes, including but not limited to. . . provide custom, personalized content, and information; monitor the effectiveness of our marketing campaigns. . . (emphasis added)

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VIOLATION OF THE FTC ACT

9. Through the means described in Paragraph 8, ScanScout represented, expressly or by implication, that consumers could prevent ScanScout from collecting data about their online activities by changing their browser settings to prevent the receipt of cookies.

10. In truth and in fact, as described in Paragraphs 6 and 7, consumers could not prevent ScanScout from collecting data about their online activities by changing their browser settings to prevent the receipt of cookies. Therefore, the representation set forth in Paragraph 9 was false or misleading.

11. The acts and practices of ScanScout, as alleged in this complaint, constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fourteenth day of December, 2011, has issued this complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon 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 Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. ScanScout is a Delaware corporation with its principal office or place of business at 295 Devonshire Street, Boston, MA 02110.
2. Respondent admits all the jurisdictional facts set forth in the draft complaint.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondent” shall mean ScanScout, Inc., a corporation, and its parent, Tremor Video, Inc., and each of their subsidiaries, successors or assigns.

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2. “Clear(ly) and prominent(ly)” shall mean:
 - a. In textual communications (e.g., printed publications or words displayed on the screen of a computer or device), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;
 - b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
 - c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication; and
 - d. In all instances, the required disclosures: (1) are presented in an understandable language and syntax; and (2) include nothing contrary to, inconsistent with, or in mitigation of any other statements or disclosures provided by respondent.
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. “Computer” or “device” shall mean any desktop or laptop computer, handheld device, telephone, or other product or device, through which a consumer can access the Internet.

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5. “Collection of data” or “collecting data” shall mean the practice of receiving any information or data from a computer or device, whether transmitted by a web browser or otherwise, and retaining that information, whether on the user’s computer or on a server. “Data collected” shall mean any information or data received from a computer or device, whether transmitted by a web browser or otherwise, and retained, whether on the user’s computer or respondent’s server(s).
6. “User” shall mean any consumer, computer, or device that respondent has uniquely identified.
7. “Online behavioral advertising” shall mean the practice of collecting data about a user’s online activities in order to deliver advertising targeted to the user’s interests.
8. “Permissible uses” shall mean uses of collected data that can be associated with a particular user, or that contains any unique identifier, including user ID or Internet Protocol (IP) address, for the following purposes and no other, provided that such data shall be retained by respondent no longer than reasonably necessary for such purpose and is not used for online behavioral advertising: (a) determining the number of times a specific user has been served or has responded to a specific advertisement within a period of time; (b) fraud prevention; (c) providing a service requested by a user; or (d) verifying a user’s age before serving an age-restricted advertisement. For purposes of (d), such data shall be retained by respondent no longer than the duration of the applicable browsing session, and in no instance no longer than twenty-four (24) hours.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees and all other persons in active concert or participation with any of them, who receive actual

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notice of this Order by personal service or otherwise, whether acting directly or through any entity, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication: (A) the extent to which data from or about a particular user or the user's online activities is collected, used, disclosed, or shared; or (B) the extent to which users may exercise control over the collection, use, disclosure, or sharing of data collected from or about them, their computers or devices, or their online activities.

II.

IT IS FURTHER ORDERED that, for so long as respondent engages in online behavioral advertising, respondent, directly or through any entity, in connection with the online advertising, marketing, promotion, offering for sale, sale, or dissemination of any product or service on websites other than respondent's, in or affecting commerce, shall:

- A. Within thirty (30) days after the date of service of this order, place a clear and prominent notice, including a hyperlink, on the homepage(s) of its website(s), which states, "We collect information about your activities on certain websites to send you targeted ads. To opt out of our targeted advertisements click here." When selected, the hyperlink shall take consumers directly to the mechanism required by Part II.B of the order;
- B. Within thirty (30) days after the date of service of this order, provide a clearly and prominently disclosed mechanism that enables users to prevent respondent: from collecting data that can be associated with a particular user, or that contains any unique identifier, including user ID or Internet Protocol (IP) address; from redirecting users' browsers to third parties that collect data, absent a click or other affirmative action by such user; and from associating any previously collected data with the user. *Provided, however,* respondent may collect data that can be associated with a particular user, or that contains a unique

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identifier: (1) to implement the user's choice to prevent respondent from collecting such data; and (2) for permissible uses;

- C. The mechanism set forth in Part II.B shall require no more than one action by the user (e.g., one click or one change to a browser setting) after the user is directed to such mechanism. The user's choice shall remain in effect for a minimum time period of five (5) years, unless the user disables the mechanism. Within close proximity to the mechanism, respondent shall clearly and prominently disclose: (1) that respondent collects information about users' activities on certain websites in order to deliver advertising targeted to users' interests; (2) that if the user implements the mechanism, respondent will not collect this information for the purpose of delivering advertising targeted to the user's interests; (3) the current status of the user's choice (e.g., "not opted out" or "opted out"); and (4) any circumstances that, if initiated by the user, would disable the mechanism or require the user to implement the mechanism again in order to maintain the user's choice (e.g., use of a different browser, use of a different device, or deletion of cookies);
- D. Within ninety (90) days after the date of service of the order, within or immediately adjacent to any display advertisement that respondent serves as part of online behavioral advertising, include a hyperlink that takes consumers directly to the mechanism required by Part II.B of this order. The hyperlink text shall clearly and prominently disclose to consumers that selecting the hyperlink will give them choices about receiving advertising targeted to their interests.
- E. Undertake reasonable efforts to develop and implement, within or immediately adjacent to any video advertisement that respondent serves as part of online behavioral advertising, a clear and prominent hyperlink that directs consumers to the mechanism required by Part II.B of this order, and discloses to

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consumers that they can opt out of receiving advertising targeted to their interests, and report on such efforts as set forth in Part VI of this order.

III.

