

Complaint

IN THE MATTER OF

MARKER VÖKL (INTERNATIONAL) GMBHCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4476; File No. 121 0004**Complaint, July 3, 2014 – Decision, July 3, 2014*

This consent order addresses Marker Vökl (International) GmbH's agreement with Tecnica Group SpA. not to compete for the services of athlete endorsers and not to compete for the services of employees. The complaint alleges that both the athlete non-compete agreement and the employee non-compete agreement violate Section 5 of the Federal Trade Commission Act. The consent order prohibits Marker Vökl from, directly or indirectly, entering into, or attempting to enter into, an agreement with a ski equipment competitor to forbear from competing for U.S. athletes to sign endorsement contracts for the company's ski equipment, and from entering into an agreement with a ski equipment competitor to forbear from competing for the services of any U.S. employee.

Participants

For the *Commission*: Joseph Baker, Jennifer Nagle, and Mark Taylor.

For the *Respondent*: Andrew Berg, Greenberg Traurig, LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Marker Vökl (International) GmbH ("Marker Vökl"), a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

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Nature of the Case

1. This action addresses anticompetitive conduct in the ski equipment industry. Beginning in or about 2004, Marker Völkl and its rival Tecnica Group, SpA. (“Tecnica”) agreed not to compete with one another for the endorsement services of ski athletes. In 2007, the companies further agreed not to compete for employees. Both agreements are unfair methods of competition, and violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Marker Völkl

2. Marker Völkl is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland, with its office and principal place of business located at Ruessenstrasse 6, 6341 Baar, Switzerland. Marker Völkl manufactures, markets, and sells skis (under the Völkl brand) and ski bindings (under the Marker brand). Marker Völkl sells its skis and ski bindings in or into the United States. Since 2007, Marker Völkl has been a wholly-owned subsidiary of its parent, Jarden Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 555 Theodore Fremd Avenue, Rye, New York 10580.

3. At all times relevant herein, Marker Völkl has been, and is now, a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. The acts and practices of respondent, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

The Ski Equipment Businesses of Marker Völkl and Tecnica

5. Marker Völkl manufactures, markets, and sells skis (Völkl brand) and ski bindings (Marker brand).

6. For many years, Tecnica specialized in the manufacture and sale of ski boots. Tecnica acquired the Nordica ski equipment

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unit from Benetton Group SpA. in 2003. The Nordica unit manufactured and sold both skis and ski boots.

7. Tecnica acquired a second ski manufacturer, Blizzard GmbH, in 2006. Currently, Tecnica, is the fourth largest seller of skis in the United States.

8. In 1992, Tecnica and Marker Völkl began collaborating in the marketing and distribution of certain complementary ski equipment: Völkl brand skis, and Tecnica brand ski boots. Initially, these companies were not competitors: Tecnica did not have a ski product; Marker Völkl did not have a ski boot product.

9. The ski brands later acquired by Tecnica (Nordica and Blizzard brands) were not included in the Tecnica/Marker Völkl collaboration. That is, Tecnica independently manufactures, markets, and distributes Nordica skis and Blizzard skis in competition with Völkl skis.

10. Tecnica and Marker Völkl terminated their collaboration in the United States in 2008, and in other regional markets over the period 2008 through 2010.

Competition for Ski Athlete Endorsements

11. The most effective and most costly tool for marketing ski equipment consists of securing endorsements from prominent ski athletes. Endorsers include world class and professional athletes who compete in organized ski competitions (such as the World Cup and the Olympics), “junior” athletes who show the potential to develop into world class athletes, skiers whose performance attracts significant media attention (such as extreme skiers), and other “opinion leaders” (such as ski instructors and ski patrollers).

