

Complaint

IN THE MATTER OF

**ZF FRIEDRICHSHAFEN AG AND TRW
AUTOMOTIVE HOLDINGS CORP.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT**

*Docket No. C-4520; File No. 141 0235
Complaint, May 5, 2015 – Decision, June 11, 2015*

This consent order resolves concerns regarding the \$12.4 billion acquisition by ZF Friedrichshafen AG (“ZF”) of TRW Automotive Holding Corp (“TRW”). ZF and TRW are two of the world’s largest auto parts suppliers, and two of only three North American suppliers of heavy vehicle tie rods. The complaint alleges that the merger would eliminate direct competition between ZF and TRW and that reducing the number of competitors from three to two would increase the likelihood of coordinated interaction between a combined ZF/TRW and its only other competitor for heavy vehicle tie rods in North America. The consent order eliminates the competitive concerns raised by ZF’s acquisition of TRW. Under the order, the combined company is required to divest TRW’s North American and European linkage and suspension business for heavy and light vehicles (which includes heavy vehicle tie rods). ZF and TRW are also required to preserve the assets until they are divested. A monitor will ensure that the merging parties comply with their obligations.

Participants

For the *Commission*: *Cem Akleman and Stephen Antonio.*

For the *Respondents*: *Peter Thomas, Simpson Thacher & Bartlett LLP; and Steven Holley, Sullivan & Cromwell LLP.*

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Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent ZF Friedrichshafen AG (“ZF”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent TRW Automotive Holdings Corp. (“TRW”), a corporation subject to the jurisdiction of the Commission, 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 (“FTC

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Act”), as amended, 15 U.S.C. § 45, 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 as follows:

I. RESPONDENTS

1. Respondent ZF Friedrichshafen AG is a stock corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Friedrichshafen, Germany.

2. Respondent TRW Automotive Holdings Corp. is a public corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 12001 Tech Center Drive, Livonia, MI 48150.

3. Respondent ZF is engaged in, among other activities, the design, manufacture, and sale of powertrain, chassis, and driveline automobile components for both light and heavy vehicles.

4. Respondent TRW is engaged in, among other activities, the design, manufacture, and sale of chassis systems, electronic systems, and passive occupant safety systems for both light and heavy vehicles.

5. Respondents are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

6. Pursuant to an Agreement and Plan of Merger dated September 15, 2014, the parties agreed that ZF would acquire TRW for \$105.60 per share in an all-cash deal valued at approximately \$12.4 billion (“the Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

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III. THE RELEVANT MARKET

7. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is heavy vehicle tie rods. A heavy vehicle is generally defined as one that weighs six tons or more, and a tie rod is a rigid connector that links a vehicle's individual wheels with the steering control mechanism.

8. For the purposes of this Complaint, the relevant geographic market in which to analyze the effects of the Acquisition on the heavy vehicle tie rod market is North America. The size and weight of heavy vehicle tie rods generally make it uneconomical to ship them long distances.

IV. STRUCTURE OF THE MARKET

9. The market for heavy vehicle tie rods in North America is already highly concentrated. The North American heavy vehicle tie rod market is served primarily by ZF, TRW, and USK Internacional S.A. DE C.V. ("Urresko"). These three firms have a combined share of nearly 99% of the market based on unit sales. The merger would increase the Herfindahl-Hirschman Index from 4,218 to 5,046, an increase of 828 points.

10. Firms other than ZF, TRW, and Urresko account for approximately 1% of the North American heavy vehicle tie rod market.

V. ENTRY CONDITIONS

11. Entry into the heavy vehicle tie rod market is not likely to deter or counteract any anticompetitive effects created by the Acquisition. Entry is unlikely in light of the relatively small market size, extremely strong position of incumbents, capital costs, switching costs, and knowledge barriers that exist.

VI. EFFECTS OF THE ACQUISITION

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition in violation of Section 7 of the

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Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition would increase the likelihood of coordinated interaction among the remaining competitors in the North American heavy vehicle tie rod market and eliminate direct competition between ZF and TRW, resulting in the increased probability that customers would pay higher prices for heavy vehicle tie rods.

VII. VIOLATIONS CHARGED

13. The allegations contained in Paragraphs 1 through 12 above are hereby incorporated by reference as though fully set forth here.

14. The Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

15. The Acquisition described in Paragraph 6, 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 FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of May, 2015, issues its Complaint against said Respondents.

By the Commission, Commissioner Wright dissenting.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent ZF Friedrichshafen AG (“ZF”) of Respondent TRW Automotive Holdings Corp. (“TRW”), hereinafter referred to as “Respondents,” 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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 alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and 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 ZF Friedrichshafen AG is a stock corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic

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of Germany, with its office and principal place of business located at Friedrichshafen, Germany.

2. Respondent TRW Automotive Holdings Corp. is a public corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 12001 Tech Center Drive, Livonia, MI 48150.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I.**

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

- A. “ACCO Execution Date” means the date upon which Respondents have executed the Agreement Containing Consent Orders pursuant to which this Order has been issued.
- B. “Acquirer” means the Person approved by the Commission to acquire the TRW L&S Business pursuant to this Order.
- C. “Acquisition” means the proposed acquisition of TRW by ZF as described and contemplated by the Agreement and Plan of Merger dated September 15, 2014, as amended, between ZF and TRW.
- D. “Acquisition Date” means the date the Acquisition is consummated.
- E. “Books and Records” means any and all original, copies, drafts, and final versions of all books, records, files, customer files, customer lists, customer

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purchasing histories, vendor files, vendor lists, advertising and marketing materials, sales materials, technical information, architectural drawings and blueprints of any kind, databases, financial information, reports, regulatory materials, or documents, information, and files of any kind, regardless of whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media.

- F. “Commission” means the Federal Trade Commission.
- G. “Contracts” means all real and personal property leases, software licenses, Intellectual Property licenses, warranties, guaranties, insurance agreements, employment contracts, all contracts of any kind relating to construction, customer contracts, sales contracts, supply agreements, utility contracts, collective bargaining agreements, confidentiality agreements, non-disclosure agreements, and contracts or agreements of any kind.
- H. “DAS” means 100% of the shares of TRW - DAS a.s., a joint stock company, which company owns all of Respondents’ rights, title, and interests in the Facility Assets:
 - 1. Located at the real property described in Exhibit 1 to this Decision and Order; and,
 - 2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.
- I. “Direct Costs” means cost not to exceed the cost of labor, material, travel, freight or other transportation, processing, and other expenditures to the extent the costs are directly incurred to provide Transitional Services or to perform a Transition Required Input Supply Agreement. “Direct Cost” to a Commission-

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approved Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

- J. "Divestiture Agreement" means one or more agreements approved by the Commission between Respondents and an Acquirer divesting the TRW L&S Business as required by this Order. The Divestiture Agreement includes, but is not limited to, the Dusseldorf Lease, any License Back, any Transition Services Agreement, any Transition Required Inputs Supply Agreement, and any Transition Trademark Assistance Agreement.
- K. "Divestiture Date" means the date upon which the divestiture required by this Order is consummated.
- L. "Divestiture Trustee" means the Divestiture Trustee appointed pursuant to Paragraph VI of this Order.
- M. "Dusseldorf Design, Engineering & Sales Support" means:
 - 1. All of Respondents' rights, title, and interests in the Facility Assets:
 - a. Located at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany (but shall exclude any interest in any owned or leased real property itself, or any buildings or improvements on owned or leased real property, together with all easements, rights of way, and appurtenances); and,
 - b. Relating to the research and development, design and engineering support activities for the development of L&S Component designs and process specifications and prototype development, production and testing, as well as purchasing, sales and marketing support activities, undertaken at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany;

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Provided, however, Dusseldorf Design, Engineering & Sales Support excludes any Facility Assets related to products other than L&S Components.

- N. “Dusseldorf Lease” means an agreement for the Acquirer to lease upon commercially reasonable terms the areas within the buildings located at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany which are, as of the ACCO Execution Date, used in the ordinary course for the Dusseldorf Design, Engineering & Sales Support (or which any business plan or other planning document in existence as of the ACCO Execution Date contemplates being accomplished through use of the Dusseldorf Design, Engineering & Sales Support, and to the extent not contemplated to be covered through other assets included in the TRW L&S Business as of the ACCO Execution Date). The term of the Dusseldorf Lease shall not exceed one (1) year; *provided, however*, at the option of the Acquirer, the Dusseldorf Lease may be extended for an additional period of six (6) months but only insofar as the lease covers the right to access and use and produce prototypes and to use testing equipment located at Hansa Allee 190, Düsseldorf, Rheinland-Pfalz, 40547, Germany. The Dusseldorf Lease shall also provide by lease or other written agreement the right for the Acquirer to use fixtures, equipment, utility services, computers, office equipment, and other tangible property of every kind as may be necessary for the Acquirer to use leased areas of the buildings. The Dusseldorf Lease shall also provide easements or other reasonable access across Respondents’ real property to allow for the Acquirer to use the leased property in a commercially reasonable manner. All of the terms of the Dusseldorf Lease shall be sufficient to allow the Acquirer to use the leased property in a manner to achieve the purposes of this Order. The Dusseldorf Lease shall include terms to prevent the Acquirer from disclosing and Respondents from acquiring or using Material Confidential Information about the Acquirer’s conduct of business at the leased site and shall obligate Respondents and

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the Acquirer to comply fully with all terms to ensure that Material Confidential Information will not be exchanged between Respondents and the Acquirer and that Respondents will not use any Material Confidential Information of the TRW L&S Business except as required or permitted by this Decision and Order and Order and the Hold Separate Order.

- O. “Equivalent Employee Benefits” means any one or more of the TRW Employee Benefits that Respondents are unable to continue to provide after the Acquisition Date. Equivalent Employee Benefits shall provide substantially the same or greater economic benefit to each of the TRW Employees as provided by the TRW Employee Benefit no longer provided to the TRW Employee. With respect to health insurance benefits or the like, Respondents shall structure, provide, and administer the Equivalent Employee Benefits so as to prevent TRW Employees from the need to satisfy additional annual or other periodic deductibles before coverage begins, from making co-payments for medical, dental, or psychological care greater than those required under the TRW Employee Benefits, and from making greater co-payments for pharmacological products than those required under the TRW Employee Benefits. With respect to any TRW Employee who has the option to acquire stock in TRW as part of the TRW Employee Benefits, Respondent shall provide a financial benefit (without the option to purchase additional TRW stock) to the TRW Employee of substantially equivalent economic value.
- P. “Excluded Intellectual Property” means:
1. All Intellectual Property that has not been used or planned to be used by the TRW L&S Business since January 1, 2014; and,
 2. All Trademarks, including, without limitation, the TRW trademark.
- Q. “Facility Assets” means:

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1. All real property interests, including rights, title, and interests in and to owned or leased property (subject to the terms of such lease agreements), together with all easements, rights of way, buildings, improvements, and appurtenances;
 2. All applicable federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, necessary for the operations of, and conduct of business at, such applicable facility, to the extent held by Respondents and with respect to which the transfer thereof is permitted by law, *provided, however*, that Respondents shall cooperate with the Acquirer and reasonably assist the Acquirer in securing any federal, state, and local regulatory agency registrations, permits, and applications whose transfer is not permitted by law; and
 3. All fixtures, equipment, machinery, tools, vehicles, personal property, or tangible property of any kind located at such applicable facility that is owned or leased by Respondents, or that Respondents have the legal right to use, or to have the custody or control of (but subject to the terms of such lease or use agreements), that is used in the TRW L&S Business.
- R. “Governmental Entity” means any federal, provincial, state, county, local, or other political subdivision of the United States, any European country, or any other country, or any department or agency thereof.
- S. “Hold Separate Order” means the Order to Hold Separate and Maintain Assets (including any modifications thereto) issued by the Commission in this matter.
- T. “Hold Separate Monitor” means the Person approved by the Commission to serve as a Hold Separate Monitor pursuant to the Hold Separate Order issued by the Commission.

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- U. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by any Person, and all associated rights thereto, including all of the following in any jurisdiction throughout the world: (i) all Patents; (ii) all trade secrets, Know-how, and confidential or proprietary information (including ideas, research and development, formulas, compositions, technical data and information, blue prints, designs, drawings, specifications, protocols, quality control information, customer and supplier lists, pricing and cost information, business and marketing plans and proposals, and all other data, technology, and plans); (iii) all Trademarks, brand names, commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered Trademarks, trade dress, logos, slogans, service marks, internet website content and internet domain names, together with all translations, adaptations, derivations, and combinations thereof, and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith; (iv) all copyrightable works, all registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations, and renewals in connection therewith; (v) all computer software (including source code, executable code, data, databases, and related documentation); (vi) all advertising and promotional materials; and (vii) all rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.
- V. “Inventories” means:
1. All supplies and inventory of one or more of any of the L&S Components; and,
 2. All supplies and inventory of raw materials and supplies (including, but not limited to, Required Inputs) relating to the research, engineering, manufacture, marketing, and sale of any one or more of the L&S Components.

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- W. “License Back” means a perpetual, royalty-free license from the Acquirer for Respondents to use Intellectual Property, which Intellectual Property was delivered to or used by TRW businesses other than the TRW L&S Business prior to March 12, 2015 (which is described in Confidential Appendix A to this Decision and Order), as needed for the sole purpose of the research, development, production, manufacture, marketing, and sale of products and for such fields of use as follows:
1. Tie rods used in TRW’s non-competing steering business currently at TRW’s Schalke facility (located at Freiligrathstrasse 8-28, D-45881, Gelsenkirchen, Germany) which manufactures tie rods for steering gears, but only insofar as TRW’s production of tie rods for steering gears at the Schalke facility is exclusively for captive use by TRW’s steering business and is not used to supply any third-party customers; and,
 2. L&S Components used in TRW’s independent aftermarket business, but only insofar as such L&S Components are not sold in competition with products produced by the TRW L&S Business and sold to original equipment manufacturers or original equipment suppliers.

The License Back may not be assigned or sublicensed except to a wholly owned subsidiary or division of Respondents, except in connection with the sale of substantially all of the assets of Respondents related to the business for which the License Back is granted. Nothing contained in this Decision and Order shall prevent Respondents and the Acquirer from agreeing in the Divestiture Agreement to license back additional TRW L&S Intellectual Property, *provided, however*, that any such agreement remains subject to Commission approval.

- X. “L&S Components” means linkage and suspension components for light vehicles and heavy vehicles for which research, engineering, marketing, manufacture

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and sale is performed at or from TRW L&S Facilities, including but not limited to control arms, ball joints, stabilizer links, tie rods, conventional steering linkage, drag links, V-links, and radius rods. For purposes of this Decision and Order, L&S Components includes I-shafts but only I-shafts for heavy vehicles manufactured at the Portland Facility.

- Y. “Know-how” means know-how, trade secrets, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development and other similar information.
- Z. “Krefeld-Gellep Facility” means all of Respondents’ rights, title, and interests in the Facility Assets:
 - 1. Located at the real property described in Exhibit 2 to this Decision and Order; and,
 - 2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.
- AA. “Material Confidential Information” means any material non-public information relating to the TRW L&S Business either prior to or after the Divestiture Date, including, but not limited to, business and strategic plans, customer or supplier lists, customer or supplier contract terms, historical information about sales to customers or purchases from suppliers, manufacturing costs, price lists, marketing methods, patents, technologies, processes, or other trade secrets, relating to the TRW L&S Business and:
 - 1. Obtained by Respondents prior to the Divestiture Date; or,
 - 2. Obtained by Respondents after the Divestiture Date, in the course of performing Respondents’ obligations under any Divestiture Agreement or the Hold Separate Order;

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Provided, however, that Material Confidential Information shall not include:

- x. Information that is in the public domain when received by Respondents;
 - y. Information that is not in the public domain when received by Respondents and thereafter becomes public through no act or failure to act by Respondents;
 - z. Information that Respondents develop or obtain independently, without violating any applicable law or this Order, and without breaching any confidentiality obligation with respect to the information; and,
 - aa. Information that becomes known to Respondents from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.
- BB. “Order Date” means the date upon which this Order was issued by the Commission.
- CC. “Patent” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Effective Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, restorations, extensions, and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto.
- DD. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Governmental Agency, and any subsidiaries, divisions, groups, or affiliates thereof.

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- EE. “Portland Facility” means all of Respondents’ rights, title, and interests in the Facility Assets:
1. Located at the real property described in Exhibit 3 to this Decision and Order; and,
 2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.
- FF. “Required Inputs” means any raw materials or partially machined parts used in the research, development, manufacture, or production of any one or more of the L&S Components that TRW has researched, engineered, manufactured, marketed or sold at any time since January 1, 2014 if the substitution of such inputs with new materials or the source of supply of such inputs would:
1. Render any L&S Components non-conforming with, in breach of, or otherwise unacceptable under any Contract with any customer; or,
 2. Provide any customer with the right to examine, test, or otherwise qualify any L&S Components prior to accepting L&S Components made with substituted raw material inputs or partially machined parts, or made with such inputs from a substituted source of supply.
- GG. “Retained Tillsonburg Facility” means the Facility Assets located at 101 Spruce St., Tillsonburg, Ontario, N4G 4J1, Canada.
- HH. “St. Catharines Facility” means all of Respondents’ rights, title, and interests in the Facility Assets:
1. Located at the real property described in Exhibit 4 to this Decision and Order; and,
 2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.

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- II. “Tillsonburg Facility” means all of Respondents’ rights, title, and interests in the Facility Assets:
1. Located at the real property described in Exhibit 5 to this Decision and Order; and,
 2. Relating to the research, engineering, manufacture, marketing, and sale of L&S Components in North America and Europe by TRW.
- JJ. “Tillsonburg Production Lines” means the equipment, machinery, and tools currently used in the production of control arms for the General Motors Silverado and Sierra platforms and the Ford Raptor platform, located at 101 Spruce St., Tillsonburg, Ontario, N4G 4J1, Canada.
- KK. “Trademarks” means a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others.
- LL. “Transition Services Agreement” means an agreement that receives the prior approval of the Commission between one or both Respondents and the Acquirer of any of the assets divested under this Order to provide, at the option of the Acquirer and at no more than the Direct Costs of the Respondents, all services (or training for the Acquirer to provide services for itself) reasonably necessary to transfer administrative support services to the Acquirer of each of the assets divested under this Order. The services which may be the subject of a Transition Services Agreement include, but are not limited to, payroll, employee benefits, accounts receivable, accounts payable, utility services, heating and air conditioning services and systems, and other logistical and administrative support. The Transition Services Agreement shall provide that, at Acquirer’s request, Respondents shall file with the Commission any request for prior approval to extend the term of the Transition Services Agreement as provided by Paragraph II.B.1.b. of this Order.

