

## Complaint

## IN THE MATTER OF

**POOL CORPORATION**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4345; File No. 101 0115**Complaint, January 10, 2012 – Decision, January 10, 2012*

This consent order addresses Pool Corporation's threats to manufacturers that it would not deal with them if they also supplied new entrants in the pool product distribution market. The complaint alleges that PoolCorp effectively foreclosed new distributors from obtaining pool products from manufacturers that represented more than 70 percent of all pool product sales in violation of Section 5 of the Federal Trade Commission Act. The consent order prohibits PoolCorp from (1) conditioning the sale or purchase of pool products, or membership in PoolCorp's preferred vendor programs, on the intended or actual sale of pool products by a manufacturer to any distributor other than PoolCorp; (2) pressuring, urging or otherwise coercing manufacturers to refrain from selling, or to limit their sales, to any distributors other than PoolCorp; and (3) discriminating or retaliating against a manufacturer for selling, or intending to sell, pool products to any distributor other than PoolCorp.

*Participants*

For the *Commission*: Matthew P. Accornero, Linda M. Holleran and Benjamin W. Jackson.

For the *Respondent*: Mark Cunningham, Jones Walker; and Cliff Aronson, Skadden, Arps, Slate, Meagher, and Flom LLP.

**COMPLAINT**

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

## Complaint

**NATURE OF THE CASE**

1. This action addresses PoolCorp's exclusionary acts and practices in the market for the distribution of residential and commercial swimming pool products. PoolCorp has unlawfully maintained its monopoly power by threatening to refuse to deal with any manufacturer that sells its pool products to a new distributor entering the market, thereby foreclosing potential rivals from an input necessary to compete. PoolCorp's conduct deters and impedes entry, raises its rivals' costs, and results in higher prices, reduced output and less consumer choice.

**RESPONDENT**

2. Respondent PoolCorp is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 109 Northpark Boulevard, Covington, Louisiana 70433.

3. Respondent distributes pool products through two distribution networks: SCP Distributors, LLC, formerly known as South Central Pools; and Superior Pool Products, LLC. Both distribution networks operate throughout the United States and distribute similar product lines.

**JURISDICTION**

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

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

**RELEVANT MARKET**

6. There are over nine million residential pools in the United States, and over 250,000 commercial pools operated by hotels, country clubs, apartment buildings, municipalities, and others. In

## Complaint

2010, the distribution of pool products was an estimated \$3 billion industry in the United States.

7. The relevant product market is no broader than the wholesale distribution of residential and commercial swimming pool products. Pool products are the equipment, products, parts or materials used for the construction, renovation, maintenance, repair or service of residential and commercial swimming pools.

8. Pool products include, among others, pumps, filters, heaters, covers, cleaners, steps, rails, diving boards, pool liners, pool walls, and the “white goods” or parts necessary to maintain pool equipment. Pool products do not include pool toys or games, or products used solely for landscaping or irrigation, Olympic-style pools, or pools used in commercial water parks.

9. Pool products are designed and manufactured specifically for residential and commercial swimming pools. There are no close substitutes for pool products, and no other products significantly constrain their pricing.

10. Pool distributors purchase pool products from manufacturers, warehouse them, and then resell those products to pool builders, pool retail stores and pool service and repair companies (collectively, “pool dealers” or “dealers”). Pool dealers then sell the pool products to the ultimate consumer: owners of residential and commercial pools.

11. Pool product manufacturers consider wholesale distributors to be a unique and essential channel for the efficient distribution of their products. Distributors purchase and warehouse significant volumes of pool products throughout the year, allowing manufacturers to operate their factories year-round notwithstanding the seasonal nature of the pool industry. Distributors also provide one-stop shopping, timely delivery and the extension of credit to thousands of dealers, thereby providing dealers and manufacturers with significant transactional efficiencies. Additionally, distributors often help manufacturers administer their dealer rebate and warranty programs, and provide expertise to answer dealers’ product-related questions.

### Complaint

12. While manufacturers make some direct sales to larger dealers, they cannot easily expand their operations into distribution because of the costs, their lack of expertise in distribution, and the difficulty of obtaining products to distribute from competing manufacturers. Distributors are the only available source of pool products for the vast majority of dealers, which are small mom-and-pop operations that do not have the inventory size or resources to purchase pool products directly from manufacturers. Dealers that buy direct from manufacturers are not permitted by the manufacturers to participate more broadly in the wholesale distribution market and sell pool products to other dealers.

13. The relevant geographic markets are no larger than the United States, and numerous local geographic markets contained therein. With the exception of a few large national pool retail chains that purchase products for their retail centers throughout the United States, competition among distributors for sales to dealers occurs locally. The high cost of transportation and the general need for same-day or next-day delivery of pool products typically limits local geographic markets to 50 to 100 square miles, depending on the concentration of the population and pools in the local area.

### **RESPONDENT HAS MONOPOLY POWER**

14. Respondent is the world's largest distributor of pool products, and operates approximately half of all pool distribution facilities in the United States. Unlike other distributors that operate in a few local markets or a specific region, Respondent is the only U.S. distributor to operate nationwide. Through a series of acquisitions, Respondent has grown to operate over 200 distribution centers throughout the United States. By way of comparison, the next largest U.S. distributor operates less than 40 centers. In 2010, Respondent earned roughly \$1.5 billion in net sales.