IT IS FURTHER ORDERED that respondent shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, unless respondent asserts a valid legal privilege, a print or electronic copy of:

- A. For a period of five (5) years from the entry of this order or from the date of preparation, whichever is later:
 - 1. Consumer complaints or inquiries directed to respondent or forwarded to respondent by a third party concerning: (a) any collection of data by respondent; (b) the use, disclosure, or sharing of such data by respondent; or (c) opt-out practices or any other mechanism to limit or prevent such collection of data or the use, disclosure, or sharing of data collected by respondent, as well as any responses to such complaints or inquiries;
 - 2. Documents that are sufficient to demonstrate compliance with each provision of this order, including, but not limited to, relevant policies and procedures, documents demonstrating respondent's efforts to develop and implement a clear and prominent hyperlink for video advertisements pursuant to Part II.E, and all reports submitted to the Commission pursuant to this order;
 - 3. Documents that contradict, qualify, or call into question respondent's compliance with this order; and
- B. For a period of five (5) years after the last public dissemination thereof by respondent, respondent's terms of use, form end-user license agreements,

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frequently asked questions, privacy policies, and other documents publicly disseminated by respondent relating to: (a) collection of data by respondent; (b) the use, disclosure or sharing of such data by respondent; or (c) opt-out practices and other mechanisms to limit or prevent such collection of data or the use, disclosure, or sharing of data collected by respondent.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all principals, officers, directors, and managers, and to all employees, agents, and representatives having supervisory responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of the order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation 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 learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this order shall be sent by hand delivery or overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line In the Matter of ScanScout, Inc. FTC File No.

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1023185. *Provided, however*, that, in lieu of hand delivery or overnight courier, a notice may be sent by first-class mail, but only if an electronic version of such notice is contemporaneously sent to the Commission by e-mail to DEbrief@ftc.gov.

VI.

IT IS FURTHER ORDERED that respondent shall, within ninety (90) days after service of the order, file with the Commission a true and accurate report, in writing, setting forth the manner and form in which respondent has complied with this order, including but not limited to compliance with the requirements of Part II.E of this order. Every six (6) months thereafter, and continuing until respondent reports it has implemented the hyperlink set forth in Part II.E of this order for every different format of video advertisement that respondent serves as part of online behavioral advertising, respondent shall submit an additional true and accurate report, in writing, setting forth the manner and form in which respondent has complied with the requirements of Part II.E of this order. Within ten (10) business days of receipt of written notice from a representative of the Federal Trade Commission at such other times as the Federal Trade Commission may require, respondent shall submit additional true and accurate written reports.

VII.

This order will terminate on December 14, 2031, 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 later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part of this order that terminates in less than twenty (20) years; and
- B. This order if such complaint is filed after the order has terminated pursuant to this Part.

Analysis to Aid Public Comment

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from ScanScout, Inc. (“ScanScout”).

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

ScanScout is a video advertising network that engages in online behavioral advertising, the practice of collecting and storing information about consumers’ online activities across websites in order to deliver advertising targeted to their interests as inferred from their online activities. ScanScout acts as an intermediary between website publishers and advertisers that wish to have their video advertisements placed on websites. As a general matter, when a consumer visits a website within an online behavioral advertiser’s network of website publishers, the online advertising network sets an HTTP cookie, which is a small text

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file, into the consumer's browser or automatically receives a cookie it has previously set in the consumer's browser. The cookie contains a unique identifier that allows the network to recognize the consumer's computer and correlate the computer to online activity across websites. The advertising network uses the cookie to collect and store information about the consumer's online activities, including content or advertisements viewed and the pages visited within a particular website.

By contrast, from at least April 2007 to September 2009, ScanScout used Flash cookies, also known as Flash local shared objects, instead of HTTP cookies to conduct online behavioral advertising. ScanScout's privacy policy stated that by changing their browser settings, consumers could opt out of receiving cookies; however, at that time, users could not use their browser settings to block the placement of Flash cookies. Accordingly, the complaint alleges that ScanScout deceived consumers and violated Section 5 of the FTC Act by stating that consumers could prevent the company from collecting data about their online activities by changing their browser settings to prevent the receipt of cookies. The Commission alleges that representations ScanScout made in its privacy policy regarding consumers' ability to opt out of receiving cookies were false or misleading.

Part I of the proposed order prohibits ScanScout¹ from misrepresenting (1) the extent to which data about users or their online activities is collected, used, disclosed, or shared and (2) the extent to which users may exercise control over the collection, use, disclosure, or sharing of data collected from or about them, their computers or devices or their online activities. Part II of the proposed order requires the company to take a number of steps to improve the transparency of, and users' ability to control, its collection of user data for online behavioral advertising. First, within thirty (30) days after service of the proposed order, ScanScout must place a clear and prominent notice with a

¹ In November 2010, ScanScout merged with Tremor Media, Inc., now known as Tremor Video, Inc. Tremor Video, Inc. is included in the definition of respondent in the order. In addition, the order includes a representation by ScanScout that any parents, subsidiaries, and successors necessary to effectuate the relief contemplated by the order are bound to the order as if they had signed the agreement and were made parties to the proceeding.

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hyperlink on the homepage of its website that states: “We collect information about your activities on certain websites to send you targeted ads. To opt out of our targeted advertisements, click here.” The notice must direct users to a mechanism that allows them to prevent the company from (1) collecting information that can be associated with them or contains a unique identifier, (2) redirecting their browsers to third parties that collect data, absent an affirmative action, and (3) associating any previously collected data with them. Such choice must remain in effect for a minimum of five (5) years. ScanScout may, however, collect data that can be associated with a particular user or that contains a unique identifier for certain permissible uses specified in the order – for example, to effectuate the consumer’s opt out choice or to limit the number of times an advertisement is displayed.

Second, within close proximity to the mechanism, the company must disclose: (1) that it collects information about users’ activities on certain websites to deliver targeted ads; (2) that by opting out, the company will not collect this information to deliver such ads; (3) users’ current choice status (i.e., whether opted out or not opted out); and (4) any circumstances that, if initiated by the user, would disable the mechanism or require the user to implement the mechanism again to maintain his or her choice (i.e., if they switch browsers or devices, or if they delete cookies, they will have to opt out again).

Third, within or immediately adjacent to any behaviorally targeted display advertisement that the company serves, it must include a hyperlink that takes users directly to the required choice mechanism. The hyperlink text must disclose to consumers that selecting the hyperlink will give them choices about receiving targeted ads.

Fourth, due to technical limitations ScanScout cannot currently incorporate a hyperlink to the choice mechanism into all its video advertisements; therefore the order requires the company to undertake reasonable efforts to develop and implement a hyperlink for video advertisements that directs users to the choice mechanism, and the company must report regularly to the Commission regarding those efforts.

Analysis to Aid Public Comment

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires ScanScout to retain documents relating to its compliance with the order. Part IV requires dissemination of the order to all current and future principals, officers, directors, managers, employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates that ScanScout submit reports to the Commission detailing its compliance with the order. Part VII provides that the order expires after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE
PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH,
INC., HCA INC., PALMYRA PARK HOSPITAL, INC.,
AND
HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY
COUNTY

Docket No. D-9348.

Order, July 15, 2011

Order granting Respondents' motion to stay the administrative proceedings under Commission Rule 3.22(a), pending the outcome of an appeal to the Eleventh Circuit in a collateral federal court action on the issue of state action immunity.