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- MM. “Transition Required Input Supply Agreement” means an agreement that receives the prior approval of the Commission between one or both Respondents and the Acquirer of any of the assets divested under this Order to provide, at the option of the Acquirer and at no more than the Direct Costs of the Respondents, sufficient quantities of Required Inputs to the Acquirer for the Acquirer to fully perform all Contracts for the sale of L&S Components to any Person (including, but not limited to, increasing the number of units of L&S Components sold to such Person to the Contract maximum quantities) by:
1. Assigning to the Acquirer some or all of Respondents’ rights to purchase or otherwise receive any Required Input sold or provided to Respondents under one or more existing supply agreements between Respondents and any Person;
 2. Selling to the Acquirer any Required Inputs; or,
 3. Otherwise supplying the Acquirer with any Required Input by commercially reasonable means.

The Transition Required Input Supply Agreement shall provide that, at Acquirer’s request, Respondents shall file with the Commission any request for prior approval to extend the term of the Transition Required Input Supply Agreement in accordance with the proviso to Paragraph II.B.3.b of this Order.

- NN. “Transition Trademark Assistance Agreement” means an agreement by which TRW grants the Acquirer, on a transitional basis and for a limited period of time mutually agreed upon with the Acquirer, a royalty-free, fully paid-up, non-exclusive, non-transferable right and license to use the TRW trademark as defined in such agreement to the extent such trademark appears on (a) signs, letterhead, advertisements, promotional materials and other tangible assets included in the purchased assets, and (b) solely on L&S Components held, manufactured or sold by the

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Acquirer or its affiliates in connection with the operation of the TRW L&S Business.

- OO. “TRW Employee Benefits” means all employee benefits offered by Respondents or available to TRW Employees as of the ACCO Execution Date, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits.
- PP. “TRW Employees” means the TRW Key Employees and the TRW Workforce Employees.
- QQ. “TRW Key Employees” means the Persons identified on Confidential Appendix B to this Order.
- RR. “TRW L&S Business” means all of Respondents’ legal and equitable rights, title, and interests in all tangible and intangible property of any kind used for or relating to the research, engineering, manufacture, marketing, and/or sale of L&S Components (a) at or from the TRW L&S Facilities and (b) TRW L&S Books and Records, TRW L&S Contracts, TRW L&S Intellectual Property, and TRW L&S Inventories. *Provided, however,* the TRW L&S Assets shall not include the following:
1. The Excluded Intellectual Property; and,
 2. Any additional assets identified in the Divestiture Agreement as excluded from the divestiture, if the Acquirer does not want such assets and if the Commission approves the Divestiture Agreement without such assets.
- SS. “TRW L&S Books and Records” means all Books and Records relating to:
1. The research, engineering, manufacture, marketing, and sale of L&S Components by TRW; or,
 2. The TRW L&S Business.

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- TT. “TRW L&S Contracts” means all Contracts relating to:
1. The research, engineering, manufacture, marketing, and sale of L&S Components by TRW; or,
 2. The TRW L&S Business.
- UU. “TRW L&S Facilities” means DAS, the Dusseldorf Design, Engineering & Sales Support, the Krefeld-Gellep Facility, the Portland Facility, the St. Catharines Facility, and the Tillsonburg Facility.
- VV. “TRW L&S Intellectual Property” means all Intellectual Property that is related to the research, engineering, manufacture, marketing, and sale of L&S Components by TRW. TRW L&S Intellectual Property includes, but is not limited to, the Patents listed on Confidential Appendix C to this Order.
- WW. “TRW L&S Inventories” means all Inventories in which the TRW L&S Business owns a legal or equitable interest and which the TRW L&S Business has not yet sold to customers, including TRW, as of the Divestiture Date.
- XX. “TRW Workforce Employees” means all part-time and full-time employees of the TRW L&S Business who are paid hourly or by salary, but excluding the TRW Key Employees.

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

- A. No later than six (6) months from the ACCO Execution Date, Respondents shall divest the TRW L&S Business, absolutely and in good faith and at no minimum price, to an Acquirer who receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

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- B. At the option of the Acquirer, and subject to the prior approval of the Commission, Respondents shall include in the Divestiture Agreement:
1. The Dusseldorf Lease;
 2. A Transition Services Agreement relating to the TRW L&S Business for a term of up to two (2) years, which agreement may be terminated at any time by the Acquirer without penalty upon commercially reasonable notice to Respondents;
 3. A Transition Required Input Supply Agreement:
 - a. For an initial term of up to one (1) year; and,
 - b. At the option of the Acquirer, for an additional term that is the greater of (i) one (1) year, or (ii) the time the Acquirer estimates in its reasonable judgment is required to examine, test or otherwise qualify L&S Components made with substituted raw material inputs or partially machined parts or made from such inputs from a substituted source of supply;

provided, however, that such additional term shall not exceed one (1) year without the prior approval of the Commission, which approval shall be sought no later than forty five (45) days prior to the expiration of the initial term; and,
 4. A Transition Trademark Assistance Agreement relating to the TRW L&S Business for a term not to exceed the term agreed between Respondents and the Acquirer.
- C. At the option of Respondents and subject to the prior approval of the Commission, Respondents and an Acquirer may enter into a License Back.
- D. Prior to the Divestiture Date:
1. Respondents shall secure at their sole expense:

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- a. Consents from all Persons that relate to or are necessary to divest the TRW L&S Business to the Acquirer and for the Acquirer to operate any tangible or intangible assets of the TRW L&S Business in a manner that will achieve the purposes of this Order; and,
- b. Consents from all Persons necessary for the assignment or transfer to the Acquirer of all of the TRW L&S Contracts, other than contracts identified in Confidential Appendix D to this Order;

provided, however, Respondents shall not be required to secure the consent of any Governmental Agency relating to any permit, license, or right that Respondents have no legal right to divest or transfer to the Acquirer; and,

provided further, however, the failure of Respondents or the Acquirer to obtain any consents that relate to or are necessary to divest the TRW L&S Business shall not extend the date by which Respondents must divest the TRW L&S Business.

2. Respondents shall use best efforts to assist the Acquirer to obtain the transfer from Respondents or issuance to the Acquirer of any permit, license, asset, or right that Respondents have no legal right to divest or transfer to the Acquirer.
- E. Respondents shall include in the Divestiture Agreement provisions that promote achieving the purposes of the Order allocating and providing for indemnification of any liabilities and direct or indirect damages and claims of customers or any other Persons (including, but not limited to, environmental liabilities, product liabilities, and product recalls) related to the operation of the TRW L&S Business prior to the Divestiture Date

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- F. At its sole cost and expense, Respondents shall disassemble the Tillsonburg Production Lines from the Retained Tillsonburg Facility, and transport the Tillsonburg Production Lines to and reassemble the Tillsonburg Production Lines at the Tillsonburg Facility. The disassembly, transportation, and reassembly of the Tillsonburg Production Lines shall be conducted in the manner and completed upon the schedule outlined in Confidential Appendix E to this Order. Respondents' obligations under this Paragraph II.E. of this Order shall not be complete until the Tillsonburg Production Lines have produced commercially acceptable quantities of the L&S Components (including the receipt from customers of any approvals or product qualifications permitted or required under TRW L&S Contracts) as set forth on Confidential Appendix E to this Order. Respondents shall hold the Acquirer harmless from all liabilities and all direct or indirect damages and claims of customers or any other Persons arising from Respondents' failure to complete the disassembly, transportation and reassembly of the Tillsonburg Production Lines in the manner and upon the schedule outlined in Confidential Appendix E to this Order.
- G. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a violation of this Order. If any term of the 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. Any modification of the Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Divestiture Date, without the prior approval of the Commission, or any failure by Respondents to meet any condition precedent to closing (whether waived or not), shall constitute a failure to comply with this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any

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modification of the Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

- H. The purpose of the divestiture is to ensure the continuation of the TRW L&S Business as an ongoing, viable and effective competitor in the North American market for the research, engineering, manufacture, marketing, and sale of tie rods for heavy vehicles, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondents shall cooperate with and assist the Acquirer of the TRW L&S Business to evaluate independently and retain the TRW Employees, such cooperation to include at least the following:
1. Not later than forty five (45) days before the Divestiture Date, Respondents shall, to the extent permitted by law: (i) provide to the proposed Acquirer, at the Acquirer's option, either access to and an opportunity to copy personnel files of all TRW Employees; or, a list of all TRW Employees by employee number, seniority date, original hire date, job title, work location, and material terms of employment including current salary, accrued vacation pay and entitlement to commissions bonus (whether monetary or otherwise), and the status and classification (as "salaried," "direct," or "indirect"); and, (ii) allow the proposed Acquirer a reasonable opportunity to interview any TRW Employees;
 2. Not later than thirty (30) days before the Divestiture Date, to the extent permitted by

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applicable law, Respondents shall provide an opportunity for the Acquirer: (i) to meet personally, and outside the presence or hearing of any employee or agent of Respondents, with any of the TRW Employees; and (ii) to make offers of employment to any of the TRW Employees;

3. Respondents shall: (i) not directly or indirectly interfere with the Acquirer's offer of employment to any one or more of the TRW Employees, directly or indirectly attempt to persuade any one or more of the TRW Employees to decline any offer of employment from the Acquirer, or offer any incentive to any TRW Employees to decline employment with the Acquirer; (ii) irrevocably waive any legal or equitable right to deter any TRW Employees from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that directly or indirectly relate to the TRW L&S Business; and (iii) either continue to provide the same TRW Employee Benefits or provide Equivalent Employee Benefits until the Divestiture Date; and,
 4. Respondents shall cooperate with the Acquirer to provide reasonable financial incentives as set forth in the Hold Separate Order to encourage TRW Key Employees to continue in his or her position with the TRW L&S Business until the Divestiture Date.
- B. For a period of two (2) years from the Divestiture Date, Respondents shall not, directly or indirectly, solicit, negotiate, hire, or enter into any arrangement for the services of any TRW Key Employee who has accepted an offer of employment with, or who is employed by, the Acquirer.

Provided, however, a violation of this provision will not occur if:

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1. The TRW Key Employee's employment has been terminated by the Acquirer;
 2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or,
 3. Respondents hire a TRW Key Employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.
- C. For a period of one (1) year from the Divestiture Date, Respondents shall not, directly or indirectly, solicit or induce, or attempt to solicit or induce, any TRW Workforce Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if:
1. The TRW Workforce Employee's employment has been terminated by the Acquirer;
 2. Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; or,
 3. Respondents hire a TRW Workforce Employee who has applied for employment with Respondents, provided that such application was not solicited or induced in violation of this Order.

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

- A. Respondents shall not:
1. Provide, disclose, or otherwise make available any Material Confidential Information to any Person

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except as required or permitted by this Order or the Hold Separate Order; or

2. Use any Material Confidential Information for any reason or purpose other than as required or permitted by this Order or the Hold Separate Order.
- B. Respondents shall devise and implement measures to protect against the storage, distribution, and use of Material Confidential Information that is not permitted by this Order or the Hold Separate Order. These measures shall include, but not be limited to, restrictions placed on access by Persons to information available or stored on any of Respondents' computers or computer networks. Except as provided by Paragraph IV.D. of this Order and the Hold Separate Order, Respondents shall redact all Material Confidential Information from its Book and Records not divested to the Acquirer.
- C. Respondents no less than annually shall provide written or electronic instructions to any and all of its officers, directors, employees, or agents who have custody or control of any Material Confidential Information concerning the limitations placed by this Order on the distribution and use of Material Confidential Information. Respondents shall require such officers to acknowledge in writing or electronically their receipt and understanding of these written or electronic instructions. Respondents shall maintain custody of these written or electronic instructions and acknowledgments for inspection upon request by the Commission.
- D. Notwithstanding Paragraph IV.A. of this Order and subject to the Hold Separate Order, Respondents may use Material Confidential Information:
1. For the purpose of performing Respondents' obligations under this Order, the Hold Separate Order, or the Divestiture Agreements;

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2. To ensure compliance with legal and regulatory requirements including, but not limited to:
 - a. Retaining a copy of Material Confidential Information for the sole purpose of complying with any applicable law, regulations, and other legal obligations; and,
 - b. Requirements of the rules and regulations of the Securities and Exchange Commission and of any stock on any exchange, the performance of necessary audits and the maintenance of effective internal controls and procedures for required disclosures of financial information;
3. To provide accounting, information technology, and credit-underwriting services;
4. To provide legal services associated with actual or potential litigation and transactions;
5. To monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements; or,
6. As otherwise provided by this Order and the Hold Separate.

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

- A. The Commission appoints Competition Rx as Monitor and approves the Monitor Agreement between Competition Rx and Respondents, attached as Appendix F.
- B. Respondents shall facilitate the ability of the Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Monitor's authority, rights or responsibilities as set forth in this Order or any agreement between the Monitor and Respondents.

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- C. The Monitor's duties and responsibilities shall include the following, among other responsibilities that may be required:
1. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. The Monitor shall serve until the earlier of the date this Order terminates by its terms and such time as Respondents have complied fully with all of their obligations under the Divestiture Agreement;
 3. The Monitor shall have the power and authority to Monitor Respondents' compliance with Paragraphs II. through IV. of the Order and with the Divestiture Agreement;
 4. The Monitor shall have power and authority to review and audit, at the Respondents' sole cost and expense, the books and records of Respondents to determine whether Respondents have complied fully with their obligations under the Order and with the Divestiture Agreement;
 5. The Monitor shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission and its staff;
 6. The Monitor shall review all reports submitted to the Commission by Respondents pursuant to the Order and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, and upon request of the Commission or its staff, report in writing to the Commission concerning performance by Respondents of their obligations under Paragraphs II. through IV. of this Order and with the Divestiture Agreement; and,
 7. During the term of any Dusseldorf Lease, Transition Services Agreement, Transition Required Input Supply Agreement or Transition

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Trademark Assistance Agreement, the Monitor shall provide the Commission with written reports at least every sixty (60) days sufficient to determine if Respondents are complying fully with the terms of any Dusseldorf Lease, Transition Services Agreement, Transition Required Input Supply Agreement or Transition Trademark Assistance Agreement, and with the terms of this Order (including the Divestiture Agreement). Thereafter, the Monitor shall provide periodic written reports to the Commission upon a schedule (but at least annually) that is sufficient to provide the Commission with timely information to determine if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). In addition, the Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). The Monitor shall not provide to Respondents, and Respondents shall not be entitled to receive, copies of these reports.

- D. Respondents shall grant and transfer to the Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including, but not limited to, the following:
1. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with Paragraphs II. through IV. of this Order and with the Divestiture Agreement;
 2. Subject to any demonstrated legally recognized privilege, Respondents shall provide the Monitor full and complete access to Respondents' personnel, books, documents, records kept in the

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ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under Paragraphs II. through IV. of this Order and with the Divestiture Agreement;

3. Within five (5) calendar days of submitting a report required by this Order or the Consent Agreement to the Commission, Respondents shall deliver a copy of such report to the Monitor;
4. Except as otherwise set forth in this Order, the Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;
5. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations 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, willful or wanton acts, or bad faith by the Monitor; and,
7. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement.

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Provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission or its staff, or require the Monitor to report to Respondents the substance of communications to or from the Commission, its staff, or the Acquirer.

- E. Respondents shall comply with all terms of the Monitor Agreement, and any breach by Respondents of any term of the Monitor Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.
- F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor. The Commission shall select the substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to

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permit the Monitor to monitor Respondents' compliance with the relevant requirements of this Order and the Divestiture Agreement in a manner consistent with the purpose of this Order. If a substitute Monitor is appointed, Respondents shall consent to the terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor as set forth in this Paragraph.

- H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- I. A Monitor appointed pursuant to this Order may be, but need not be, the same Person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order and the same Person appointed as Hold Separate Monitor under the Hold Separate Order.

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

- A. If Respondents have not fully complied with the obligations of Paragraph II. of this Order, whether or not all Government Agency consents have been obtained, the Commission may appoint a Divestiture Trustee to divest the TRW L&S Business, enter into a Transition Services Agreement and Transition Required Input Supply Agreement, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. If Respondents have not fully complied with the obligations imposed by Paragraph II. of this Order, the Divestiture Trustee shall divest the TRW L&S Business to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other

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statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including one or more court-appointed Divestiture Trustees, pursuant to Section 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.

- B. The Commission may select a Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Commission may appoint a Divestiture Trustee to divest the TRW L&S Business and perform Respondents' other obligations in a manner that satisfies the requirements of Paragraph II. of this Order. Any Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their 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.
 - 1. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement for any divestitures required by Paragraph II. of this Order 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, Paragraph II. of this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

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2. 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:
 - a. 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, this Order.
 - b. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture required by Paragraph II. of this Order, 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 satisfy the obligations of Paragraph II. of this Order, or believes that such obligation can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, that the Commission may extend the period only two (2) times.
 - c. Subject to any demonstrated legally recognized privilege, any Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant 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 any Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede any Divestiture Trustee's

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accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VI. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

- d. Any 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 that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission as required by this Order; *provided, however*, if any Divestiture Trustee receives bona fide offers for any asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.
- e. Any 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. Any 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

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responsibilities. Any Divestiture Trustee shall account for all monies derived from the divestitures 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 any 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.

- f. Respondents shall indemnify any 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.
- g. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
- h. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestitures.
- i. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's

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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.

- C. If the Commission determines that the 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 VI.
- D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of any Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.
- E. The Divestiture Trustee appointed pursuant to this Paragraph VI. may be the same person appointed as Hold Separate Trustee pursuant to the relevant provisions of the Hold Separate, and may be the same Person as the Monitor appointed under this Order.

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

- A. Within thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until the Divestiture Date of the divestiture required by Paragraph II. of this Order, Respondents shall submit to the Commission (and a complete copy to the Monitor appointed under this Order, and the Hold Separate Monitor appointed under the Hold Separate Order) a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. For the period covered by each report, the report shall include, but not be limited to (among other things that are

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required from time to time), a full description of the efforts being made to comply with Paragraph II. of this Order, including a description of all substantive contacts or negotiations for the divestiture and the identity and contact information of all parties contacted. Respondents shall include in the reports copies of all material written communications to and from such parties, all internal memoranda reviewing or evaluating possible acquirers or divestiture proposals, a copy of the written instructions and acknowledgments concerning Material Confidential Information required by Paragraph IV. of this Order, and all reports and recommendations concerning completing the obligations.

- B. Within thirty (30) days after the date that the initial term of the first of any Transition Services Agreement or Transition Required Input Supply Agreement commences, and every sixty (60) days thereafter until the date upon which the last of any Transition Services Agreement or Transition Required Input Supply Agreement terminates, Respondents shall submit to the Commission (and a complete copy to the Monitor appointed under this Order) a verified written report. Each verified written report under this paragraph VII.B. shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with any Transition Services Agreement or Transition Required Input Supply Agreement. For the period covered by each report, the report shall include, but not be limited to (among other things that are required from time to time), the name and contact information for each Person that maintains or claims (regardless of whether Respondents agree or disagree with such Person, and regardless whether a judicial or arbitration action has been threatened or commenced) that one or more Respondents have failed to comply fully with either any Transition Services Agreement or Transition Required Input Supply Agreement, briefly describe the Person's claim, and provide copies of any written communications

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between Respondents and the Person concerning the claim.

