

Complaint

IN THE MATTER OF

**FIDELITY NATIONAL FINANCIAL, INC.
AND
LENDER PROCESSING SERVICES, 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-4425; File No. 131 0159
Complaint, December 23, 2013 – Decision, March 4, 2014*

This consent order addresses the \$2.9 billion acquisition by Fidelity National Financial, Inc. of certain assets of Lender Processing Services, Inc. The complaint alleges that the acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act and, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between Respondents and by increasing the likelihood of collusion or coordinated interaction in the markets for the provision of title information services in seven relevant markets in Oregon. The consent order requires Respondents to divest a copy of LPS's title plants serving Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon, to a Commission-approved acquirer. The order also requires Respondents to divest an ownership interest equivalent to LPS's share in the joint title plant that serves the Portland, Oregon, metropolitan area to a Commission-approved buyer.

Participants

For the *Commission*: *Jessica S. Drake*.

For the *Respondents*: *Joe Simons and Aidan Synnott, Paul, Weiss, Rifkind, Wharton & Garrison LLP and Peter Barbur, Cravath, Swaine & Moore LLP*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Fidelity National Financial, Inc. ("Fidelity") and Lender Processing Services, Inc. ("LPS") have entered into an acquisition agreement that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended,

Complaint

15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 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. DEFINITIONS

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

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

3. “Respondent Fidelity” or “Fidelity” means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by Fidelity; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

4. “Respondent LPS” or “LPS” means Lender Processing Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by LPS; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

II. RESPONDENTS

5. Respondent Fidelity is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside

Complaint

Avenue, Jacksonville, FL 32204. Fidelity, among other things, is engaged in the sale of title insurance and the provision of title information services.

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

7. Respondents and each of their relevant operating subsidiaries are, and at all relevant times have been, engaged in activities in or affecting “commerce” as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

8. Pursuant to an Agreement and Plan of Merger dated May 28, 2013, Fidelity proposes to acquire all of the outstanding common stock of LPS for a total equity value of approximately \$2.9 billion.

IV. RELEVANT MARKETS

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

10. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the proposed acquisition in the relevant line of commerce are the following jurisdictions in the state of Oregon: Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties; and the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties. Title information is generated and collected on a county level and because of the local character of the real estate markets in which the title information services are used, geographic markets for title information services are highly localized.

Complaint

V. STRUCTURE OF THE MARKETS

11. Oregon law requires title insurers and title insurance producers, who are the only users of title information services, to own an interest in a title plant in each county in which they issue policies. Oregon's regulatory requirement prevents third-party information providers from offering title information services in the relevant geographic areas listed under Paragraph 10.

12. Four independent title plants provide title information services in Josephine and Polk counties, Oregon. Three independent title plants provide title information services in Clatsop, Columbia, Coos, and Tillamook counties, Oregon. Each independent title plant in these counties has a single owner, a title insurer or title insurance producer, who is the plant's sole user. Both Respondents own title plants in each of these counties.

13. A single jointly-owned title plant provides title information services in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties. The jointly-owned title plant is governed by an agreement permitting each owner to use the title plant. The agreement sets forth the terms under which the owners can vote to expel other owners from the joint title plant. Both Respondents own interests in the joint title plant.

14. The markets for title information services in the geographic areas listed under Paragraph 10 are highly concentrated. The proposed acquisition significantly increases concentration in the relevant markets.

VI. BARRIERS TO ENTRY

15. Entry into the market for providing title information services is unlikely and would not occur in a timely manner to deter or counteract the adverse anticompetitive effects described in Paragraph 16, because of, among other things, the time and expense necessary to collect, compile, and index historical real property records.

Complaint

VII. EFFECTS OF THE ACQUISITION

16. The effects of the proposed acquisition, if consummated, may be substantially to lessen competition in the relevant markets in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Respondents Fidelity and LPS in the relevant markets;
- b. by increasing the likelihood of collusion or coordinated interaction in Clatsop, Columbia, Coos, and Tillamook counties, Oregon, where the proposed acquisition reduces the number of independent title plants from three to two;
- c. by increasing the likelihood of collusion or coordinated interaction in Josephine and Polk counties, Oregon, where the proposed acquisition reduces the number of independent title plants from four to three; and
- d. by increasing the likelihood of collusion or coordinated interaction in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties, Oregon, where the proposed acquisition reduces the number of joint title plant owners necessary to expel other owners from the joint title plant.

VIII. VIOLATIONS CHARGED

17. The agreement described in Paragraph 8 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

18. The acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Order to Maintain Assets

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-third day of December, 2013 issues its Complaint against Respondents.

By the Commission, Commissioner Wright dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. (“Fidelity”), of Respondent Lender Processing Services, Inc. (“LPS”), and Respondents 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 Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents 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 Respondents 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt

Order to Maintain Assets

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 Complaint and Order to Maintain Assets (“Order”):

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

ORDER**I.**

IT IS ORDERED that, as used in this Order, the definitions in the Decision and Order issued in this matter shall apply as well as the following definition:

- A. “Decision and Order” means the:
 1. Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a final Decision and Order by the Commission; and
 2. Final Decision and Order issued and served by the Commission.