12. Endorsement agreements between a ski equipment company and a ski athlete are typically of short duration, and are subject to renewal. Commonly, the ski athlete: (i) authorizes the company to use the athlete’s name and likeness in promotions and in advertisements, (ii) agrees to use and promote the company’s equipment on an exclusive basis, (iii) agrees to display the company’s equipment when the athlete can attract media exposure, such as by taking the skis to the podium when receiving

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a medal, and/or (iv) agrees to appear at promotional events on behalf of the company. The association of a ski equipment brand with a prominent ski athlete generates sales, goodwill, and other benefits for the company.

13. As consideration for the ski athlete's endorsement services, the ski equipment company commonly provides the ski athlete with monetary compensation (keyed to the athlete's success in competitions), support services at competitions, free or discounted equipment, and/or travel expenses.

14. Ordinarily, ski equipment companies compete with one another to secure the endorsement services of prominent ski athletes. At the expiration of an endorsement agreement, a ski athlete can be induced to switch from one company to another in return for greater compensation, in much the same way that an employee can be induced to change employers in return for a higher salary or better benefits.

15. Endorsement agreements are the primary source of income for professional ski athletes. Among professional skiers, the common wisdom is: To make money in this sport, ski fast—and endorsement deals may follow.

The Anticompetitive Agreements

16. In or about 2004, Marker Völkl and Tecnica agreed not to compete with one another to secure the endorsement services of ski athletes. Specifically, Marker Völkl agreed not to solicit, recruit, or contract with a ski athlete who previously endorsed Nordica brand skis or who was otherwise claimed by Tecnica. Tecnica agreed not to solicit, recruit, or contract with a ski athlete who previously endorsed Völkl brand skis or who was otherwise claimed by Marker Völkl.

17. In 2005, Marker Völkl and Blizzard GmbH agreed not to compete with one another to secure the endorsement services of ski athletes. Specifically, Marker Völkl agreed not to solicit, recruit, or contract with a ski athlete who previously endorsed Blizzard brand skis or who was otherwise claimed by Blizzard GmbH. Blizzard GmbH agreed not to solicit, recruit, or contract

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with a ski athlete who previously endorsed Völkl brand skis or who was otherwise claimed by Marker Völkl.

18. In or about January 2007 – shortly after Tecnica's acquisition of Blizzard GmbH – executives of Marker Völkl met with executives of Tecnica to review the inter-company collaboration and the non-compete agreements. Marker Völkl and Tecnica reaffirmed that the companies would not compete with one another to secure the endorsement services of ski athletes. Marker Völkl and Tecnica intended that these athlete non-compete agreements would enable them to avoid bidding up the cost of securing athlete endorsements.

19. At the January 2007 meeting, Marker Völkl and Tecnica also agreed to expand the scope of their non-compete agreements. Marker Völkl and Tecnica agreed not to compete for the services of any employee. Specifically, Marker Völkl agreed not to solicit, recruit, or contract with any employee of Tecnica. Tecnica agreed not to solicit, recruit, or contract with any employee of Marker Völkl. Marker Völkl and Tecnica intended that this employee non-compete agreement would enable them to avoid bidding up the salaries paid to employees.

20. In furtherance of the athlete non-compete agreements and the employee non-compete agreement, executives of Marker Völkl and Tecnica communicated the terms of these agreements to company managers with responsibility for recruiting ski athletes and for hiring employees.

21. Christoph Bronder, the President and Chief Executive Officer of Marker Völkl, aggressively policed the Marker Völkl/Tecnica non-compete agreements, and complained to Tecnica when he detected a potential violation.

22. The restraints on competition agreed to by Marker Völkl and Tecnica were not reasonably necessary for the formation or efficient operation of the collaboration between the companies. The ski businesses of Tecnica (the Nordica and Blizzard brands) were at all times outside of and apart from the collaboration. Consequently, the restraints did not align the disparate incentives of the companies in a manner that promoted the cognizable efficiency goals of the collaboration. Also, the restraints

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adversely affected competition for – and the compensation available to – athletes and employees whose services were unrelated to the collaboration.