- C. On the first anniversary of the Order Date, and thereafter on each subsequent anniversary until Respondents have satisfied in full all of their obligations under Paragraph II of this Order and all of the Divestiture Agreement (including any Transition Services Agreement and Transition Required Input Supply Agreement), 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. For the period covered by each such report, Respondents shall state the name and contact information for each Person that maintains or claims (regardless of whether Respondents agree or disagree with such Person, and regardless whether a judicial or arbitration action has been threatened or commenced) that one or more Respondents have failed to comply fully with the Order (including any Divestiture Agreement made a part thereof), briefly describe the Person's claim, and provide copies of any written communications between Respondents and the Person concerning the claim.

VIII.

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

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

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IX.

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on June 11, 2025.

By the Commission, Commissioner Wright dissenting.

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APPENDIX A

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

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APPENDIX B

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

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APPENDIX C

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

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APPENDIX D

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

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APPENDIX E

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

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APPENDIX F**Monitor Agreement****FTC MONITOR AGREEMENT****BETWEEN:**

1. **ZF Friedrichshafen AG** (hereafter "**ZF**"), a company organized under the laws of Germany, which has its registered seat at Graf-von-Soden-Platz 1, 88046 Friedrichshafen, Germany,
2. **TRW Automotive Holdings Corp.** (hereafter "**TRW**"), a public corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 12001 Tech Center Drive, Livonia, MI 48150, United States of America,

ZF and TRW are hereafter referred to as the "**Respondents**".

AND:

3. **CompetitionRx Ltd.**, a company organized under the laws of the United Kingdom, which has its registered offices at 35 Ballards Lane, London, N3 1XW, United Kingdom, represented by Thomas Hoehn, (hereafter the "**Monitor**").

WHEREAS:

The Federal Trade Commission ("**FTC**") has initiated an investigation of the acquisition by ZF of TRW. ZF and TRW have executed an Agreement Containing Consent Orders ("**Consent Agreement**") with ZF and TRW consenting to the issuance of an Order to Hold Separate and Maintain Assets (the "**Hold Separate Order**"), and a Decision and Order (the "**D&O**," and together with the Hold Separate Order, the "**Orders**"). The Orders contain, inter alia, the obligations of ZF and TRW to divest the TRW L&S Business (as defined in the Orders) to an Acquirer, who receives the prior approval of the FTC and in a manner that receives the prior approval of the FTC, and to hold separate and maintain the TRW L&S Business pending the divestiture.

In the Orders, the FTC will appoint the Monitor as Monitor (as defined in the D&O) and Hold Separate Monitor (as defined in the Hold Separate Order).



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APPENDIX F**IT HAS BEEN AGREED AS FOLLOWS:****Section A: Engagement of Monitor**

1. ZF hereby engages the Monitor in his capacity as the Hold Separate Monitor effective when the Hold Separate Order becomes final, and as the Monitor under the D&O when the D&O becomes final.
2. The Monitor hereby accepts the said engagement as Hold Separate Monitor and Monitor.

Section B: Duties, Rights, and Obligations of the Hold Separate Monitor and Respondents under the Hold Separate Order

1. The Hold Separate Monitor shall:
 - a. monitor the organization and operations of the Hold Separate Business;
 - b. supervise the management of the Hold Separate Business by TRW Key Employees;
 - c. maintain the independence of the Hold Separate Business; and
 - d. monitor Respondents' compliance with their obligations pursuant to the Orders.
2. Respondents hereby transfer to and confer upon the Hold Separate Monitor all rights, powers and authority necessary to permit the Hold Separate Monitor to perform his duties and responsibilities pursuant to the Hold Separate Order and in a manner consistent with the purposes of the Orders and in consultation with the Commission staff.
3. The Hold Separate Monitor shall carry out the Hold Separate Monitor's duties and responsibilities as outlined in the Hold Separate Order, including submitting periodic reports to the Commission concerning the efforts to accomplish the purposes of the Hold Separate Order and Respondents' compliance with its obligations under the Orders.

Section C: Duties, Rights, and Obligations of the Monitor and Respondents under the D&O

1. Respondents shall facilitate the ability of the Monitor to comply with the duties and obligations set forth in the D&O, and shall take no action that interferes with or hinders the Monitor's authority, rights or responsibilities as set forth in the D&O or any agreement between the Monitor and Respondents.
2. The Monitor's duties and responsibilities shall include the following, among other responsibilities that may be required:
 - a. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 - b. The Monitor shall have the power and authority to monitor Respondents' compliance with Paragraphs II. through IV. of the Order and with the Divestiture Agreement, including, but not limited to, any Transition Services Agreement or Transition Required Input Supply Agreement;
 - c. The Monitor shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission and its staff;



Decision and Order

APPENDIX F

- d. The Monitor shall review all reports submitted to the Commission by Respondents pursuant to the Order and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, and upon request of the Commission or its staff, report in writing to the Commission concerning performance by Respondents of their obligations under Paragraphs II. through IV. of this Order and with the Divestiture Agreement; and,
 - e. During the term of any Transition Services Agreement or Transition Required Input Supply Agreement, the Monitor shall provide the Commission with written reports at least every sixty (60) days sufficient to determine if Respondents are complying fully with the terms of any Transition Services Agreement and Transition Required Input Supply Agreement, and with the terms of this Order (including the Divestiture Agreement). Thereafter, the Monitor shall provide periodic written reports to the Commission upon a schedule (but at least annually) that is sufficient to provide the Commission with timely information to determine if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). In addition, the Monitor shall provide such additional written reports as Commission staff may request that reasonably are related to determining if Respondents have complied and are complying with their obligations under this Order (including the Divestiture Agreements). The Monitor shall not provide to Respondents, and Respondents shall not be entitled to receive, copies of these reports.
3. Respondents hereby grant and transfer to the Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including, but not limited to, the following:
- a. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with Paragraphs II. through IV. of this Order and with the Divestiture Agreement;
 - b. Within five (5) calendar days of submitting a report required by this Order or the Consent Agreement to the Commission, Respondents shall deliver a copy of such report to the Monitor;

Section D: General Duties, Rights, and Obligations of the Monitor and Respondents under the Orders

1. Subject to applicable laws and regulations, the Monitor shall have full and complete access to the personnel, books, records, document and facilities of the TRW L&S Business, and to any other relevant information as the Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the TRW L&S Business. Respondents shall develop such financial or other information as the Monitor may reasonably request and shall cooperate with the Monitor. The Monitor shall give Respondents reasonable notice of any request for such access or such information. The Monitor shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondents' operations. At the request of the Monitor, Respondents shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Respondents who have knowledge relevant to the proper discharge of its duties and responsibilities under the Orders.

Decision and Order

APPENDIX F

2. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants (the "Monitor's Consultants") as are reasonably necessary to carry out the Monitor's duties and responsibilities.

Section E: Confidentiality

1. The Monitor shall:
- a. maintain the confidentiality of all Confidential Business Information, and any other information provided to the Monitor by Respondents, any Prospective Acquirer, any Acquirer, any Commission approved Acquirer, the Commission, or any employee, representative or advisor thereof, and shall use such information only for the purpose of performing his duties and responsibilities as Monitor and not for any other purpose, including, but not limited to, any other business or personal purpose. The Monitor may disclose Confidential Business Information only to:
 - i. persons engaged, employed by, or working with the Monitor;
 - ii. any Acquirer or Commission-approved Acquirer to the extent such information is of a non-privileged nature; and
 - iii. persons employed at the Commission who are working on this matter.
 - b. require any Monitor's Consultant to execute a confidentiality agreement that requires such persons to treat confidential information, including any Confidential Business Information, with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Agreement, provided, however, that such confidentiality agreement shall not restrict the Monitor from providing any information to the Commission or its staff. The Monitor shall maintain a record of persons engaged by the Monitor to whom Confidential Business Information has been disclosed;
 - c. maintain the confidentiality after the termination of this Agreement of all other aspects of the performance of the Monitor's duties and responsibilities under this Agreement and shall not disclose any confidential or proprietary information relating thereto; and
 - d. upon termination of the Monitor's duties under this Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondents provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondents to return or destroy materials that Respondents provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with the Respondents' request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor, for ten (10) years after termination of this Agreement.

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APPENDIX F**Section F: Remuneration and Indemnification**

1. Respondents shall pay the Monitor in accordance with the Fee Schedule attached hereto as Confidential Exhibit A for all time spent in the performance of the Monitor's duties and responsibilities and in the performance of the Monitor's duties and responsibilities, and all reasonable and necessary travel time. In addition, Respondents will pay the Monitor in accordance with the attached Fee Schedule (i) all out-of-pocket expenses incurred by the Monitor in the performance of the Hold Separate Monitor's and Monitor's duties, including any travel, and (ii) all fees and disbursements incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's and Monitor's duties.
2. Respondents hereby confirm their obligations to indemnify the Monitor acting as the Hold Separate Monitor and Monitor, and any Monitor's Consultant retained by the Monitor in the fulfillment of the Monitor's duties and responsibilities and hold the Monitor and the Monitor's Consultants harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties hereunder, 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 malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

Section G: General Provisions

1. This FTC Monitor Agreement ("Agreement") may not be modified without the prior approval of the Commission
2. In the performance of its functions and duties as Hold Separate Monitor and Monitor, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.
3. In the event that a disagreement or dispute should arise between Respondents and the Monitor concerning Respondents' obligations under the Orders, and in the event that such disagreement cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division to resolve this issue.
4. In the event that either Respondents or the Monitor determine that there is a possible conflict between the Monitor's duties, responsibilities, or obligations under the Orders and under the EC Commitments or the EC Mandate, the Monitor or Respondents promptly shall notify the Commission and the European Commission in writing and consult with them about the possible conflict.
5. This Agreement shall terminate the earlier of
 - a. thirty (30) days following the termination date set forth in the applicable Order;
 - b. Respondents' receipt of written notice from the Commission that the Commission has determined that Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve as Monitor;
 - c. with at least thirty (30) days' advance notice to be provided by Monitor to Respondents and to the Commission, upon resignation of the Monitor; or
 - d. when Respondents' last obligation under the Orders and the Divestiture Agreement that pertain to the Monitor's service have been fully performed; provided, however, that the Commission may require that Respondents extend

Decision and Order

APPENDIX F

- this Agreement or enter into an additional agreement with Monitor as may be necessary or appropriate to accomplish the purposes of the Orders.
6. If the Monitor becomes aware during the term of this Agreement that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance of any of its duties or responsibilities under this Agreement, the Monitor shall promptly inform Respondents and the Commission of any such conflict.
7. The Monitor shall provide written notice to Respondents and to the Commission if the Monitor:
- enters into any written or oral Material Agreement with any of the Respondents, any Person named as a Proposed Acquirer in any application filed by the Respondents with the Commission for the approval of the divestiture of the TRW L&S Business, or any Person approved by the Commission as the Acquirer of the TRW L&S Business; or
 - acquires a Material Financial Interest in any of the Respondents, any Person named as a Proposed Acquirer in any application filed by the Respondents with the Commission for the approval of the divestiture of the TRW L&S Business, or any Person approved by the Commission as the Acquirer of the TRW L&S Business.
8. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York (without giving effect to choice of law principles thereof).
9. All notices under this FTC Monitor Agreement shall be provided as follows:
- To the Commission
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
United States of America
and
By email to: bccompliance@ftc.gov
 - To the European Commission
European Commission
DG Competition
Unit B-3: Mergers/Energy and Environment
MADO 24/043
Place Madou 1
B-1049 Brussels/Belgium
and
By email to: Henri.PIFFAUT@ec.europa.eu
 - To the Monitor
CompetitionRx Ltd
Attn: Thomas Hoehn
47 Dorset Street
London, W1U 7ND
United Kingdom
and
By email to: thomas.hoehn@competitionrx.com



Decision and Order

APPENDIX F

d. To Respondent TRW
TRW Automotive Holdings Corp.
Attn: Jeff Cooper
12001 Tech Center Drive
Livonia, MI 48150,
United States of America
and

By email to: Jeff.Cooper@trw.com

e. To Respondent ZF
ZF Friedrichshafen AG
Department FM
Attn: Dr. Martin Grabolle
Graf-von-Soden-Platz 1
88046 Friedrichshafen
Germany
and

By email to: martin.grabolle@zf.com

Section H: Definitions

As used in this Agreement, the following definitions, and all other definitions used in the Orders, shall apply:

1. "EC Commitments" means the Commitments entered by ZF to the EU Commission on February 19, 2015.
2. "EC Mandate" means the EU Trustee Mandate executed between ZF and the Monitor on April 9, 2015.
3. "Material Agreements" means any agreement or contract pursuant to which the Monitor
 - a. has or accepts any employment by or is or accepts any appointment as Member of the Board or member of other management bodies of the Respondents other than appointments pertaining to the establishment and performance of the EC Mandate;
 - b. has or accepts any assignments or other business relationships with or financial interests in the Respondents that might lead to a Conflict of Interest; or
 - c. has or accepts any other appointments, assignments or other business relationships that may, in view of the circumstances of the particular case, be regarded as impairing the Monitor's objectivity and independence in discharging its duties under the Agreement.

Decision and Order

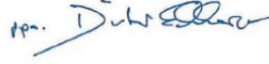
APPENDIX F

4. "Material Financial Interest" means any assignment or other business relationship between the Monitor and the Respondents or investments by the Monitor in the stock or securities of the Respondents if such assignments, business relationships or investments are outside the normal course of business and are material to the Monitor or the Respondents.

April 21, 2015

On behalf of ZF Friedrichshafen AG

By: DIETEN ECKHARDT
Title: VP M&A / COOPERATIONS

per: 

By: Young Sukwoo
Title: Sr. Manager M&A / Cooperations

in: 

On behalf of TRW Automotive Holdings Corp.

By: 
Title: EXECUTIVE VICE PRESIDENT & CFO

On behalf of CompetitionRx Ltd.

By:
Title:

Decision and Order

APPENDIX F

4. "Material Financial Interest" means any assignment or other business relationship between the Monitor and the Respondents or investments by the Monitor in the stock or securities of the Respondents if such assignments, business relationships or investments are outside the normal course of business and are material to the Monitor or the Respondents.

April 21, 2015

On behalf of ZF Friedrichshafen AG

By: *Dietmar Eckhardt*
Title: VP TWA / COOPERATIONS

per Dietmar Eckhardt

By: *Young Suhwoo*
Title: Sr. Manager TWA / COOPERATIONS

in Suhwoo

On behalf of TRW Automotive Holdings Corp.

By:
Title:

On behalf of CompetitionRx Ltd.

By: *THOMAS HASTEN*
Title: *DIRECTOR*

for as per

Decision and Order

EXHIBIT 1

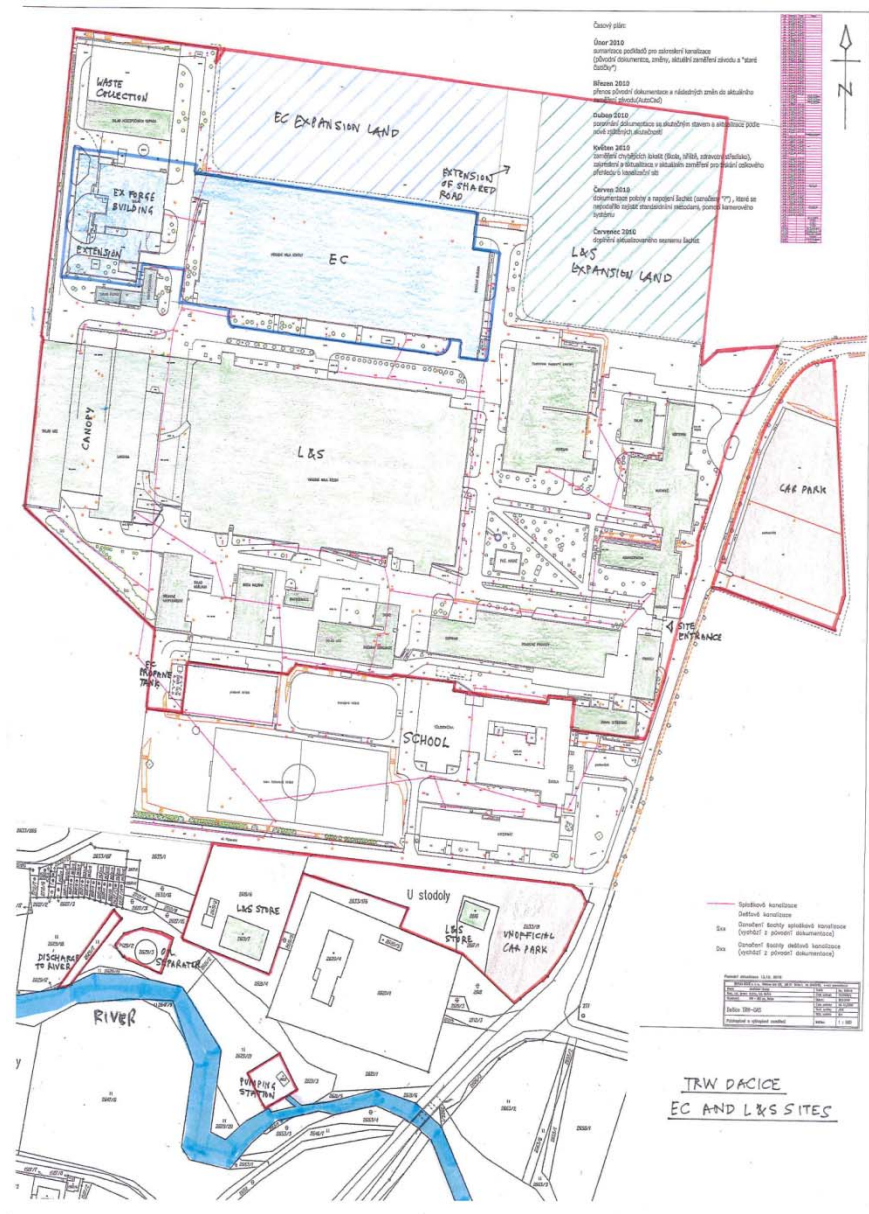
TRW's manufacturing facility in Dačice, Czech Republic is located at:

Strojírenská 160
380 01 Dačice
Czech Republic

* * * * *

The boundaries and location of the Dačice facility are also depicted in the attached site plan.

