

Complaint

IN THE MATTER OF

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

Docket No. C-4399; File No. 101 0215
Complaint, April 17, 2013 – Decision, April 17, 2013

This consent order addresses allegations regarding Graco, Inc.'s ("Graco") acquisitions of Gusmer Corporation ("Gusmer") in 2005 and GlasCraft, Inc. ("GCI") in 2008. Graco manufactures fast set equipment ("FSE"), commercial equipment used to apply polyurethane foams or polyuria coatings. FSE manufacturers sell their products almost exclusively through a network of specialized, third-party distributors. The complaint alleges that Graco's acquisitions of Gusmer and GCI, its two closest competitors, eliminated head-to-head competition in the North American market for FSE. As a result of these acquisitions, Graco acquired a near-monopoly in the market for FSE and was able to raise prices and barriers to entry, reduce product options, and force distributors to carry Graco products exclusively. The consent order requires Graco to license its technology patents to, and enter into a settlement agreement with, Gama Machinery USA, Inc. (Gama)/Polyurethane Machinery Corporation (PMC) within ten (10) days of the entry of the order. The order further directs Graco to cease and desist from imposing any conditions on its distributors that could lead, directly or indirectly, to exclusivity. Last, the order obligates Graco to waive or modify any policies or contracts that would violate the order.

Participants

For the *Commission*: *Joel Christie, Benjamin W. Jackson, Karen A. Mills, Jeffrey S. Oliver, and Laurel A. Price.*

For the *Respondent*: *John Graubert and John W. Nields, Covington & Burling LLP; Richard A. Duncan, Faegre & Benson, LLP; and Clifford Greene, Greene Espel PLLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, having reason to believe that Respondent Graco Inc. ("Graco") entered into agreements pursuant to which Graco

Complaint

acquired, respectively, all of the voting securities of Gusmer Corp. (“Gusmer”), and all of the voting securities of GlasCraft, Inc. (“GlasCraft”), and that each acquisition violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. STATEMENT OF THE CASE

1. Graco acquired its only significant competitors in the manufacture and sale of fast-set equipment in North America: Gusmer and GlasCraft.

2. Fast-set equipment combines and applies various reactive chemicals that form polyurethane foams or polyurea coatings. The essential components of a complete fast-set equipment system are: (1) the proportioner, which controls the ratio, temperature, and flow of the chemicals; (2) heated hoses, which independently maintain the fast-set chemicals at proper temperature; and (3) the spray gun, which is specially designed to mix and to dispense polyurethane foams and polyurea coatings. A manufacturer that produces or supplies a complete system of fast-set equipment is generally considered to be a full-line manufacturer.

3. The vast majority of end-users of fast-set equipment are contractors or contracting firms that use the equipment to apply polyurethane foams to insulate commercial and residential buildings, and to apply polyurea coatings to protect structures such as bridges, holding tanks, pipelines, and marine hulls.

4. Prior to the acquisitions, Gusmer, GlasCraft, and Graco competed aggressively on price, innovation, service, and quality. Each company responded to the others’ innovations and prices with its own improvements and discounts. Prior to the acquisitions, the three companies were the only domestic full-line manufacturers of fast-set equipment, and at the time of each acquisition, Gusmer and GlasCraft were Graco’s closest competitors in the relevant market.

Complaint

5. These acquisitions have led to higher prices and fewer choices, and enabled Graco to raise barriers to entry that inhibited entry and expansion by potential competitors.

6. Fast-set equipment manufacturers sell their products almost exclusively through a specialized, third-party distribution channel, which consists of distributors acting as intermediaries between the manufacturer and the end user. Fast-set equipment manufacturers do not sell competitively significant quantities of equipment directly to end-users.

7. Fast-set equipment distributors meet end-user demand for a convenient and nearby source of expertise, spare parts, and repair services. A robust network of third-party fast-set equipment distributors is necessary for any manufacturer to compete meaningfully in the relevant market.

8. Before Graco's acquisitions, fast-set equipment distributors historically carried multiple manufacturers' brands. Graco's actions after the acquisitions resulted in higher prices and fewer product choices, and these actions created an opportunity for new entry and expansion in the relevant market.

9. Following Graco's acquisition of GlasCraft, Graco initiated several strategies that reduced any prospective entrant's access to distribution resources required for success in the market. These strategies included raising distributors' discount and inventory thresholds, thereby reducing distributors' ability to carry the products of new entrants, and threatening distributors with termination or other retaliation should they agree to carry the products of competing manufacturers. Given distributors' reliance on Graco post-acquisition, these actions further heightened barriers to entry in the relevant market.

10. In 2007 former Gusmer owners and employees, operating through PMC, Garraf Maquinaria S.A., and Gama Machinery USA, Inc. (now Polyurethane Machinery Corp.) ("Gama/PMC") sought to enter the relevant market. Graco initiated a lawsuit in federal district court ("the Gama/PMC litigation") alleging, among other things, theft of trade secrets and breach of contract.

Complaint

The uncertainty of the outcome of the litigation has kept some distributors from purchasing fast-set equipment from Gama/PMC.

II. RESPONDENT GRACO

11. Graco is a for-profit corporation, existing and doing business under and by virtue of the laws of the state of Minnesota, with its office and principal place of business located at 88 11th Avenue Northeast, Minneapolis, Minnesota 55413. Graco manufactures and sells a full line of fast-set equipment throughout North America and the world.

III. GUSMER

12. Prior to its acquisition by Respondent in 2005, Gusmer was the largest and most significant competitor engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world, with its principal place of business located in Lakewood, New Jersey.

IV. GLASCRAFT

13. At the time of its acquisition by Respondent in 2008, GlasCraft was the only competitor other than Graco engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world, with its principal place of business located in Indianapolis, Indiana.

V. JURISDICTION

14. Respondent is, and at all relevant times has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

15. The acquisition of Gusmer by Graco constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

Complaint

16. The acquisition of GlasCraft by Graco constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

VI. THE ACQUISITIONS

17. In February 2005, Graco acquired Gusmer and its foreign counterparts from PMC Global, Inc. (“PMC”) for \$65 million. The transaction was not reportable under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. The acquisition increased Graco’s share of the North American fast-set equipment market to over 65%. The acquisition left GlasCraft as Graco’s only significant North American competitor. Following the acquisition of Gusmer, Graco closed Gusmer’s fast-set equipment manufacturing facilities.

18. In February 2008, Graco acquired GlasCraft for \$35 million. The transaction was not reportable under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a. The acquisition raised Graco’s market share above 90% and removed Graco’s last significant North American competitor. Following the acquisition of GlasCraft, Graco closed GlasCraft’s fast-set equipment manufacturing facilities.

VII. THE RELEVANT PRODUCT MARKET

19. For purposes of this Complaint, the relevant line of commerce within which to analyze the effects of the transactions is the market for the manufacture and sale of fast-set equipment for use by contractors.

VIII. THE RELEVANT GEOGRAPHIC MARKET

20. For purposes of this Complaint, the relevant geographic market within which to analyze the competitive effects of the transactions is North America.

IX. MARKET STRUCTURE

21. The market for fast-set equipment is highly concentrated. Prior to the acquisitions, Gusmer, Graco, and GlasCraft were the only significant suppliers of fast-set equipment in North America. Therefore, the cumulative effect of such acquisitions was that

Complaint

Graco acquired between a 90% and 95% share of the fast-set equipment market in North America.

X. CONDITIONS OF ENTRY AND EXPANSION

22. Entry into the relevant market has not been, and would not be, timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisitions. No significant entry has occurred since Graco's entry in 2002.

23. There are significant entry barriers to the relevant market, which include, *inter alia*, brand reputation, installed base, and the difficulty in finding adequate third-party distribution.