23. Marker Völkl's conduct, as alleged herein, had the purpose, capacity, tendency, and likely effect of (i) restraining competition unreasonably, (ii) harming the economic interests of ski athletes, and (iii) harming the economic interests of the affected employees of Marker Völkl and Tecnica.

Violations Alleged

24. As set forth in paragraphs 16 through 23 above, Marker Völkl and Tecnica agreed to restrain competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of July, 2014, issues its complaint against respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Marker Völkl (International) GmbH ("Marker Völkl"), a corporation, hereinafter sometimes referred to as "Respondent," and Respondent having been furnished thereafter with a copy of a draft of Complaint that counsel for the Commission proposed to

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present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft 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 had violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Marker Vökl is a corporation organized, existing, and doing business under and by virtue of the laws of Switzerland with its office and principal place of business located at Ruessenstrasse 6, 6341 Baar, Switzerland. Marker Vökl is a wholly-owned subsidiary of its parent, Jarden Corporation, which is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 555 Theodore Fremd Avenue, Rye, New York 10580.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “Respondent” means Marker Völkl (International) GmbH, its directors, officers, employees, agents, representatives, successors, and assigns, and includes its parent, all subsidiaries, divisions, groups, and affiliates controlled by them, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Agreement” means any agreement, arrangement, contract, combination, or understanding, formal or informal, written or unwritten, direct or indirect, between two or more Persons.
- D. “Endorsement Agreement” means an Agreement between a Ski Company and a living natural person providing in part that, for consideration, (1) the Ski Company is authorized to utilize the name and/or likeness of the living natural person in connection with the advertisement, promotion, or sale of Ski Equipment, and/or (2) the living natural person will use and promote the Ski Company’s Ski Equipment; for the avoidance of doubt, the following Agreements are not Endorsement Agreements for the purposes of this Order: (1) any Agreement between Respondent and a living natural person who is an employee of Respondent at the time he or she enters into the Agreement; (2) any Agreement between Respondent and another Ski Company in connection with the exclusive licensing of intellectual property relating to Ski Equipment; or (3) any exclusive Agreement between Respondent and a retailer and/or distributor of Ski Equipment that is not a Ski Company.

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- E. “Person” means any living natural person, corporate entity, sole proprietorship, partnership, association, joint venture, or trust.
- F. “Ski Company” means any Person that, for the purpose of sale, resale, distribution, or marketing in or into the United States, manufactures Ski Equipment or causes Ski Equipment to be manufactured, and includes all the directors, officers, employees, consultants, agents and representatives of the Ski Company acting on behalf of or at the direction of the Ski Company; for the avoidance of doubt, “Ski Company” does not include: (1) any employee of Respondent to the extent he or she is acting on his or her own behalf; or (2) ski teams or ski pools.
- G. “Ski Equipment” means alpine snow skis, ski boots, or ski bindings.
- H. “U.S. Skier” means any living natural person who is engaged or has engaged in the sport of alpine skiing, and who, at the time the Ski Companies enter into an Agreement that, but for the proviso in Paragraph II.A. of this Order, would be prohibited by Paragraph II.A. of this Order, is:
 - 1. a citizen or permanent resident alien (as defined by the US Citizenship and Immigration Services) of the United States;
 - 2. a member of the U.S. Ski and Snowboard Association;
 - 3. a member of the U.S. Ski Team;
 - 4. a representative of the United States at the NorAm Cup, the World Cup, or any competition sanctioned by the International Ski Federation; or
 - 5. a representative of the United States at the Winter Olympics.

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- I. “U.S. Employee” means any living natural person who is a citizen or permanent resident alien (as defined by the US Citizenship and Immigration Services) of the United States or whose principal place of employment is within the United States.

II.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, distributing, marketing, or selling Ski Equipment in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, directly or indirectly, or through any corporate or other device:

- A. Inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any Agreement, either express or implied, with any Ski Company or Ski Companies (other than Respondent) to forbear from soliciting, cold calling, recruiting, hiring, contracting with, or otherwise competing for any U.S. Skier to be a party to an Endorsement Agreement.