ORDER GRANTING RESPONDENTS' UNOPPOSED MOTION TO STAY PROCEEDING

On July 1, 2011, Respondents filed an unopposed Motion to Stay the proceedings in this matter under Commission Rule 3.22(a). On July 7, 2011, the Administrative Law Judge certified that motion to the Commission. For the reasons that follow, the Commission has determined to grant the Motion.

The administrative trial in this matter is scheduled to begin on September 19, 2011. Respondents assert that "there is no benefit to undergoing the burdens and expense of continuing this administrative proceeding given" the pendency of an appeal to the Eleventh Circuit in collateral federal court litigation on the "critical issue" in this proceeding, namely state action immunity. (Motion ¶ 8.) Respondents assert that if the Eleventh Circuit were to rule in the FTC's favor, these administrative "proceedings can resume with no prejudice." (*Id.*) Complaint Counsel does not oppose Respondents' Motion.

The Commission's Rules of Practice allow the Commission to stay the administrative proceedings while a collateral federal court proceeding is ongoing upon a showing of good cause. See Rule

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3.41(f), 16 C.F.R. § 3.41(f) (“The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs.”). While the Commission has a strong interest in completing Part 3 proceedings expeditiously,¹ here the Commission finds good cause to grant a stay of this proceeding. The applicability of the state action doctrine is a key issue in this proceeding and will be addressed by the Eleventh Circuit on an expedited basis. The Eleventh Circuit’s grant of an injunction pending appeal will help ensure that the status quo is preserved and the proposed acquisition is not consummated. Under these circumstances, staying these proceedings will avoid a waste of resources and will not prejudice either side.

Accordingly,

IT IS ORDERED that Respondents’ Unopposed Motion to Stay be, and it hereby is, **GRANTED**.

By the Commission, Commissioner Rosch abstaining.

¹ See Rule 3.1, 16 C.F.R. § 3.1 (“[T]he Commission’s policy is to conduct [adjudicative] proceedings expeditiously.”); Rule 3.41(b), 16 C.F.R. § 3.41(b) (“Hearings shall proceed with all reasonable expedition”); Rules of Practice Amendments, 61 Fed. Reg. 50,640 (FTC Sept. 26, 1996) (“[A]djudicative proceedings shall be conducted expeditiously and . . . litigants shall make every effort to avoid delay at each stage of a proceeding.”).

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UNIVERSAL COMPUTERS AND ELECTRONICS, INC.,
D/B/A APPLIANCEBESTBUYS.COM
AND D/B/A UNIVERSALLCDTV.COM

Docket No. D-9347.

Order, August 4, 2011

Order granting parties' joint motion to withdraw the matter from adjudication to enable 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 Respondents having jointly moved that this matter be withdrawn from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Respondents having submitted a proposed Consent Agreement containing a proposed Order, executed by the Respondents and by Complaint Counsel and approved by the Director of the Bureau of Consumer Protection 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) (2011), that this matter in its entirety be, and it hereby is, withdrawn from adjudication, and that all proceedings before the Administrative Law Judge be, and they hereby are, stayed pending a determination by the Commission with respect to 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.

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THE NORTH CAROLINA BOARD OF DENTAL
EXAMINERS*Docket No. D-9343.**Order, August 12, 2011*

Order granting parties' joint motion to withdraw the matter from adjudication to enable the Commission to consider a proposed consent agreement.

ORDER ON RESPONDENT'S MOTION FOR EXTENSION OF TIME

Respondent North Carolina Board of Dental Examiners has filed a Motion for Extension of Time, in which it requests an additional two weeks to file its appeal brief to the Commission. Complaint Counsel do not oppose the motion so long as Complaint Counsel receives a comparable extension to file its answering brief. For the reasons described below, the Commission grants the parties an additional ten days to file their respective appeal and answering briefs.

Commission Rule 3.52(b), 16 C.F.R. § 3.52, gives parties 30 days from service of the 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 August 15, 2011.

Respondent has requested that its time to file an appeal brief be extended two weeks and for Complaint Counsel's time to file an answering brief likewise be extended an additional two weeks. Respondent seeks additional time because "Respondent's Counsel moved to new office space on July 22, 2011. . . . Respondent's Counsel and staff have necessarily been engaged in packing and unpacking activity, and as a consequence have not been able to devote the full amount of time contemplated by the FTC's rules as being adequate for the preparation of Respondent's opening appeal brief." (Motion ¶¶ 1-2.)

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Under these circumstances, the Commission is willing to grant Respondent additional time to prepare its appeal brief. Respondent's request for a two week extension, however, appears excessive, particularly in light of the late hour of Respondent's motion. In addition, the Commission is mindful that in any litigation involving alleged anti competitive conduct, 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 Thursday, August 25, 2011 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 Tuesday, October 4, 2011;

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, Commissioner Brill recused.

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TOPS MARKET LLC

*Docket No. C-4295.**Order, September 26, 2011*

Order granting respondent a 90-day extension by which respondent must divest assets under the consent order.

COMMISSION LETTER EXTENDING DIVESTITURE PERIOD

Dear Mr. Morris:

This is in response to the September 13, 2011, letter you filed as Divestiture Trustee in this matter seeking an extension of the divestiture period for ninety (90) days in order to accomplish the divestiture of the supermarket identified in Schedule A of the above-referenced Order and located at 404 West Morris Street, Bath, New York. The Commission has determined to grant your request. Accordingly, the divestiture period is extended until December 27, 2011.

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

By direction of the Commission.

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THE DOW CHEMICAL COMPANY

Docket No. C-4243.

Order, September 30, 2011

Order approving respondent's request to modify lease and asset purchase agreement incorporated into the consent order.

COMMISSION LETTER MODIFYING ORDER

Dear Mr. Cary:

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice and Paragraph III.G. of the Decision and Order in this matter, the Commission has determined to approve the request of The Dow Chemical Company (July 6, 2011) to modify the Torrance Tank Area Lease and the Asset Purchase Agreement (July 31, 2009) incorporated into the Decision and Order in this matter by approving the Tank Lease Amendment and the LPP Amendment. In according its approval to Dow's Petition, the Commission has relied upon the information submitted by Dow, and the Commission has assumed that information to be accurate and complete.

By direction of the Commission.

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CONOCO, INC. AND PHILLIPS PETROLEUM COMPANY

*Docket No. C-4058.**Order, November 14, 2011*

Order approving respondent's request to modify lease and asset purchase agreement incorporated into the consent order.