24. The most significant entry barrier is the need for specialized third-party distribution. A fast-set equipment distributor needs to possess the technical expertise to teach contractors to operate and maintain such equipment properly in accordance with the specifications established by equipment manufacturers and various chemical manufacturers. Through its acquisitions, Graco has become the only remaining full-line manufacturer of fast-set equipment, giving it substantial control of the established fast-set equipment distribution channel in North America. Graco's increasing of discount and inventory thresholds, Graco's threatening of distributors with termination or other retaliation should they agree to carry the products of competing manufacturers, and uncertainties resulting from the Gama/PMC litigation, all have substantially reduced prospective competitors' access to customers in the relevant market, substantially reducing the likelihood of successful entry and the disciplining of Graco's prices.

25. Given all of the above, following Graco's 2008 acquisition of Glascraft, only one competitor, Gama/PMC, has held a market share of as much as five percent, and it is unlikely to expand substantially due to the unavailability of effective distribution.

26. Other prospective entrants have also failed to gain any meaningful market share in the North American fast-set equipment market. These would-be competitors participate at the fringes of the market. Most do not offer full lines of fast-set

Complaint

equipment, but rather individual proportioners or guns. Together, they comprise significantly less than 5% of the relevant market. Without access to the specialized distribution channels, these prospective entrants are not likely to expand beyond being fringe competitors.

XI. EFFECTS OF THE ACQUISITIONS

27. Graco's acquisitions of Gusmer and GlasCraft substantially lessened competition and tended to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

28. Specifically, the acquisitions have:

- a. Eliminated actual, direct, and substantial competition among Graco, Gusmer, and GlasCraft in the relevant market;
- b. Permitted Graco to increase prices, reduce product options and offerings, and reduce innovation;
- c. Permitted Graco to increase barriers to entry and expansion by foreclosing access to established fast-set equipment distributors;
- d. Substantially increased the level of concentration in the relevant market; and
- e. Allowed Graco to exercise market power unilaterally in the relevant market.

29. In particular, the loss of competition from Gusmer and GlasCraft has given Graco the ability to raise barriers to entry and exclude prospective competitors from the North American fast-set equipment market. Graco became the sole supplier for the only significant fast-set equipment distribution channel in North America and the only authorized source of spare parts for its existing installed base. Consequently, Graco has been able to prevent its distributors from carrying the products of competing manufacturers.

Complaint

30. The significant anticompetitive effects of Graco's acquisitions are not offset by any efficiencies realized by the acquisitions.

XII. VIOLATIONS CHARGED

Count I – Illegal Acquisition

31. The allegations of Paragraphs 1 through 30 are incorporated by reference as though fully set forth.

32. Graco's acquisition of Gusmer substantially lessened competition and tended to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Count II – Illegal Acquisition

33. The allegations of Paragraphs 1 through 30 are incorporated by reference as though fully set forth.

34. Graco's acquisition of GlasCraft substantially lessened competition and tended to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of April, 2013, issues its complaint against Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition by Respondent Graco Inc. (hereinafter referred to as “Respondent” or “Graco”) of Gusmer Corporation and GlasCraft, Inc., and of certain acts and practices of Respondent, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Graco Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Minnesota, with its office and

Decision and Order

principal place of business located at 88-11th Avenue Northeast, Minneapolis, Minnesota 55413.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent and the proceeding is in the public interest.

ORDER**II.**

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

- A. “Graco” or “Respondent” means Graco Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Graco, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Graco includes, but is not limited to, Graco Minnesota Inc.
- B. “Commission” means the Federal Trade Commission.
- C. “PMC” means PMC Global, Inc., a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 12243 Branford Street, Sun Valley, California 91352; and the joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by PMC Global, Inc., including, but not limited to, PMC Inc., Moehs Iberica S.L., and Gama Machinery USA, Inc. d/b/a Polyurethane Machinery Corporation or Polymac.
- D. “Antitrust Compliance Program” means a program (including, but not limited to, an effective in-person or web-based antitrust training program) to ensure compliance with this Order and with the Antitrust Laws, as required by Paragraph IV of this Order.

Decision and 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. “Delivery Services” means all terms and services associated with Respondent delivering FSE Products to a specified location to or on behalf of a Distributor or other Person. Delivery Services include, but are not limited to:
 - 1. Delivery of FSE Products via air, truck, or common carrier, delivery directly to the Distributor or to a FSE Customer’s place of business or job site; and,
 - 2. The timely scheduling of deliveries.
- G. “Discriminatory Manner” means to transact business with one Distributor in a manner:
 - 1. That is different from the manner of transacting business with one or more similarly-situated Distributors; or,
 - 2. That is other than in accordance with the terms and conditions Generally Available and applied to similarly-situated Distributors.
- H. “Distribute” or “Distribution” means the taking of possession (whether by wholesale purchase, lease, consignment, or other methods) of FSE Products from a manufacturer for the primary purpose of transferring or conveying such FSE Products to end users or other resellers by resale, lease, or other methods that are in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act.
- I. “Distributor” means a Person that Distributes, that Graco has reason to believe intends to Distribute, or that engages in the Distribution of, Graco’s or another manufacturer’s FSE Products in or affecting commerce, as “commerce” is defined in the Federal

Decision and Order

Trade Commission Act. Distributor does not include a Person that is a Graco Competitor or a Person that supplies Graco with manufacturing inputs, but only to the extent that such Person is acting in such capacity.

- J. “Effective Date” means the date on which Graco executes and enters into the Graco/PMC Agreements with PMC.
- K. “Exclusivity” or “Exclusive” means any requirement, term, or condition, whether formal or informal, direct or indirect, by the Respondent, that has the purpose or effect that:
 - 1. A Distributor research, develop, manufacture, Distribute, produce, market, purchase, sell, lease, or license, Graco’s FSE Products to the exclusion, in whole or in part, of any FSE Products from Graco Competitors; or
 - 2. A Distributor be restrained from, refrain from, or limit its research, development, manufacture, production, Distribution, marketing, promotion, sales, leasing, purchasing, or licensing of any FSE Product from a Graco Competitor.
- L. “Favorable” means more economically advantageous Price Terms, Delivery Services, Product Support, or other terms and conditions than Respondent makes Generally Available to similarly-situated Distributors.
- M. “Field” means both “Restricted Field” and “Open Field” as those terms are defined in the Graco/PMC License.
- N. “FSE Customer” means any Person that purchases, licenses, or leases FSE Products primarily for use in such Person’s trade, profession, or business, or for resale.
- O. “FSE Products” means any and all equipment, components, parts, replacement parts, and all other property related to the initial sale, and operation and

Decision and Order

maintenance over the useful life, of equipment that is manufactured for use by contractors for the application of sprayed or poured polyurethane foam or polyurea coatings.

- P. “Generally Available” means the typical or standard terms and conditions that Respondent offers or provides to Distributors:
1. That have revenues, a number or training level of employees, distribution of FSE Products over geographic areas equivalent in geographic size or total population, or other characteristics, that fall within equivalent categories or ranges of values;
 2. That are classified or designated the same by Respondent; or,
 3. That have characteristics relevant to assessing Distributors’ potential future unit sales of, or future revenue generated from, Respondent’s FSE Products that fall within an equivalent category or range of values.
- Q. “Graco Competitors” means any Person (other than Respondent) who manufactures FSE Products for sale (directly or through Distributors) to FSE Customers.
- R. “Graco/PMC Agreements” mean the Graco/PMC Settlement Agreement and the Graco/PMC License.
- S. “Graco/PMC License” means the license between Graco Inc., Graco Minnesota Inc., and Gama Machinery USA, Inc. d/b/a Polyurethane Machinery Corporation or Polymac, to be executed in accordance with Section II.A of this Order, an unexecuted version of which is attached hereto as Appendix B.
- T. “Graco/PMC Settlement Agreement” means that certain agreement between Graco Inc., Graco Minnesota Inc., PMC Global, Inc., PMC, Inc., Moehs Iberica S.L., Gama Machinery USA, Inc. d/b/a Polyurethane Machinery Corporation or Polymac, and

Decision and Order

Denis S. Commette, to be executed in accordance with Section II.A of this Order, an unexecuted version of which is attached hereto as Appendix A.