15. Respondent has monopoly power in numerous local geographic markets across the country, including, among others, Austin TX, Baton Rouge LA, Mobile AL, Nashville TN, Oklahoma City OK, and Springfield MO. In these local markets, Respondent is the only or dominant distributor in the local

## Complaint

market, and has maintained a market share of approximately 80 percent or higher for at least the past five years.

16. Respondent's dominance in local markets is enhanced by its status as the largest nationwide buyer of pool products, commonly representing 30 to 50 percent of a manufacturer's total sales. Respondent obtains a significant competitive advantage in the downstream market by qualifying for large volume discounts from manufacturers that are not available to any other distributor.

17. Respondent's conduct of foreclosing new entrants from obtaining pool products directly from manufacturers, which is a necessary input to compete, represents a significant barrier to entering the pool distribution market.

**RESPONDENT EMPLOYED UNFAIR METHODS OF  
COMPETITION IN ORDER TO MAINTAIN ITS  
MONOPOLY**

18. Beginning in at least 2003 and continuing through to today, Respondent has engaged in unfair methods of competition by foreclosing access to essential inputs and impeding market entry by potential rivals. Respondent's conduct has the tendency and effect of improperly maintaining and enhancing Respondent's monopoly power. Respondent's conduct has caused injury to competition and to consumers. Respondent's conduct is likely to continue to harm competition absent the relief requested herein, and violates Section 5 of the FTC Act, as amended.

**A. The Wholesale Pool Product Distribution Industry**

19. The swimming pool industry is generally very fragmented. There are over 100 manufacturers that produce a small number of product lines, such as pool heaters or diving boards and rails. However, there are only three manufacturers that sell nearly all the pool products necessary to operate and maintain a pool: Pentair Water Pool and Spa, Inc.; Hayward Pool Products, Inc.; and Zodiac Pool Systems, Inc. Collectively, these three full-line manufacturers represent more than 50 percent of sales at the wholesale level.

20. Distributors generally carry all brands of pool products across all manufacturers in order to satisfy any and all orders from

### Complaint

their dealer customers. It is necessary to sell the products of at least one of the three full-line manufacturers in order to be able to compete effectively as a distributor. The products of the full-line manufacturers are “must have” products for wholesale distributors because of the volume of products they represent and the considerable consumer demand for their products. A positive relationship with these and other manufacturers is “critical” to the success of a pool distributor.

21. In general, manufacturers are willing to sell their products through any credit-worthy distributor that has a physical warehouse and personnel with knowledge of the pool industry. Manufacturers typically prefer to have two or more distributors selling their products in a local geographic market in order to ensure that their dealer customers receive competitive service and prices.

22. Manufacturers market their products directly to dealers in order to create pull-through demand at the distribution level, but also offer year-end rebates to distributors based on the volume of a distributors’ purchases. These year-end rebates represent a significant component of the ultimate price paid by distributors for pool products. Failure to qualify for these rebates can have a significant detrimental impact on a distributor’s ability to compete on price.

23. Dealers select a local distributor based on its level of service and the prices it offers. When a distributor increases its prices, dealers typically pass those increases on to their customers. Thus, the ultimate price paid by end consumers for pool products depends heavily on the prices that distributors charge to dealers.

### **B. Respondent’s Exclusionary Practices**

24. In August 2002, Respondent acquired Fort Wayne Pools, Inc. (“FWP”), a large regional pool distributor with operations in 16 states. FWP was Respondent’s then-largest, and sometimes only, competitor in numerous local markets.

25. Soon thereafter, Respondent closed a FWP distribution facility in Baton Rouge, LA. This left Respondent as the only

## Complaint

remaining distributor in the area, and it implemented a five percent price increase. In Spring 2003, a former dealer with almost 20 years of experience in the industry opened a distribution business in Baton Rouge, LA to compete with Respondent.

26. Respondent responded to this new competition by notifying all major manufacturers that it would stop dealing with any manufacturer that sold any of its products to the new entrant. Respondent threatened to terminate not only its purchases and sales in the local Baton Rouge area, but across the entire country.

27. As the manufacturers' largest customer, Respondent's threat was significant. No other distributor could replace the large volume of potential lost sales to Respondent, particularly in those markets where Respondent was the only distributor. The loss of sales to Respondent could be "catastrophic" to the financial viability of even major manufacturers. Without expending tens of millions of dollars to enter dozens of markets simultaneously, it was impossible for the new entrant to offer any economic incentive to manufacturers that would offset the risks imposed by Respondent's threats.

28. The manufacturers, including the three "must-have" manufacturers, refused to sell pool products to the new entrant and canceled any pre-existing orders. Respondent effectively foreclosed the new entrant from obtaining pool products from manufacturers that represented more than 70 percent of all pool product sales. Without direct access to the manufacturers' pool products, the new entrant's business ultimately failed in 2005.

29. A new entrant cannot avoid the effects of Respondent's conduct by purchasing pool products from other distributors, rather than directly from manufacturers. As a general rule, distributors do not sell pool products to other distributors. Even when possible, this alternative is not a viable long-term strategy because it substantially increases a distributor's costs and lessens its quality of service.

30. For example, buying from a distributor forces the new entrant to pay transportation costs from the distributor's location rather than receiving free shipping under manufacturer programs.