Order to Maintain Assets

II.

IT IS FURTHER ORDERED that, until Respondents fully comply with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall:

- A. Take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and the Tri-County Title Plant and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets and the Tri-County Title Plant except for ordinary wear and tear;
- B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than as required by this Order) and the Tri-County Title Plant nor take any action that lessens their viability, marketability, or competitiveness; and
- C. Maintain the Divestiture Assets and the Tri-County Title Plant in the regular and ordinary course of business and in accordance with past practice, and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets and the Tri-County Title Plant to the extent and in the manner maintained prior to the Acquisition, including, but not limited to, updating the records and/or indices contained in the Divestiture Assets and the Tri-County Title Plant and not compromising the ability and suitability of the Title Plant Assets and the Tri-County Title Plant to meet Oregon state requirements for title insurers and title insurance producers.

III.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraph II. of this Order and with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall submit to the

Order to Maintain Assets

Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order.

IV.

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

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

V.

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

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

Decision and Order

VI.

IT IS FURTHER ORDERED that this Order shall terminate after the last of the divestitures required by the Decision and Order is completed.

By the Commission, Commissioner Wright dissenting.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. (“Fidelity”), of Respondent Lender Processing Services, Inc. (“LPS”), and Respondents 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 Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents 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 Respondents 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its

Decision and Order

Complaint and Order to Maintain Assets, 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 Fidelity 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 601 Riverside Avenue, Jacksonville, FL 32204.
2. Respondent LPS 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 601 Riverside Avenue, Jacksonville, FL 32204.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Fidelity” means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by Fidelity; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Fidelity shall include LPS.

Decision and Order

- B. “LPS” means Lender Processing Services, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups, and affiliates in each case controlled by LPS; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means any and all Persons approved by the Commission pursuant to Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.
- E. “Acquisition” means the acquisition by Fidelity of all of the outstanding common stock of LPS pursuant to the Agreement and Plan of Merger dated May 28, 2013.
- F. “Copy” means a reproduction of a Title Plant that will enable an Acquirer to use the reproduction in a qualitatively similar way to the Title Plant. A Copy will reproduce all of the records, indices, documents, and other information contained in the Title Plant, as of the Divestiture Date, and enable such information to be accessed no less quickly and no less conveniently than it could be using the Title Plant.
- G. “Divestiture Agreement” means any and all agreements between the Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer, and all amendments, exhibits, attachments, agreements, and schedules thereto, that have been approved by the Commission pursuant to Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.
- H. “Divestiture Assets” means:
 - 1. Portland Title Agency Interest, and
 - 2. Title Plant Assets.

Decision and Order

- I. “Divestiture Date” means each date on which Respondents (or a Divestiture Trustee) fully complete the divestiture of each of the Divestiture Assets, as applicable, as required by Paragraphs II. and/or III. (or Paragraph IV., if applicable) of this Order.
- J. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph IV. of this Order.
- K. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business entity, and any subsidiaries, divisions, groups, or affiliates thereof.
- L. “Portland Title Agency” means Portland Title Agency, LLC, a wholly-owned subsidiary of Fidelity.
- M. “Portland Title Agency Interest” means the Title Plant Interest held by Portland Title Agency in the Tri-County Title Plant.
- N. “Respondents” means Fidelity and LPS, individually and collectively.
- O. “Third Party” means any non-governmental Person other than the Respondents or each Acquirer.
- P. “Title Information Services” means providing selected information contained in a Title Plant to a customer or user or permitting a customer or user to have access to information contained in a Title Plant.
- Q. “Title Plant” means a privately-owned collection of records and/or indices regarding the ownership of and interests in real property. Title Plants include such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

Decision and Order

- R. “Title Plant Assets” means a Copy of each Title Plant, and all rights associated with each Copy, owned or otherwise held by LPS prior to the Acquisition, covering each of the Oregon counties listed below:
1. Clatsop,
 2. Columbia,
 3. Coos,
 4. Josephine,
 5. Polk, and
 6. Tillamook.
- S. “Title Plant Interest” means any and all rights, present or contingent, of a Person to hold any membership or partnership share, voting or nonvoting stock, share capital, equity or other interests, and/or beneficial ownership of a Title Plant.
- T. “Tri-County Title Plant” means the joint venture Title Plant established pursuant to the Tri-County Title Plant Partnership Agreement, effective as of October 15, 1992, and all amendments, exhibits, and attachments thereto, which covers records and/or indices regarding the ownership of and interests in real property located in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington counties, Oregon.

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

- A. Not later than five (5) months after the date this Order is issued, Respondents shall divest the Portland Title Agency Interest, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner

Decision and Order

(including a Divestiture Agreement) that receives the prior approval of the Commission; *provided, however*, that no proposed divestiture of the Portland Title Agency Interest to a Person that owns or controls a Title Plant Interest in the Tri-County Title Plant at the time of the divestiture will be approved if that Person's Title Plant Interest, when combined with the Portland Title Agency Interest and the Respondents' Title Plant Interests in the Tri-County Title Plant, would equal or exceed 70% of the outstanding Title Plant Interests in the Tri-County Title Plant.