- U. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by Respondent in which Respondent has a proprietary interest, and all associated rights thereto, including all of the following in any jurisdiction throughout the world: (i) all Patents; (ii) all trade secrets, know-how, and confidential or proprietary information (including ideas, research and development, formulas, compositions, manufacturing and production processes and techniques, technical data and information, blue prints, designs, drawings, specifications, protocols, quality control information, customer and supplier lists, pricing and cost information, business and marketing plans and proposals, and all other data, technology, and plans); (iii) all brand names, commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, trade dress, logos, slogans, service marks, internet website content and internet domain names, together with all translations, adaptations, derivations, and combinations thereof, and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith; (iv) all copyrightable works, all registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations and renewals in connection therewith; (v) all computer software (including source code, executable code, data, databases and related documentation); (vi) all advertising and promotional materials; and (vii) all rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.
- V. “Less Favorable” means less economically advantageous Price Terms, Delivery Services, Product Support, or other terms and conditions than

Decision and Order

Respondent makes Generally Available to similarly-situated Distributors.

- W. “Order Date” means the date upon which this Order becomes final.
- X. “Patent(s)” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Effective Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, restorations, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.
- Y. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.
- Z. “PMC Releasees” means PMC, Distributors of PMC’s FSE Products, and FSE Customers that purchase, license, or lease PMC’s FSE Products.
- AA. “Price Term” means the wholesale price, resale price, purchase price, rebate, discount, price list, credit term, or any other term defining, setting forth, or relating to the money or compensation paid by or received by a Distributor in connection with the purchase, lease, consignment, or other means or method of or for obtaining FSE Products from Respondent.
- BB. “Product Support” means any service of FSE Products, assistance to FSE Products Distributors or FSE Customers, training provided to FSE Products Distributors or FSE Customers on the use or maintenance of FSE Products, visits to FSE Customers

Decision and Order

(whether related to the marketing, sales, use or service of FSE Products), warranty terms or the performance of warranty terms, or other support related to the research, development, manufacture, production, Distribution, marketing, promotion, lease, sale, purchase, or licensing of any FSE Product.

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

- A. Not later than ten (10) days after the Order Date, Respondent shall execute and enter into the Graco/PMC Agreements with PMC. The Graco/PMC Agreements are incorporated by reference into this Order and made a part hereof.
- B. Once both Respondent and PMC have executed and entered into the Graco/PMC Agreements, Respondent shall comply with all terms of the Graco/PMC Agreements, and any breach by Respondent of any term of the Graco/PMC Agreements shall constitute a violation of this Order. If any term of the Graco/PMC Agreements varies from the terms of this Order (“Order Term”), then to the extent Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order.
- C. Respondent shall not modify or amend any of the terms of the Graco/PMC Agreements without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any paragraph, section, or other provision of the Graco/PMC Agreements, any modification of the Graco/PMC Agreements without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.
- D. Respondent shall not:
 - 1. join, or file, prosecute or maintain any suit, in law or equity, against any PMC Releasee alleging that

Decision and Order

the research, development, manufacture, use, import, export, distribution, sale or lease or offer for sale of PMC's FSE Products in the Field on or prior to the Effective Date infringe any Intellectual Property owned or licensed by Respondent as of the Effective Date;

2. assign, transfer or license any Intellectual Property in the Field owned or licensed by Respondent as of the Effective Date unless the assignee, transferee, or licensee agrees in writing to provide a covenant not to sue the PMC Releasees that is at least as protective as the prohibitions in Paragraph II.D.1. above, as a condition of such assignment, transfer or license; and
3. actively induce, assist or participate in any suit, legal or other action or proceeding against any one or more of the PMC Releasees alleging that the research, development, manufacture, use, import, export, distribution, sale or lease or offer for sale of PMC's FSE Products in the Field on or prior to the Effective Date infringe any third party rights licensed to Respondent as of the Effective Date as to which Respondent does not control the right of prosecution of any suit, legal or other action.

III.

IT IS FURTHER ORDERED that Respondent, acting directly or indirectly, or through any corporate or other device, in connection with the actual or potential research, development, manufacturing, marketing, lease, or sale of FSE Products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from the following acts and practices:

- A. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, or understanding that has the purpose or effect of achieving Exclusivity with a Distributor, including, but not limited to:

Decision and Order

1. Conditioning availability or terms of the research, development, manufacturing, marketing, lease, sale, or service of FSE Products on Exclusivity;
2. Conditioning availability or terms of Price Terms, Delivery Services, Product Support, or other terms and conditions on Exclusivity;
3. Providing or offering to provide Favorable Price Terms, Delivery Services, Product Support, or other terms and conditions to a Distributor because the Distributor agrees to Exclusivity;
4. Providing or offering to provide Less Favorable Price Terms, Delivery Services, Product Support, or other terms and conditions to a Distributor because the Distributor fails or refuses to agree to Exclusivity;
5. Urging, inducing, coercing, threatening, or pressuring, or attempting thereto, a Distributor to refuse to research, develop, manufacture, market, lease, sell, or service FSE Products manufactured by a Graco Competitor; and,
6. Requiring Distributors to make annual purchases, or maintain inventory levels, of Graco's FSE Products in an amount greater than is necessary based on market conditions or other objective factors (such as sales forecasts or historic purchasing or demand levels) in order for Distributors to sell and service FSE Products to and for FSE Customers on a commercially reasonable and timely basis.

Provided, however, that:

- a. Respondent may offer to provide or provide to Distributors special (one-time) purchase terms, discounts, marketing assistance, Price Terms, Delivery Services, or Product Support.
- b. Respondent may enter into written agreements or understandings with a Distributor providing for Exclusivity with respect to both Respondent and a Distributor regarding the research,

Decision and Order

development, manufacturing, marketing, sale or lease of FSE Products developed jointly by Respondent and the Distributor, the development of which resulted from a contribution of significant capital, Intellectual Property rights, labor, or other things of value by both Respondent and the Distributor.

- c. Respondent may require its Distributors to make annual purchases of Graco's FSE Products in stated amounts and to maintain inventory of Graco's FSE Products at stated levels in order to qualify for various Price Terms.

Provided further, however, that such purchase requirements for such discounts for calendar year 2013, or such part thereof that may be covered by this Order, for a Distributor in the "Advanced" category shall be no more than \$450,000 of Respondent's FSE Products, and for a Distributor in the "Specialized" category shall be no more than \$100,000 of Respondent's FSE Products, which amounts will include in either case one demonstration model of Respondent's FSE Products. Such inventory requirements for discounts for calendar year 2013, or such part thereof that may be covered by this Order, for a Distributor in the "Advanced" category shall be no more than \$45,000 of Respondent's FSE Products, and for a Distributor in the "Specialized" category shall be no more than \$10,000 of Respondent's FSE Products, excluding in either case the value on one demonstration model of Respondent's FSE Products. Such purchase and inventory requirements for such discounts in calendar years 2014, and thereafter, shall be determined by increasing the purchase or inventory amounts actually required in accordance with this Order in the

Decision and Order

immediately preceding calendar year by not more than 5%.