EXHIBIT 1



Decision and Order

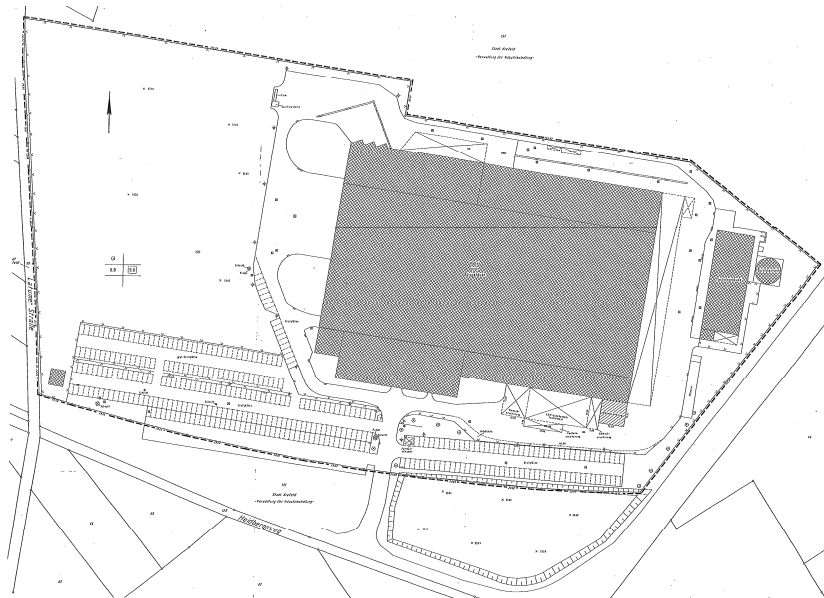
EXHIBIT 2

TRW's manufacturing facility in Krefeld, Germany is located at:

Heidbergsweg 100
47809 Krefeld
Germany

* * * * *

The boundaries and location of the Krefeld-Gellep facility are also depicted in the attached survey.



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EXHIBIT 3

The legal description of TRW's manufacturing facility in Portland, Michigan located at 902 Lyons Road is as follows:

Situated in the Township of Portland & City of Portland,
County of Ionia, State of Michigan:

COMMENCING AT A POINT ON THE SECTION LINE BETWEEN SECTIONS 21 AND 28 IN TOWNSHIP 6 NORTH OF RANGE 5 WEST WHICH POINT IS 47.16 RODS EAST OF THE NORTHWEST CORNER OF SAID SECTION 28, AND RUNNING THENCE SOUTH ON A LINE PARALLEL WITH THE WEST LINE OF SAID SECTION TO THE NORTH LINE OF THE PERE MARQUETTE RAILROAD RIGHT-OF WAY (FORMERLY THE DETROIT, LANSING AND LAKE MICHIGAN RAILROAD); THENCE NORTHWESTERLY ALONG THE NORTH LINE OF SAID RAILROAD TO ITS INTERSECTION WITH THE CENTER OF THE PORTLAND AND LYONS HIGHWAY (SO-CALLED); THENCE SOUTHEASTERLY ALONG THE CENTER OF PORTLAND AND LYONS HIGHWAY (SO-CALLED) TO ITS INTERSECTION WITH THE NORTHEAST AND WEST 1/8 LINE OF SAID SECTION NUMBER 28; THENCE EAST ON SAID 1/8 LINE TO THE GRAND RIVER; THENCE NORTH AND NORTHWESTERLY ALONG THE WESTERLY AND SOUTHWESTERLY LINE OR BANK OF SAID GRAND RIVER TO A POINT WHICH IS 47.16 RODS EAST OF THE WEST LINE OF SAID SECTION 21; THENCE SOUTH ON A LINE PARALLEL WITH THE WEST LINE OF SAID SECTION 21 TO THE PLACE OF BEGINNING; ALWAYS EXCEPTING THEREFROM THE RIGHT-OF-WAY OF THE PERE MARQUETTE RAILROAD COMPANY, SAID ABOVE-DESCRIBED LAND BEING ON THE NORTH 1/2 OF THE NORTHWEST 1/4 OF SAID SECTION 28 AND ON THE SOUTHWEST FRACTION OF THE SOUTHWEST 1/4 OF SECTION 21, BOTH IN TOWNSHIP 6 NORTH OF RANGE 5 WEST.

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ALL OF THE SOUTH $\frac{1}{2}$ OF THE NORTHWEST $\frac{1}{4}$ OF SECTION 28, TOWN 6 NORTH, RANGE 5 WEST LYING EAST OF THE LAND OF THE PERE MARQUETTE RAILROAD COMPANY, AND ALL OF THE SOUTH $\frac{1}{2}$ OF THE NORTHEAST $\frac{1}{4}$ OF SECTION 28, TOWNSHIP 6 NORTH, RANGE 5 WEST LYING WEST OF GRAND RIVER, LOCATED IN AND ADJACENT TO THE VILLAGE OF PORTLAND.

ALSO THE EAST 20 ACRES OF THOSE LANDS DESCRIBED AS: COMMENCING AT THE CORNER OF SECTIONS 20, 21, 28 AND 29; THENCE SOUTH ALONG THE LINE BETWEEN SECTIONS 28 AND 29, 7 CHAINS, 37 LINKS TO THE CENTER OF THE ROAD; THENCE SOUTH 40 DEGREES 10 MINUTES EAST ALONG THE ROAD, 6 CHAINS, 83 LINKS TO THE RAILROAD; THENCE SOUTHEASTERLY ALONG THE RAILROAD 7 CHAINS, 64 LINKS TO AN IRON STAKE; THENCE NORTH OR PARALLEL WITH THE LINE BETWEEN SECTIONS 20 AND 21, 30 CHAINS AND 52 LINKS TO THE SOUTH BANK OF GRAND RIVER, THENCE DOWN ALONG THE SOUTH BANK OF GRAND RIVER TO THE SECTION LINE BETWEEN SECTIONS 20 AND 21, THENCE SOUTH ALONG SAID LINE 29 CHAINS AND 54 LINKS TO THE PLACE OF BEGINNING. ALL BEING IN SECTIONS 21 AND 28, TOWN 6 NORTH OF RANGE 5 WEST.

EXCEPT, COMMENCING AT A POINT ON THE NORTH CORPORATION LINE OF THE VILLAGE OF PORTLAND AND ON THE WEST BANK OF GRAND RIVER, SAID CORPORATION LINE BEING THE NORTH, EAST AND WEST $\frac{1}{8}$ LINE OF SECTION 28, TOWN 6 NORTH, RANGE 5 WEST; THENCE FROM SAID POINT OF BEGINNING NORTH 88 DEGREES 21 MINUTES WEST ON SAID NORTH, EAST AND WEST $\frac{1}{8}$ LINE 350 FEET; THENCE SOUTH 85 DEGREES 51 MINUTES EAST 260.8 FEET; THENCE SOUTH 0 DEGREES 51 MINUTES WEST 300 FEET; THENCE SOUTH 26 DEGREES 51 MINUTES WEST 321.4 FEET TO THE NORTHEASTERLY RIGHT-OF-WAY OF THE C & O RAILROAD; THENCE ALONG THE RAILROAD

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RIGHT-OF-WAY ON A CHORD OF THE RAILROAD CURVE, SAID CHORD BEING SOUTH 31 DEGREES 04 MINUTES EAST 568.8 FEET TO THE EAST AND WEST $\frac{1}{4}$ LINE OF SECTION 28; THENCE SOUTH 88 DEGREES 21 MINUTES EAST ON SAID $\frac{1}{4}$ LINE 2424.6 FEET TO THE SOUTHWESTERLY BANK OF GRAND RIVER; THENCE NORTHERLY AND WESTERLY ALONG THE SOUTHERLY AND WESTERLY BANK OF GRAND RIVER TO THE POINT OF BEGINNING.

ALSO EXCEPT, PART OF THE NORTHWEST $\frac{1}{4}$ OF SECTION 28, AND PART OF THE SOUTHWEST $\frac{1}{4}$ OF SECTION 21, TOWN 6 NORTH, RANGE 5 WEST DESCRIBED AS: BEGINNING AT A POINT ON THE SOUTH LINE OF SECTION 21, NORTH 89 DEGREES 11 MINUTES 49 SECONDS EAST 391.77 FEET FROM THE SOUTHWEST CORNER OF SECTION 21; THENCE NORTH 00 DEGREES 52 MINUTES 15 SECONDS WEST 1356.20 FEET ALONG THE EAST LINE OF THE RECORDED PLAT OF F & H INDUSTRIAL PARK TO A POINT ON THE SOUTH BANK OF THE GRAND RIVER; THENCE ALONG A TRAVERSE LINE ALONG THE SOUTH BANK OF THE GRAND RIVER SOUTH 21 DEGREES 58 MINUTES 50 SECONDS EAST 150.90 FEET, AND SOUTH 31 DEGREES 04 MINUTES 05 SECONDS EAST 129.45 FEET AND SOUTH 58 DEGREES 14 MINUTES 48 SECONDS EAST 270.83 FEET TO THE END OF SAID TRAVERSE LINE; THENCE SOUTH 32 DEGREES 08 MINUTES 56 SECONDS WEST 181.83 FEET; THENCE SOUTH 34 DEGREES 16 MINUTES 55 SECONDS EAST 269.06 FEET; THENCE SOUTH 00 DEGREES 39 MINUTES 36 SECONDS EAST 1570.03 FEET ALONG THE EAST LINE AS SURVEYED AND ESTABLISHED BY C.M. MONNINGH MARCH 5, 1953 TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF THE FORMER C & O RAILROAD; THENCE NORTHWESTERLY ALONG THE NORTHERLY RIGHT-OF-WAY LINE ON A CURVE TO THE LEFT AN ARC DISTANCE OF 418.59 FEET, SAID CURVE WITH A RADIUS OF 2421.53 FEET, A DELTA ANGLE OF 09 DEGREES 54 MINUTES 15 SECONDS, AND A LONG CHORD AND BEARING OF NORTH 70 DEGREES 18 MINUTES 22 SECONDS WEST 418.07 FEET; THENCE NORTH 00 DEGREES 48 MINUTES 37 SECONDS WEST 539.62 FEET; THENCE NORTH 00 DEGREES 52

Decision and Order

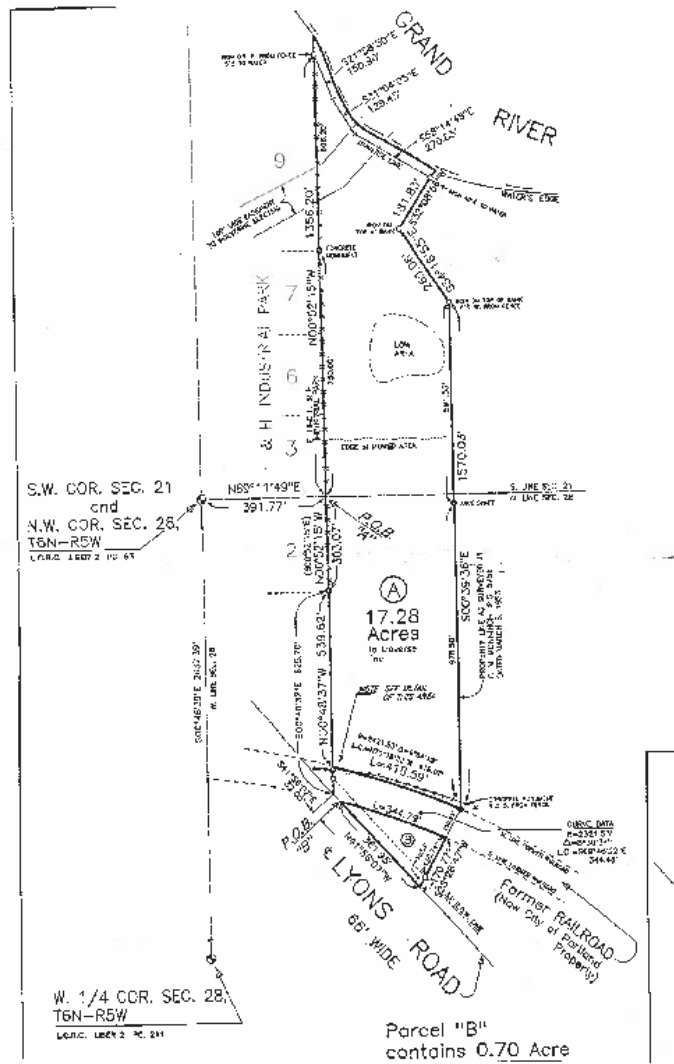
MINUTES 15 SECONDS WEST 303.07 FEET ALONG THE EAST LINE OF SAID F & H INDUSTRIAL PARK TO THE POINT OF BEGINNING. THIS PARCEL INCLUDES THE AREA BETWEEN THE TRAVERSE LINE AND THE WATERS EDGE OF THE GRAND RIVER.

ALSO, EXCEPT, PART OF THE NORTHWEST $\frac{1}{4}$ OF SECTION 28, TOWN 6 NORTH, RANGE 5 WEST DESCRIBED AS: COMMENCING AT THE NORTHWEST CORNER OF SECTION 28; THENCE NORTH 89 DEGREES 11 MINUTES 49 SECONDS EAST 391.77 FEET ALONG THE NORTH LINE OF SECTION 28; THENCE SOUTH 00 DEGREES 52 MINUTES 15 SECONDS EAST 303.07 FEET ALONG THE EAST LINE OF THE RECORDED PLAT OF F AND H INDUSTRIAL PARK; THENCE SOUTH 00 DEGREES 48 MINUTES 37 SECONDS EAST 625.70 FEET TO THE CENTERLINE OF LYONS ROAD; THENCE SOUTH 41 DEGREES 56 MINUTES 07 SECONDS EAST 32.03 FEET ALONG SAID CENTERLINE TO THE POINT OF THIS DESCRIPTION; THENCE SOUTHEASTERLY ALONG THE SOUTH RIGHT-OF-WAY OF THE FORMER C & O RAILROAD ON A CURVE TO THE RIGHT AN ARC DISTANCE OF 344.79 FEET, SAID CURVE WITH A RADIUS OF 2321.53 FEET, A DELTA ANGLE OF 08 DEGREES 30 MINUTES 34 SECONDS, AND A LONG CHORD AND BEARING OF SOUTH 69 DEGREES 46 MINUTES 22 SECONDS EAST 344.48 FEET; THENCE SOUTH 28 DEGREES 26 MINUTES 47 SECONDS WEST 170.77 FEET TO THE CENTERLINE OF LYONS ROAD; THENCE ALONG SAID CENTERLINE NORTH 41 DEGREES 56 MINUTES 07 SECONDS WEST 361.95 FEET TO THE POINT OF BEGINNING.

* * * * *

The boundaries and location of the Portland facility are also depicted in the attached survey.

Decision and Order

EXHIBIT 3

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EXHIBIT 4

The legal description of TRW's manufacturing facility in St. Catharines, Ontario, Canada located at 230 and 235 Louth Street is as follows:

For 230 Louth Street:

FIRSTLY:

Part of Lot 21, Concession 7, former geographical Township of Grantham, now in the City of St. Catharines, Regional Municipality of Niagara, designated as Parts 1, 3 and 5, Plan 30R-7311; EXCEPT Part 1, Plan 30R-9891; Parts 1 and 2, Plan 30R-10216; Parts 2-7, Plan 30R-10702; and Parts 2-6, Plan 30R-10813;

AND SUBJECT to an easement over Part 3, Plan 30R-7311 as in Instrument No. R0134973.
PIN 46156-0180 (LT)

SECONDLY:

Part of Lot 21, Concession 7, former geographical Township of Grantham, now in the City of St. Catharines, Regional Municipality of Niagara, as in Remainder of Instrument No. R0626671

(Thirdly);

EXCEPT Parts 1-6, Plan 30R-7311; Part 1, Plan 30R-9891; Parts 1-6, Plan 30R-10813; Part 1, Plan 30R-4789; and, Part 1, Plan 30R-4441;

AND SUBJECT to an easement over Part 1, Plan 30R-851 as in Instrument No. R0349385.
PIN 46156-0178 (LT)

* * * * *

For 235 Louth Street:

FIRSTLY:

Decision and Order

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of St. Catharines, in the Regional Municipality of Niagara and Province of Ontario, being formerly in the County of Lincoln and being composed of Part of Lots 1439, 1440 and 1441 as shown on a compiled Plan registered in the Registry Office for the Registry Division of the County of Lincoln as Corporation Plan No. 2 for the said City of St. Catharines and being more particularly described as follows:

COMMENCING at a point in the Northerly boundary of St. Paul Street West distant therein North 64 degrees, 32 minutes East, 10.9 feet from the Easterly boundary of Louth Street said streets as established by Municipal Survey No. 791;

THENCE North 64 degrees, 32 minutes East along the Northerly boundary of St. Paul Street West, 535.7 feet to an angle therein;

THENCE North 64 degrees, 26 minutes East along said Northerly boundary, 515.8 feet to an angle therein;

THENCE North 63 degrees, 24 minutes East along said Northerly boundary, 402.4 feet;

THENCE North 58 degrees, 38 minutes and 45 seconds West, 88.55 feet;

THENCE North 11 degrees, 51 minutes East, 95.0 feet to the Southerly boundary of the lands of the Canadian National Railway;

THENCE North 77 degrees, 54 minutes West along said Southerly boundary, 941.0 feet;

THENCE North 78 degrees, 13 minutes West along said Southerly boundary, 375.3 feet to a point in the Easterly boundary of Louth Street as widened to 60.0 feet;

THENCE South 1 degree, 50 minutes East along said last mentioned Easterly boundary, 1047.7 feet more or less to the Point of Commencement.