### Complaint

The purchases are also at a marked-up price and do not qualify for key manufacturer year-end rebates. These higher costs would prevent the new entrant from being able to compete aggressively on price. Additionally, without full control of its inventory, this work-around hampers the entrant's ability to provide timely and quality service to its dealer customers.

31. Respondent has employed similar exclusionary strategies in other local markets, including against distributors that have entered the market since 2008, with the purpose and effect of excluding rivals, raising its rivals' costs, and maintaining its monopoly power. Respondent's exclusionary practices and policies target new entrants, rather than established rivals, because new entrants represent a unique competitive threat due to their likelihood to compete aggressively on price in order to earn new business.

### **ANTICOMPETITIVE EFFECTS OF RESPONDENT'S CONDUCT**

32. The acts and practices of Respondent as alleged herein have had the purpose, capacity, tendency, and effect of impairing the competitive effectiveness of Respondent's rivals, raising its rivals costs, and deterring and impeding entry. Respondent's conduct has contributed significantly to the enhancement and maintenance of Respondent's monopoly power.

33. Respondent's conduct adversely affects competition and consumers by:

- a. increasing the prices and reducing the output of pool products;
- b. deterring, delaying and impeding the ability of Respondent's actual or potential competitors to enter or to expand their sales in the wholesale distribution market; and
- c. reducing the choice of suppliers available to pool dealers.

## Decision and Order

34. There are no legitimate procompetitive efficiencies that justify Respondent's conduct or outweigh its substantial anticompetitive effects.

**VIOLATION ALLEGED**

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this tenth day of January, 2012, issues its complaint against Respondent.

By the Commission, Commissioner Rosch dissenting.

**DECISION AND ORDER**

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Pool Corporation (hereinafter "PoolCorp" or Respondent), and Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute

## Decision and Order

an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from an interested person pursuant to section 2.34 of its Rules, 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 PoolCorp is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 109 Northpark Blvd, Covington, Louisiana 70433-5521.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

**ORDER****I.**

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

**THE PARTIES**

- A. "Respondent" or "PoolCorp" means Pool Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups

## Decision and Order

and affiliates controlled by PoolCorp; and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

- B. “Commission” means the Federal Trade Commission.

**OTHER DEFINITIONS**

- C. “Analysis to Aid Public Comment” means the public statement provided by the Commission that describes the allegations in the Complaint in FTC File No. 101-0115 and the terms of this Order.
- D. “Antitrust Compliance Program” means the program to ensure compliance with this Order and with the Antitrust Laws, as required by Paragraph III of this Order.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et. seq.*, the Sherman Act, 15 U.S.C. § 1 *et. seq.*, and the Clayton Act, 15 U.S.C. § 12 *et. seq.*
- F. “Business Segment” means, separately, pool builders; pool retailers; and pool service companies.
- G. “Confidentially” means that any documents or data that are produced by a Manufacturer to a third party are in an aggregated or other form such that the documents or data could not be used to identify the specific pricing or sales to any individual Distributor(s), and that will not be provided to or otherwise shared with Respondent.
- H. “Dealer” means any Person (*e.g.*, pool builders, pool service companies, and pool retail stores) that sells Pool Products directly to owners of residential or commercial pools.
- I. “Delivery Services” means all terms and services associated with a Distributor delivering Pool Products

## Decision and Order

to a specified location on behalf of a Manufacturer, Dealer or other Person, including but not limited to, delivery of Pool Products via truck or common carrier, delivery directly to a consumer's home or job site, the timely scheduling of the delivery, and the extension of credit to eligible Dealers.

- J. "Distribute" or "Distribution" means the wholesale purchase of Pool Products from a Manufacturer and the re-sale of those Pool Products to Dealers or others.
- K. "Distributor" means a Person that Distributes, or intends to Distribute, Pool Products.
- L. "Document" means all written, recorded, or graphic materials of every kind, prepared by any Person, that are in the possession, custody, or control of Respondent, and includes but is not limited to, letters, reports, memoranda, e-mails, notes, and presentations.
- M. "Executive Staff" means all Directors on the Board of Directors, the President, all Vice-Presidents, the Chief Financial Officer, Senior Directors, General Managers, and Regional Managers of Respondent, or their equivalent positions regardless of job title.
- N. "Favorable" means more economically advantageous Price Terms or Product Support, or more effective Delivery Services, to Dealers or to Manufacturers than Respondent makes Generally Available to other Dealers or to other Manufacturers.
- O. "Generally Available" means the standard or typical terms and conditions, including but not limited to Price Terms, Product Support and Delivery Services, that Respondent offers or provides on like grade, quality and quantity of goods to most, if not all, Manufacturers based on their designation as a Preferred Vendor, or to most, if not all, Dealers in the same Business Segment(s) in the local geographic market.