- d. It shall not by itself constitute prohibited Exclusivity if a Distributor, acting unilaterally and without an agreement with or invitation from Respondent, chooses to carry the FSE Products of Respondent on an exclusive basis, or to give preference to the FSE Products of Respondent.
- B. Respondent shall not discriminate against, penalize, or otherwise retaliate against any FSE Products because such Distributor researches, develops, markets, leases, sells, or otherwise deals in (or negotiates, intends to, or proposes or announces an intention to research, develop, market, lease, sell, or otherwise deal in) FSE Products manufactured by a Graco Competitor, or otherwise refuses to enter into or continue any condition, agreement, contract, understanding or other requirement of Exclusivity. Examples of prohibited retaliation include, but are not limited to:
1. Terminating, suspending, reducing, or delaying, or threatening or proposing thereto, purchases or sales of FSE Products;
 2. Auditing or reviewing the books and records of a Distributor to determine the revenue from or unit sales of purchases, sales, leases, or other Distribution of FSE Products manufactured by Graco Competitors;
 3. Withdrawing or modifying, or threatening or proposing thereto, Favorable Delivery Services, Price Terms, Product Support or other terms and conditions;
 4. Providing, or threatening or proposing thereto, Less Favorable Delivery Services, Price Terms, Product Support, or other terms and conditions;

Decision and Order

5. Withholding from a Distributor FSE Products newly developed or introduced by Respondent;
6. Dealing with Distributors in a Discriminatory Manner;
7. Withholding or conditioning in a Discriminatory Manner Respondent's consent to permit a Distributor: (a) to resell FSE Products to Persons who research, develop, market, lease, sell or otherwise deal in FSE Products manufactured by a Graco Competitor; or, (b) to sell FSE Products outside certain geographic areas or territories (including, but not limited to, areas designated as Primary Trading Areas in Respondent's contracts) to Persons who research, develop, market, lease, sell or otherwise deal in FSE Products manufactured by a Graco Competitor;

Provided, however, it shall not by itself constitute prohibited retaliation if Respondent, not acting in a Discriminatory Manner:

- a. Changes the status of a Distributor because the Distributor fails to meet written objective standards including, but not limited to, sales levels, completion of training or customer service certification, or the like;
- b. Requires Distributors to receive specialized technical training or satisfy other qualification requirements to receive one or more of Respondent's FSE Products with respect to which specialize training or other qualification requirements reasonably are required;
- c. Imposes commercially reasonable and objective requirements (including, but not limited to, payment history and creditworthiness) for credit and payment arrangements;

Decision and Order

- d. Prohibits Distributors from reselling one or more of Respondent's FSE Products to other Distributors of FSE Products where the relevant FSE Products reasonably require specialized training or other qualification requirements that the purchasing Distributor does not have;
 - e. Establishes or seeks to establish new Distributors to meet actual or potential customer demand for Respondent's FSE Products; and,
 - f. Offers promotional programs or other Product Support that are Generally Available to similar Distributors who meet objective written qualifications.
- C. Within thirty (30) days after the Order Date, Respondent shall waive, without penalty to or financial cost from the Distributor, and shall no longer enforce any condition, requirement, policy, agreement, contract, or understanding with any Distributor that is inconsistent with the terms of this Order. Examples of provisions that shall be waived and not enforced include, but are not limited to:
- 1. Any provision in any agreement between Graco and a Distributor that calls for the Distributor to inform Graco, in whatever manner, of the non-Graco FSE Products that are being marketed or sold by the Distributor;
 - 2. Any provision in any agreement between Graco and a Distributor that requires a Distributor to obtain consent from Graco in advance of any sale of FSE Products by that Distributor to any other Person.

Provided, however, Respondent shall not be prohibited from requiring a Distributor to provide reasonable notice to Respondent prior to such

Decision and Order

Distributor making an initial sale of FSE Products to any FSE Customer that Distributor has reason to believe will make a regular practice of reselling such FSE Products. Such notice shall only include the name and address of the FSE Customer. In addition, Respondent shall not be prohibited from requiring a Distributor to provide to Respondent, no more than once in any calendar year, the name and address of all its FSE Customers that such Distributor has reason to believe make a regular practice of reselling FSE Products as of the time of such notice. If after diligent inquiry, Respondent finds that any such FSE Customer does not meet written objective standards for reselling its FSE Products, it may require such Distributor to stop selling FSE Products to that FSE Customer for resale; so long as such directive is not otherwise in violation of the Order. Respondent's directive to its Distributor shall include a statement of the objective standard(s) that such FSE Customer fails to satisfy. A copy of Respondent's directive shall be provided to the FSE Customer in question, and be included in Respondent's annual compliance report to the Commission.

3. Any inventory or annual purchase requirements that fail to comply with Paragraph III.A.6.
- D. Within thirty (30) days after the Order Date, Graco shall deliver written confirmation of all waivers required by Paragraph III.C. of this Order to all applicable Distributors, and shall negotiate and offer to execute contract amendments with such Distributors to modify, without penalty or financial cost, all contracts so that all contract terms comply with the terms of this Order.
 - E. Respondent shall, within thirty (30) days after the Order Date, mail a copy of this Order and Appendix C to this Order (with Appendix C affixed as the first page) by first class mail to:

Decision and Order

1. Each of its officers and directors; and,
2. Each Distributor that has purchased any one or more of Graco's FSE Products from Respondent within twelve (12) months prior to the Order Date.

IV.

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:

- 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 and Appendix D to this Order (with Appendix D affixed as the first page) to all officers and directors, and to its employees in the United States whose duties relate primarily to marketing and sales of FSE Products:
 1. Within thirty (30) days after the Order Date; and,
 2. Annually within thirty (30) days of the anniversary of the Order Date until the Order terminates;
- C. Annual training on the requirements of this Order and the Antitrust Laws for Respondent's officers and directors, and its employees in the United States whose duties relate primarily to marketing and sales of FSE Products; and,
- D. The retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV of this Order.

Decision and Order

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

- A. Respondent shall not, without providing advance written notification to the Commission in the manner described in Paragraph V.B., and without complying with the terms of the waiting period described in Paragraph V.C., acquire, directly or indirectly, any stock, share capital, equity, or other interest in or assets (but not including FSE Products offered for sale to Distributors) of any Person, corporate or non-corporate, that Graco has reason to believe researches, develops, manufactures, markets, sells, leases or licenses FSE Products in the United States, or has done so within six (6) months prior to the acquisition.
- B. The advance written notification provided by Respondent shall include:
 - 1. A description of the acquisition and any executed letter agreement, letter of intent, purchase and sale agreement, stock acquisition agreement, or other contract or agreement between Respondent and the Person describing or effecting the proposed acquisition;
 - 2. All documents that would be responsive to Items 4(c) and 4(d) of the Premerger Notification and Report Form (or any successor Items in the Form) under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed acquisition;
 - 3. Gross annual revenues of FSE Products of the Person and of Respondent in the United States;
 - 4. The name and address of the ten largest customers of the Person and of Respondent;
 - 5. The total number of FSE Customers of the Person and of Respondent; and,

Decision and Order

6. A description in reasonable detail of the FSE Products sold and services offered by the Person in which or from whom Respondent proposes to acquire equity or assets, as well as the geographic areas in which such products and services are sold and offered for sale.

Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

- C. Respondent shall provide the advance written notification at least thirty (30) days prior to consummating the transaction that is the subject of the notification (hereinafter the “First Waiting Period”). If, within the First Waiting Period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until thirty (30) days after submitting all of the additional information and documentary information (hereinafter the “Second Waiting Period”). Early termination of the First Waiting Period and the Second Waiting Period may be requested and, where appropriate, granted by a letter from the Commission’s Bureau of Competition.
- D. Respondent shall provide the Commission with no fewer than thirty (30) days’ notice prior to filing any lawsuit, arbitration proceeding, or mediation proceeding against any Distributor or FSE Customer alleging in whole or in part that such Person has:
 1. Breached or violated any provision of the Graco/PMC License or the Graco/PMC Settlement Agreement; or,
 2. Has infringed any of Respondent’s rights in or to any Intellectual Property:

Decision and Order

- a. Related to the research, manufacture, marketing, sale, lease or use of FSE Products (including, but not limited to, trade secrets and Patents licensed to PMC pursuant to the Graco/PMC License); or,
 - b. Within the scope of Paragraph II.D. of this Order.
- E. Respondent's notice pursuant to Paragraph V.D. of this Order shall include the name and address of each party to the lawsuit, arbitration proceeding, or mediation proceeding, a brief description of the claims of each party, and a copy of each complaint or answer filed by each party to the lawsuit, arbitration proceeding, or mediation.