ORDER REOPENING AND MODIFYING ORDER

ConocoPhillips Company filed its "Petition of ConocoPhillips to Reopen and Modify the Decision and Order and for Approval of Amended Agreement" in this matter on June 20, 2011. ConocoPhillips is seeking the modification to allow it to change its license agreement with Holly Corp. (the acquirer of the divested Woods Cross refinery), which will extend the term of the license agreement. ConocoPhillips bases its request to reopen and modify the Order on both changed facts and public interest. For the reasons stated below, the Commission has determined to grant the Petition to reopen and modify the Order.¹

I. BACKGROUND

Conoco Inc.'s 2002 merger with Phillips Petroleum Company created ConocoPhillips. The Commission reviewed the proposed merger and concluded that it would adversely affect competition in multiple product and geographic markets. The parties agreed to divestitures and other relief to remedy those anticompetitive effects. Of concern here is the remedy in the market for the bulk supply of light petroleum products in northern Utah.²

To remedy the likely anticompetitive effects in that market, the Commission ordered ConocoPhillips to divest Phillips' refinery in Woods Cross, Utah, by August 2, 2003. As defined by the order, ConocoPhillips was required to divest the refinery,

¹ The Commission has also determined to approve the amended agreement and does so in a separate letter to ConocoPhillips from Donald Clark, Secretary, Federal Trade Commission.

² See Complaint, ¶¶ 20 *et seq.*, available at <http://www.ftc.gov/os/2002/08/conocophillipscmp.pdf>.

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an interest in refinery tanks, all crude pipelines connected to the refinery, a refined products pipeline, interests in nearby terminals, loading facilities, and all intellectual property, licenses, plans, agreements and joint ventures relating to the operation of the refinery. The Commission found no anticompetitive effects at the retail gasoline sales level, but to assure the viability of the refinery in the bulk supply market the Commission ordered ConocoPhillips to divest the Phillips 66 retail network that was supplied from the refinery. That included the Phillips-owned gasoline stations in Utah, Wyoming, Idaho, and Montana and all Phillips 66 supply agreements with the independent marketers that supplied the other Phillips 66 brand retailers in those four states.

So that the acquirer could continue to use the Phillips 66 brand name, the order required ConocoPhillips to license the acquirer, on an exclusive basis for ten years, the right to use in those four states all brand names owned by or licensed to Phillips and used in those states as of August 2, 2002, in connection with the sale of gasoline. This would enable the acquirer to continue to supply the stations it acquired in the divestiture as well as the independent marketers. To assure access to the brand beyond the ten years (and beyond the term of the Commission's order), the Commission also required that ConocoPhillips enter into discussion with the Commission-approved acquirer regarding the renewal of the brand licensing agreement at the end of the ninth year.

ConocoPhillips entered into an agreement to divest the required assets to Holly and to license the brand to Holly on an exclusive basis for the ten-year period required in the Order. ConocoPhillips went beyond the provisions of the order and agreed to discuss extension of the agreement at any time during the ten-year term of the license rather than only after the ninth year. Furthermore, ConocoPhillips agreed to use best efforts to negotiate the terms of a renewal for at least a five-year term.³

³ See Exhibit I, Trademark License Agreement, ¶ 7.02. Paragraph II.G. requires that in the event that the acquirer of the Woods Cross Assets ceases to use the Phillips brand in Utah, Idaho, Wyoming and Montana, ConocoPhillips retains the right to use that Phillips brand in Utah, Idaho, Wyoming, and Montana beginning two years after the acquirer ceases to use that Phillips brand in Utah, Idaho, Wyoming, and Montana. Under the Trademark License

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ConocoPhillips petitioned the Commission for approval of its proposed divestiture of the Woods Cross assets to Holly in January 2003. The Commission reviewed the proposed divestiture and approved it in May 2003.⁴ Holly acquired the assets on June 1, 2003. ConocoPhillips granted the ten-year exclusive license to Holly,⁵ and the license agreement complied with all other provisions of the Commission's order.⁶ The license agreement expires on June 1, 2013.⁷

Since that time, according to Holly, Holly has been successfully operating the refinery.⁸ It increased capacity at the refinery in 2008 and is in the process of constructing a pipeline from Salt Lake City to Las Vegas, which will improve its ability to supply Las Vegas from the refinery. Although Holly sold the 25 company-owned stations to independent dealers, it has continued to serve the majority of them from the Woods Cross refinery.⁹ It has also continued to serve the marketers whose contracts it acquired in the divestiture. It has devoted more resources to developing and expanding its presence in Utah and Idaho than it has in Wyoming and Montana, but it has continued to serve its customers in Wyoming and Montana. ConocoPhillips views Holly as a successful supplier.¹⁰

Beginning last year, several of the Phillips 66 retailers that Holly supplies began expressing concern to Holly about

Agreement, Phillips retains ownership of the trademarks.

⁴ See Petition at <http://www.ftc.gov/os/2003/01/conocopetition.pdf> (hereinafter "Petition"); see Press Release, May 23, 2003, at <http://www.ftc.gov/opa/2003/05/fyi0334.shtm>.

⁵ See Exhibit I, Trademark License Agreement, ¶¶ 2.01 and 7.01 and Exhibit L, Branded Ancillary Products Purchase Agreement, ¶ 6.

⁶ See Exhibit I, Trademark License Agreement Opening Paragraph.

⁷ The Order terminates February 13, 2013.

⁸ See Declaration of Gregory A. White, Vice President, Holly Refining & Marketing Company LLC (hereinafter "Holly Declaration"), ¶ 4.

⁹ Holly Declaration, ¶ 3.

¹⁰ Petition at 4; Holly Declaration, ¶ 5.

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post-2013 supply. Holly, thus, sought to negotiate an extension to its license agreement with ConocoPhillips as early as possible. Consistent with the order and the license agreement, ConocoPhillips entered into negotiations with Holly in 2009 to extend the terms of the license agreement. These negotiations led to a signed letter of intent in July 2010 and an executed license extension in February 2011.

The new agreement will extend the license to Holly for an additional seven years in the four states beginning when the current license expires in June 2013, on a non-exclusive basis, with a mutual option to extend for an additional five years. In return for the extension now in the four-state area, Holly agreed to modify the divestiture agreement to give up exclusivity in Wyoming and Montana as soon as the Commission approves the modification, rather than retaining it until June 2013 as required by the Order. ConocoPhillips agreed not to attempt to rebrand any of the retailers currently served by Holly in those two states until June 2013, but ConocoPhillips will obtain the right to brand any other retailers in those two states as soon as the agreement is effective. Holly will retain exclusivity in Utah and Idaho until June 2013 as required by the Order. Because the elimination of exclusivity in Wyoming and Montana prior to June 2013 would be inconsistent with the Commission's Order, ConocoPhillips has requested that the Commission reopen and modify the order to allow the modification.