Provided, however, that Respondent may enter into, attempt to enter into, or comply with a written agreement with any other Ski Company or Ski Companies to forbear from competing for any U.S. Skier to be a party to an Endorsement Agreement that (1) is reasonably related to a lawful joint venture agreement, or lawful merger, acquisition or sale agreement; and (2) is reasonably necessary to achieve such agreement’s procompetitive benefits.

- B. Inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any Agreement, either express or implied, with any Ski Company or Ski Companies (other than Respondent)

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to forbear from soliciting, cold calling, recruiting, hiring, contracting with, or otherwise competing for any U.S. Employee of a Ski Company.

Provided, however, that Respondent may enter into, attempt to enter into, or comply with a written agreement with any other Ski Company or Ski Companies to forbear from competing for any U.S. Employee of a Ski Company that (1) is reasonably related to a lawful joint venture agreement, or lawful merger, acquisition or sale agreement; and (2) is reasonably necessary to achieve such agreement's procompetitive benefits.

Provided, further, that Respondent may enter into, attempt to enter into, or comply with written agreements with any other Ski Company or Ski Companies to forbear from competing for any employee of a Ski Company if such agreement: (1) is in settlement of a bona fide dispute relating to the enforcement of an employee's non-compete or non-solicitation agreement with the Respondent or the other Ski Company; or (2) is included in non-disclosure or confidentiality agreements that Respondent has entered into in connection with conducting due diligence relating to a proposed and bona fide merger, acquisition, or consolidation.

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

- A. Within sixty (60) days after the date the Order is issued, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order.
- B. One (1) year after the date the Order is issued, annually for the next two (2) years on the anniversary of the date the Order is issued, and at other times as the

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Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which Respondent has complied and is complying with the Order.

IV.

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

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

V.

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

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

Analysis to Aid Public Comment

VI.

IT IS FURTHER ORDERED that this Order shall terminate on July 3, 2034.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing consent order (“Agreement”) from Marker Völkl (International) GmbH (“Marker Völkl”) and a separate Agreement from Tecnica Group SpA. (“Tecnica”). Marker Völkl and Tecnica are hereinafter sometimes referred to collectively as “Respondents.”

Respondents are manufacturers of various types of ski equipment. The Agreements settle charges that Marker Völkl and Tecnica both violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with each other not to compete for the services of athlete endorsers and not to compete for the services of employees.

The Agreements have been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreements and comments received, and will decide whether it should withdraw from the Agreements or make final the orders contained in the Agreements.

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

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The proposed orders are for settlement purposes only and do not constitute an admission by the Respondents that they violated the law or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

The Complaints

This action addresses anticompetitive conduct in the ski equipment industry. The allegations of the Complaints are summarized below.

Background

Marker Völkl and Tecnica manufacture, market, and sell ski equipment. The most effective and most costly tool for marketing ski equipment consists of securing endorsements from prominent ski athletes.

Endorsement agreements between a ski equipment company and a ski athlete are typically of short duration, and are subject to renewal. Commonly, the ski athlete: (i) authorizes the company to use the athlete's name and likeness in promotions and in advertisements, (ii) agrees to use and promote the company's equipment on an exclusive basis, (iii) agrees to display the company's equipment when the athlete can attract media exposure, such as by holding up the skis at the end of a race, or taking the skis to the podium when receiving a medal, and/or (iv) agrees to appear at promotional events on behalf of the company. The association of a ski equipment brand with a prominent ski athlete generates sales, goodwill, and other benefits for the company.

As consideration for the ski athlete's endorsement services, the ski equipment company commonly provides the ski athlete with monetary compensation (keyed to the athlete's success in competitions), support services at competitions, free or discounted equipment, and/or travel expenses.

Ordinarily, ski equipment companies compete with one another to secure the endorsement services of prominent ski athletes. At the expiration of an endorsement agreement, a ski athlete can be induced to switch from one company to another in

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return for greater compensation, in much the same way that an employee can be induced to change employers in return for a higher salary or better benefits.