VI.**IT IS FURTHER ORDERED** that

- A. Within sixty (60) days after the Order Date, and on the first annual anniversary of the Order Date, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. 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; and
 - 2. The name, title, and business address of each Person to whom Respondent distributed a copy the Order and Appendix, pursuant to Section IV(B) of this Order, and the date and manner of distribution to each.

Decision and Order

- B. On the first anniversary of the Order Date, and thereafter on the annual anniversary until this Order terminates, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order.

VII.

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

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

VIII.

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized

Decision and Order

representative(s) of the Commission and at the expense of the Respondent; and,

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on April 17, 2023.

By the Commission.

CONFIDENTIAL APPENDIX A
Graco/PMC Settlement Agreement

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

Decision and Order

**CONFIDENTIAL APPENDIX B
Graco/PMC License Agreement**

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

APPENDIX C

[Graco letterhead]

To our customers and business partners:

The Federal Trade Commission ("FTC") has been investigating whether two acquisitions by Graco Inc. ("Graco") in the U.S. market for spray foam equipment, as well as certain other terms of our distributor agreements, violated federal antitrust laws.

Graco does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines from the FTC relating to Graco's future marketing efforts, Graco has reached a consent agreement with the FTC pursuant to which the FTC can issue and Graco will be bound by a Decision and Order issued by the FTC. This consent agreement acknowledges that Graco does not admit to any violations of any law.

The consent agreement contains two general groups of provisions. Under the first, the Decision and Order incorporates Graco's settlement of its pending litigation with Polyurethane Machinery Corporation (PMC), a manufacturer of competing spray foam equipment, its ultimate parent company, PMC Global Inc., and others. Graco's litigation with PMC was based on its strong belief that PMC's products were unlawfully based on trade secrets, confidential information and other property that Graco acquired from PMC in 2005 ("Gusmer Intellectual Property"). Under the terms of the settlement, PMC will purchase licenses to the technology that Graco alleged is based on the Gusmer Intellectual Property. Because PMC will purchase these licenses, Graco no longer claims that PMC's polyurethane foam and

Decision and Order

polyurea are unfairly based on Graco's intellectual property; Graco therefore now recognizes PMC as a legitimate competitor. As with any other legitimate competitor, you are free to decide whether you wish to do business with PMC in the U.S. spray foam market.

Second, the Order provides limitations on Graco's ability to require exclusivity from distributors, subject to certain exceptions, and prohibits Graco from punishing or retaliating against distributors who also deal in competitors' spray foam products in the U.S. market.

You may read and download a copy of the Order, as well as an Analysis to Aid Public Comment, from the FTC at its website [add link]. If you have any concerns in the future about whether Graco is complying with its obligations under the Order, Graco invites you to raise them with us directly. You may contact any of our sales staff with whom you do business, or contact our corporate offices directly by phoning or emailing [name] at [phone number and email address]. Alternatively or additionally, you may contact the FTC directly to express your concerns, at [phone number] or [email].

Thank you again for your continued support and the confidence you have shown for Graco products.

Sincerely,

Decision and Order

APPENDIX D

[Graco internal communication format]

The Federal Trade Commission (“FTC”) has been investigating whether two acquisitions by Graco Inc. (“Graco”) in the U.S. market for spray foam equipment, as well as certain other terms of our distributor agreements, violated federal antitrust laws.

Graco does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines from the FTC relating to Graco’s future marketing efforts, Graco has reached a consent agreement with the FTC pursuant to which the FTC can issue and Graco will be bound by a Decision and Order issued by the FTC. This consent agreement acknowledges that Graco does not admit to any violations of any law.

It is very important to Graco that all of its officers and directors, as well as employees whose duties relate primarily to the marketing and sales of spray foam equipment in the United States, understand and comply with the Order. We are providing this notice as a first step to help you do that by telling you about the Order, describing a few of its most important terms, and telling you how you can learn more about the Order and get answers to any questions you may have about it.

The Order contains two general groups of provisions. Under the first, the Order incorporates Graco’s settlement of its pending litigation with Polyurethane Machinery Corporation (PMC), a manufacturer of competing spray foam equipment, its ultimate parent company, PMC Global Inc., and others. Graco’s litigation with PMC was based on its strong belief that PMC’s products were unlawfully based on trade secrets, confidential information and other property that Graco acquired from PMC in 2005 (“Gusmer Intellectual Property”). Under the terms of the settlement, PMC will purchase licenses to the technology that Graco alleged is based on the Gusmer Intellectual Property. Because PMC will purchase these licenses, Graco no longer claims that PMC’s polyurethane foam and polyurea are unfairly

Decision and Order

based on Graco's intellectual property; Graco therefore now recognizes PMC as a legitimate competitor. As with any other legitimate competitor, Graco customers are free to decide whether they wish to do business with PMC in the U.S. spray foam market.

Second, the Order provides limitations on Graco's ability to require exclusivity from distributors, subject to certain exceptions, and prohibits Graco from punishing, retaliating, or in any way discriminating against distributors who also deal in competitors' spray foam products in the U.S. market.

Graco management wants to help you better understand Graco's rights and obligations under the Order. Therefore, as required by the Order, Graco has appointed [name and title] to oversee a program to train you on the Order and applicable antitrust laws. You will be contacted soon to schedule your training. In the meantime, if you have any questions at any time about the Order or your training, please contact [identify contact person] at [email or phone].

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted for public comment an Agreement Containing Consent Order (“Consent Order”) with Graco, Inc. (“Graco”) to remedy the alleged anticompetitive effects resulting from Graco’s acquisition of its most significant competitors, Gusmer Corp. (“Gusmer”) and GlasCraft, Inc. (“GlasCraft”). The Commission Complaint (“Complaint”) alleges that, at the time of the acquisitions, Graco, Gusmer, and GlasCraft each manufactured and sold equipment for the application of fast-set chemicals (“fast-set equipment”). Neither acquisition was reportable under the Hart-Scott-Rodino Act. The Consent Order seeks to restore competition lost through the acquisitions by requiring Graco to license certain technology to a small competitor to facilitate its entry and expansion, and to cease and desist from engaging in certain conduct that may delay or prevent entry and expansion of competing firms. The Complaint and Consent Order in this matter have been issued as final and the Consent Order is now effective.

The Complaint alleges that the acquisitions each violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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

The Consent Order is for settlement purposes only. The Commission has placed the Consent Order on the public record for thirty (30) days for the receipt of comments by interested persons.

I. The Relevant Market and Market Structure

The relevant market within which to analyze the competitive effects of these acquisitions is fast-set equipment used by

Analysis to Aid Public Comment

contractors in North America. Fast-set equipment combines and applies various reactive chemicals that form polyurethane foams or polyurea coatings used for the application of insulation and protective coatings. The essential components of a fast-set equipment system are the proportioner, the heated hoses, and the spray gun.

Fast-set equipment manufacturers sell their products almost exclusively through a network of specialized, third-party distributors. These independent distributors sell to end-users. End-users demand a proximate source of expertise, spare parts, and repair services. Therefore, a robust network of third-party fast-set equipment distributors is necessary for any manufacturer to compete effectively in the relevant market.

Prior to its acquisition by Respondent in 2005, Gusmer was the largest and most significant competitor engaged in the manufacture and sale of a full line of fast-set equipment throughout North America and the world. The acquisition increased Graco's share of the North American fast-set equipment market to over 65%, and left GlasCraft as Graco's only significant North American competitor. Graco's acquisition of GlasCraft in 2008 raised Graco's market share above 90% and removed Graco's last significant North American competitor. Following the acquisitions of each of Gusmer and GlasCraft, Graco closed both firms' fast-set equipment manufacturing facilities and has fully assimilated or terminated all remaining assets, products, intellectual property, and personnel from both firms.