II. CONOCOPHILLIPS' PETITION

Paragraph II.C.1.a. of the Order requires ConocoPhillips to grant a ten-year exclusive license for use in the four states, and ConocoPhillips is now in compliance with that obligation. A modification to the license agreement that eliminates exclusivity in Wyoming and Montana prior to the end of the ten-year period in June 2013 would be inconsistent with the Commission's Order.

ConocoPhillips, thus, proposes adding the following proviso to Paragraph II.C.2. of the Commission's order:

Provided, however, that Respondents and the acquirer may agree, prior to the end of the ninth year and subject to the

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Commission's prior approval, to modify the terms of the agreement entered pursuant to Paragraph II.C.I. in order to provide a nonexclusive license in Montana and Wyoming for the remainder of the ten-year period, notwithstanding the provisions of Paragraphs II.C.I. and II.G, as long as the modification is consistent with the purpose of the Order.

With the above modification to the Commission's Order, ConocoPhillips asserts that the proposed amendment to the license will not violate the Order.

ConocoPhillips maintains that the proposed amendment and modification will be pro-competitive, will not adversely affect the refinery's viability, and will thus serve the public interest. Holly will continue to supply exclusively in Idaho and Utah through June 2013. Although Holly will give up exclusivity immediately in Wyoming and Montana, ConocoPhillips will agree not to compete for the stations Holly currently supplies in those two states through the initial contract period. Thus, Holly will continue to supply all the stations it currently supplies, maintaining the same level of service as it currently has with no impact on its viability. On the other hand, ConocoPhillips could begin competing in Wyoming and Montana immediately, thereby injecting additional competition into those states.

In addition, ConocoPhillips asserts that changed facts and circumstances require approval of the modification and amended agreement and that approval will further the purposes of the order.

After operating in the market for over eight years, Holly has determined that exclusivity in Wyoming and Montana is not necessary to maintain viable operations at the refinery. Extending the license agreement for up to 12 additional years now, however, will enable Holly to give its retailers and marketers the assurances they are seeking and further enhance the refinery's viability. Enhancing the refinery's viability will further the objectives of the Commission's order.

ConocoPhillips filed its Petition on June 20, 2011. It was available for public comment for thirty days until July 27, 2011. No public comments were filed.

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III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). First, Section 5(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require.¹¹ A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.¹² The Commission’s Rule 2.51(b) requires such “satisfactory showing” to include affidavits setting forth admissible facts.¹³

Second, Section 5(b) provides that the Commission may also reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.¹⁴ In the case of “public interest” requests, Rule 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

¹¹ See also *Supplementary Information*, Amendment to the Commission’s Rules of Practice § 2.51(b), 16 C.F.R. 2.51(b) (August 15, 2001).

¹² S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (“A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the petition itself does not plead facts requiring modification.”).

¹³ 16 C.F.R. § 2.51(b).

¹⁴ Hart Letter at 5; 16 C.F.R. § 2.51.

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A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.¹⁵ This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. Just as for petitions based on changed conditions, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,¹⁶ and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of the Commission's orders.¹⁷ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.¹⁸

IV.THE ORDER WILL BE REOPENED AND MODIFIED

The Commission has determined to reopen and modify the Order as requested by ConocoPhillips. Reopening the Order to eliminate the exclusive licensing requirement in the manner that ConocoPhillips proposes will relieve ConocoPhillips of a specific

¹⁵ 16 C.F.R. § 2.51.

¹⁶ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

¹⁷ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹⁸ 16 C.F.R. § 2.51(b).

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obligation in the Commission's Order; the Commission must thus determine whether reopening the Order is warranted. In this case, it is clear that elimination of the requirement in the manner proposed by ConocoPhillips will not affect the viability of Holly's refinery operations and thus the effectiveness of the Commission's remedy, but it will instead have two immediate procompetitive consequences.

First, it will inject immediate competition into Wyoming and Montana without jeopardizing Holly's operations. And, second, and perhaps more important, in exchange for the immediate elimination of exclusivity in these two states, ConocoPhillips has agreed to provide Holly additional rights by extending the brand licensing agreement in the entire four-state area for up to 12 more years. This will enable Holly to assure its customers now of post-2013 supply, further enhancing Holly's viability and further benefitting competition. The resulting benefits to competition justify reopening the Order and modifying it to eliminate that obligation now.

The Order was premised on the Complaint's allegation that the merger of Conoco and Phillips would be unlawful in the bulk supply of light petroleum products in Northern Utah.¹⁹ As the Order explicitly states:

The purpose of this Paragraph is to ensure that the Phillips Woods Cross Assets remain in the market and to remedy the lessening of competition in the refining, terminaling and bulk supply of Motor Fuels and other petroleum products resulting from the proposed Merger as alleged in the Commission's Complaint. A further purpose of this Paragraph is to ensure that the acquirer of the Phillips Woods Cross Assets has the same capabilities and incentives as did Phillips prior to the Merger to expand and develop alternative sources of Motor Fuels and other light petroleum products for the Northern Utah market as alleged in the Commission's Complaint and is able to take control of the assets and, with minimal additional

¹⁹ The Complaint alleges: "After the Merger, the combined firm could effectively coordinate to reduce supply, slow growth of supply, and raise prices in the market for LPP bulk supply in Northern Utah." Complaint, ¶ 30.

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investment, compete as aggressively as did Phillips prior to the Merger.²⁰

To remedy the anticompetitive effects alleged in the Complaint, the Commission ordered divestiture of the refinery supplying the relevant geographic market. But to assure the viability of the refinery and to enable the acquirer to “compete as aggressively as” Phillips had prior to the merger, the Commission also ordered divestiture of the marketing assets supplied from the refinery and a ten-year exclusive brand license covering the four-state area supplied from the refinery.

Eight years later, it is clear that the Order has achieved its remedial objectives in this regard. Divestiture of the refinery to Holly was intended to replace the competition lost in the bulk supply of light petroleum products in Northern Utah as a result of the merger of Conoco and Phillips, and it did so. Divestiture of the marketing assets and the four-state ten-year exclusive license was intended to enhance the viability of the refinery to assure effective relief in that market, and it did so as well. The inclusion of the marketing assets and the exclusive license in all four states has served its purpose. Holly has effectively operated the refinery for eight years and has now determined that continued exclusivity in Montana and Wyoming is not necessary for viable operations of the refinery. The proposed agreement, although eliminating exclusivity in Montana and Wyoming immediately, will preserve Holly’s footprint there by prohibiting ConocoPhillips from competing for the stations that Holly currently serves in those two states through June 2013. On the other hand, by eliminating Holly’s exclusivity in Montana and Wyoming now, the modification will enable ConocoPhillips to compete for additional marketers in those two states thereby injecting additional competition immediately without jeopardizing the effectiveness of the remedy.