Decision and Order

SUBJECT TO an easement over said Lot 1441 and being in perpetuity to enter upon the lands hereinafter described for the purpose of laying down, constructing, installing and maintaining underground radials necessary to insure the satisfactory performance of a "non-directional beacon" to be erected by the Grantee herein on the lands hereinbefore described and for such purpose the Grantee shall have access to the lands hereinafter described at, any time for itself and its servants, employees, workmen and assigns: it being understood and agreed that the Grantee herein will replace either sod or asphalt, or both so that the grounds within the area of the easement as hereinafter described are returned to the same condition in which they were found prior to the commencement of construction and it being also understood and agreed that the Grantor shall have the right fully to use and enjoy the said lands hereinafter described, subject always to and so as not to interfere with the easements, rights and privileges hereby granted and conferred upon the Grantee. The said lands to be affected by this easement are:

COMMENCING at an iron bar planted in the northwesterly limit of St. Paul Street, the said iron bar being located as follows:

STARTING at the intersection of the northwesterly limit of St. Paul Street with the southerly limit of Great Western Street, as established by Municipal Survey No. 791;

THENCE South 61 degrees, 44 minutes West along the said northwesterly limit, a distance of 244.3 feet to an iron bar planted;

THENCE South 63 degrees, 24 minutes West continuing along the said northwesterly limit, a distance of 191.51 feet to the Point of Commencement;

THENCE South 63 degrees, 24 minutes West continuing along the said northwesterly limit, a distance of 115.0 feet to a point;

THENCE North 26 degrees, 36 minutes West, a distance of 109.96 feet to a point;

Decision and Order

THENCE North 11 degrees, 51 minutes East, a distance of 109.96 feet to a point in the Northerly boundary of said Lot 1441, the said boundary being along a line drawn parallel to and distant 50.0 feet measured southerly at right angle from the centre line of the East bound main line track of the Canadian National Railway;

THENCE South 78 degrees, 09 minutes East along the said Northerly boundary, a distance of 74.91 feet to an iron bar planted;

THENCE South 11 degrees, 51 minutes West, a distance of 95.00 feet to an iron bar planted;

THENCE South 58 degrees, 38 minutes and 45 seconds East, a distance of 88.55 feet, more or less to the Point of Commencement;

SECONDLY:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of St. Catharines in the Regional Municipality of Niagara and Province of Ontario, being formerly in the Township of Grantham and the County of Lincoln, being composed of Part of Lot 21 in the Sixth Concession in said Township of Grantham and being more particularly described as follows:

COMMENCING at the Southwest angle of said Lot 21:

THENCE North 1 degree, 38 minutes East along the Westerly boundary of said Lot, 522.95 feet to the Southerly boundary of the lands of the Canadian National Railways;

THENCE South 78 degrees, 10 minutes East along said Southerly boundary, 762.65 feet to the Southerly boundary of said Lot;

THENCE South 63 degrees, 27 minutes West along said Southerly boundary, 818.05 feet more or less to the Point of Commencement.

THIRDLY:

Decision and Order

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of St. Catharines, in the Regional Municipality of Niagara and Province of Ontario, being formerly in the Township of Grantham and the County of Lincoln, being composed of Part of Lot 21 in the Seventh Concession in said Township of Grantham and being more particularly described as follows:

COMMENCING at a point in the Northerly boundary of St. Paul Street West as shown on a plan of former Highway No. 8 registered in the Registry Office for the Registry Division of the County of Lincoln as Highway Plan No. 112 distant therein South 54 degrees, 17 minutes and 40 seconds West, 31.3 feet from the Easterly boundary of said Lot 21;

THENCE South 54 degrees, 17 minutes and 40 seconds West along said Northerly boundary, 455.7 feet to the beginning of a curve to the right having a radius of 1095.8 feet;

THENCE Southwesterly along said last mentioned curve, an arc distance of 373.52 feet;

THENCE North 11 degrees, 27 minutes West, 234.6 feet;

THENCE South 73 degrees, 01 minutes West, 189.2 feet;

THENCE North 10 degrees, 43 minutes West, 187.7 feet;

THENCE South 76 degrees, 17 minutes West, 365.9 feet to the Westerly boundary of said Lot;

THENCE North 1 degree, 38 minutes West along said Westerly boundary, 590.0 feet to an angle therein;

THENCE North 1 degree, 51 minutes West, 331.3 feet along said Westerly boundary, 331.3 feet to the Northwest angle of said Lot;

THENCE North 63 degrees, 17 minutes East along the Northerly boundary of said Lot, 926.1 feet to the Southerly boundary of the lands of the Canadian National Railways;

THENCE South 78 degrees, 10 minutes East along said Southerly boundary, 500.0 feet to the Westerly boundary of Louth Street as widened to 60.0 feet;

* * * * *

Decision and Order

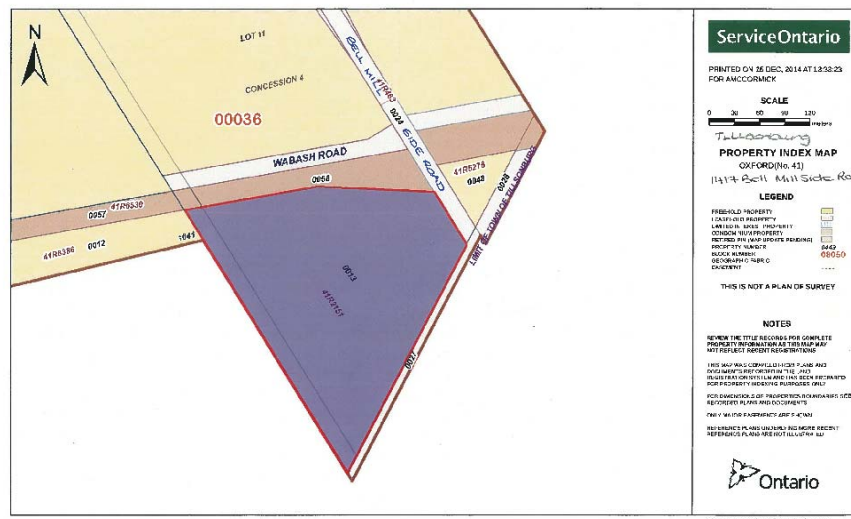
EXHIBIT 5

The legal description of TRW's manufacturing facility in Tillsonburg, Ontario, Canada located at 1417 Bell Mill Side Road is as follows:

Part Lot 11, Concession 4 NTR Middleton; Part of Road Allowance between Lots 10 and 11, Concession 4 NTR Middleton closed by A93247, designated as Part 1 on Plan 41R-2151; Tillsonburg being the whole of PIN 00036-0013 (LT).

* * * * *

The boundaries and location of the Tillsonburg facility are also depicted in the attached property index map.



Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by ZF Friedrichshafen AG (“ZF”) of TRW Automotive Holdings Corp. (“TRW”), hereinafter referred to as “Respondents,” 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 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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 determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order 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 Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent ZF Friedrichshafen AG is a stock corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic

Order to Maintain Assets

of Germany, with its office and principal place of business located at Friedrichshafen, Germany.

2. Respondent TRW Automotive Holdings Corp. is a public corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 12001 Tech Center Drive, Livonia, MI 48150.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions, and all other definitions used in the Consent Agreement and the Decision and Order, shall apply:

- A. “Decision and Order” means:
 1. the 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. the Final Decision and Order issued and served by the Commission.
- B. “EC Decision” means Case M.7420 – ZF/TRW Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area issued on March 12, 2015.
- C. “Hold Separate Business” means the TRW L&S Business.

Order to Maintain Assets

- D. “Hold Separate Business Employee” means any employee or agent of the Hold Separate Businesses (other than a Support Services Employee).
- E. “Hold Separate Order Date” means the date this Hold Separate Order is issued.
- F. “Hold Separate Period” means the period from the Acquisition Date until the Divestiture Date.
- G. “Orders” means the Decision and Order and this Hold Separate Order.
- H. “Support Services Employee” means any employee, agent, contractor, or consultant of Respondents performing Support Services, including, but not limited to, the Persons identified in Confidential Appendix B to this Hold Separate Order.
- I. “Support Services” means assistance with respect to the operation of the TRW L&S Business, including, but not limited to: (i) human resources and administrative services such as payroll processing and employee benefits; (ii) preparation of tax returns, environmental health and safety services; (iii) financial accounting and reporting services; (iv) legal, licensing, and audit services; (v) licensing and regulatory compliance in any jurisdiction in which it does business; (vi) maintenance and oversight of information technology systems and other computerized or electronic systems and databases; (vii) processing of accounts payable and accounts receivable; (viii) procurement services; (ix) public relations and public affairs services; (x) construction and development services; (xi) safety and security services; and (xii) procurement and renewal of insurance and related services. Support Services includes any assistance provided to the TRW L&S Business at any time within twenty four (24) months prior to the commencement of the Hold Separate Period, and in addition, any other assistance or support reasonably required during the Hold Separate Period to

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achieve the purposes of this Hold Separate Order and the Decision and Order.

- J. “Tillsonburg Production Line Transfer Expenditures” means all budgeted, planned, or approved expenditures and funding as of the Hold Separate Order Date that are necessary for or related to the timely completion of the transfer of the Tillsonburg Production Line as set forth in Confidential Appendix A to this Hold Separate Order.

II.

IT IS FURTHER ORDERED that during the Hold Separate Period:

- A. Respondents shall:
1. Keep the Hold Separate Business separate, apart, and independent of Respondents’ other businesses and assets as required by this Hold Separate Order and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business;
 2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, or the Hold Separate Monitor, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate Order, the Consent Agreement, the Decision and Order, the EC Decision, and all applicable laws; and
 3. Take all actions necessary to maintain and assure the continued viability, marketability, and competitiveness of the Hold Separate Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets of the Hold Separate Business, except for ordinary wear and tear, and shall not sell, transfer,

Order to Maintain Assets

encumber, or otherwise impair any of the assets of the Hold Separate Business or the Hold Separate Business (except as required by the Decision and Order).

- B. The purpose of this Hold Separate Order is to (1) maintain and preserve the Hold Separate Business as a viable, competitive, and ongoing business independent of Respondents until the divestitures required by the Decision and Order are achieved; (2) assure that no Material Confidential Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate Order; and (3) prevent interim harm to competition pending the divestiture and other relief.

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

- A. The Commission appoints Competition Rx as Hold Separate Monitor to monitor and supervise the management of the Hold Separate Business and ensure that Respondents comply with their obligations under this Hold Separate Order and the Decision and Order.
- B. Respondents shall enter into the agreement with the Hold Separate Monitor, attached as Appendix C to this Hold Separate Order, that shall become effective no later than one (1) day after the date the Acquisition is completed, and that transfers to and confers upon the Hold Separate Monitor all rights, powers, and authority necessary to permit the Hold Separate Monitor to perform his or her duties and responsibilities pursuant to this Hold Separate Order in a manner consistent with the purposes of this Hold Separate Order and the Decision and Order and in consultation with Commission staff; and shall require that the Hold Separate Monitor act in a fiduciary capacity for the benefit of the Commission:

Order to Maintain Assets

1. The Hold Separate Monitor shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by TRW Key Employees; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their obligations pursuant to this Hold Separate Order and the Decision and Order.
2. The Hold Separate Monitor shall act in a fiduciary capacity for the benefit of the Commission. Subject to all applicable laws and regulations, the Hold Separate Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Monitor may reasonably request.
3. The Hold Separate Monitor shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Monitor's duties and responsibilities.
4. The Commission may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Monitor's duties.

Order to Maintain Assets

5. Respondents may require the Hold Separate Monitor and each of the Hold Separate Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the Hold Separate Monitor from providing any information to the Commission.
 6. The Hold Separate Monitor shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
 7. Respondents shall indemnify the Hold Separate Monitor and hold it harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Monitor'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 the Hold Separate Monitor's malfeasance, gross negligence, willful or wanton acts, or bad faith.
 8. Thirty (30) days after the date the Acquisition is completed, and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order and Respondents' compliance with their obligations under the Hold Separate Order and the Decision and Order.
- C. If the Hold Separate Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order or with the EC Decision, the

Order to Maintain Assets

Commission may appoint a substitute Hold Separate Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:

1. If Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Hold Separate Monitor within five (5) business days after notice by the staff of the Commission to Respondents of the identity of the proposed substitute Hold Separate Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor.
 2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Hold Separate Monitor, enter into an agreement with the substitute Hold Separate Monitor that, subject to the approval of the Commission, confers on the substitute Hold Separate Monitor all the rights, powers, and authority necessary to permit the substitute Hold Separate Monitor to perform, its, his, or her duties and responsibilities on the same terms and conditions as provided in Paragraph III. of this Hold Separate Order.
- D. The Hold Separate Monitor shall serve through the Hold Separate Period; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. The Commission may on its own initiative or at the request of the Hold Separate Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Hold Separate Order.

Order to Maintain Assets

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

- A. Respondents shall cooperate with, and take no action to interfere with or impede the ability of: (i) the Hold Separate Monitor, (ii) any Hold Separate Business Employee, or (iii) any Support Services Employee, to perform his or her duties and responsibilities consistent with the terms of this Hold Separate Order and the Decision and Order.
- B. Respondents shall continue to provide, or offer to provide, Support Services and Required Inputs to the Hold Separate Business as were being provided to the Hold Separate Business by Respondents as of the Date of the Merger Agreement;
 - 1. For Support Services and Required Inputs that Respondents provided to the Hold Separate Business as of the Date of the Merger Agreement, Respondents may charge no more than the same price, if any, charged by Respondents for such Support Services and Required Inputs as of the Date of the Merger Agreement;
 - 2. For any other Support Services and Required Inputs that Respondents may provide to the Hold Separate Business, Respondents may charge no more than Respondents' Direct Cost for the same or similar Support Services or Required Inputs; and
 - 3. Notwithstanding the above, the Hold Separate Business shall have, in consultation with the Hold Separate Monitor, the ability to acquire Support Services or Required Inputs from Persons other than Respondents.
 - 4. Notwithstanding the above, Respondents' obligation to provide Support Services to the Hold Separate Business shall not include the provision

Order to Maintain Assets

of legal services in Germany to the extent that the provision of such services is not permitted by law.

- C. Respondents shall not permit:
1. Any of its employees, officers, agents, or directors, other than (i) any Hold Separate Employees, and (ii) any Support Services Employees, to be involved in the operations of the Hold Separate Business, except to the extent otherwise provided in this Hold Separate Order.
 2. Any Hold Separate Employee to be involved, in any way, in the operations of Respondents' businesses other than the Hold Separate Business.
- D. Respondents shall provide the Hold Separate Business with sufficient financial and other resources as may be required to fulfill Respondents' obligations and responsibilities under the Orders, and as may reasonably be requested by the Hold Separate Monitor, to:
1. Operate the Hold Separate Business as it was operated as of the Date of the Merger Agreement (including efforts to generate new business) consistent with the practices of the Hold Separate Business in place prior to the Date of the Merger Agreement;
 2. Perform all maintenance to, and replacements or remodeling of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and with current plans;
 3. Carry on such capital projects, physical plant improvements, and business plans (including, but not limited to, the Tillsonburg Production Lines as set forth in Confidential Appendix A to this Hold Separate Order) as are already under way or planned for which all necessary regulatory and

Order to Maintain Assets

legal approvals have been obtained, including, but not limited to, existing or planned renovation, remodeling, and expansion projects; and

4. Maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order, the Hold Separate Monitor may, in consultation with Commission staff, direct the Hold Separate Business Employees to reduce in scale or pace any capital or research and development project of the Hold Separate Business, or substitute any capital or research and development project of the Hold Separate Business for another of the same cost.

- E. Respondents shall provide each Hold Separate Business Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Assets pending divestiture. Such incentives shall include a continuation of all employee benefits (or employee benefits of substantially equivalent value), including funding of regularly scheduled raises and bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation, and prevent any diminution, of the viability, marketability, and competitiveness of the Hold Separate Business until the Closing Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate Order.
- F. No later than ten (10) days after the date the Acquisition is completed, Respondents shall establish

Order to Maintain Assets

and implement procedures, subject to the approval of the Hold Separate Monitor, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate Order.

- G. No later than ten (10) days after the date the Acquisition is completed, Respondents shall circulate to Hold Separate Business Employees, Support Services Employees, and to persons who are employed in Respondents' businesses that compete with the Hold Separate Business, a notice of the requirements of this Hold Separate Order, the Decision and Order, and the Consent Agreement, in a form approved by the Hold Separate Monitor in consultation with Commission staff, including copies of the Hold Separate Order and the Decision and Order.

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

- A. After the date the Acquisition is completed, Respondents' employees, other than employees of the Hold Separate Business and Support Services Employees, shall not receive, or have access to, or use or continue to use any Material Confidential Information of the Hold Separate Business except in the course of:
1. Performing their obligations or as permitted under this Hold Separate Order or the Decision and Order;
 2. Performing their obligations under the Divestiture Agreements;
 3. Negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence; and

Order to Maintain Assets

4. Complying with financial reporting requirements, obtaining legal advice, defending legal claims, conducting investigations, or enforcing actions threatened or brought against the Hold Separate Business, or as required by law. Notwithstanding the above, Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents to comply with the requirements and obligations of the laws and regulations of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold Separate Order or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this Hold Separate Order.

For purposes of this Paragraph V.A., Respondents' employees that provide Support Services or that staff the Hold Separate Business shall be deemed to be performing obligations under this Hold Separate Order.

- B. If access to or disclosure of Material Confidential Information of the Hold Separate Business to Respondents' employees is necessary and permitted under Paragraph V.A. of this Hold Separate Order, Respondents shall:
 1. Implement and maintain a process and procedures, as approved by the Hold Separate Monitor, such approval not to be unreasonably withheld, pursuant to which Material Confidential Information of the Hold Separate Business may be disclosed or used only:
 - a. to or by those employees who require such information;

Order to Maintain Assets

- b. to the extent such Material Confidential Information is required; and
 - c. after such employees have signed an appropriate agreement in writing to maintain the confidentiality of such information.
 - 2. Enforce the terms of this Paragraph V. as to any of Respondents' employees and take such action as is necessary to cause each such employee to comply with the terms of this Paragraph V, including training Respondents' employees and taking all other actions that Respondents would take to protect their own trade secrets and proprietary information.
- C. Respondents shall implement, and maintain in operation, a system, as approved by the Hold Separate Monitor, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Hold Separate Business, including, but not limited to, the opportunity by the Hold Separate Monitor, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate Order.
- D. No Hold Separate Business Employee shall receive or have access to, or use or continue to use, any non-public, confidential information relating to Respondents' businesses (not subject to the Hold Separate Order), except such information as is necessary to maintain and operate the Hold Separate Business.

VI.

IT IS FURTHER ORDERED that, within thirty (30) days after this Hold Separate Order becomes final, and every thirty (30) days thereafter until this Hold Separate Order terminates, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they

Order to Maintain Assets

intend to comply, are complying, and have complied with all provisions of this Hold Separate Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Hold Separate Order.

VII.

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

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

VIII.

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

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

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Commission and at the expense of such Respondent;
and

- B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Hold Separate Order.

IX.

IT IS FURTHER ORDERED that this Hold Separate Order shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after divestiture required by the Decision and Order is completed.

By the Commission, Commissioner Wright dissenting.

Order to Maintain Assets

CONFIDENTIAL APPENDIX A

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

Order to Maintain Assets

CONFIDENTIAL APPENDIX B

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

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted from ZF Friedrichshafen AG (“ZF”) and TRW Automotive Holdings Corp. (“TRW”), subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from ZF’s proposed acquisition of TRW.

Pursuant to an Agreement and Plan of Merger dated September 15, 2014, the parties agreed that ZF would acquire TRW for \$105.60 per share in an all-cash deal valued at approximately \$12.4 billion (“the Acquisition”). The proposed Acquisition would result in a duopoly in the heavy vehicle tie rod market. The Commission’s Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in the market for heavy vehicle tie rods in North America.