Prior to the acquisitions, fast-set equipment distributors typically carried products from multiple manufacturers. Distributors and end-users were able to mix and match the products from the different manufacturers to assemble a fast-set system that best satisfied end-users' demands. Further, manufacturers did not impose exclusive relationships on distributors – a distributor was free to make some or all of its fast-set equipment purchases from whichever manufacturers it chose. The Complaint alleges, among other effects, that the acquisitions of Gusmer and GlasCraft have removed the ability of distributors and end-users to select the equipment that best serves their, and their customers', interests and needs.

Analysis to Aid Public Comment

II. Conditions of Entry and Expansion

The Complaint alleges high entry barriers in the relevant market. The principal barrier to entry is the need for specialized third-party distribution. As a result of its acquisitions, Graco obtained substantial control over access to that distribution channel. Subsequent Graco practices have further heightened barriers to competitive entry and expansion, such that restoration of the competition lost as a result of Graco's acquisitions is unlikely to be restored unless Graco's continuation of those practices is enjoined.

Beginning in 2007, former employees of Gusmer began distributing fast-set equipment as Gama Machinery USA, Inc., now doing business as Polyurethane Machinery Corp. ("Gama/PMC"). In March 2008, Graco sued Gama/PMC and others alleging, among other things, breach of contract. The continuation of that litigation has reduced the willingness of distributors to purchase fast-set equipment from Gama/PMC, for fear that their supply of fast-set equipment might later be interrupted as a result of litigation. To reduce that barrier, an impending settlement of that litigation is incorporated in the Commission's Consent Order.

Like Gama/PMC, other prospective competitors—some of which presently offer only some components, rather than a full line of proportioners, hoses, and spray guns—have been unable to gain a meaningful foothold in the North American fast-set equipment market because of barriers to access to the required specialty distribution channel. Following its obtaining of market power through its acquisitions, Graco increased the discount and inventory thresholds it required of distributors, and threatened to cut off any distributor's access to needed Graco fast-set equipment if the distributor purchased fast-set equipment from any Graco rival. The reduction of barriers to entry and expansion by enjoining the continuation of this conduct is necessary to the restoration of competition lost as a result of Graco's acquisitions, and certain provisions of the Commission's cease and desist order are directed to that end.

Analysis to Aid Public Comment

III. Effects of Graco's Acquisitions

As a result of the acquisitions, Graco has eliminated head-to-head competition with Gusmer and GlasCraft. The Complaint alleges that concentration in the relevant market has increased substantially, and given Graco the ability to exercise market power unilaterally. The Complaint alleges that Graco has exercised that market power by raising prices, reducing product options and alternatives, and reducing innovation. The Complaint further alleges that Graco engaged in certain post-acquisition conduct that has raised barriers to entry and expansion such that the continuation of that conduct must be enjoined if the competition lost as a result of Graco's acquisitions is to be restored.

IV. The Consent Agreement

Since the acquisitions were completed some time ago, it is not practicable to recreate the acquired firms as independent going concerns. Instead, the purpose of the Consent Order is to ensure the restoration of the competitive conditions that existed before the acquisitions, to the extent possible, by facilitating Gama/PMC's entry and expansion and lowering barriers to entry. Therefore, the Consent Order requires Graco to enter into a settlement agreement with Gama/PMC within ten (10) days of the entry of the Order. In addition, Graco must grant to Gama/PMC an irrevocable license to certain Graco patents and other intellectual property in order to ensure that Graco cannot continue or renew its suit. In exchange, PMC will pay to Graco a sum of money for the settlement of the litigation and agree to a deferred license fee for the intellectual property. The settlement documents will be incorporated by reference into the Consent Order, and cannot be modified without the Commission's prior approval. Further, the Consent Order independently prohibits Graco from filing suit against Gama/PMC for infringing the licensed intellectual property.

In order to reduce barriers to competitor entry, the Consent Order directs Graco to cease and desist from imposing any conditions on its distributors that could, directly or indirectly, lead to exclusivity. The Consent Order also prohibits Graco from discriminating against, coercing, threatening, or in any other

Analysis to Aid Public Comment

manner pressuring its distributors not to carry or service any competing fast-set equipment. The Consent Order does not mandate that any distributor carry competitive fast-set equipment; rather, it bars Graco from imposing exclusivity on its distributors.

The Consent Order further obligates Graco to waive or modify any policies or contracts that would violate the Consent Order. Graco will have thirty (30) days after the Consent Order is final to negotiate changes in the contracts with its distributors to comply with the Consent Order. Graco must provide all of its distributors, employees and agents with a copy of the Consent Order and a plain-language explanation of what it says and requires.

The Consent Order further requires Graco to provide the Commission with prior notice: (1) if it intends to make another acquisition of fast-set equipment (after an appropriate waiting period); or (2) if it intends, within thirty (30) days, to institute a lawsuit or similar legal action against a distributor or end-user with regard to a claimed violation of Graco's trade secrets or other intellectual property covering fast-set equipment. The Consent Order will remain in effect for ten (10) years, and contains standard compliance and reporting requirements.

V. Effective Date of the Consent Order and Opportunity for Public Comment

In this instance, the Commission issued the Complaint and the Consent Order as final, and served them upon Graco at the same time it accepted the Consent Agreement for public comment. As a result of this action, the Consent Order has become effective. The Commission adopted procedures in August 1999 to allow for immediate implementation of an order prior to the public comment period. The Commission announced that it "contemplates doing so only in exceptional cases where, for example, it believes that the allegedly unlawful conduct to be prohibited threatens substantial and imminent public harm." 64 Fed. Reg. 46,267, 46,268 (1999).

This is an appropriate case in which to issue a final order before receiving public comment because the effectiveness of the remedy depends on the timeliness of the private settlement

Analysis to Aid Public Comment

agreement between Graco and Gama/PMC, which only becomes effective when the Consent Order becomes final. Both Graco and Gama/PMC have made initial efforts to address distributor concerns about possible Graco retribution by separately sending letters to distributors assuring them that preliminary discussions of business relations with Gama/PMC would not have any adverse consequences on the distributors' relationship with Graco. However, the protections of the applicable license and covenants, as well as those included in the Consent Order, are needed to provide distributors reasonable assurances that buying from Gama/PMC will not jeopardize the distributors' relationship with Graco. As a result, any delay in the effectiveness of the Consent Order and the associated private settlement will prevent Gama/PMC from finalizing relationships with distributors in time for the current construction season – and this will have a significant and meaningful impact on competition in the fast-set equipment market that the Consent Order is intended to foster.

The Commission anticipates that the competitive problems alleged in the Complaint will be remedied by the Consent Order, as issued. Nonetheless, public comments are encouraged and will be considered by the Commission. The purpose of this analysis is to invite and facilitate such comments concerning the Consent Order and to aid the Commission in determining whether to modify the Consent Order in any respect. Therefore, the Complaint and Consent Order have been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the comments received, and may determine that the Consent Order should be modified in response to the comments.¹

¹ If the Respondent does not agree to any such modifications, the Commission may (1) initiate a proceeding to reopen and modify the Consent Order in accordance with Rule 3.72(b), 16 CFR § 3.72(b), or (2) commence a new administrative proceeding by issuing an administrative complaint in accordance with Rule 3.11. See 16 CFR § 2.34(e)(2).

Statement of the Commission

STATEMENT OF THE COMMISSION

Today the Commission has voted unanimously to approve the Complaint and Decision & Order (“Order”) against Graco, Inc. (“Graco”) to resolve allegations that it violated Section 7 of the Clayton Act when it acquired Gusmer Corp. (“Gusmer”) in 2005 and Glascraft, Inc. (“Glascraft”) in 2008. At the time of the acquisitions, Gusmer and Glascraft were Graco’s two closest competitors in the market for fast-set equipment (“FSE”) used to apply polyurethane and polyurea coatings. The acquisitions eliminated the only significant competition in the market, and resulted in Graco holding a monopoly position as the only full-line FSE manufacturer. The Order contains provisions, including prohibitions on discriminating against distributors selling competitors’ FSE products, that are intended to constrain Graco’s ability to exclude prospective entrants into the FSE market by establishing and/or maintaining exclusive relationships with its third-party distributors. Commissioner Wright voted in favor of the Complaint and Order, but also issued a statement outlining his disagreement with these portions of the Order. We respectfully disagree with Commissioner Wright, and believe that these specific provisions are necessary to remediate the anticompetitive impact of the two mergers in this case.