Endorsement agreements are the primary source of income for professional ski athletes.

The Marker Völkl/Tecnica Collaboration

In 1992, Marker Völkl began collaborating with Tecnica in the marketing and distribution of certain complementary ski equipment: Völkl brand skis, and Tecnica brand ski boots. Initially, these companies were not competitors: Tecnica did not have a ski; Marker Völkl did not have a ski boot.

In 2003, Tecnica acquired the Nordica ski equipment unit from Benetton Group SpA. Nordica manufactured and sold both skis and ski boots. Tecnica acquired a second ski manufacturer, Blizzard GmbH (“Blizzard”), in 2006.

The ski brands acquired by Tecnica (Nordica and Blizzard brands) were not included in the Marker Völkl/Tecnica collaboration. That is, Tecnica independently manufactures, markets, and distributes Nordica skis and Blizzard skis, in competition with Völkl skis.

The Challenged Conduct

Marker Völkl and Tecnica agreed not to compete with one another to secure the services of ski athletes and employees.

Beginning in or about 2004, Marker Völkl and Tecnica agreed not to compete with one another to secure the endorsement services of ski athletes. Specifically, Marker Völkl agreed not to solicit, recruit, or contract with a ski athlete who previously endorsed Tecnica’s skis, or who was otherwise claimed by Tecnica. Tecnica agreed not to solicit, recruit, or contract with a ski athlete who previously endorsed Marker Völkl’s skis, or who was otherwise claimed by Marker Völkl.

In 2007, Marker Völkl and Tecnica agreed to expand the scope of their non-compete agreements. Marker Völkl and

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Tecnica agreed not to compete for the services of any employee. Specifically, Marker Völkl agreed not to solicit, recruit, or contract with any employee of Tecnica. Tecnica agreed not to solicit, recruit, or contract with any employee of Marker Völkl.

Marker Völkl and Tecnica intended that these non-compete agreements would enable them to avoid bidding up (i) the cost of securing athlete endorsements, and (ii) the salaries paid to employees.

Respondents' conduct had the purpose, capacity, tendency, and likely effect of (i) restraining competition unreasonably, (ii) harming the economic interests of ski athletes, and (iii) harming the economic interests of the affected employees of Marker Völkl and Tecnica.

Legal Analysis

The Complaint alleges that both the athlete non-compete agreement and the employee non-compete agreement violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

These agreements are appropriately analyzed under the framework articulated by the Commission in the *Polygram* case.¹ Agreements between competitors not to compete for professional services, for employees, or for other inputs, are presumptively anticompetitive or inherently suspect, if not *per se* unlawful.²

¹ *In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310 (F.T.C. 2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). *See also North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *In the Matter of Realcomp II Ltd., A Corp.*, 2009-2 Trade Cas. (CCH) ¶ 76784 (F.T.C. Oct. 30, 2009).

² *See, e.g., United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). *See also Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (stating that *per se* rule would “likely apply” to allegations of actual agreement among competitors to fix employee salaries); *Knevelbaard v. Kraft Foods, Inc.*, 232 F.3d 979, 988-89 (9th Cir. 2000) (“Most courts understand that a buying cartel’s low prices are illegal Clearly mistaken is the occasional court that considers low buying prices pro-competitive or that thinks sellers receiving illegally low prices do not suffer antitrust injury.”); *NBA v. Williams*, 45 F.3d 684, 687 (2d Cir. 1995) (“Absent justification under the Rule of Reason or some defense, employers who compete for labor may not agree among themselves to purchase that labor only on certain specified terms and conditions Such conduct

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When an agreement is deemed inherently suspect, a party may avoid summary condemnation under the antitrust laws by advancing a legitimate (cognizable and plausible) efficiency justification for the restraint.³