Under the terms of the proposed Decision and Order (“Order”) contained in the Consent Agreement, the parties are required to divest TRW’s Linkage and Suspension Business in a manner, and to an acquirer, that meets Commission approval. The divestiture package includes five manufacturing facilities in North America and Europe, along with related assets including intellectual property. The acquirer also has the option to enter into transitional services and supply agreements. The Consent Agreement provides an acquirer with everything needed to compete effectively in the North American heavy vehicle tie rod market. The parties must complete the divestiture within six months of executing the Consent Agreement.

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

Analysis to Aid Public Comment

The Parties

Headquartered in Friedrichshafen, Germany, ZF is a privately held global automotive and industrial products manufacturer. ZF makes light and heavy vehicle components for the powertrain, chassis, and driveline. ZF designs, manufactures, and sells heavy vehicle tie rods, amongst several other products, in its chassis division.

Headquartered in Livonia, Michigan, TRW sells chassis systems, electronic systems, passive occupant safety systems, and other automotive components. Like ZF, TRW designs, manufactures, and sells heavy vehicle tie rods.

The Relevant Product And Market Structure

The relevant line of commerce in which to analyze the effects of the Acquisition is heavy vehicle tie rods. A heavy vehicle is generally defined as one that weighs six tons or more, and a tie rod is a rigid connector that links a vehicle's individual wheels with the steering control mechanism. Customers and other market participants did not identify any substitutes for heavy vehicle tie rods.

North America is the relevant geographic market in which to analyze the effects of the Acquisition on the heavy vehicle tie rod market. The size and weight of heavy vehicle tie rods generally make it uneconomical to ship them long distances. Customers interviewed primarily consider manufacturers in North America, and have found more distant firms uncompetitive for reasons including: 1) price; 2) logistics; and 3) quality. Therefore, North America is the relevant geographic market.

The market for heavy vehicle tie rods in North America is highly concentrated. It is served primarily by ZF, TRW, and USK Internacional S.A. DE C.V. ("Urresko"). These three firms have a share of nearly 99% of the market based on unit sales. The merger would reduce the number of competitors from three to two, and increase the Herfindahl-Hirschman Index from 4,218 to 5,046, an increase of 828.

Analysis to Aid Public Comment

Entry

Entry into the North American heavy vehicle tie rod market is not likely to deter or counteract any anticompetitive effects of the proposed Acquisition. Entry is unlikely in light of the relatively small market size, strong position of incumbents, high capital costs, switching costs, and knowledge barriers that exist. The parties did not identify any likely entrants, and those firms best situated for entry – manufacturers of related heavy vehicle components – expressed no interest in entering the North American heavy vehicle tie rod market.

Effects Of The Acquisition

The proposed Acquisition would increase the likelihood of coordinated interaction among the remaining competitors in the North American heavy vehicle tie rod market. The combined company would have only one remaining significant competitor in North America, Urresko. Reducing the number of competitors from three to two would eliminate much uncertainty and make it easier for the remaining firms to reach agreement on terms of coordination, whether the coordination focuses on customer allocation, price, or some other aspect of competition.

Additionally, the proposed Acquisition would eliminate direct competition between ZF and TRW, resulting in the increased probability that customers would pay higher prices for heavy vehicle tie rods. In the past, customers have been able to use competition between ZF and TRW to obtain better prices by obtaining competing bids. Customers have also switched between ZF and TRW. That competition would be lost absent the merger.

The Consent Agreement

The Consent Agreement eliminates the competitive concerns raised by ZF's proposed acquisition of TRW by requiring the parties to divest TRW's North American and European Linkage and Suspension Business ("the L&S Business"). The proposed divestiture includes everything needed for an acquirer to compete effectively in the North American market for heavy vehicle tie rods, and also includes additional products that ensure the business will be viable. Given the robust nature of the divested

Analysis to Aid Public Comment

business, the Commission is confident that a post-order divestiture is sufficient to protect its interest in restoring competition.

Pursuant to the Order, the parties are required, no later than six months from execution of the Consent Agreement, to divest the L&S Business to a Commission-approved acquirer. That business consists of both heavy and light vehicle components, and includes – in addition to tie rods – control arms, ball joints, stabilizer links, conventional steering linkages, drag links, V-links, radius rods, and I-shafts. The divestiture buyer will receive all rights and assets relating to the L&S Business, including five TRW manufacturing facilities, Portland (US), Tillsonburg-Plant 2 (Canada), St. Catharines (Canada), Dacice (Czech Republic), and Krefeld-Gellep (Germany), as well as leased space previously occupied by L&S research and development at TRW's Dusseldorf Tech Center. The divested assets also include intellectual property rights as well as all books, records, and confidential business information related to the L&S Business.

To ensure that the divestiture is successful, the Order requires the parties to provide transition services such as logistical and administrative support at the option of the acquirer. Moreover, the acquirer will have the option to enter into a transition supply agreement with the parties for key manufacturing inputs necessary to perform existing customer contracts. The Consent Agreement also includes other standard terms designed to ensure the viability of the divestiture, including requirements that the parties assist the acquirer in hiring the existing work force of the business, and refrain from soliciting those employees for up to two years.

Given the robustness of the divested business and the protections contained in the Order, the Commission is confident that a post-order divestiture will be sufficient to preserve competition. The L&S Business has been run largely as a standalone business within TRW, and potential buyers have confirmed that the divested assets include everything necessary to compete effectively as a viable business. Similarly, potential customers have confirmed that an acquirer of the L&S Business would be a workable option as a supplier.

To ensure compliance with the Order, the Commission will appoint an Interim Monitor to oversee ZF's and TRW's

Analysis to Aid Public Comment

performance of their obligations pursuant to the Consent Agreement, and to keep the Commission informed about the status of the divestiture. The Order also allows the Commission to appoint a Divestiture Trustee to accomplish the divestiture if the parties fail to divest within the required timeframe. Lastly, the Consent Agreement contains standard reporting requirements and terminates in ten years.

The Commission has also issued an Order to Hold Separate and Maintain Assets to protect the assets until they are divested. During the hold separate period, the parties must fund the business' operations, including capital projects, according to existing plans. To ensure compliance with the Hold Separate Order, a Commission-approved Hold Separate Monitor will oversee the L&S Business during the interim period.

Opportunity For Public Comment

The purpose of this analysis is to facilitate public comment on the Consent Agreement to aid the Commission in determining whether it should make the Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

Statement of the Commission

STATEMENT OF THE COMMISSION

The Commission has issued a proposed complaint and consent order to address narrow competitive concerns associated with ZF Friedrichshafen AG's proposed \$12.4 billion acquisition of TRW Automotive Holdings Corp.¹ Specifically, we have reason to believe that this proposed acquisition is likely to substantially reduce competition in the manufacture and sale of heavy vehicle tie rods in North America. The proposed remedy, which involves a divestiture of TRW's linkage and suspension business in North America and Europe, addresses our competitive concerns and will bolster the viability of the divested business in the hands of a buyer, without eliminating efficiencies that otherwise might arise from the combination of the two companies.

ZF and TRW are global automotive parts manufacturers. Both companies manufacture and sell a wide variety of components for discrete systems within a motor vehicle such as the chassis, powertrain, and suspension systems. They each have production facilities located throughout the United States, Canada, and Mexico.

The proposed transaction will create the second-largest global auto parts supplier. Our competitive concerns arise from a limited aspect of the proposed combination, namely, its likely effect in the market for the manufacture and sale of heavy vehicle tie rods for customers in North America. Tie rods are part of a motor vehicle's steering and linkage system; they are rigid connectors that link the wheels to the vehicle's steering control mechanism. To perform their intended function within the linkage systems of vehicles weighing six tons or more, these tie rods have to be large (approximately three to six feet long) and heavy (weighing approximately 50 pounds). This means that tie rods designed for light vehicles are not practical substitutes since they would be too small and light and therefore not as strong structurally. At the same time, tie rods designed for much heavier, industrial vehicles (like mining vehicles weighing hundreds of tons) would not be substitutes either.

¹ This statement reflects the views of Chairwoman Ramirez and Commissioners Brill, Ohlhausen, and McSweeney.

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Because of their weight, it is not economical to ship heavy vehicle tie rods over long distances. For this reason, North American customers primarily consider manufacturers with production facilities in the United States, Canada, and Mexico and generally do not regard suppliers outside of North America as viable options for reasons of price, logistics, and quality. As a result, ZF and TRW, together with a Mexican firm, USK Internacional, S.A. de C.V. (“Urresko”), account for virtually all (99%) of the sales of heavy vehicle tie rods in North America. We estimate the market shares of ZF, TRW, and Urresko to be 23%, 18%, and 58%, respectively. Fringe competitors hold the remaining 1% market share.

The parties’ proposed combination will therefore reduce the number of significant competitors in the relevant market from three to two and substantially increase concentration in an already highly concentrated market.² Based on this increase in concentration and current market conditions, we believe the transaction is likely to produce substantial anticompetitive effects in the relevant market, in particular, by increasing the potential for coordination. Furthermore, there is unlikely to be any entry that would alleviate our competitive concerns. The small market size, the strong position of the incumbents, switching costs, and capital and knowledge barriers, among other factors, would more than likely deter North American manufacturers of related automotive parts—the most logical candidates for entry—from expanding their product offerings to include heavy vehicle tie rods. Consequently, we have reason to believe that the proposed combination would substantially lessen competition in the relevant market and harm customers and consumers, thereby violating Section 7 of the Clayton Act.

In light of the foregoing, we respectfully disagree with Commissioner Wright’s assertions that we lack a “credible basis” on which to conclude that the merger may enhance the risk of coordination and that our action is otherwise inconsistent with the

² The proposed transaction would increase the Herfindahl-Hirschman Index (“HHI”) in the relevant market from 4,218 to 5,046. The threshold at which a market is considered “highly concentrated” under the Merger Guidelines is 2,500. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010).

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2010 Horizontal Merger Guidelines.³ Under the 2010 Guidelines, substantial increases in concentration caused by a merger rightly continue to play an important role in our merger analysis.⁴ They do so for the simple reason that highly concentrated markets are more conducive to anticompetitive outcomes than less concentrated markets.⁵ Accordingly, the lens we apply to the evidence in a merger that reduces the number of firms in a market to three or two is, and should be, different than the lens we apply to a merger that reduces the number of firms to seven or six. Where, as here, a proposed merger significantly increases concentration in an already highly concentrated market, a presumption of competitive harm is justified under both the Guidelines and well-established case law.⁶

³ Dissenting Statement of Commissioner Joshua D. Wright at 3–4.

⁴ See Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701 (2010) (“Thus, like the fox, the 2010 Guidelines embrace multiple methods. But this certainly does not mean they reject the use of market concentration to predict competitive effects, as can be seen in Sections 2.1.3 and 5.”). As Commissioner Wright acknowledges, “The predictive power of market share and market concentration data is informed by economic theory and available empirical evidence.” Wright Dissent at 7.

⁵ See, e.g., Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), available at <http://scholarship.law.georgetown.edu/facpub/1304> (“[V]arious theories of oligopoly conduct—both static and dynamic models of firm interaction—are consistent with the view that competition with fewer significant firms on average is associated with higher prices.... Accordingly, a horizontal merger reducing the number of rivals from four to three, or three to two, would be more likely to raise competitive concerns than one reducing the number from ten to nine, *ceteris paribus*.”); Steffen Huck, et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435, 443 (2004) (testing the frequency of collusive outcomes in Cournot oligopolies and finding “clear evidence that there is a qualitative difference between two and four or more firms”); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 1006 (1991) (finding, in a study of tire prices, that “[m]arkets with three or more dealers have lower prices than monopolists or duopolists,” and noting that, “while prices level off between three and five dealers, they are higher than unconcentrated market prices”).

⁶ See 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

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Despite Commissioner Wright's insistence to the contrary, our inquiry extended beyond consideration of market concentration and application of the Guidelines presumption of competitive harm. We also examined the transaction's likely anticompetitive effects, and are satisfied that there is sufficient evidence to support the issuance of our complaint and proposed consent order.⁷ As noted above, we are particularly concerned that the transaction is likely to enhance the potential for coordination.⁸ As set forth in the Guidelines, the Commission is likely to challenge a merger under a coordinated effects theory if: "(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct []; and (3) the [Commission has] a credible basis on which to conclude that the merger may enhance that vulnerability."⁹ We have reason to believe that all three factors are satisfied here.¹⁰

rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."); *Chicago Bridge & Iron Co., N.V. 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).

⁷ The investigation in this matter did not proceed to a full phase because the parties proposed a remedy soon after second requests had been issued. Consequently, the quantum of evidence is not the same as if the agency had completed a full-phase investigation. But that does not mean, as Commissioner Wright suggests, that we are lowering our reason-to-believe standard when a remedy is proposed during the course of an investigation. Wright Dissent at 9. We believe our complaint is well supported and meets the same reason-to-believe standard we always apply. We simply do not think it would have been appropriate to subject the parties to the added expense and delay of a full-phase investigation. It would not have been a good use of Commission resources either.

⁸ Although coordinated effects is the primary basis upon which we found reason to believe that the proposed transaction violates Section 7 of the Clayton Act, we also found evidence of unilateral effects, namely, that in the past, customers have solicited competing bids from ZF and TRW to obtain better prices, and have switched between ZF and TRW as their preferred supplier.

⁹ MERGER GUIDELINES § 7.1.

¹⁰ 15 U.S.C. § 45(b) (2013).

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First, as noted above, the proposed transaction results in a highly concentrated relevant market.¹¹ Second, the market is susceptible to coordinated conduct, as evidenced by several recent cases of collusion in the auto parts industry.¹² Third, by reducing the number of significant competitors to only two, the merger would decrease the impediments to reaching common terms of coordination and make it easier to monitor compliance with, and retaliate against potential deviation from, a coordinated scheme. Specifically, as remaining duopolists with nearly equal shares (41% and 58%, respectively), the combined firm and Urresko would have greater incentives to take advantage of a market with relatively few customers that purchase homogeneous products through individual purchase orders rather than long-term supply contracts. They would also find it easier to divide customers and monitor their allocations.

Our concern that the merger may enhance the relevant market's vulnerability to coordination is backed by the well-accepted view that markets with only two or three firms are more conducive to anticompetitive outcomes than markets with four or more firms.¹³ The proposed merger would eliminate a third competitor and create greater symmetry between the two remaining firms.

Additionally, there is no evidence that fringe competitors, which have higher prices, or new entrants, which are unlikely to materialize, could disrupt any coordination between the combined firm and Urresko. For these reasons, we have ample basis to

¹¹ See Shapiro, *supra* note 4, at 708 ("In particular, as the revised Guidelines explain, the Agencies place considerable weight on HHI measures in cases involving coordinated effects.").

¹² Among the Antitrust Division's recent prosecutions of companies and individuals in the automotive parts industry for price-fixing and bid-rigging is an indictment involving TRW in an alleged conspiracy for seat belts, air bags, and steering wheels. See Plea Agmt., *United States v. TRW Deutschland Holding GMBH*, Crim. No. 12-20491 (E.D. Mich. Sept. 25, 2012), available at <http://www.justice.gov/atr/cases/f287600/287657.pdf>. See generally MERGER GUIDELINES § 7.2 ("Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.").

¹³ See Salop; Huck et al.; Bresnahan & Reiss, *supra* note 5.

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conclude that the merger may enhance the vulnerability to coordinated effects that already exists in the relevant market.¹⁴

As we noted above, the parties have chosen to address our limited competitive concerns in the heavy vehicle tie rods market through a proposal to divest TRW's linkage and suspension business in North America and Europe. This allows the parties to address our competition concerns, as well as those of the European Commission. The EC has already accepted the proposed settlement and ordered the divestiture of the European assets.¹⁵ Furthermore, there is no evidence that the divestiture of TRW's linkage and suspension business would eliminate any efficiencies that otherwise might result from the parties' proposed combination.

In sum, because we have reason to believe that customers and consumers are likely to suffer a substantial loss of competition as a result of the proposed transaction, and there are no demonstrated countervailing efficiencies, we believe the public interest is best served by accepting the proposed consent order to remedy our competitive concerns.

¹⁴ See MERGER GUIDELINES § 7.1 (recognizing that "the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof"). The Guidelines contemplate that the third factor can be satisfied in several ways; as Commissioner Wright himself notes, an acquisition of a maverick firm is but "one illustrative example of the type of evidence that would satisfy this third condition." Wright Dissent at 3.

¹⁵ See Press Release, European Commission, Mergers: Commission Clears Acquisition of Automotive Components Manufacturer TRW by Rival ZF, Subject to Conditions (Mar. 12, 2015), available at http://europa.eu/rapid/press-release_IP-15-4600_en.htm.

Concurring Statement

STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

I voted in favor of issuing for public comment the proposed consent agreement in this matter. As discussed below, there is sufficient evidence to provide me with a reason to believe that, absent a remedy, the transaction is likely to violate Section 7 of the Clayton Act. I also find that the proposed consent, which is intended to remedy any such violation, is in the public interest.

Based on the evidence presented to me – including the evidence discussed in the Analysis to Aid Public Comment and the majority statement in this matter – I am satisfied that the “reason to believe” prong that the Commission must assess in issuing a complaint, including in the consent context, is met here. It is important to note that the Commission makes the reason to believe determination before a full evidentiary and legal record is developed during a trial on the merits, which suggests that the standard must necessarily be lower than what the Commission or a court should apply for finding ultimate liability. Individual Commissioners, of course, have different views on how much evidence is necessary to satisfy the reason to believe standard. Unfortunately, there does not appear to be a consensus view on what the standard requires. I respect Commissioner Wright’s view that the standard was not met for him in this case. For the reasons identified in the majority statement in this matter, I determined that there is a credible basis on which to conclude that this merger may enhance the vulnerability to coordinated effects that already exists in the relevant market at issue.¹

I further view this consent to be in the public interest. In my time as a Commissioner, I have advocated for transparency, predictability, and fairness across a variety of settings.² Those

¹ See 2010 HORIZONTAL MERGER GUIDELINES § 7.1.