The typical remedy for the Commission in a Section 7 matter is a divestiture of the illegally acquired assets (and any other assets necessary to make the divestiture buyer a viable competitor). Pursuing such a remedy in this matter, however, would be difficult, if not impossible, because Graco had long ago integrated or discontinued the product lines it acquired from Gusmer and Glascraft. There was no easily severable package of assets that could be divested to recreate one – much less two – viable competitors to replace Gusmer and Glascraft. As a result, the most effective relief available was a behavioral remedy intended to facilitate entry into the FSE market, which, of course, includes addressing the post-acquisition conduct described in the Complaint that had precluded entry into the relevant market. Specifically, after the acquisitions Graco solidified its market share by locking up third-party distributors through a series of purchase and inventory threshold requirements, as well as threats

Statement of the Commission

of retaliation and termination if distributors carried the products of any remaining or newly entering FSE manufacturers.

The evidence gathered in the course of the Commission's investigation demonstrates that Graco's efforts were successful; no other firm gained more than five percent of the North American FSE market and Graco's market share of between 90 and 95 percent has remained intact since its 2008 acquisition of Glascraft. Further, the investigation uncovered no evidence that Graco's post-acquisition conduct provided any cognizable efficiency that would benefit consumers. A remedy that does not address Graco's ability to raise and maintain nearly insurmountable entry barriers is substantially less likely to return competition to the FSE market. The Order provisions that Commissioner Wright criticizes, in our view, are integral to achieving that goal but will not cause market inefficiencies.

We believe that exclusive dealing relationships can have procompetitive benefits and that such relationships should not be condemned in the absence of a thorough factual and economic assessment of the circumstances surrounding such conduct. But it is equally important to recognize that, when employed by a competitor that has acquired significant market power or monopoly power, exclusive dealing arrangements have the potential to cement such power and prevent or deter entry that would lead to lower prices, higher quality, and better service for consumers.¹ In any event, regardless of how one views exclusive dealing arrangements generally, there is ample support for the fencing-in relief prescribed in this merger settlement, which is designed to restore competition in the FSE market lost as a result of Graco's illegal acquisitions.

We join Commissioner Wright in commending the Commission staff for their hard work in this matter. They have done an excellent job in investigating the market involved and the issues raised during the course of this investigation.

¹ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 71-72, 74 (D.C. Cir. 2001) (holding that Microsoft's exclusive dealing arrangements with Internet access providers, independent software vendors, and Apple violated Sherman Act § 2).

Dissenting Statement

STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT

The Commission has voted to issue a Complaint and Order against Graco, Inc. (“Graco”) to remedy the allegedly anticompetitive effects of Graco’s acquisition of Gusmer Corp. (“Gusmer”) in 2005 and GlasCraft, Inc. (“GlasCraft”) in 2008. I supported the Commission’s decision because there is reason to believe Graco’s acquisitions substantially lessened competition in the market for fast-set equipment in violation of Section 7 of the Clayton Act. I want to commend staff for their hard work in this matter. Staff has conducted a thorough investigation and developed strong evidence that Graco’s acquisition of Gusmer and GlasCraft likely resulted in higher prices and fewer choices for consumers.

I write separately to discuss two aspects of the Order with which I respectfully disagree, namely the provisions prohibiting Graco from entering into exclusive dealing contracts with distributors and establishing purchase and inventory thresholds that must be satisfied in order for distributors to obtain discounts. Both provisions are aimed at prohibiting exclusivity or, in the case of purchase and inventory thresholds, loyalty discounts that might be viewed as *de facto* exclusive arrangements. I am not persuaded in this case that prohibiting exclusive dealing contracts and regulating loyalty discounts will make consumers better off. To the contrary, these provisions may lead to reduced output or higher prices for consumers. I therefore do not believe the limitations on such arrangements imposed by the Order are in the public interest.

I. Appropriate Use of Behavioral Remedies

The majority and I agree that although the most suitable remedy for an anticompetitive merger usually is a divestiture of assets, under certain circumstances behavioral remedies may be appropriate.¹ One scenario in which behavioral remedies may be

¹ See e.g., Fed. Trade Comm’n, Statement of Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies, at 5 (2012), available at <http://www.ftc.gov/bc/bestpractices/merger-remediesstmt.pdf> (stating the Commission favors structural relief, such as divestitures, in horizontal mergers, but that behavioral relief may be appropriate in some cases).

Dissenting Statement

appropriate is when the challenged merger has long since been consummated and divestiture or other structural remedies are not a viable option for restoring competition to pre-merger levels. Given that Graco has fully integrated Gusmer and Glascraft and discontinued their product lines, divestiture is not an option and the Commission should rightly consider whether behavioral remedies in this case would protect consumers.

As with merger remedies generally, when deciding whether and what behavioral remedy to impose, the Commission must ultimately be guided by its mission of protecting consumers.² Because behavioral remedies displace normal competitive decision-making in a market, they pose a particularly high risk of inadvertently reducing consumer welfare and should be examined closely prior to adoption to ensure consumers' interests are best served. In particular, effective behavioral remedies must be "tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process."³ Merely showing high market shares and the unavailability of structural remedies does not justify restricting conduct that typically is procompetitive because these conditions do not make the conduct any more likely, much less generally likely, to be anticompetitive.⁴ A minimum

² The Commission should keep in mind that ours is not a binary choice simply between imposing a structural or a behavioral remedy. The most attractive option from a consumer welfare point of view for any given circumstance may be to block the merger in its entirety, allow the merger to proceed without any remedy, or a hybrid solution combining some aspects of each of these options. Having ruled out structural remedies in this case, the question is which, if any, of the non-structural alternatives best improves consumer welfare. See Ken Heyer, *Optimal Remedies for Anticompetitive Mergers*, 26 ANTITRUST 27 (2012) (arguing behavioral remedies are not justified simply because structural remedies are unavailable, and that an agency should weigh the economic costs and benefits of each non-structural alternative, including doing nothing).

³ U.S. Dep't of Justice Antitrust Div., Antitrust Division Policy Guide to Merger Remedies, at 7 n.12 (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>; see also, Heyer, *supra* note 2, at 27-28 ("[A]mong the most important considerations in devising a behavioral remedy is that there be a close nexus between the remedy imposed and the theory of harm motivating its use.").

⁴ In fact, efficiencies justifications for exclusive dealing contracts apply, and some even more strongly, when a firm has market power.

Dissenting Statement

safeguard to ensure remedial provisions – whether described as fencing-in relief or otherwise – restore competition rather than inadvertently reduce it is to require evidence that the type of conduct being restricted has been, or is likely to be, used anticompetitively to harm consumers.

With this analytical framework in mind, I support those remedies in the Order that seek to restore pre-merger competition by imposing restrictions closely linked to the evidence of anticompetitive harm in this case. For instance, staff uncovered evidence Graco threatened distributors that considered carrying fast-set equipment sold by competing manufacturers, and that these threats actually led to distributors not purchasing the competing products. Staff also learned that distributors refused to purchase fast-set equipment from Gama/PMC, one of the few fringe competitors remaining after Graco's acquisitions, because of the uncertainty resulting from Graco's lawsuit against Gama/PMC. The Order thus appropriately prohibits Graco from retaliating against distributors that consider purchasing fast-set equipment from other manufacturers⁵ and requires Graco to settle its lawsuit against Gama/PMC.