## Decision and Order

- P. “In-Person Training” means any educational session, seminar, or other meeting whereby individuals participate on a face-to-face basis or through a live, two-way video-conference feed as part of the Antitrust Compliance Program required in Paragraph III of this Order.
- Q. “Less Favorable” means economically disadvantageous Price Terms or Product Support or less effective Delivery Services, to Dealers or to Manufacturers than Respondent makes Generally Available to other Dealers or to other Manufacturers.
- R. “Manufacturer” means any Person that manufactures, develops, or produces one or more Pool Products.
- S. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiary, division, group or affiliate thereof.
- T. “Pool Product” means any equipment, product, part or material used for the construction, renovation, maintenance, repair or service of residential or commercial swimming pools (*e.g.*, pumps, filters, heaters, cleaners, covers, drains, fittings, diving boards, steps, rails, pool liners, pool walls, chemicals, and cleaning tools). This definition does not include: pool toys or games; generic building materials (*i.e.*, concrete, salt, sand, rebar, tiles, pavers, and electrical and plumbing products); or any equipment, product, part or material that is used solely for landscaping or irrigation, Olympic-style pools, or pools used in commercial water parks.
- U. “Preferred Vendor” means a Manufacturer that has been designated by Respondent as being eligible for favorable or preferential treatment by Respondent in connection with the sale, promotion, marketing, or purchase of the Manufacturer’s Pool Product(s).

## Decision and Order

- V. “Price Term” means the wholesale price, resale price, purchase price, price list, credit term, delivery term, service term, or any other term defining, setting forth, or relating to the money, compensation, or service paid by or received by a Manufacturer in connection with the sale of its Pool Products to Respondent.
- W. “Product Support” means any service, assistance or other support related to a Manufacturer’s Pool Product(s), including but not limited to, the processing or administration of Manufacturer warranties, Manufacturer rebates to Dealers, and training on the features of a Manufacturer’s Pool Product.
- X. “Sales Staff” means the officers, directors, employees, and contractors of Respondent whose duties primarily relate to the marketing, promotion, sale, or purchase of Pool Products.

**II.**

**IT IS ORDERED** that Respondent, acting directly or indirectly, or through any corporate or other device, in connection with the actual or potential purchase, sale, or Distribution of Pool Products, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, shall cease and desist from:

- A. Conditioning the sale, purchase, or Distribution of Pool Products by Respondent, or a Manufacturer’s Preferred Vendor status, based on a Manufacturer’s sale, or an intention to sell, Pool Products to any Distributor other than Respondent;
- B. Urging, inducing, coercing, threatening, or pressuring, or attempting thereto, a Manufacturer to refuse to sell Pool Products, or limit its sales of Pool Products, to any Distributor other than Respondent; and
- C. Discriminating against, penalizing, or otherwise retaliating against a Manufacturer because the Manufacturer sells, or intends to sell, Pool Products to any Distributor other than Respondent. Examples of

## Decision and Order

prohibited retaliation shall include, but not be limited to, the following when the conduct is substantially caused by the fact that the Manufacturer sells, or intends to sell, Pool Products to any Distributor other than Respondent:

1. Terminating, suspending, reducing, or delaying, or threatening or proposing thereto, purchases of a Manufacturer's Pool Products;
2. Terminating, suspending, reducing, or delaying, or threatening or proposing thereto, the sales or promotion of a Manufacturer's Pool Products to Dealers;
3. Increasing Respondent's sales price of a Manufacturer's Pool Product(s) to Dealers, provided there has been no corresponding increase in costs for Distributing such Pool Products;
4. Requiring, soliciting, requesting, or encouraging a Manufacturer to furnish information to Respondent relating to the price or quantity of any sales by the Manufacturer to any specific Distributor other than Respondent, provided that information that is provided Confidentially by a Manufacturer to a third party for compliance or audit purposes shall not be prohibited;
5. Withdrawing, terminating, or modifying, or threatening or proposing thereto, Favorable Price Terms, Product Support, or Preferred Vendor status for a Manufacturer that is otherwise eligible;
6. Providing, or threatening or proposing thereto, Less Favorable Price Terms or Product Support; and
7. Refusing to deal with a Manufacturer, or with Dealers of a Manufacturer's Pool Products, on terms and conditions that are Generally Available

## Decision and Order

from Respondent to other Manufacturers or to other Dealers.

*Provided, however*, that nothing in this Order requires Respondent to continue purchasing the same volume of Pool Products from any Manufacturer as in previous years if there is a reduced demand for such Pool Products from Respondent's customers at Respondent's then current prices or margins in any local geographic market(s) where entry has occurred.

- D. Notwithstanding any provision of this Order, the following will not constitute, in and of itself, a violation of this Order:
1. Respondent's refusal to deal with a Manufacturer, or Respondent's engagement in any of the conduct described above in Paragraph II.C (1-7), when substantially caused by independent and verifiable business reasons unrelated to whether the Manufacturer sells, or intends to sell, Pool Products to any Distributor(s) other than Respondent; or
  2. Respondent's agreement(s) with a Manufacturer to be an exclusive Distributor of private-label Pool Products.
- E. Respondent, within ninety (90) days after the date this Order becomes final, shall waive or modify any condition, requirement, policy, agreement, contract, or understanding with any Manufacturer that is inconsistent with the terms of this Order.