² Those settings have included the use of disgorgement in competition cases, the proper scope of our standalone Section 5 authority, the intersection of intellectual property and antitrust, and the treatment of U.S. businesses by foreign antitrust jurisdictions. See, e.g., Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re Cardinal Health, Inc.*, FTC File No. 101-0006 (Apr. 17, 2015), available at <https://www.ftc.gov/public-statements/2015/04/dissenting-statement-commissioner-maureen-k-ohlhausen-cardinal-health-inc> (dissenting from consent involving disgorgement of profits

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three critical goals apply equally to the merger context. A practical problem in our merger review process arises, however, where investigations are cut short by the merging parties, which, for business, strategic, or other reasons, offer staff and then ultimately the Commission a proposed remedy in lieu of responding to a Second Request or other compulsory process. In such cases, the available evidence may be sufficient to provide reason to believe the proposed transaction would violate Section 7, but a full investigation might (or might not) reveal additional evidence sufficient to counterbalance the available evidence and support closing the investigation altogether. In that situation, the goals of predictability and fairness counsel against forcing merging parties (and Commission staff) to incur the significant costs associated with a full-phase investigation. Merging parties also expend non-trivial amounts of time and money in developing and then proposing remedies to FTC staff; those good-faith efforts – particularly ones that involve coordination of remedies across antitrust jurisdictions – should not be discounted. The public interest analysis thus should take into account the need for predictability and fairness for merging parties in these circumstances.

for alleged Section 2 violation); Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2014), available at <http://www.ftc.gov/public-statements/2013/10/section-5-ftc-act-principles-navigation-0> (advocating for additional guidance on the FTC's use of its standalone Section 5 authority); Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re Motorola Mobility LLC & Google, Inc.*, FTC File No. 121-0120 (Jan. 3, 2013), available at <https://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0> (dissenting from consent involving standalone Section 5 claim against holder of standard-essential patents); Testimony of Commissioner Maureen K. Ohlhausen, "The Foreign Investment Climate in China: U.S. Administration Perspectives on the Foreign Investment Climate in China," before the U.S.-China Economic and Security Review Commission (Jan. 28, 2015), available at <https://www.ftc.gov/public-statements/2015/01/testimony-commissioner-maureen-k-ohlhausen-hearing-foreign-investment> (discussing importance of foreign antitrust jurisdictions pursuing the goals of predictability, transparency, and fairness).

Dissenting Statement

**STATEMENT OF
COMMISSIONER JOSHUA D. WRIGHT**

The Commission has voted to issue a Complaint and Decision & Order against ZF Friedrichshafen AG (“ZF”) to remedy the allegedly anticompetitive effects of ZF’s proposed acquisition of TRW Automotive Holdings Corp. (“TRW”). I respectfully dissent because the evidence is insufficient to provide reason to believe ZF’s acquisition will substantially lessen competition for heavy vehicle tie rods sold in North America. In particular, I believe the Commission has not met its burden to show that the acquisition will result in an increased likelihood of harm from coordinated effects or from unilateral effects. As a consequence, the Commission should close the investigation and allow the parties to complete the proposed transaction without imposing a remedy.

I write separately today to explain my vote and to discuss the quality and quantity of evidence necessary to support a coordinated and unilateral effects challenge under the 2010 *Horizontal Merger Guidelines* (“*Merger Guidelines*”).

The Complaint alleges the proposed transaction increases the likelihood of coordinated effects and unilateral effects in the market for heavy vehicle tie rods sold in North America.¹ After the proposed transaction, ZF and TRW would have a combined 41% share. The remaining competitor, Urresko, has a 58% share. Fringe suppliers have a 1% share.

I. Coordinated Effects Are Unlikely In The Relevant Market

The Complaint implicates an important question with regard to coordinated effects: what evidence is necessary to establish reason to believe a proposed transaction may substantially lessen competition by “enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers.”²

¹ Compl. ¶ 12, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 5, 2015).

² U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 7 (2010) [hereinafter MERGER GUIDELINES].

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The *Merger Guidelines* offer three conditions that, if satisfied, suggest the agency is likely to challenge a merger upon the basis that it will result in an increased likelihood of competitive harm from coordination. The *Merger Guidelines* specify that the agencies are likely to challenge a merger if: (1) “the merger would significantly increase concentration and lead to a moderately or highly concentrated market;”³ (2) the “market shows signs of vulnerability to coordinated conduct;”⁴ and (3) “the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability.”⁵

The second and third conditions are at issue here and worthy of further discussion.

The record evidence is mixed with respect to the second condition, whether the market shows signs of vulnerability to coordinated conduct. Evidence that the market is generally conducive to coordinated interaction includes the fact that heavy vehicle tie rods are fairly homogeneous goods and are purchased using relatively short-term contracts.

Also potentially germane to assessing the vulnerability of the relevant market to coordinated conduct are previous episodes of coordination by the same players in different markets. In 2012, a German subsidiary of TRW Automotive, TRW Deutschland Holding GmbH, pled guilty to a conspiracy to fix prices of seatbelts, airbags, and steering wheels sold to two German automobile customers for vehicles manufactured or sold in the United States.⁶ While this prior episode does not involve the same relevant product or geographic markets as the current matter, it might suggest some vulnerability to coordination.⁷

³ *Id.* § 7.1.

⁴ *Id.*

⁵ *Id.*

⁶ Plea Agreement ¶ 4(e)-(f), *United States v. TRW Deutschland Holding GmbH*, No. 2:12-cr-20491-GCS-PJK (E.D. Mich. Sept. 25, 2012).

⁷ The *Merger Guidelines* state that “The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in

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There are other considerations, however, that indicate the market for heavy vehicle tie rods is not particularly vulnerable to coordination. First, while the product might be fairly homogeneous, there are significant switching costs including the time and cost involved with validation testing of the new supplier's tie rods. All else equal, significant switching costs make markets less vulnerable to coordination because they diminish firms' ability to punish effectively deviations from the coordinated price. Second, cost and demand fluctuations appear to be relatively frequent and large, which increase the information costs needed to detect accurately deviations.⁸ Third, Urresko is a relatively recent entrant and has become the largest supplier in the market. These types of disruptive market events are generally not conducive to successful coordinated interactions. Finally, there are a number of large buyers, which can result in dramatic market share swings if a supplier loses the majority of a buyer's business. While the record evidence with respect to vulnerability of the relevant market is certainly mixed at best, it would not be

express collusion affecting the relevant market," but that prior "express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market," and that prior collusion "in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market." MERGER GUIDELINES, *supra* note 2, § 7.2. Thus, I am comfortable with concluding the prior TRW Deutschland price-fixing case is material to our investigation, and that this evidence increases the likelihood of coordination, all things equal. However, without a more detailed assessment of any logical connection between the markets where collusion actually took place and the relevant market here, I am hesitant to give this factor alone substantial weight given observable differences between the markets. For instance, in the markets at issue in that case, the bidding process appeared to be more formal with longer commitments. See Information ¶ 8, *United States v. TRW Deutschland Holding GmbH*, No. 2:12-cr-20491-GCS-PJK (E.D. Mich. July 30, 2012).

⁸ For instance, the primary input to produce heavy vehicle tie rods is steel. Looking at the producer price index for steel mill products, the average annual price change over the past ten years is 1.6% with a standard deviation of 6.6%. Some of the specific yearly changes are substantial, e.g., -8.6%, 7.5%, 9.1%, 12.8%. *Producer Price Index - Metals and Metal Products*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/regions/mid-atlantic/data/ProducerPriceIndexMetals_US_Table.htm (last visited May 8, 2015).

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unreasonable to find the second prong in the *Merger Guidelines* satisfied.

Ultimately, however, I do not have reason to believe the proposed transaction is likely to result in coordinated effects because the record evidence does not satisfy the third condition – that is, there is no “credible basis on which to conclude that the merger may *enhance*” any pre-merger vulnerability to coordination.

The *Merger Guidelines* provide the acquisition of a maverick firm as one illustrative example of the type of evidence that would satisfy this third condition. There is no evidence that either ZF or TRW is a maverick firm as contemplated by the *Merger Guidelines*.

The sole evidence offered in favor of the proposition that the proposed transaction will *enhance* the market’s vulnerability to coordination is that the merger will reduce the number of firms in the relevant market from three to two. I do not agree that a reduction of firms from three to two, without more, is enough to provide “a credible basis to conclude that the merger may *enhance* that vulnerability.” The observation that a market with N firms will, after the merger, have N-1 firms, is simply insufficient without more to establish the required credible basis under the *Merger Guidelines*. This is true even when a merger reduces the number of firms from three to two. The Commission offers no explanation as to why the *Merger Guidelines* would go through the trouble of requiring a credible basis to believe a merger will change the market’s competitive dynamics that *enhances* the market’s vulnerability to coordinated conduct, *in addition to* an increase in market concentration, in order to substantiate a coordinated effects merger challenge if the latter were considered sufficient to satisfy both elements.⁹

⁹ The Commission cites Carl Shapiro to support the proposition that market concentration is relevant to coordinated effects analysis. See Statement of the Federal Trade Commission 2 n.4, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015) (quoting Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 708 (2010) (“In particular, as the revised Guidelines explain, the Agencies place considerable weight on HHI measures in cases involving coordinated effects.”)). I agree. The 2010 *Merger Guidelines* establish market

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As I have stated previously, “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. Thus, the *Merger 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.”¹⁰ Janusz Ordover, in a leading treatment of the economics of coordinated effects, similarly explains that “It is now well understood that it is not sufficient when gauging the likelihood of coordinated effects from a merger to simply observe that because the merger reduces the number of firms, it automatically lessens the coordination problem facing the firms and enhances their incentives to engage in tacit collusion; far from it.”¹¹ The required additional evidence needed to satisfy the third condition is absent in this case.

II. Unilateral Effects Are Unlikely in the Relevant Market

The sole evidence offered in favor of the Commission’s allegation that the merger will render unilateral price effects likely is that some customers have used the competition between ZF and TRW to obtain better pricing and some customers have switched between the two suppliers.¹² While this is certainly material to our inquiry, this is a thin reed, without more, upon which to base a unilateral price effects case. There is no information on price

concentration as one of three conditions that must be satisfied to find coordinated effects. What Shapiro does not state, and the proposition the Commission does not otherwise substantiate, is that evidence of changes in market concentration is sufficient to satisfy the third condition along with the first.

¹⁰ Dissenting Statement of Commissioner Joshua D. Wright 3, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013).

¹¹ Janusz A. Ordover, *Coordinated Effects*, in 2 ISSUES IN COMPETITION LAW AND POLICY 1359, 1367 (ABA Section of Antitrust Law 2008) (“It is quite clear . . . that a reduction in the number of firms and concomitant increases in concentration do not necessarily make collusion inevitable or even more likely, stable, or complete.”).

¹² See Analysis of Agreement Containing Consent Order to Aid Public Comment 2, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 5, 2015).

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effects. Moreover, there is no substantial evidence on the record with respect to the role the market leader, Urresko, plays in disciplining prices. The fact that Urresko is a recent entrant and has become the market leader in a relatively short period of time also renders dubious the proposition that barriers to entry in the relevant market are adequate to sustain a post-merger price increase. Additionally, even with sufficient barriers, Urresko's rapid growth undermines significantly any unilateral effects argument and suggests a post-merger price increase from a merged ZF-TRW would be fragile and potentially unsuccessful. The *Merger Guidelines* contemplate the possibility of intense competition in markets with small numbers of firms, observing that "Even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings."¹³

Moreover, unilateral effects in a homogeneous goods market principally involve reductions in output.¹⁴ In order to be profitable, the reduction in output must not be met by a sufficient supply response by rivals. Thus, absent meaningful capacity constraints, unilateral effects are less likely in homogeneous goods markets. I have seen no evidence that Urresko is capacity constrained.

III. Conclusion

The Commission insists that a different "lens" should be used to evaluate evidence in markets where the number of firms is reduced by merger to three or two.¹⁵ The Commission cites in support of its structural theory and presumption three academic articles written by economists.¹⁶ Only two offer economic evidence and the proffered substantiation fails to support the claim. The first is an important early entrant into the static entry literature examining the relationship between market size and the number of entrants in a market, focusing upon isolated rural

¹³ MERGER GUIDELINES § 5.3, *supra* note 2.

¹⁴ *See id.* § 6.3.

¹⁵ *See* Statement of the Federal Trade Commission, *supra* note 9, at 2.

¹⁶ *Id.* at 2 n.5.

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markets.¹⁷ It strains credulity to argue that Bresnahan and Reiss's important analysis of the impact of entry in markets involving doctors, dentists, druggists, plumbers, and tire dealers in local and isolated areas, where they find the competitive benefits of a second competitor are especially important, apply with generality sufficient to support a widely applicable presumption of harm based upon the number of firms. Indeed, the authors warn against precisely this interpretation of their work.¹⁸

The second is a laboratory experiment and does not involve the behavior of actual firms and certainly cannot provide sufficient economic evidence to support a presumption that four-to-three and three-to-two mergers in real-world markets will result in anticompetitive coordination.¹⁹ Once again, the authors warn against such an interpretation.²⁰

Finally, the Commission cites a draft article, authored by Steve Salop, in support of its view that economic evidence supports a presumption that four-to-three and three-to-two

¹⁷ Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991). While Bresnahan and Reiss is an important early contribution to the static entry literature, it cannot possibly bear the burden the Commission wishes to place upon it. Abstracting from the complexities of market definition was necessary for the researchers to isolate entry decisions. This is possible when studying the effects of entry by a second dentist in a town with a population of less than 1,000, but not in most real-world antitrust applications. The authors of the study make this point themselves, noting that "whether this pattern appears in other industries remains an open question." *Id.* at 1007.

¹⁸ In earlier research using similar empirical techniques and data – namely, small rural markets – Bresnahan and Reiss plainly reject the notion that the findings should inform views of market structure and competition generally: "We do not believe that these markets 'stand in' for highly concentrated industries in the sectors of the economy where competition is national or global." Timothy F. Bresnahan & Peter C. Reiss, *Do Entry Conditions Vary Across Markets*, 3 BROOKINGS PAPERS ECON. ACTIVITY 833, 868 (1987).

¹⁹ Steffen Huck et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435 (2004).

²⁰ *Id.* at 436 ("The number of firms is not the only factor affecting competition in experimental markets. This implies that there exists no unique number of firms that determines a definite borderline between non-cooperative and collusive markets irrespective of all institutional and structural details of the experimental markets.").

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mergers are competitively suspect.²¹ The article does not purport to study or provide new economic evidence on the relationship between market structure and competition. Thus, it cannot support the Commission's proposition.²² In sum, there is simply no empirical economic evidence sufficient to warrant a *presumption* that anticompetitive coordination is likely to result from four-to-three or three-to-two mergers.

It is important to note that the Commission and I have no disagreement over the proposition that the number of competitors within a market is a relevant fact to assess the likely competitive effects of a transaction. The relevant question is not whether the number of firms matters but how much it matters—and in particular, whether a movement to three or two firms warrants a generally applicable presumption that a transaction is more likely than not to harm competition. I do not believe it does. The Commission disagrees.

The *Merger Guidelines* make clear that the purpose of market concentration and market shares associated thresholds “is not to provide a rigid screen to separate competitive benign mergers from anticompetitive ones, although high levels of concentration do raise concerns.”²³ Rather concentration is but one aspect of the inquiry aimed at better understanding post-merger incentives to

²¹ Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), available at <http://scholarship.law.georgetown.edu/facpub/1304/>.

²² Nevertheless, to the extent Salop argues in favor of legal presumptions in merger analysis, he clarifies that they “obviously should be based on valid economic analysis, that is, proper economic presumptions,” which should be updated “based on new or additional economic factors besides market shares and concentration.” *Id.* at 37, 48. I agree. Additionally, Salop explains that “[c]ontemporary economic learning suggests that concentration be considered when undertaking competitive effects analysis – in conjunction with other factors suggested by the competitive effects theory – but not treated as the sole determinant of post-merger pricing.” *Id.* at 13-14. Notably, Salop does not endorse a distinction between four-to-three mergers or three-to-two mergers and mergers in less concentrated markets that justifies a presumption that the former are anticompetitive; rather, he merely observes that empirical evidence and economic theory do not warrant “*ignoring* market shares and concentration in merger analysis.” *Id.* at 12 (emphasis in original).

²³ MERGER GUIDELINES, *supra* note 2, § 5.3.

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compete. The predictive power of market share and market concentration data is informed by economic theory and available empirical evidence. There is no empirical evidence sufficient to establish a generally applicable presumption that mergers that reduce the number of firms to three or two are likely to harm competition.²⁴ Further, the Commission's reliance upon such shorthand structural presumptions untethered from empirical evidence subsidize a shift away from the more rigorous and reliable economic tools embraced by the *Merger Guidelines* in favor of convenient but obsolete and less reliable economic analysis.

This is not to say that evidence of changes in market structure cannot ever warrant such a presumption. It does when the evidence warrants as much. The Commission has in certain contexts found reason to believe competition would be substantially lessened based simply upon a reduction of firms in the relevant market. See *Actavis plc-Forest Laboratories*²⁵ and also *Akorn-Hi-Tech Pharmacal*,²⁶ which both involve generic pharmaceutical markets. The Commission was able to draw conclusions about the relationship between price and the number of firms in generic pharmaceutical markets because substantial research has been done to establish that such a relationship exists.²⁷ Indeed, the cases in the pharmaceutical industry are the

²⁴ See Statement of Commissioner Joshua D. Wright 3-5, *Holcim Ltd.*, FTC File No. 141-0129 (May 8, 2015).

²⁵ Analysis of Agreement Containing Consent Orders to Aid Public Comment 2, *Actavis plc*, FTC File No. 141-0098 (June 30, 2014) (“In generic pharmaceutical product markets, price generally decreases as the number of generic competitors increases. Accordingly, the reduction in the number of suppliers within each relevant market would likely have a direct and substantial anticompetitive effect on pricing.”).

²⁶ Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, *Akorn Enterprises, Inc.*, FTC File No. 131-0221 (Apr. 14, 2014) (“In generic pharmaceuticals markets, price is heavily influenced by the number of participants with sufficient supply.”).

²⁷ See David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 REV. ECON. & STAT. 37 (2005). As an aside, given that we are now ten years removed from the publication of this important study and over twenty years removed from the sample period, it might be worth revisiting this question with fresher data if the Commission intends to continue relying upon inferences of competitive harm from market structure in the generic pharmaceutical market.

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exceptions that prove the rule that the Commission needs to do more than count the number of firms in a market to have reason to believe a substantial lessening of competition is likely. No such research has been done in this market. Accordingly, unlike in generic pharmaceutical markets, we have no evidence to conclude that a simple reduction in the number of firms in this market is likely to lead to higher prices and lower output. Simply assuming such a relationship exists in this market without any evidence to suggest that it does harkens back to the bad old days of the first half of the 20th century, when the structure-conduct-performance paradigm was in vogue.

To summarize, there are three-to-two mergers that give rise to unilateral effects, and three-to-two mergers that give rise to coordinated effects. It is our burden to show that *this* three-to-two merger is likely anticompetitive. The Commission must find sufficient evidence to support an inference of likely economic harm to consumers. The heavy degree of reliance upon a structural presumption in this case is not sufficient to do so.

Finally, the Commission and Commissioner Ohlhausen each claim that the quantity, and presumably the quality, of the evidence is not the same for investigations truncated by remedy proposals compared to cases where a full phase investigation is completed or compared to a completed trial, respectively.²⁸ While this observation is an accurate description of the pragmatic reality of conducting law enforcement investigations, I do not agree with the implication that the quantum and quality of evidence needed to satisfy the “reason to believe” standard should turn on whether and when a remedy proposal is offered during an investigation. The idea is that we should “take into account the need for predictability and fairness for merging parties in these circumstances”²⁹ and considerations whether it is “appropriate to subject the parties to the added expense and delay of a full phase investigation.”³⁰ I fully support the agency identifying

²⁸ See Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7; see also Separate Statement of Commissioner Maureen K. Ohlhausen 1, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015).