- B. Prior to the Divestiture Date, Respondents shall obtain all consents, approvals, and waivers from all Third Parties that are necessary to permit Respondents to divest the Portland Title Agency Interest and transfer all associated rights to the Acquirer.
- C. Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, exercise any of their voting rights, or influence any other partners to exercise any of their voting rights, under Section 11.01(f) of the Tri-County Title Plant Partnership Agreement (as reflected in the version of the agreement in effect as of the date Respondents execute the Agreement Containing Consent Orders), to expel the Acquirer of the Portland Title Agency Interest.
- D. The purpose of the divestiture of the Portland Title Agency Interest is to ensure the continuation of the Portland Title Agency Interest as an independent interest in the Tri-County Title Plant and to remedy the lessening of competition in Title Information Services resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Not later than five (5) months after the date this Order is issued, Respondents shall divest the Title Plant

Decision and Order

Assets, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner (including a Divestiture Agreement) that receives the prior approval of the Commission.

- B. Prior to the Divestiture Date, Respondents shall obtain all consents, approvals, and waivers from all Third Parties that are necessary to permit Respondents to divest each of the Title Plant Assets and transfer all associated rights to each Acquirer.
- C. The purpose of the divestiture of the Title Plant Assets is to remedy the lessening of competition in Title Information Services resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. If Respondents have not fully complied with the obligations of Paragraphs II. and III. to divest all of the Divestiture Assets, the Commission may appoint a trustee ("Divestiture Trustee") to complete the divestiture of any remaining Divestiture Assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

Decision and Order

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by, Paragraphs II. and III. of this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, Paragraphs II. and III. of this Order.
 - 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to effectuate the required divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to divest or believes the divestitures can be achieved within a

Decision and Order

reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the Divestiture Assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays caused by Respondents shall extend the time for divestiture under this Paragraph for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to each Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five

Decision and Order

(5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

Decision and Order

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the specified divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
 10. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each of the divestitures required by this Order.

Decision and Order

V.

IT IS FURTHER ORDERED that, until Respondents fully comply with Paragraphs II.A., II.B, III.A., and III.B. (and Paragraph IV., if applicable) of the Decision and Order, Respondents shall:

- A. Take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and the Tri-County Title Plant and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets and the Tri-County Title Plant except for ordinary wear and tear;
- B. Not sell, transfer, encumber, or otherwise impair the Divestiture Assets (other than as required by this Order) and the Tri-County Title Plant nor take any action that lessens their viability, marketability, or competitiveness; and
- C. Maintain the Divestiture Assets and the Tri-County Title Plant in the regular and ordinary course of business and in accordance with past practice, and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets and the Tri-County Title Plant to the extent and in the manner maintained prior to the Acquisition, including, but not limited to, updating the records and/or indices contained in the Divestiture Assets and the Tri-County Title Plant and not compromising the ability and suitability of the Title Plant Assets and the Tri-County Title Plant to meet Oregon state requirements for title insurers and title insurance producers.

VI.

IT IS FURTHER ORDERED that:

- A. No Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of

Decision and Order

any Acquirer or to reduce any obligations of Respondents under such agreements.

- B. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all terms of each Divestiture Agreement, and any breach by Respondents of any term of a Divestiture Agreement shall constitute a failure to comply with this Order. If any term of a Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

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

- A. For a period of ten (10) years from the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission, acquire any:
 - 1. Title Plant covering any county in Oregon, if, as a result of such acquisition, there would be three (3) or fewer independent Title Plants covering the county;
 - 2. Title Plant Interest of any Title Plant covering any county in Oregon:
 - a. if, as a result of such acquisition, when aggregated with any and all Title Plant Interests already owned or otherwise held by Respondents in such Title Plant, Respondents would own or otherwise hold an interest of fifty (50) percent or more in such Title Plant; or

Decision and Order

- b. if, as a result of such acquisition, there would be three (3) or fewer independent Title Plant Interest holders in such Title Plant.
- B. The prior notification required by this Paragraph VII. shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. In addition to the information required to be supplied on such Notification and Report Form pursuant to the above-referenced regulation, Respondents shall submit the following supplemental information in Respondents’ possession or reasonably available to Respondents:
 1. The name of each county to which the terms of Paragraph VII.A. are applicable;
 2. A description of the Title Plant or Title Plant Interest that is being acquired; and
 3. With respect to each Title Plant covering each county to which the terms of Paragraph VII.A. are applicable (including all Title Plants in which the Respondents own or otherwise hold a direct or indirect Title Plant Interest, as well as other Title Plants known to the Respondents), the names of all Persons that own or otherwise hold any direct or indirect Title Plant Interest in the Title Plant and the percentage interest held by each Person; the time period covered by each category of title records contained in the Title Plant; whether the respective categories of title records are regularly being updated; the indexing system or systems used with respect to each category of title records;

Decision and Order

and the names of all Persons, including, but not limited to, title insurers or title insurance producers, who have access to the Title Plant.