**III.**

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

## Decision and Order

- A. Respondent's designation of an officer or director to supervise personally the design, maintenance, and operation of this program, and to be available on an ongoing basis to respond to any questions by employees of Respondent;
- B. Distribution of a copy of this Order to all Executive Staff and Sales Staff:
  - 1. Within thirty (30) days of the date this Order becomes final; and,
  - 2. Annually within thirty (30) days of the anniversary of the date this Order becomes final until the Order terminates;
- C. In-Person Training on the requirements of this Order and the Antitrust Laws for Respondent's Executive Staff to occur annually at either of Respondent's bi-annual management meetings;
- D. Training on the requirements of this Order and the Antitrust Laws for Respondent's Sales Staff to occur annually;
- E. Distribution within thirty (30) days after this Order becomes final of a copy of this Order and the Analysis to Aid Public Comment to all Manufacturers that have sold Pool Products to Respondent within twelve (12) months prior to the date this Order becomes final; and
- F. The retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III of this Order.

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

- A. Within sixty (60) days after the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent

## Decision and Order

has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:

1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;
  2. The name, title, business address, e-mail address, and business phone number of each Person to whom Respondent distributed a copy of this Order, and the date and manner of distribution to each; and
  3. The name, title, business address, e-mail address, and business phone number of each Person who received In-Person Training on the requirements of this Order and the Antitrust Laws; the date and location at which each Person was trained; the name, title, business address, e-mail address, and business phone number of the Person who conducted the training; and a description in reasonable detail of the In-Person Training.
- B. One (1) year after the date this Order becomes final, and annually for the following nine (9) years on the anniversary of the date this Order becomes final, as well as at any other such times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;

## Decision and Order

2. The name, title, business address, e-mail address, and business phone number of each Person to whom Respondent distributed a copy of this Order, and the date and manner of distribution to each;
3. The name, title, business address, e-mail address, and business phone number of each Person within Respondent's Executive Staff who received a copy of this Order and In-Person Training on the requirements of this Order and the Antitrust Laws during the reporting period, the date each Person received a copy of this Order and In-Person Training, and a description in reasonable detail of the In-Person Training;
4. The name, business address, e-mail address, and business phone number of each Person to whom Respondent required, solicited, requested or encouraged any Manufacturer to furnish information relating to the price or quantity of any sales by the Manufacturer to any Distributor other than Respondent;
5. The name, title, business address, e-mail address, and business phone number of each Person who has complained or alleged, orally or in writing (including, but not limited to, pleadings filed in any state or federal court), that Respondent has violated this Order or the Antitrust Laws, a description in reasonable detail of the complaint or allegation, and a description of any action or conduct by Respondent taken or proposed in response to the complaint or allegation; and
6. The names, business addresses, business phone numbers, and email addresses of the top ten Manufacturers that sold to Respondent the greatest dollar amounts of Pool Products in the United States in each of the following categories: pumps and filters, heaters, cleaners, covers, drains, fittings, diving boards, steps, rails, pool liners, and pool walls, during the most recently concluded

## Decision and Order

fiscal year and during the prior fiscal year; and for each such Person:

- a. State the total dollar amount of the Pool Products purchased by Respondent from the Manufacturer;
- b. Provide copies of all written agreements between Respondent and such Person in effect at any time during the most recently concluded fiscal year; and
- c. Provide copies of any Document that summarizes, memorializes, or otherwise reflects the terms of any oral agreement between Respondent and such Person that directly or indirectly require such Person to refrain from selling, limit its sales of, or delay its sales of, Pool Products to any other Distributor in effect at any time during the most recently concluded fiscal year.

**V.**

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

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

**VI.**

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

## Concurring Statement

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on January 10, 2032.

By the Commission, Commissioner Rosch dissenting.

**STATEMENT OF****COMMISSIONERS JULIE BRILL, JON LEIBOWITZ  
AND EDITH RAMIREZ**

The Commission is today issuing for public comment a Complaint and Order that would resolve allegations that Pool Corporation ("PoolCorp") used anticompetitive acts and practices to exclude rivals from, and to maintain its monopoly power in, several local pool product distribution markets, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

On the basis of staff's investigation and as outlined in the Complaint, we have reason to believe that a violation of the antitrust laws has occurred — and that Commission action is in

## Concurring Statement

the public interest. 15 U.S.C. § 45(b). Specifically, the Complaint alleges that PoolCorp, which possesses monopoly power in many local distribution markets, threatened its suppliers (*i.e.*, pool product manufacturers) that it would no longer distribute a manufacturer's products on a nationwide basis if that manufacturer sold its products to a new distributor that was attempting to enter a local market. Although these manufacturers preferred to have a broad and diverse distribution network, they declined to add distributors because they feared retribution from PoolCorp. These decisions were not made for independent business reasons.<sup>1</sup>

As alleged in the Complaint, PoolCorp's actions foreclosed new entrants from obtaining pool products from manufacturers representing more than 70 percent of sales. Significantly, there is no efficiency justification for PoolCorp's conduct. That is, without any legitimate justification, PoolCorp dictated whether new competitors could access the full range of merchandise needed to compete effectively in the market. *Cf. Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 930 (7th Cir. 2000) (actions by dominant toy retailer to prevent would-be entrants from obtaining access to toys judged to be anticompetitive). Some of PoolCorp's targets were able to survive by purchasing pool products from other distributors rather than directly from the manufacturers. However, we assess consumer harm relative to market conditions that would have existed but for the respondent's allegedly unlawful conduct. Here, PoolCorp's strategy significantly increased a new entrant's costs of obtaining pool products. Conduct by a monopolist that raises rivals' costs can harm competition by creating an artificial price floor or deterring investments in quality, service and innovation.<sup>2</sup> The higher cost

---

1 We disagree with Commissioner Rosch's conclusion that manufacturers refused to deal with new entrants for independent business reasons. In our view, the evidence demonstrates a causal relationship between the manufacturers' decisions and PoolCorp's alleged conduct.