In addition, ConocoPhillips has agreed to extend the license agreement throughout the entire four-state area for up to 12 years if Holly agrees to the elimination of exclusivity in Montana and

²⁰ Order, ¶ II.M.

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Wyoming immediately and if the Commission reopens and modifies the Order to allow the change. Thus, by reopening and modifying the Order as ConocoPhillips requests, the Commission will facilitate the valuable benefit that Holly will obtain by being able to assure the retailers and marketers that it presently serves in the four-state area that it will be able to supply them for up to another 12 years. The assurance now that Holly will remain a viable supplier in this market will enhance its competitiveness and thus assure the effectiveness of the Commission's remedy.²¹

Accordingly, the Petition satisfies the standard for reopening and modifying the Order under the "public interest" provision of Rule 2.51(b) of the FTC Rules of Practice and Section 5 of the FTC Act. ConocoPhillips has established that reopening the Order is in the public interest in light of the pro-competitive benefits that will be obtained. ConocoPhillips has also shown that the Order should be modified as it proposes by demonstrating

²¹ Reopening and modifying this Order is consistent with the Commission's action in Solvay S.A., Docket No. C-4046, Order Reopening and Modifying Order at: <http://www.ftc.gov/opa/2003/04/solvayord.pdf>, in which the Commission reopened the final hold separate order and eliminated a two-year ban on hiring a named employee, finding that the Hold Separate Order had been effective in facilitating the acquirer's efforts to retain necessary employees. Based on those facts, the Commission concluded:

In determining whether to modify the Hold Separate Order, the Commission must consider and balance all the reasons for and against the modification. Although the Hold Separate Order's two year ban on Solvay employing the Solvay Fluoropolymers Business promoted the important goal of encouraging the employees of the divested business to accept employment with Dyneon, its decision not to hire Mr. Mularski renders the employment ban obsolete and unnecessary. The employment ban now imposes an unintended harm to Mr. Mularski's personal financial and employment interests because the employment ban prevents Solvay from hiring Mr. Mularski. In balancing and weighing the reasons for and against modifying the Hold Separate Order, it appears that Mr. Mularski will suffer personal harm if the Hold Separate Order is not modified, but that declining to modify the Hold Separate Order will not promote any competitive or public purpose.

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that the modification will have no impact on Holly's viability but will instead inject additional competition into the market.²²

Accordingly,

IT IS ORDERED that the Order in Docket No. C-4058 be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that the Order be, and it hereby is, modified by making the following changes to Paragraph II.C. 2.:

(Deletions noted with strike through and new text bold and underlined)

~~at~~ **on or before** the end of the ninth year after the Effective Date of Divestiture of the Phillips Woods Cross Assets, Respondents shall offer to meet with the acquirer to discuss a renewal of the agreement;

and by adding the following proviso to Paragraph II.C.2.:

Provided, however, that Respondents and the acquirer may agree, prior to the end of the ninth year and subject to the Commission's prior approval, to modify the terms of the agreement entered pursuant to Paragraph II.C.I. in order to provide a nonexclusive license in Montana and Wyoming for the remainder of the ten-year period, notwithstanding the provisions of Paragraphs II.C.I. and II.G, as long as the modification is consistent with the purpose of the Order.

By the Commission.

²² Having determined that ConocoPhillips' Petition satisfies the public interest test, the Commission need not consider whether the Petition has made a satisfactory showing of changed conditions of fact.

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CONOCO, INC. AND PHILLIPS PETROLEUM COMPANY

Docket No. C-4058.

Order, November 14, 2011

Order approving respondent's amended agreement.

COMMISSION LETTER APPROVING AMENDED AGREEMENT

Dear Mr. Cary and Mr. Byrne:

This letter responds to the Petition of ConocoPhillips To Reopen and Modify the Decision and Order and for Approval of Amended Agreement filed by ConocoPhillips Company on June 20, 2011. The Petition was placed on the public record for comments until July 27, 2011, and no comments were received.

In its Order Modifying Order, issued on November 14, 2011, the Commission has determined to reopen the Order in this matter and modify it as requested by ConocoPhillips. ConocoPhillips has also requested that, pursuant to Section 2.41 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(2011), the Commission approve the Amended Agreement described in the Petition.

After consideration of the Amended Agreement as set forth in the Petition and supplemental documents, as well as other available information, and consistent with the Order as modified by the Order Modifying Order, the Commission has determined to approve the Amended Agreement. In according its approval, the Commission has relied upon the information submitted and representations made in connection with ConocoPhillips' Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

BASF SE

*Docket No. C-4253.**Order, November 15, 2011*

Commission letter approving the modification of the toll manufacturing agreement, which is incorporated into the the divestiture agreement required pursuant to the Commission's order.

COMMISSION LETTER APPROVING MODIFIED AGREEMENT

Dear Mr. Schlossberg:

This is in reference to the "Petition of BASF SE for Approval of IB Toll Manufacturing Agreement Extension" ("Petition"), dated September 20, 2011, and filed by BASF SE ("BASF"). Pursuant to the Decision and Order in the above matter, BASF requests approval of a proposed change in the toll manufacturing agreement, a document that is part of the divestiture agreement included in the Decision and Order.

After consideration of BASF's Petition and other available information, the Commission has determined to approve the proposed change as set forth in BASF's Petition. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with BASF's Petition and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

TOPS MARKET LLC

Docket No. C-4295. Order, December 9, 2011

Order granting respondent a second 90-day extension by which respondent must divest assets under the consent order.

COMMISSION LETTER EXTENDING DIVESTITURE PERIOD

Dear Mr. Morris:

This is in response to the November 23, 2011, letter you filed as Divestiture Trustee in this matter seeking an extension of the divestiture period for ninety (90) days in order to accomplish the divestiture of the supermarket identified in Schedule A of the above-referenced Order and located at 404 West Morris Street, Bath, New York. The Commission has determined to grant your request. Accordingly, the divestiture period is extended until March 26, 2012.

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

By direction of the Commission.

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UNIVERSAL HEALTH SERVICES, INC.

*Docket No. C-4309.**Order, December 27, 2011*

Commission letter approving the divestiture of assets in Las Vegas, Nevada, by Universal Health Services to Strategic Behavioral Health, LLC.