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

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

- A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. and III. (and Paragraph IV., if applicable) of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. (and Paragraph IV., if applicable) of this Order, including a description of all substantive contacts or negotiations for accomplishing the specified actions and the identity of

Decision and Order

all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the accomplishment of the specified actions and obligations.

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

IX.

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

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

X.

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

- A. Access, during business office hours and in the presence of counsel, to all facilities and to inspect and copy all books, ledgers, accounts, correspondence,

Analysis to Aid Public Comment

memoranda, and all other records and documents in the possession or under the control of such Respondent relating to compliance with this Order, which copying services shall be provided by such Respondent at its expense; and

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

XI.

IT IS FURTHER ORDERED that this Order shall terminate on March 4, 2024.

By the Commission, Commissioner Wright dissenting.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Fidelity National Financial, Inc. (“Fidelity”) and Lender Processing Services, Inc. (“LPS”) (collectively, “Respondents”). Fidelity proposes to acquire LPS, a combination that would reduce competition in seven relevant markets in Oregon where Respondents own overlapping title plant assets. The proposed Consent Agreement remedies the competitive concerns arising from the acquisition. The proposed Consent Agreement requires, among other things, that Respondents divest: a copy of LPS’s title plants covering Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties in Oregon; and an ownership interest equivalent to LPS’s share in a joint title plant serving the Portland, Oregon, metropolitan area.

Analysis to Aid Public Comment

On May 28, 2013, Respondents entered into an acquisition agreement under which Fidelity would acquire all of the outstanding common stock of LPS for approximately \$2.9 billion (the “Acquisition”). The Commission’s Complaint alleges that the acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between Respondents and by increasing the likelihood of collusion or coordinated interaction in the relevant geographic markets.

II. The Parties

Fidelity, a publicly-traded company headquartered in Jacksonville, Florida, provides title insurance, transaction services, and technology solutions to the mortgage industry. Fidelity is the nation’s largest title insurance company, operating six underwriting subsidiaries.

LPS, a publicly-traded company headquartered in Jacksonville, Florida, provides transaction services and technology solutions to the mortgage industry. LPS’s transaction services include title insurance underwriting provided by its National Title Insurance of New York, Inc. (“NTNY”) subsidiary.

Respondents own overlapping title plants in Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon. Fidelity and LPS are also partners in a title plant serving the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

III. Title Information Services

Lenders require assurance of title before issuing a mortgage loan, typically in the form of title insurance. Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title agent or abstractor must first conduct a title search. Title search is the due diligence process that enables title insurance underwriters to assess (and mitigate, if necessary) the

Analysis to Aid Public Comment

risk of subsequent title challenges. The title agent or abstractor examines property-specific records to establish the chain of title and to identify any potential obstacles – such as liens or encumbrances – that might impair the transfer of title.

To facilitate the title search process, title agents and underwriters often utilize title plants. Title plants are privately-owned (either individually or jointly) databases of information detailing the title status of real property parcels. Title plants compile, normalize, and re-index county-level property records, which are often difficult to access or inefficient to search directly. Oregon law requires title insurers and title insurance producers, who are the sole users of title information services, to own an interest in a title plant in each county in which they issue policies. This law means that there are no alternatives to title plants in Oregon counties.

IV. The Complaint

The Commission's Complaint alleges that the acquisition agreement between Fidelity and LPS constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The Complaint further alleges that consummation of the agreement may substantially lessen competition in the provision of title information services in seven relevant markets in Oregon, 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.

The Complaint alleges that a relevant product market in which to analyze the effects of the Acquisition is the provision of title information services. "Title information services" means the provision of selected information, or access to information, contained in a title plant to a customer or user.

The Complaint alleges that the relevant geographic markets are local in nature. Title information is generated, collected, and used on a county (or county-equivalent) level. Therefore, geographic markets for title information services are highly localized and consist of each of the counties or other local jurisdictions covered by the title plants at issue. The geographic areas of concern outlined in the Complaint are Clatsop, Columbia,

Analysis to Aid Public Comment

Coos, Josephine, Polk, and Tillamook counties, Oregon; and the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

The Complaint alleges, absent the proposed relief, that the Acquisition would increase the risk of coordinated anticompetitive effects in the relevant markets. In Clatsop, Columbia, Coos, and Tillamook counties, the Acquisition would reduce the number of independent title plant owners to two. In Josephine and Polk counties, the Acquisition would leave only three independent title plant owners. In each of these six counties, each title plant has a single owner that is also the title plant's sole user. In contrast, one jointly-owned title plant serves the Portland, Oregon, metropolitan area; each co-owner has full access to this title plant. The Acquisition would leave five joint owners of that joint title plant, but would reduce the number of owners necessary to expel other owners from the joint title plant.