Here, the Commission finds reason to believe that the athlete non-compete agreement and the employee non-compete agreement serve no pro-competitive purpose. More specifically, these restraints are not reasonably necessary for the formation or efficient operation of the marketing collaboration between Marker Völkl and Tecnica. That the restraints are, at a minimum, overbroad is demonstrated by the fact that the agreements adversely affect competition for – and the compensation available to – athletes and employees who have no relationship with the collaboration.⁴ Further, Respondents cannot plausibly claim that the restraints serve to align the incentives of the companies in a manner that promotes the cognizable efficiency goals of their collaboration. Rather, the ski businesses of Tecnica (the Nordica and Blizzard brands) were at all times outside of and apart from the collaboration.⁵ In sum, the Respondents did not provide evidence demonstrating why Marker Völkl and Tecnica cannot cooperate in the marketing of

would be *per se* unlawful.”); *Vogel v. Am. Soc’y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) (“[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal *per se*.”); *U.S. v. eBay*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013) (denying defendant’s motion to dismiss government’s claim that an agreement between employers not to solicit or hire each other’s employees was a naked restraint of trade subject to *per se* or quick look analysis).

These cases must be distinguished from (1) non-compete agreements between employers and their employees and (2) a no-hire agreement between the seller of a business and its buyer. Non-compete or no-hire agreements in those contexts do not generally receive *per se* condemnation to the extent that the courts deem the restraints ancillary to a legitimate and procompetitive transaction.

³ *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

⁴ *Cf.*, Federal Trade Comm’n and U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) § 3.36(b).

⁵ *See In the Matter of Polygram Holding, Inc., et al.*, 136 F.T.C. 310, 322, 357-63 (F.T.C. 2003).

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certain ski products, yet at the same time compete for the services of endorsers and employees.

The athlete non-compete agreement and the employee non-compete agreement serve to protect Marker Völkl and Tecnica from the rigors of competition, with no advantage to consumer welfare. The justifications for the non-compete agreements proffered by the Respondents were neither supported by the evidence nor cognizable under the antitrust laws. Because there is no plausible and cognizable efficiency rationale for the non-compete agreements, these inherently suspect agreements constitute unreasonable restraints on trade, and are properly judged to be illegal.

The Proposed Orders

The proposed Orders are designed to remedy the unlawful conduct charged against Respondents in the Complaints and to prevent the recurrence of such conduct.

The proposed Orders enjoin Marker Völkl and Tecnica from, directly or indirectly, entering into, or attempting to enter into, an agreement with a ski equipment competitor to forbear from competing for U.S. athletes to sign endorsement contracts for the company's ski equipment. The proposed Orders also enjoin Marker Völkl and Tecnica from entering into an agreement with a ski equipment competitor to forbear from competing for the services of any U.S. employee. A proviso to the cease and desist requirements allows reasonable restraints ancillary to a legitimate joint venture.

The proposed Orders will expire in 20 years.

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IN THE MATTER OF

AMERICAN PLASTIC LUMBER, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4478; File No. 132 3200
Complaint, July 24, 2014 – Decision, July 24, 2014

This consent order addresses American Plastic Lumber, Inc.'s green claims made while promoting its plastic lumber products. The complaint alleges that the post-consumer recycled plastic in Respondent's products was substantially less than Respondent represented. The consent order prohibits Respondent from making representations regarding the recycled content, the post-consumer recycled content, or the environmental benefit of any product or package unless they are true, not misleading, and substantiated by competent and reliable evidence.

Participants

For the *Commission*: Robert M. Frisby.

For the *Respondent*: James A. Kaminski, Hughes & Bentzen, PLLC.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Plastic Lumber, Inc., a corporation ("Respondent"), 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 American Plastic Lumber, Inc. is a California corporation with its principal office or place of business at 3867 Dividend Drive, Suite B, Shingle Springs, California 95682.
2. Respondent has advertised, offered for sale, sold, and distributed plastic lumber products, including picnic tables, benches, trash receptacles, wheel stops, and speed bumps, to end-use consumers and businesses in the construction industry.