COMMISSION LETTER APPROVING DIVESTITURE

Dear Mr. Barbur and Mr. Belelieu:

This letter responds to the Application for Approval of Divestiture of the Las Vegas Divestiture Assets filed by Universal Health Services, Inc., on November 7, 2011. The Application requests that the Commission approve, pursuant to the order in this matter, Universal's proposed divestiture of the Las Vegas Divestiture Assets to Strategic Behavioral Health, LLC. The application was placed on the public record for comments until December 12, 2011, and no comments were received.

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

By direction of the Commission.

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UNIVERSAL HEALTH SERVICES, INC.

Docket No. C-4309.

Order, December 27, 2011

Commission letter denying Respondent's request to extend the time to divest its Las Vegas assets to a Commission-approved acquirer because the Respondent failed to demonstrate either that its efforts to divest the assets or its efforts to resolve staff concerns were sufficient to warrant an extension.

COMMISSION LETTER DENYING MOTION FOR EXTENSION OF TIME
TO DIVEST LAS VEGAS DIVESTITURE ASSETS

Dear Messrs. Barbur and Belielieu:

This letter responds to Universal Health Services, Inc.'s Motion For Extension of Time to Divest the Las Vegas Divestiture Assets ("Motion"), filed by you on behalf of Respondents Alan B. Miller and Universal Health Services, Inc., *et al.* (collectively, "Universal" or "Respondents") in the above-captioned matter on October 3, 2011. In its Motion, Universal seeks an extension of time to divest until March 31, 2012. Under the terms of the Decision and Order ("Order") issued in this matter, which were agreed to by Respondents, Universal is required to divest the Las Vegas Divestiture Assets no later than six months after the date the Order became final, *i.e.*, by October 31, 2011, to an acquirer that receives the Commission's prior approval, and in a manner that also receives the Commission's prior approval. Universal has failed to complete the required divestiture within the Order's deadline. For the reasons discussed below, Universal has not met its burden under the Commission's Rules and the applicable legal standards for showing good cause why its Motion should be granted. Accordingly, the Commission has denied the Motion.

In reaching its decision, the Commission has reviewed Universal's Motion and other available information, including that provided by Universal in its periodic reports of compliance, its applications seeking prior approval of proposed divestitures and in supplemental submissions. The Commission has also reviewed Universal's efforts to divest the Las Vegas Divestiture Assets as required by the terms of the Order.

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The Order, which became final on April 29, 2011,¹ was issued to resolve competitive concerns arising from Universal's acquisition of Psychiatric Solutions, Inc., which combined two of the largest providers of acute inpatient psychiatric services in three relevant geographic markets: the Las Vegas, Nevada, Metropolitan Statistical Area; the State of Delaware; and the Commonwealth of Puerto Rico. The Order requires Universal to divest the Divestiture Assets, as defined,² within specified time periods,³ in each of the Relevant Areas, as defined:⁴ the State of Delaware; the Las Vegas, NV, MSA; and the Commonwealth of Puerto Rico. In particular, Paragraph III.A. of the Order requires Universal to divest the Las Vegas Divestiture Assets, as defined,⁵ "[n]o later than six (6) months after the date [the] Order becomes final" (*i.e.*, by October 31, 2011), only to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.⁶ Paragraph VIII.A. of the Order provides that the Commission may appoint a trustee ("Divestiture Trustee") to, among other things, divest the Las Vegas Divestiture Assets if Respondents have not fully complied with the obligations imposed by Paragraph III. of the Order.

On May 20, 2011, Universal filed an application ("May 20th application") seeking the Commission's prior approval to divest the Las Vegas Divestiture Assets to Signature Healthcare

¹ On November 15, 2010, the Commission accepted an Agreement Containing Consent Orders in this matter for public comment. The Commission subsequently issued a modified final Decision and Order (*i.e.*, the Order) on April 19, 2011, which became final on April 29, 2011.

² Order ¶ I.O.

³ Order ¶¶ IIA., III.A., IV.A.

⁴ Order ¶ I.DD.

⁵ Order ¶¶ I.T., V., CC.

⁶ Pursuant to a consent settlement with the State of Nevada, Universal must comply with essentially identical divestiture obligations according to the terms of a Final Judgment, filed on November 15, 2010, by the Attorney General for the State of Nevada ("Nevada Attorney General"), in the United States District Court for the District of Nevada.

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Services, LLC (“Signature”), an entity wholly owned by Dr. Soon Kim. As described below, the Commission’s staff engaged in detailed discussions with Universal and with Signature concerning the proposed divestiture to Signature, and conducted an extensive review of Signature as a “Prospective Acquirer,” as defined,⁷ of the Las Vegas Divestiture Assets. On September 15, 2011, Universal filed a Notice of Withdrawal of the May 20th application.

In its Motion, Universal requests that the Commission extend the time for divestiture until March 31, 2012, pursuant to Section 4.3(b) of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 4.3(b). Commission Rule 4.3(b) provides that “the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or order of the Commission.” Under applicable precedent, Universal has the burden of demonstrating good cause, and granting an extension of time rests in the discretion of the Commission.⁸ As the Commission’s publicly-available guidance makes clear, failure to consummate a required divestiture within the time limit set by the Order (*i.e.*, not just file for approval) is a violation of the Order and can result in liability for civil penalties and other relief pursuant to Section 5(l) of the Federal Trade Commission Act.⁹ The Commission has consistently held respondents to a high standard when considering granting an extension of time to divest because, by granting such a request, the Commission would forgo its ability to seek civil penalties or other relief for the period of the extension. Good cause to extend the Order’s deadline could include a persuasive showing of extraordinary or unforeseen circumstances not reasonably within a respondent’s control that prevented the timely completion of the divestiture, or a showing of some harm that would result from denial of the motion. Conversely, indications of a respondent’s lack of diligent efforts to complete a Commission-ordered divestiture as expeditiously as

⁷ Order ¶ I.X.

⁸ *United States v. Swingline, Inc.*, 371 F. Supp. 37, 45 (E.D.N.Y. 1974).

⁹ 15 U.S.C. § 45(l) See Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies, at n.30 and accompanying text, <http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm>.