The Complaint alleges that entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would be costly and time-consuming, requiring any potential entrant to assemble a complete and accurate index of historical property records.

V. The Proposed Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns resulting from the Acquisition in each of the relevant markets discussed above. Pursuant to the proposed Consent Agreement, Respondents must divest a copy of LPS's title plants serving Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon, to a Commission-approved acquirer. Respondents must complete these divestitures within five (5) months of the closing date of the Acquisition. The required divestitures will eliminate the competitive harm that otherwise would have resulted in these counties by restoring the number of independent title plant owners within each county to the pre-acquisition level.

The proposed Consent Agreement also requires Respondents to divest an ownership interest equivalent to LPS's share in the joint title plant that serves the Portland, Oregon, metropolitan area

Analysis to Aid Public Comment

to a Commission-approved buyer. Respondents must complete this divestiture within five (5) months of the closing date of the Acquisition. The proposed Consent Agreement requires that the divestiture purchaser's interest in the joint title plant, when combined with Fidelity's post-merger interest, must not equal or exceed 70 percent. The divestiture will ensure that no two joint owners of the plant could coordinate to expel other members of the joint title plant in this relevant market. The proposed Consent Agreement further prohibits Fidelity from exercising its voting rights, or influencing others to exercise their voting rights, to expel the divestiture buyer from the joint title plant for failure to conduct an active title business for a period of three (3) months.

In addition to the required divestitures, the proposed Consent Agreement obligates Respondents to provide the Commission with prior written notice of title plant acquisitions in any county in Oregon in three sets of circumstances: (1) if the acquisition would result in three or fewer title plants covering the county; (2) if the acquisition would result in three or fewer owners of a joint plant; and (3) if the acquisition would result in Fidelity controlling a 50 percent or greater share in a joint plant. Each of these circumstances would raise competitive concerns in the market for title information services, and could reduce competition in the market for title insurance underwriting in Oregon. These transactions likely would not come to the Commission's attention without the prior notification provision.

VI. The Order to Maintain Assets

The Decision and Order and the Order to Maintain Assets obligate Fidelity to continue to update and maintain the individual title plants, the Portland Tri-County Plant interest, and the Portland Tri-County Plant until the required divestitures are complete. This will ensure that the divested assets remain viable sources of title information to support the title insurance underwriting operations of the acquirer or acquirers. The Order to Maintain Assets explicitly requires Fidelity not to compromise these assets' ability and suitability to meet Oregon's requirements for title insurers and title insurance producers.

Statement of the Commission

VII. Opportunity for Public Comment

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

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite and inform public comment on the Consent Agreement, including the proposed divestitures. This analysis is not intended to constitute an official interpretation of the Consent Agreement, nor is it intended to modify the terms of the Consent Agreement in any way.

Statement of the Federal Trade Commission

Today the Commission is taking remedial action with respect to the proposed acquisition of Lender Processing Services, Inc. by Fidelity National Financial, Inc. We believe Fidelity's acquisition of LPS, which would combine the two firms' title plants, among other assets, is likely to reduce competition that benefits title insurance consumers in nine counties in the state of Oregon. Our proposed remedy is tailored to counteract the likely anticompetitive effects of the proposed acquisition without eliminating any efficiencies that might arise from the combination of the two companies.

Fidelity is a leading provider of mortgage and other services to the mortgage industry and is the largest title insurance underwriter in the United States. LPS's underwriting activity is small by comparison, a complementary operation to LPS's key business as a leading provider of technology solutions, transaction

Statement of the Commission

services, and data and analytics to the mortgage and real estate industries.

Our competitive concerns arise from a limited aspect of the \$2.9 billion combination of Fidelity and LPS: the title plant assets each company uses to support its title insurance underwriting activities in certain Oregon counties. Both Fidelity and LPS own title plants covering Oregon's Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties. Both firms are also joint owners of a title plant covering the tri-county Portland metropolitan area.

Title insurance underwriters require access to county-level title information contained in title plant databases. In Oregon, state law requires title insurance underwriters or their agents to own a title plant in each county in which they issue policies. As a result, any firm offering title insurance underwriting in Oregon must obtain an ownership interest in an existing title plant or build one from scratch. Fidelity and LPS compete for title insurance customers in the nine Oregon counties of concern. The proposed acquisition will eliminate one of only a few underwriters available in each relevant market,¹ and the Commission has reason to believe that no timely entrant is likely to replace the competition lost in these counties.

Although price competition in title insurance underwriting occurs at the state level, underwriters compete on the basis of service as well. For example, underwriters compete on the turnaround time from title order to settlement, enabling consumers to close on mortgage transactions more quickly. Moreover, the costs of entering the title insurance underwriting business are higher in Oregon because of the requirement that underwriters operating in the state own an interest in a title plant rather than merely purchase title information from a third-party provider. No

1 In Clatsop, Coos, Columbia, and Tillamook counties, only two title insurance underwriters will remain post-acquisition. In Josephine and Polk counties, three underwriters will remain. In the Portland tri-county area, the proposed acquisition will leave five competing title insurance underwriters as joint owners of the only title plant serving the Portland area. However, the transaction would reduce to two the number of joint owners with the ability to exclude all others from the plant.