In contrast, and as is discussed in more detail below, there is insufficient evidence linking the remedial provisions in the Order prohibiting exclusive dealing contracts and regulating loyalty discounts to the anticompetitive harm in this case.

II. Prohibitions on Exclusive Dealing

It is widely accepted that exclusive dealing and *de facto* exclusive contracts – while generally efficiency enhancing – can lead to anticompetitive results when certain conditions are satisfied. The primary competitive concern is that exclusive dealing may be used by a monopolist to raise rivals' costs of distribution by depriving them the opportunity to compete for distribution sufficient to achieve efficient scale, and ultimately

⁵ Such retaliatory conduct alone is outside the normal competitive process and has no plausible procompetitive benefit. Its proscription therefore is unlikely to harm consumers. Of course, a decision by Graco to refuse to sell to distributors who do not enter into an exclusive contract should not itself be proscribed as illegitimate retaliation.

Dissenting Statement

harm consumers by putting competitors out of business.⁶ On the other hand, the economic literature is replete with procompetitive justifications for exclusive dealing, including aligning the incentives of manufacturers and distributors, preventing free-riding, and facilitating relationship-specific investments.⁷ In fact, the empirical evidence substantially supports the view that exclusive dealing arrangements are much more likely to be procompetitive than anticompetitive.⁸

Because exclusive dealing contracts typically are procompetitive and a part of the normal competitive process, the Commission should only restrict the use of such arrangements when there is sufficient evidence that they have or are likely to decrease consumer welfare. This ensures consumers the merger remedy does not deprive them the fruits of the competitive process. The evidence in this case is insufficient to conclude that Graco has used, or intends to use, exclusive dealing or *de facto* exclusive contracts to foreclose rivals and ultimately harm consumers. To the contrary, the Commission's Complaint describes the fast-set equipment market as one particularly well suited for exclusive arrangements. Specifically, the Complaint acknowledges the sale of fast-set equipment demands specialized third party distributors that possess the technical expertise to teach consumers how to use and maintain the manufacturer's equipment.⁹ One could therefore easily imagine that

⁶ See e.g., Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, in ANTITRUST LAW AND ECONOMICS 183, 194-96 (Keith N. Hylton ed., 2d ed. 2010). There also are novel theories of anticompetitive harm, including models exploring the possibility that certain types of discount programs effectively impose a tax upon distributors' choice to expand rivals' sales and thereby potentially prevent rivals from acquiring a sufficient number of retailers to cover the fixed costs of entry. See e.g., Joe Farrell, et al., *Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior*, 37 (4) REV. INDUS. ORG. 263 (2010).

⁷ See e.g., Abbott & Wright, *supra* note 6, at 200-01; Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS, 393-94 (Paolo Buccirossi, ed., 2008); Benjamin Klein & Kevin Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L. J. 433, 465 (2008).

⁸ See e.g., Abbott & Wright, *supra* note 6, at 200-01; Lafontaine & Slade, *supra* note 7, at 393-94.

⁹ Complaint ¶ 24, Graco, Inc., FTC File No.101-0215, (April 17, 2013).

Dissenting Statement

manufacturers might only be willing to provide training to distributors if they have some assurance that current or future competitors will be unable to free ride on their investments in the distributors' technical expertise. Exclusive dealing arrangements with distributors are one well-known and common method of preventing such free riding.

The provisions in the Order prohibiting exclusive contracts therefore may needlessly harm consumers by deterring potentially procompetitive arrangements. For that reason, I do not believe that provision is in the public interest.

III. Restrictions on Loyalty Discounts

The primary anticompetitive concerns with loyalty discounts are analytically similar to those associated with exclusive dealing and *de facto* exclusive contracts.¹⁰ As with exclusive dealing, the economic literature also supports the view that loyalty discounts more often than not are procompetitive.¹¹ The Commission's competition mission therefore is best served by an approach that counsels against imposing restrictions on loyalty discounts unless there is sufficient evidence to establish that such arrangements have or are likely to harm competition and consumers.

The Order permits Graco to enter into certain loyalty discount agreements that require distributors to meet annual purchase and inventory thresholds to qualify for discounted prices.¹² The Order, however, restricts the scope of these loyalty discounts by prescribing the maximum threshold levels Graco may set in 2013 and by only allowing those maximums to increase by 5 percent year to year. Although there is evidence that Graco in some instances increased the inventory and purchase thresholds it required distributors to meet to receive discounts on fast-set equipment following its acquisitions, I have not seen evidence sufficient to link these increases to the anticompetitive effects of the mergers alleged in the Commission's Complaint. For example,

¹⁰ See generally Bruce H. Kobayashi, *The Economics of Loyalty Discount and Antitrust Law in the United States*, 1 COMP. POL'Y INT'L 115 (2005).

¹¹ *Id.*

¹² Decision & Order § III(6)(c), Graco, Inc., FTC File No.101-0215, (April 17, 2013).

Dissenting Statement

I have seen no evidence that a distributor dropped Gama/PMC or any other fringe competitor in response to Graco's increased thresholds. Further, although there appears to be evidence that at least some distributors are unable to both meet the thresholds necessary to receive Graco's discounts and carry competing manufacturers' products, there is nothing barring these distributors from forgoing those discounts in order to carry multiple products lines. It has been several years since Graco increased the thresholds. In the absence of evidence this change harmed competition, the fact that some distributors prefer to take the discounts is not a sufficient reason to believe that prohibiting these contracts will protect consumers. Moreover, it is unlikely that the Commission is best positioned to gauge what the appropriate threshold should be for each distributor over time and as market conditions change.

As a result, based upon the available evidence, I am concerned the restrictions on loyalty discounts in the Order ultimately may reduce consumer welfare rather than protect competition. Thus, I do not believe this aspect of the Order is in the public interest.

* * * * *

For these reasons, I voted in favor of the Commission's Complaint and Order, but respectfully disagree with the Order provisions prohibiting exclusive contracts and restricting loyalty discounts. To the extent the majority believes Graco may use such arrangements to engage in anticompetitive conduct in the future, the Commission's willingness and ability to bring a monopolization claim where the evidence indicates it is appropriate would protect consumers against the competitive risks posed by these arrangements without depriving consumers of their potential benefits.

Decision and Order

IN THE MATTER OF

ROBERT BOSCH GMBHCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND 5(A) OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4377; File No. 121 0081**Complaint, November 21, 2012 – Decision, April 23, 2013*

This consent order addresses the acquisition by Robert Bosch GmbH (“Bosch”) of the SPX Service Solutions business of SPX. Bosch is a global supplier of automotive and industrial, consumer goods, and building technology. On January 23, 2012, Bosch entered into an agreement to acquire the SPX Service Solutions business from SPX, the leading supplier of air conditioning recycling, recovery, and recharge (ACRRR) devices. ACRRR devices are stand-alone pieces of equipment used by automotive technicians to remove refrigerant from a vehicle’s on-board air conditioning system, store the refrigerant while the air conditioning system is being serviced, and recycle the refrigerant back into the system. The complaint alleges that Bosch’s proposed acquisition of SPX Service Solutions would create a virtual monopoly in the ACRRR market. The order requires Bosch to divest its ACRRR business to a viable competitor, Mahle Clevite, Inc. Bosch is also required to grant manufacturers’ licenses to key patents that Mahle needs in order to compete in the ACRRR market. Lastly, the order also requires Bosch to end agreements that restrict third parties from advertising, servicing, distributing, or selling competitive products in the United States.

Participants

For the *Commission*: Jordan S. Andrew, Jacqueline Mendel, Eric Rohlck and Mark Silvia.

For the *Respondent*: Michael A. Kindsay and Jaime Stilson, Dorsey & Whitney LLP; and Maria Cirincione, Damon Kalt, and Barry Nigro, Fried Frank Harris Shriver & Jacobson.

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 Robert Bosch GmbH, a corporation subject to the jurisdiction of the Commission has: (1) agreed to acquire the SPX Service