2 See, *e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 *YALE L.J.* 209, 224 (1986) (finding that a dominant firm's strategy of restraining rivals' access to supply can be a "particularly effective method of anticompetitive exclusion" because it allows the dominant firm to use its vertical relationships to create additional horizontal market power).

## Concurring Statement

structure PoolCorp imposed on new entrants prevented them from providing a competitive constraint to PoolCorp's alleged monopoly prices. And without full control of their inventory, the new distributors' ability to provide high quality service to their dealer customers was diminished. The harm to consumers that occurred as a result was substantial. In the end, consumers had fewer choices and were forced to pay higher prices for pool products.

Although we recognize that PoolCorp's alleged conduct did not target incumbent distributors, we nevertheless have reason to believe that the conduct harmed competition and consumers. Separate from PoolCorp, there are few, if any, incumbent distributors in the local markets at issue here. By targeting new distributor entrants, PoolCorp's conduct harmed the very companies that were most likely to compete aggressively on price and to introduce innovative services or ways of doing business.<sup>3</sup> The Commission has seen this pattern before. The targets of anticompetitive exclusion are often the new rivals that incumbents foresee as most likely to shake up the market and benefit consumers at the expense of incumbents.<sup>4</sup> We fail to do our job if we permit a monopolist to decide, without sufficient efficiency justification, whether or on what terms a rival will be permitted to enter the market.

Because we have reason to believe that PoolCorp's conduct had the purpose and effect of maintaining PoolCorp's monopoly power in numerous local markets where its dominance was threatened by new distributor entrants, we support the attached Complaint and Order.

---

3 See *id.* at 246 (explaining that potential competition by new entrants can provide a "significant competitive check" distinct from established firms).

4 See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) (condemning association action to prevent inclusion of plastic conduits in relevant standard); *Realcomp II, LTD. v. FTC*, 635 F.3d 815 (6th Cir. 2011) (condemning Multiple Listing Service rules that disadvantaged new brokerage model), *cert. denied*, 2011 U.S. Lexis 7292 (Oct. 11, 2011); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (condemning dominant toy company's actions that limited sources of toys available to new warehouse clubs).

## Analysis to Aid Public Comment

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

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order to Cease and Desist (“Agreement”) with Pool Corporation (“PoolCorp”). PoolCorp is the world’s largest distributor of products used in the construction, renovation, repair, service and maintenance of residential and commercial swimming pools. The Agreement resolves charges that PoolCorp used exclusionary acts and practices to maintain its monopoly power in the pool product distribution market in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

The administrative complaint that accompanies the Agreement (“Complaint”) alleges that PoolCorp used its monopoly power in local geographic markets to prevent manufacturers from supplying pool products to new entrants since at least 2003. As a result, PoolCorp foreclosed rival distributors from obtaining pool products – a necessary input to compete – and significantly raised its rivals’ costs, thereby lowering output, increasing prices, and diminishing consumer choice.

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

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

The Agreement is for settlement purposes only and does not constitute an admission by PoolCorp that the law has been

## Analysis to Aid Public Comment

violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

**I. The Complaint**

The Complaint makes the following allegations.

**A. Industry Background**

This case involves wholesale distribution in the swimming pool industry. There are over nine million residential pools in the United States, and over 250,000 commercial pools operated by hotels, country clubs, apartment buildings, municipalities, and others. In 2010, the distribution of pool products was an estimated \$3 billion industry in the United States.

Manufacturers use distributors to sell the products used to build, repair, service and maintain residential and commercial swimming pools (“pool products”). Pool products include, among others, pumps, filters, heaters, covers, cleaners, diving boards, steps, rails, pool liners, pool walls, and the parts necessary to maintain pool equipment. Distributors purchase pool products from manufacturers, warehouse them, and then resell the products to pool retail stores, pool service companies and pool builders (collectively, “pool dealers” or “dealers”). Dealers, in turn, sell the pool products to the ultimate consumer: owners of residential and commercial swimming pools.

The swimming pool industry is very fragmented and wholesale distributors make it more efficient for manufacturers and dealers to sell their products. Distributors purchase most, if not all, brands of pool products that are produced by manufacturers so that they can provide convenient one-stop shopping for their dealer customers. Distributors also extend credit and provide quick delivery of pool products to thousands of dealers. The vast majority of dealers are mom-and-pop operations that are too small to buy directly from manufacturers; for these dealers, distributors are their only source of pool products. Distributors also allow manufacturers to operate their factories year-round by purchasing large quantities of pool products throughout the year, even though the pool industry is seasonal.

*Analysis to Aid Public Comment*

In general, manufacturers are willing to sell their products to any credit-worthy distributor that has a physical warehouse and personnel with knowledge of the pool industry. Manufacturers typically prefer to have two or more distributors selling their products in a local geographic market in order to ensure that the distributors compete and give competitive service and prices to their dealer customers.