Statement of the Commission

other states where both Fidelity and LPS compete have a similar requirement. For these reasons, we have reason to believe that the proposed acquisition is likely to result in a loss of competition and harm title insurance customers.²

We respectfully disagree with Commissioner Wright that our action is based solely on the fact that the merger will decrease the number of underwriters operating in the relevant markets and that it is inconsistent with the 2010 Horizontal Merger Guidelines. Substantial increases in concentration caused by a merger play an important role in our analysis under the Guidelines because highly concentrated markets with two or three large firms are conducive to anticompetitive outcomes. The lens we apply to the evidence in a merger that reduces the number of firms in a market to two or three is, and should be, different than the lens we apply to a merger that reduces the number of firms to six or seven. In the former case, as in the merger here, a presumption of competitive harm is justified, under both the express language of the Guidelines and well-established case law.³

However, we did not end our analysis there. We also considered whether other market factors, such as the possibility of entry, might alleviate our competitive concerns. In most of the markets we considered, even where the merger would reduce the number of title plant operators from three to two, we concluded that the transaction was unlikely to lessen competition because the evidence demonstrated that alternative sources of title information

2 We note that, in deciding whether to issue a complaint, the relevant standard for the Commission is whether we have “reason to believe” a merger violates Section 7 of the Clayton Act, not whether a violation has in fact been established. 15 U.S.C. § 45(b).

3 2010 HORIZONTAL MERGER GUIDELINES § 2.1.3 (“Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.”); see also *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (“Typically, the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition.”); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (merger to duopoly creates a rebuttable presumption of anticompetitive harm through direct or tacit coordination).

Statement of the Commission

beyond proprietary title plants existed. That is not the case in Oregon. We are also not persuaded that price regulation in Oregon is sufficient to address our concerns about potential competitive harm. The evidence showed that competition between underwriters occurs on nonprice dimensions, supporting our view that the transaction was likely to harm competition in the identified nine counties.

Consistent with the approach the Commission has taken in previous merger enforcement actions involving title plants,⁴ the proposed consent order addresses these competitive concerns by requiring divestiture of a copy of LPS's title plants in each of the affected counties and an ownership interest equivalent to that of LPS in the tri-county Portland-area joint plant. With the divested assets, the acquirer or acquirers will have the title plant ownership interest necessary to overcome the most significant legal impediment to compete in underwriting, thereby preserving the competition that would be lost as a result of the acquisition. There is no evidence that the proposed consent order would eliminate any efficiencies resulting from the transaction or otherwise burden the parties.

Merger analysis is necessarily predictive and requires us to make a determination as to the likely effects of a transaction. Where, as here, we have reason to believe that consumers are likely to suffer a loss of competition, and there are no countervailing efficiencies weighing against the remedy, we believe the public interest is best served by remedying the competitive concerns.

4 See, e.g., Complaint, *Fidelity Nat'l Fin., Inc.*, FTC Dkt. No. C-4300 (Sept. 16, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/09/100916fidelitycmp.pdf>; Complaint, *Fidelity Nat'l Fin., Inc.*, FTC Dkt. No. C-3929 (Feb. 25, 2000), available at <http://www.ftc.gov/sites/default/files/documents/cases/2000/02/fidelitycmp.pdf>; Complaint, *Commonwealth Land Title Ins. Co.*, FTC Dkt. No. C-3835 (Nov. 12, 1998), available at <http://www.ftc.gov/sites/default/files/documents/cases/1998/11/ftc.gov-9810127cmp.htm>; Complaint, *LandAmerica Fin. Grp., Inc.*, FTC Dkt. No. C-3808 (May 27, 1998), available at <http://www.ftc.gov/sites/default/files/documents/cases/1998/05/ftc.gov-9710115.cmp.htm>.

Dissenting Statement

Dissenting Statement of Commissioner Joshua D. Wright

The Commission has voted to issue a Complaint and Decision & Order against Fidelity National Financial, Inc. (“FNF”) to remedy the allegedly anticompetitive effects of FNF’s proposed acquisition of Lender Processing Services, Inc. (“LPS”). I dissented from the Commission’s decision because the evidence is insufficient to provide reason to believe FNF’s acquisition will substantially lessen competition for title information services in the Oregon counties identified in the Complaint in violation of Section 7 of the Clayton Act. I commend staff for their hard work in this matter. Staff has worked diligently to collect and analyze a substantial quantity of evidence related to numerous product and geographic markets within the U.S. mortgage lending industry. Based upon this evidence, I concluded there is no reason to believe the proposed transaction is likely to lessen competition in the Oregon counties identified in the Complaint. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I. Mortgage Lending Industry Background

Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title insurance underwriter must evaluate the risk that a subsequent title challenge will be made against the property. Title plants are privately owned repositories of real estate records that help underwriters examine property-specific title information in order to establish chain of title and identify any potential obstacles—such as liens or encumbrances—that could impair the transfer of title. In recent years, third-party title information services have begun to offer an alternative to title plants by providing access to the necessary data and records on a transactional or subscription basis. However, in Oregon, state law requires all title insurance underwriters to own an interest in a title plant in each county in which it issues policies. This law therefore effectively precludes a market in third-party provision of title information services.¹

1 It is important to note at the outset that Oregon’s vertical integration requirement creates a scenario in which there is no relevant market for title

Dissenting Statement

II. Coordinated Effects Analysis Under the Horizontal Merger Guidelines

The Commission's theory of anticompetitive harm in this matter is based solely upon a structural analysis. In other words, the Commission seeks to satisfy its *prima facie* burden of production to demonstrate the merger will substantially lessen competition based exclusively upon a tenuous logical link between the reduction in the number of firms that own title plants in each of the Oregon counties identified in the Complaint and a presumption that the merger between FNF and LPS will increase the likelihood of collusion or coordinated interaction among the remaining competitors for the sale of title information services.²

It is of course true that a reduction in the number of firms in a relevant market, all else equal, makes it easier for the remaining firms to coordinate or collude.³ However, this is true of any reduction of firms, whether it be from seven to six or three to two, and therefore that proposition alone would have us condemn all mergers. The pertinent question is whether and when a reduction

information services in Oregon. As a result, any competitive concerns arising from increased concentration in title plant ownership must be based upon anticompetitive effects in the downstream title insurance underwriting market in Oregon. The Commission does not allege, and there is no evidence to support the conclusion, that the merger will result in a substantial lessening of competition in the title insurance underwriting market in Oregon.

2 The Complaint appears to allege that the proposed transaction also may result in unilateral effects by stating the proposed merger will substantially lessen competition "by eliminating actual, direct, and substantial competition between Respondents Fidelity and LPS in the relevant markets." Complaint ¶ 16(a), Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). I have seen no evidence to support a unilateral effects theory of harm in either the title insurance services or title insurance underwriting markets. Nor does the Commission's Analysis to Aid Public Comment discuss the potential for a unilateral effects theory in this matter. See Analysis of the Agreement Containing Consent Order to Aid Public Comment § 4, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013). Moreover, the merger cannot possibly result in unilateral effects in the title insurance services market because no such market exists in Oregon as a result of the state's vertical integration requirement.

3 See generally George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

Dissenting Statement

in the number of firms, without more, gives reason to believe an acquisition violates the Clayton Act.⁴ The Horizontal Merger Guidelines (“Guidelines”) clarify that the focus of modern coordinated effects analysis is not merely upon the number of firms but rather “whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction.”⁵ The key economic issue underlying coordinated effects analysis is to understand how the merger changes incentives to coordinate, or, as the Guidelines explain, to examine “how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct.”⁶ Consistent with the focus on changes in post-merger incentives to coordinate rather than mere structural analysis, the Guidelines declare the federal antitrust agencies are not likely to challenge a merger based upon a coordinated effects theory of harm unless the following three conditions are satisfied: (1) “the merger would increase concentration and lead to a moderately or highly concentrated market”; (2) “the market shows signs of vulnerability to coordinated conduct”; and (3) “the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.”⁷

Although market structure is relevant to assessing the first and second conditions, the Guidelines require more than the observation that the merger has decreased the number of firms to satisfy the third condition. This is the correct approach. And it is no less correct for mergers that reduce the number of firms from three to two. Of what relevance is market structure if the Commission does not allege or otherwise describe the relevance

4 One reason to disfavor an approach that assesses the likelihood of anticompetitive effects based solely upon the number of firms in a market is that the approach is sensitive to the market definition exercise and requires great faith that we have defined the relevant market correctly.

5 U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [hereinafter 2010 Guidelines], *available at* <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

6 *Id.*

7 *Id.*

Dissenting Statement

of the reduction in the number of firms to post-merger incentives to coordinate? There is no basis in modern economics to conclude with any modicum of reliability that increased concentration -- without more -- will increase post-merger incentives to coordinate.⁸ Thus, the Guidelines require the federal antitrust agencies to develop additional evidence that supports the theory of coordination and, in particular, an inference that the merger increases incentives to coordinate.

For example, the Guidelines observe that “an acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.”⁹ In short, the Guidelines correctly, and consistent with

8 The Commission touts legal authority rooted in a long ago established legal presumption that disfavors mergers that create concentrated markets. Statement of the Commission, Fidelity National Financial, Inc., FTC File No. 131-0159, n. 2. (Dec. 23, 2013) (citing to authority); *see also* United States v. Philadelphia Nat’l Bank, 374 U.S. 321 (1963) (creating the so-called “structural presumption” that shifts the burden of proof away from the federal antitrust agencies and towards defendants in cases where the government challenges certain mergers resulting in concentrated markets). Significantly, however, modern economic learning and evidence no longer supports the foundations for the structural presumption upon which the Commission relies today. *See* Joshua D. Wright, Comm’r, Fed. Trade Comm’n, The FTC’s Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets, Remarks at the 2013 Georgetown Global Antitrust Symposium Dinner (Sept. 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf. And although *Philadelphia National Bank* remains good law in that it has not been overruled by the Supreme Court, it should not be the basis for the Commission’s decision if the economic foundations upon which the legal proposition was built no longer hold. The Commission has correctly taken a similar approach with other disavowed but not yet overturned precedent, such as, for instance, *United States v. Von’s Grocery Co.*, 385 U.S. 270 (1966).