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possible could negate assertions of good cause to extend the divestiture deadline.¹⁰

Universal states in its Motion that it has worked diligently to divest the Divestiture Assets, and points to its timely divestiture of the Delaware Divestiture Assets,¹¹ and substantial progress toward a timely divestiture of the Puerto Rico Divestiture Assets,¹² as factors the Commission should take into account in assessing its requested extension of time to divest the Las Vegas Divestiture Assets. Universal's compliance with its obligations regarding the Delaware Divestiture Assets and its compliance efforts regarding the Puerto Rico Divestiture Assets are an indication of Universal's diligence and efforts to comply with the Order's requirements, but do not excuse Universal's failure to have *fully* complied by completing the required divestiture of the Las Vegas Divestiture Assets on time. The Commission has never found partial compliance with an Order's requirements alone to constitute sufficient good cause for extending the time to divest. Universal expressly represented to the Commission in settling this matter that it could accomplish the full relief contemplated by the Order,¹³ and is presumed to have understood the obligations it undertook when it signed the consent agreement.

The circumstances surrounding Universal's failure to divest the Las Vegas Divestiture Assets on time were neither

¹⁰ See, e.g., Letter re: *In the Matter of Service Corporation International, Inc., et al.*, Docket No. C-4174 (April 25, 2008), <http://www.ftc.gov/os/caselist/0610156/080501letter.pdf>.

¹¹ Universal was required to divest the Delaware Divestiture Assets by October 31, 2011 (Order ¶ II.A.). It filed an application for approval to divest to PHC, Inc., which was approved by the Commission on June 3, 2011. The divestiture closed on July 1, 2011.

¹² Universal is required to divest the Puerto Rico Divestiture Assets by January 30, 2012 (Order ¶ IV.A.). It filed an application for approval to divest the assets to United Medical Corporation and related individuals and entities on September 28, 2011. Commission action on the application is pending.

¹³ Paragraph 13 of the Agreement Containing Consent Orders executed in this matter by Respondents states that, "[b]y signing this Consent Agreement, Proposed Respondents represent and warrant that they can accomplish the full relief contemplated by the attached Decision and Order (including effectuating all required divestitures, assignments, and transfers)."

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extraordinary nor unforeseen so as to constitute sufficient “good cause” under Commission Rule 4.3(b) to justify extending the time to divest. In late March 2011, before Universal filed the May 20th application seeking Commission approval of Signature to acquire the Las Vegas Divestiture Assets, the Commission’s staff, working in coordination with staff of the Office of the Nevada Attorney General (“NV-AG staff”), notified Universal that, based on publicly-available information, Signature already had plans to enter the relevant Las Vegas, NV, MSA market as a provider of acute inpatient psychiatric services. Staff explained its view that divestiture to Signature, with its apparent imminent plans to enter at a substantial scale, would fail to achieve the remedial deconcentrating effect and purpose of the Order’s divestiture requirement in the relevant market. Universal disagreed with staff’s assessment and filed the May 20th application.

The Commission’s staff and NV-AG staff then conducted a coordinated, in-depth review of Signature as a Prospective Acquirer of the Las Vegas Divestiture Assets. This included review of confidential documents and information submitted by Signature pursuant to compulsory process issued by the Office of the Nevada Attorney General, interviews with third parties, and numerous conversations with representatives of Signature and Universal. Throughout its review, staff regularly and repeatedly informed Universal (and Signature) that, based on information it was receiving, staff continued to have serious concerns about Signature as a committed entrant into the Las Vegas area. Nonetheless, both Universal and Signature persisted in presenting arguments that Signature should still be considered an acceptable acquirer of the Las Vegas Divestiture Assets.¹⁴ Finally, the Commission’s staff and NV-AG staff determined that further review would likely yield no new information that would resolve or eliminate staff’s concerns. In view of the rapidly-approaching divestiture deadline, the Commission’s staff (along with NV-AG staff) informed Universal on August 22, 2011, that staff was prepared to recommend that the Commission deny Universal’s application for approval of its proposed divestiture to Signature. Universal subsequently withdrew its May 20th application on

¹⁴ See Motion at ¶ 9.

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September 15, 2011. Although it immediately began the process to find another candidate to acquire the Las Vegas Divestiture Assets, and filed an application for approval of its proposed divestiture to a new Prospective Acquirer on November 7, 2011,¹⁵ Universal failed to satisfy its obligation to divest the Las Vegas Divestiture Assets by October 31, 2011, as required by the Order.

Based on the foregoing, Universal has not demonstrated that its divestiture efforts prior to the Order's divestiture deadline were sufficient to justify the relief requested. Nor has Universal identified any harm, such as harm to the public, if the Commission denies the Motion.¹⁶ Although Universal was free to continue to urge staff to support its proposed divestiture to Signature, Universal must accept the risk that prolonged discussion, especially in light of the staff's repeated expressions of concern about the proposal that were never resolved by Universal, would adversely affect Universal's ability to complete the divestiture by the Order's deadline. Accordingly, the Commission has determined to deny Universal's Motion.¹⁷

Failure to complete a divestiture by the Order's deadline is a violation of the Order and creates the potential liability for civil penalties and other relief pursuant to Section 5(l) of the FTC Act.¹⁸ As provided in Paragraph VIII. of the Order, neither the appointment of a Divestiture Trustee nor a decision by the Commission not to appoint a Divestiture Trustee relieves Respondents of their potential liability for civil penalties. In

¹⁵ On November 7, 2011, Universal filed an application seeking Commission approval for divestiture of the Las Vegas Divestiture Assets to Strategic Behavioral Health, LLC and related entities.

¹⁶ The requirements of the Order to Hold Separate and Maintain Assets, and the oversight of the Hold Separate Trustee appointed by the Commission, will help assure the continued viability, competitiveness and marketability of the Divestiture Assets pending divestiture. They are not substitutes, however, for a timely divestiture, which remains the core remedy in this Order.

¹⁷ In reaching its decision, the Commission, through staff, worked in close coordination with the Office of the Nevada Attorney General. The Commission's decision does not, however, bind or necessarily represent the views of the State of Nevada.

¹⁸ 15 U.S.C. § 45(l).

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denying Universal's Motion, however, the Commission has made no determination to seek a trustee to accomplish the divestiture of the Las Vegas Divestiture Assets at this time, nor has it made a determination to seek civil penalties or other relief for Universal's failure to comply with this divestiture obligation in a timely fashion. Although Universal has not shown that its efforts prior to the divestiture deadline were sufficient to justify the requested time extension, its substantial progress toward proposing a new Prospective Acquirer weighs in favor of allowing Universal to continue the process already underway rather than risk further delay by introducing a Divestiture Trustee at this juncture. The Commission will closely monitor Universal's efforts to complete the process of divesting the Las Vegas Divestiture Assets as expeditiously as possible, consistent with its Order obligations.

The Commission reserves the right to appoint a Divestiture Trustee or take such further action as circumstances warrant.

By direction of the Commission.