To compete effectively as a distributor, a firm must be able to buy pool products directly from manufacturers. There are no cost-effective alternatives. While there are over 100 manufacturers of pool products, there are only three full-line manufacturers that produce almost all of the products used to operate or repair swimming pools: Pentair Water Pool & Spa; Zodiac Pool Systems, Inc.; and Hayward Pool Products. Collectively, these manufacturers represent more than 50 percent of all pool product sales. To be successful, a distributor must sell the products of at least one of these manufacturers. As recognized by PoolCorp, a positive relationship with these and other manufacturers is “critical” to the success of a distributor.

**B. PoolCorp’s Monopoly Power**

The relevant market is no broader than the wholesale distribution of pool products in the United States and numerous local geographic markets. With the exception of large national retail chains that purchase pool products for their retail centers located throughout the United States, competition among distributors for sales to dealers occurs locally. PoolCorp has monopoly power in numerous local markets, as evidenced by a persistently high market share of 80 percent or more for the past five years. PoolCorp’s conduct of foreclosing new distributor entrants from obtaining pool products directly from manufacturers represents a significant barrier to entry.

**C. PoolCorp’s Conduct**

Beginning in 2003 and continuing to today, PoolCorp has implemented an exclusionary policy that effectively impeded entry by new distributors by preventing them from being able to purchase pool products directly from manufacturers. Specifically, when a new distributor attempted to enter a local geographic

## Analysis to Aid Public Comment

market, PoolCorp threatened manufacturers that it would not deal with them if they also supplied the new entrant. PoolCorp threatened to terminate the purchase and sale of the manufacturer's pool products for all 200+ PoolCorp distribution centers located throughout the United States. PoolCorp's policy did not exclude existing rivals from obtaining pool products from manufacturers.

PoolCorp's threat was significant. The loss of sales to PoolCorp could be "catastrophic" to the financial viability of even major manufacturers. No other distributor could replace the large volume of potential lost sales to PoolCorp, particularly in markets where PoolCorp is the only distributor. New entrants could not offer any economic incentive to manufacturers that would offset the risks imposed by PoolCorp's threats.

After receiving these threats, manufacturers, including the three "must-have" manufacturers, refused to sell pool products to the new distributors and canceled any pre-existing orders. PoolCorp thus effectively foreclosed new distributors from obtaining pool products from manufacturers that represented more than 70 percent of all pool product sales.

In some cases, the new distributors were able to purchase pool products from other distributors. This counterstrategy, however, did not mitigate the effects of PoolCorp's conduct. As a general rule, distributors do not sell pool products to other distributors. Even when possible, this alternative is not a viable long-term strategy because it substantially increases the entrant's costs and lessens its quality of service. For example, buying pool products from a distributor forces the new distributor entrant to pay transportation costs from the distributor's location rather than receiving free shipping under manufacturer programs. The purchases are also at a marked-up price and do not qualify for key manufacturer year-end rebates.

By effectively increasing its rivals' costs, PoolCorp's exclusionary policy prevented the new distributor entrants from being able to compete aggressively on price. Additionally, without full control of their inventory, the entrants' ability to provide quality service to their dealer customers was diminished. PoolCorp specifically targeted new entrants, rather than

## Analysis to Aid Public Comment

established rivals, because the new distributors represented a significant competitive threat due to their likelihood to compete aggressively on price in order to earn new business. PoolCorp's conduct, therefore, had the purpose and effect of maintaining and enhancing PoolCorp's monopoly power in numerous local markets where its dominance would otherwise be threatened by new entrants. PoolCorp's exclusionary policy, therefore, has likely resulted in higher prices and reduced output.

There are no procompetitive efficiencies that justify PoolCorp's conduct.

## II. Legal Analysis

The offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition, enhancement or maintenance of that power through exclusionary conduct.<sup>1</sup> A monopolist's refusal to deal with a firm if that firm also deals with a rival has long been recognized as exclusionary conduct. Exclusionary practices violate Section 2 of the Sherman Act when the challenged conduct significantly impairs the ability of rivals to compete effectively with the respondent and thus to constrain its exercise of monopoly power.<sup>2</sup>

The factual allegations in the complaint regarding market structure support a finding of monopoly power and competitive

---

1 *Verizon Communs. v. Law Offices of Curtis V. Trinko LLP.*, 540 U.S. 398, 407 (2004); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

2 *E.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985) (exclusionary conduct "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way") (citations omitted); *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 151-54 (1951) (condemning newspaper's refusal to deal with customers that also advertised on rival radio station because it harmed the radio station's ability to compete); *United States v. Microsoft*, 253 F.3d 34, 68-71 (D.C. Cir. 2001) (condemning exclusive agreements that prevented rivals from "pos[ing] a real threat to Microsoft's monopoly"); *United States v. Dentsply*, 399 F.3d 181, 191 (3d Cir. 2005) (condemning policy that kept competitors below "the critical level necessary for any rival to pose a real threat to Dentsply's market share").

## Analysis to Aid Public Comment

harm. PoolCorp's "all or nothing" threats acted as a powerful deterrent to manufacturers against dealing with new distributor entrants by jeopardizing a large and irreplaceable percentage of the manufacturer's sales. PoolCorp's conduct effectively foreclosed new entrants from manufacturers representing more than 70 percent of pool product sales. New entrants were unable to provide any economic incentive to manufacturers that could offset the risk posed by PoolCorp's threats. Raising rivals' costs by restraining their supply of inputs can be a "particularly effective method of anticompetitive exclusion."<sup>3</sup>

Additionally, the work-around strategy employed by some new entrants of purchasing pool products from other distributors significantly raised their costs and reduced their ability to provide quality service. PoolCorp's exclusionary policy therefore prevented these firms from providing a meaningful constraint on PoolCorp's monopoly prices.