9 *See* 2010 Guidelines, *supra* note 5, § 7.1. The Guidelines define a maverick as a firm “that plays a disruptive role in the market to the benefit of customers,” and provide a number of examples. *See id.* § 2.1.5. Each example has in common the acquisition of a firm that imposes a particularized constraint upon successful coordination before the merger. *See* Jonathan B. Baker, *Mavericks, Mergers and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U.L. REV. 135 (2002); Taylor M. Owings, *Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor*, 66 VAND. L. REV. 323 (2013).

Dissenting Statement

the modern economics of collusion, require the Commission to do more than point to a reduction in the number of firms to generate inferences of likely competitive harm. Although the acquisition of a maverick is not necessary for a coordinated effects theory, a theory consistent with the Guidelines must include a specific economic rationale explaining why—above the mere reduction in the number of firms attendant to all mergers—the acquisition of this rival is likely to eliminate or reduce a constraint upon successful coordination and thus lead to increased incentives to coordinate, or alternatively, some evidence supporting structural inferences in the context of the specific transaction.

III. Insufficient Evidence to Conclude an Increased Likelihood of Coordination Exists Post-Merger

In my view, the Commission’s coordinated effects theory and the evidence to support it do not provide a credible basis for concluding the merger between FNF and LPS will enhance incentives to coordinate. There is no evidence beyond the mere increase in the concentration of title plants in the Oregon counties identified in the Complaint that provides a reason to believe that the merger will increase the likelihood of coordination or collusion for title insurance underwriting and thereby substantially reduce competition for the same.

Significantly, because insurance rates are generally set at the state level and also because Oregon is a “prior approval” state in which underwriters must request specific rates that the regulator then approves or amends, it is unlikely that concentration in title plant ownership at the county level can increase the likelihood of collusion or coordinated interaction and thereby result in an increase in price.¹⁰ There also is no evidence that FNF’s acquisition of LPS will eliminate a maverick that is currently a constraint upon successful coordination. Furthermore, there is no

10 Notably absent from the Commission’s statement is any explanation of how the proposed transaction will increase the parties’ incentives to coordinate on non-price terms post-merger. Such analysis is fundamental to modern merger analysis under the Guidelines. See 2010 Guidelines, *supra* note 5, § 7.1 (“The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction.”).

Dissenting Statement

evidence that title insurance underwriters can effectively coordinate on non-price factors, such as service and turnaround time. Lastly, there is no empirical evidence demonstrating that similar levels and changes in concentration in other title information service markets have resulted in a reduction in price or non-price competition.

Section 7 of the Clayton Act requires that the Commission first find that a merger likely will substantially lessen competition prior to agreeing to enter into a consent agreement with merging parties. Because there is insufficient evidence to conclude that the proposed transaction will substantially lessen competition, I respectfully dissent and believe the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

* * * * *

Complaint

IN THE MATTER OF

AARON’S, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4442; File No. 122 3264
Complaint, March 10, 2014 – Decision, March 10, 2014

This consent order addresses Aaron’s, Inc.’s use of PC Rental Agent, a privacy-invasive software that many of its franchisees installed on computers rented to consumers. The complaint alleges that Aaron’s knowingly assisted its franchisees by allowing them to access DesignerWare’s website, which was necessary in order for them to use PC Rental Agent to activate Detective Mode and secretly monitored consumers’ activities on rented computers. Second, Aaron’s corporate server was used to transmit and store a voluminous number of emails containing Detective Mode content. The complaint further alleges that Aaron’s knew the data being gathered by Detective Mode could be highly intrusive and invaded consumers’ privacy; and that, as a result of Aaron’s practices, consumers were substantially harmed. The consent order requires the destruction of any data using monitoring or tracking technology without the requisite notice and consent or obtained under false pretenses, and mandates the encryption of any properly collected data when it is transmitted. The order also requires Aaron’s to oversee and monitor its franchisees to ensure that their conduct complies with the core constraints imposed on Aaron’s, which prohibits the deceptive gathering of consumer information such as using fake software registration notices or similar deceptive tactics.

Participants

For the *Commission*: Julie K. Mayer and Tracy S. Thorleifson.

For the *Respondent*: Kristy Brown and Jim Harvey, Alston & Bird LLP.

COMPLAINT

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

1. Respondent Aaron’s, Inc., (“Aaron’s” or “respondent”), is a Georgia corporation with its principal office or place of business at 309 E. Paces Ferry Road, N.E., Atlanta, Georgia 30305.