Notably, PoolCorp's conduct targeted new entry and did not exclude existing rivals. The test for exclusionary conduct, however, is not total foreclosure, but "whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."<sup>4</sup> New entrants may have a more disruptive impact on the market than established firms because they may have an increased incentive to compete aggressively on price in order to win business. Conduct that artificially raises entry barriers by increasing the scale, cost or time of entry harms

---

3 See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 *YALE L.J.* 209, 224 (1986) (explaining that this method of exclusion allows a dominant firm to use its vertical relationships to create additional horizontal market power); *see also Dentsply*, 399 F.3d at 195 (holding "all or nothing" ultimatum exclusionary when it "created a strong economic incentive for dealers to reject competing lines in favor of Dentsply's teeth."); *In re Transitions Optical, Inc.*, 75 Fed. Reg. 10799 (Mar. 2010) (proposed complaint and analysis to aid public comment).

4 *LePage's, Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003); *see also Dentsply*, 399 F.3d at 190 (explaining that "it is not necessary that all competition be removed from the market").

## Analysis to Aid Public Comment

consumers by providing a greater opportunity for monopoly pricing.<sup>5</sup>

A monopolist may rebut a *prima facie* showing of competitive harm by showing that the challenged conduct is reasonably necessary to achieve a procompetitive benefit. Any efficiency benefit, if proven, must be balanced against the harm caused by the challenged conduct.

There are no procompetitive efficiencies that justify PoolCorp's conduct. In some cases, for example, exclusive arrangements with suppliers could be necessary to prevent free-riding or to secure adequate supply. Here, however, PoolCorp did not offer any services upon which a new entrant could free-ride. Further, the pool industry is not subject to product shortfalls that could justify exclusive arrangements with suppliers. In short, PoolCorp's practice of foreclosing new entrants from supply did not help PoolCorp compete on the merits by improving its efficiency, quality or prices.

### III. The Order

The proposed Consent Order remedies PoolCorp's anticompetitive conduct. Paragraph II of the Order addresses the core of PoolCorp's conduct. Specifically, Paragraph II of the proposed Consent Order prohibits PoolCorp from:

- A. Conditioning the sale or purchase of pool products, or membership in PoolCorp's preferred vendor programs, on the intended or actual sale of pool products by a manufacturer to any distributor other than PoolCorp;

---

5 Herbert Hovenkamp, *ANTITRUST LAW* ¶ 1802c, at 64 (2d ed. 2002) ("Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth"); *see also Microsoft*, 253 F.3d at 79 ("it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will"); *LePage's*, 324 F.3d at 159 ("When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, *i.e.*, predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general.").

## Analysis to Aid Public Comment

- B. Pressuring, urging or otherwise coercing manufacturers to refrain from selling, or to limit their sales, to any distributors other than PoolCorp; and
- C. Discriminating or retaliating against a manufacturer for selling, or intending to sell, pool products to any distributor other than PoolCorp.

The definition of “distributor” includes any entity that buys pool products directly from manufacturers and resells those products to dealers or others. The Order explicitly allows PoolCorp to enter into exclusive agreements with manufacturers to purchase private-label pool products.

Paragraph III of the Proposed Order requires PoolCorp to implement an antitrust compliance program. Paragraph IV- VI impose reporting and other compliance requirements. The Order will expire in 20 years.

\* \* \*

## Complaint

## IN THE MATTER OF

**TEVA PHARMACEUTICAL INDUSTRIES LTD.  
AND  
CEPHALON, INC.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND  
SECTION 7 OF THE CLAYTON ACT***Docket No. C-4335; File No. 111 0166**Complaint, October 7, 2011 – Decision, January 27, 2012*

This consent order addresses the \$6.8 billion acquisition by Teva Pharmaceutical Industries Ltd. of certain assets of Cephalon, Inc. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the U.S. markets for fentanyl citrate, cyclobenzaprine hydrochloride, and modafinil. The consent order requires Teva to divest to Par Pharmaceutical, Inc. (“Par”) all of Teva’s rights and assets relating to its generic transmucosal fentanyl citrate lozenges and generic extended release cyclobenzaprine hydrochloride capsules. The Order also requires Teva to enter into a supply agreement to allow Par to sell generic modafinil tablets for a period of at least one year; and Par has the option to extend that supply agreement for up to one additional year if it chooses.

*Participants*

For the *Commission*: *Stephanie C. Bovee, David Von Nirschl,*  
and *Kari A. Wallace.*

For the *Respondents*: *Ian R. Conner and Christine S. Wilson,*  
*Kirkland & Ellis LLP; Clifford H. Aronson and C. Scott Lent,*  
*Skadden, Arps, Slate, Meagher & Flom LLP.*

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Teva Pharmaceutical Industries Ltd. (“Teva”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Cephalon, Inc. (“Cephalon”), a corporation subject to the jurisdiction of the Commission, in violation of