²⁹ Separate Statement of Commissioner Maureen K. Ohlhausen, *supra* note 28, at 2.

³⁰ Statement of the Federal Trade Commission, *supra* note 9, at 3 n.7.

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opportunities to lower the administrative costs of antitrust investigations and believe there to be ample opportunity to do so. But attempts to operate a more efficient law enforcement system must satisfy the constraint, required by law, that there is reason to believe a transaction violates Section 7 of the Clayton Act. That standard sets a relatively low bar for the minimum level of evidence required to substantiate a merger challenge. I reject the view that it should be a standard that should be relaxed because the merging parties offer a remedy.³¹ The Commission is primarily a law enforcement agency, albeit one that largely conducts its business by entering into consents with merging parties. Making the consent process more efficient and predictable is a laudable goal; but we must not allow pursuit of a more efficient consent process to distort our evaluation of the substantive merits. To do so, as in my view we have here, risks in the long run reducing the institutional capital of the agency in magnitudes far greater than any potential cost savings from truncating an investigation.

For these reasons, I cannot join my colleagues in supporting the consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

³¹ That said, as I stated in *Holcim Ltd.*, I am not suggesting the “reason to believe” standard “requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request.” See Statement of Commissioner Joshua D. Wright, *supra* note 24, at 11.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

JERK, LLC AND JOHN FANNING

Docket No. 9361. Order, January 12, 2015.

Commission order granting a four-day extension of the deadline for complaint counsel to file a reply to respondent's opposition to complaint counsel's motion for summary decision.

COMMISSION ORDER ON COMPLAINT COUNSEL'S UNOPPOSED MOTION TO EXTEND TIME TO REPLY TO RESPONDENT JERK, LLC'S OPPOSITION TO MOTION FOR SUMMARY DECISION

On January 6, 2015, Complaint Counsel moved to extend the time to reply to Respondent Jerk, LLC's ("Jerk's") Opposition to Complaint Counsel's Motion for Summary Decision. Under Commission Rule 3.22(d), the deadline for Complaint Counsel's Reply is January 12, 2015. Complaint Counsel has requested an extension of that deadline to January 16, 2015.

Complaint Counsel explains that the extension would permit it to receive Jerk's responses to long-outstanding discovery requests – expected on or before January 13 – before filing the Reply. Complaint Counsel also maintains that simultaneous filing obligations regarding aspects of the case pending before Chief Administrative Law Judge Chappell leave it “pressed for time.” Complaint Counsel states that counsel for Respondents Jerk and John Fanning do not oppose the requested extension.

Under Commission Rule 4.3(b), the Commission, “for good cause shown, may extend any time limit prescribed by the rules . . .” 16 C.F.R. § 4.3(b). Under the circumstances described above, the four-day extension of time is appropriate. Accordingly, the Unopposed Motion is **GRANTED**; and

IT IS HEREBY ORDERED that the deadline for Complaint Counsel to file a Reply to Respondent Jerk's Opposition to

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Complaint Counsel's Motion for Summary Decision shall be January 16, 2015.

By the Commission.

H.I.G. BAYSIDE DEBT & LBO FUND II, L.P.

Docket No. C-4494. Order, February 18, 2015.

Letter approving application to divest the membership interest in the Blue Springs Surgery Center in Orange City, Florida, to Dr. Mark Hollmann.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Stephen C. Wu, Esquire
McDermott Will & Emery LLP

Dear Mr. Wu:

This responds to the Application for Approval of Divestiture ("Application") to Dr. Mark Hollmann filed by H.I.G. Bayside Debt & LBO Fund II, L.P. on November 26, 2014. Pursuant to the Decision and Order in Docket No. C-4494, HIG requests prior Commission approval of its proposal to divest certain assets to Dr. Hollmann. The Application was placed on the public record for comments for thirty days, until January 9, 2015, and one comment was received.

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

By direction of the Commission.

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COMMUNITY HEALTH SYSTEMS
AND HEALTH MANAGEMENT ASSOCIATES

Docket No. C-4427. Order, February 24, 2015.

Letter approving application to divest Riverview Regional Medical Center and its associated assets near Gadsden, Alabama, to Prime Healthcare Services, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Bilal Sayyed, Esquire
Kirkland & Ellis, LLP

Dear Mr. Sayyed:

This responds to the Application for Approval of Proposed Divestiture (“Application”) to Prime Healthcare Services, Inc., filed by Community Health Systems on November 24, 2014. Pursuant to the Decision and Order in Docket No. C-4427, Community requests prior Commission approval of its proposal to divest certain assets to Prime. The Application was placed on the public record for comments for thirty days, until January 8, 2015, and no comments were received.

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

This also responds to Community’s Petition for Extension of Time (“Petition”) filed by Community dated October 14, 2014. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), Community requests an extension of time in which to complete the divestiture required by the Decision and Order in this matter. Pursuant to the terms of the Decision and Order, Community was required to complete the divestiture within four months from the date the Commission issued the Order as final, or by October 14, 2014. Rule 4.3(b) provides that “the Commission, for good cause shown, may extend any time limit prescribed by

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the rules in this chapter or order of the Commission.” Under applicable precedent, Community has the burden of demonstrating good cause, and granting an extension of time rests in the discretion of the Commission.

The Commission has reviewed this Petition, Community’s compliance reports, and other information, and, after careful consideration, has determined to grant this Petition and extend the time in which Community must complete the divestiture to Prime as approved by the Commission today. Community has shown that it began its divestiture efforts immediately upon reaching the consent agreement with the Commission staff, that it has acted diligently throughout the entire divestiture period and in close communication with the Commission staff to reach a final agreement with Prime, and that the delays in completing negotiations were not due to unreasonable demands or other unreasonable conduct by Community. The Commission expects that Community will complete the divestiture promptly upon the Commission’s approval.

By direction of the Commission.

ECM BIOFILMS, INC.

Docket No. 9358. Order, February 25, 2015.

Commission order approving a 2,500-word extension of the word count limitation for both respondent’s and complaint counsel’s appeal briefs.

COMMISSION ORDER EXTENDING WORD COUNT LIMITATION

On February 24, 2015, the parties filed a Joint Motion for Extension of Word Count Limitation, pursuant to Commission Rules 3.52(c)(2) and 3.52(k). The Joint Motion requests a 2,500-word extension of the limits for opening and answering appeals briefs, for a limit of 16,500 words each. The parties maintain that

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in view of the magnitude and technical complexity of the record, undue prejudice will result from the existing word limits.

Commission Rule 3.52(k) provides that “[e]xtensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit.” Under the circumstances described by the parties, an extension of the word count limitations is appropriate. Accordingly,

IT IS ORDERED THAT the parties will be permitted to file opening and answering appeals briefs not to exceed 16,500 words in each brief; and

IT IS FURTHER ORDERED THAT the appeals briefs filed in this matter shall in all other respects conform to the requirements of Commission Rule 3.52, 16 C.F.R. § 3.52.

By the Commission.

PHOEBE PUTNEY HEALTH SYSTEM, INC. ET AL.

Docket No. 9348. Order, February 26, 2015.

Commission order permitting the matter to be withdrawn from adjudication for an additional month to facilitate further consideration of a settlement proposal.

COMMISSION ORDER EXTENDING WITHDRAWAL OF MATTER FROM
ADJUDICATION UNTIL MARCH 31, 2015

On January 28, 2015, the Commission issued an Order withdrawing this matter from adjudication for the purpose of considering a Consent Proposal. Pursuant to that Order, this matter is scheduled to revert to Part 3 adjudicative status at 11:59 p.m. EST on Friday, February 27, 2015. To facilitate further consideration of the Consent Proposal, the Commission has

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decided to extend the withdrawal of this matter from adjudication. Accordingly,

IT IS ORDERED THAT, pursuant to 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b)(2015), this matter will remain withdrawn from adjudication until 11:59 p.m. EST on Tuesday, March 31, 2015, at which time it will return to adjudicative status under Part 3 of the Commission Rules of Practice.

By the Commission, Commissioner Wright and Commissioner McSweeney not participating.

JERK, LLC AND JOHN FANNING

Docket No. 9361. Order, May 28, 2015.

Commission order denying respondents' applications to stay the Commission's final order pending review by the United States Court of Appeals for the First Circuit, as respondents failed to demonstrate the order will cause irreparable injury and as a stay would risk harm to consumers.

COMMISSION ORDER DENYING RESPONDENTS' MOTION TO STAY
FINAL ORDER PENDING JUDICIAL REVIEW

Respondent John Fanning has applied for a stay of the Commission's Final Order, pending review by the United States Court of Appeals for the First Circuit. Respondent Jerk, LLC ("Jerk") has filed an application "adopt[ing] and incorporat[ing]" Mr. Fanning's application. Complaint Counsel oppose the requests for stay. For the reasons discussed below, Respondents have not shown that a stay is warranted and we deny their applications.¹

¹ The Commission's opinion in this matter is available at https://www.ftc.gov/system/files/documents/cases/150325jerkopinion_0.pdf. The order is available at <https://www.ftc.gov/system/files/documents/cases/150325jerkorder.pdf>.

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BACKGROUND

From 2009 to 2013, Respondents operated Jerk.com, a social media website that invited users to create profiles for other people and rate each as a “jerk” or “not a jerk.” Op. 1, 2. The site encouraged users to post photos of their friends and acquaintances with comments and reviews about them. Op. 9. Jerk earned revenues from selling “memberships” promising “additional paid premium features,” including the ability to dispute information posted on the site. Op. 2. The website contained more than 80 million unique profiles, including several million with pictures of children. Op. 2, 27, 33. The Commission and state law enforcement agencies received hundreds of complaints about Jerk.com from consumers who reported that they spent time and money attempting to get their profiles removed. Op. 33-34.

In 2014, the Commission issued a two-count administrative complaint alleging that Jerk and its member and manager, John Fanning, engaged in deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Count I alleged that Respondents falsely represented that the names, photographs, and other content that appeared on the website were posted by users and reflected users’ views of the profiled persons, when in fact Respondents harvested nearly all of the content from Facebook. Count II alleged that Respondents falsely represented that consumers who purchased a \$30 “standard membership” would receive benefits, including the ability to dispute information posted on Jerk.com about them. But customers who purchased the memberships received no benefits in return.

On March 13, 2015, we granted summary decision to Complaint Counsel against both Respondents on both counts.² With regard to Count I, we held that Jerk’s statements on its website constitute an implied representation that Jerk.com

² Rule 3.24 of the Commission’s Rules of Practice permits the Commission to issue summary decision when it “determines that there is no genuine issue as to any material fact regarding liability or relief.” 16 C.F.R. § 3.24(a)(2); see *Polygram Holdings, Inc.*, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002) (Rule 3.24(a)(2) is “virtually identical” to the summary judgment provisions in Federal Rule of Civil Procedure 56).

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content, including names and photographs, was created by Jerk users and reflected their views of the profiled individuals. Respondents did not dispute that Jerk itself had taken the “vast majority” of the content from Facebook and posted it on Jerk.com. Respondents also offered nothing to rebut evidence that consumers sought removal of their profiles and purchased memberships because of the “embarrass[ment]” and “alarm[.]” that people they knew had created Jerk.com profiles about them. Op. 14, 16. Thus, Complaint Counsel sustained their burden to demonstrate that Respondents’ representations about the source of the content on the website were both false and material.

Respondents barely responded to Complaint Counsel’s motion for summary decision on Count II. Complaint Counsel produced testimony by consumers (confirmed by an FTC investigator) who bought Jerk.com memberships but were unable to dispute or remove information from their profiles. Respondents did not rebut or address any of that evidence. They offered instead only John Fanning’s vague and nonresponsive declaration, which stated that “[a]s far as [he was] aware,” Jerk “remove[d] content from Jerk.com whenever it was obligated to do so” and “would refund money to users who claimed they had paid but had not received membership services.” Op. 20-21.

Finally, we found beyond genuine dispute Mr. Fanning’s individual liability for Jerk’s violations. He instructed programmers to create Jerk.com profiles by taking information from Facebook, advocated a business model in which Jerk charged consumers for “dispute resolution” services, and defended these decisions to investors and business partners. Op. 26-28. Mr. Fanning’s declaration asserted that he was merely an “advisor” to Jerk, Op. 24, but because the declaration did not provide “any evidence to support his bare assertions,” we found it did not create a genuine factual dispute. Op. 28.

As a remedy, Paragraph I of the Final Order bars Respondents, “in connection with the marketing, promoting, or offering for sale of any good or service,” from misrepresenting the source of any content on a website or the benefits of joining any service. Paragraph II forbids Respondents from disclosing, using, selling, or benefitting from Jerk’s customer information or consumers’ personal information obtained in connection with

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Respondents' operation of Jerk. To ensure that Respondents do not use this information for future deceptive claims, Paragraph II also requires Respondents to dispose of the information within 30 days of the effective date of the Final Order. Paragraphs III through VII contain various recordkeeping, notification, and reporting requirements.

STANDARD FOR A STAY

Section 5(g) of the Federal Trade Commission Act provides that the Commission's cease and desist orders (except divestiture orders) will take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2). Respondents and Respondents' counsel were served with the Order and Final Opinion of the Commission on March 30, 2015. Thus, absent a stay, the Final Order will become effective on May 29, 2015. See 15 U.S.C. § 45(g)(2); 16 C.F.R. § 3.56(a).

Under Commission Rule 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. See 16 C.F.R. § 3.56(c); *In re McWane, Inc.*, 2014 WL 1630460, at *1 (FTC Apr. 11, 2014); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). The required likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay." *In re North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006). If the balance of the equities does not support a stay, the movant must make a higher showing of likely success on the merits. *In re North Carolina Board of Dental Examiners*, 2012 WL 588756, at *1 (FTC Feb. 10, 2012). Respondents have not satisfied any of the four factors.

LIKELIHOOD OF SUCCESS ON APPEAL

As to the first factor, Respondents are unlikely to succeed on appeal because their legal claims are without merit.

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Respondents first contend that they were deprived of fair notice and “an opportunity to present their objections,” Fanning Mtn. to Stay 3, because the Commission found Respondents liable for *implied* misrepresentations whereas (according to Respondents) the Complaint and Complaint Counsel’s motion for summary decision predicated liability on a theory of *express* misrepresentations. That claim misstates the record. In fact, Count I of the Complaint alleged that “respondents represented, expressly **or by implication**, that content on Jerk . . . was created by Jerk users.” Compl. ¶ 15 (emphasis added). Consistent with that allegation of implied misrepresentation, Complaint Counsel’s motion for summary decision argued that Respondents had violated the FTC Act by making both express *and* implied misrepresentations about the source of the content posted on Jerk.com.³ Respondents plainly had notice of the implied representation theory because their oppositions to Complaint Counsel’s motion for summary decision argued that “[n]othing contained in the homepage disclaimer constitutes a ‘claim’ about the source of the content, **either express or implied**, or could possibly be construed as an advertisement intended to lure users to the Jerk.com site.”⁴ Respondents’ notice theory is thus without merit.

³ See Complaint Counsel’s Memorandum in Support of Motion for Summary Decision 20 (“Even if this representation were not disseminated through express statements, it would still be presumptively material because Respondents intended to convey it to consumers visiting Jerk.com.”); *see also id.* 7-8 (arguing that Respondents’ reposting of photographs from Facebook created an “implication” that Jerk.com’s content was user-generated); Complaint Counsel’s Reply to Respondent Jerk, LLC’s Opposition to Complaint Counsel’s Motion for Summary Decision 6 (“Here, it is beyond dispute that Jerk made the misrepresentation alleged in Count I through multiple explicit and clearly implied statements.”); *id.* at 9 (“Because the representation alleged in Count I was conveyed through express and conspicuous implied statements, the Commission need not look to extrinsic evidence to unearth a deeper meaning beyond what is plain on its face.”).

⁴ John Fanning’s Memorandum in Opposition to Complaint Counsel’s Motion for Summary Decision 9 (emphasis added) (citing *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992)); *see also* Jerk, LLC’s Memorandum in Opposition to Complaint Counsel’s Motion for Summary Decision 7, 10 (characterizing Complaint Counsel as arguing that (1) the Jerk website’s terms and conditions “*implicitly* represented that all profiles on jerk.com were created by jerk.com users,” and (2) Respondents’ misrepresentations were material because they were made “explicitly or *implicitly* but intentionally.” (emphasis added)). Nor does Respondents’ notice theory have merit as to Count II,

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Respondents next assert that they cannot lawfully be held liable because their misrepresentations that the content on Jerk.com was created by users “could not possibly be construed as an advertisement.” Fanning Mtn. to Stay 4-5. As we explained in granting summary decision, however, the Commission’s authority to prevent deceptive practices is not limited to “advertising” or “promotional” claims; it applies to *any* type of commercial representation likely to deceive a reasonable consumer. Op. 11-12, citing *FTC v. AMG Servs., Inc.*, 29 F. Supp. 3d 1338, 1349-52 (D. Nev. 2014) (loan note disclosure); *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 626, 631 (D. N.J. 2014) (statements on website about privacy policy). In any case, the representation that content was user-generated “drove traffic to the Jerk.com website” and “was indeed promotional.” Op. 11-12. This argument, too, is thus meritless.

Respondents are also wrong to argue that the Commission improperly granted summary disposition because a “fact question” exists concerning whether they deceived consumers into purchasing Jerk.com memberships by claiming they would receive benefits, including the right to dispute information in their profiles. Fanning Mtn. to Stay 6. Beyond their bare assertion of a factual dispute, Respondents cite no actual evidence demonstrating one. Nor did they cite any such evidence in their opposition to Complaint Counsel’s motion for summary decision. Indeed, Jerk did not even address Count II in its brief in opposition, and Mr. Fanning addressed Count II only with a self-serving, conclusory declaration that did not rebut the testimonial and documentary evidence cited by Complaint Counsel. *See* Op. 17-22.

There is also no merit to Respondents’ claims concerning the injunctive provisions of the Final Order. Paragraph I prohibits Respondents, “in connection with the marketing, promoting, or offering for sale of any good or service,” from misrepresenting (1) “the source of any content on a website, including personal information;” and (2) “the benefits of joining any service.” Respondents claim they have an “absolute right” under the First

regarding which the Commission identified express statements that “represent exactly what the Complaint alleges.” Op. 18-19.

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Amendment to publish information gathered from public sources and to engage in speech on social media. Fanning Mtn. to Stay 7. But Paragraph I of the Final Order does not apply to non-commercial speech and, even as to commercial speech, does not bar Respondents from disseminating information from public sources or engaging in truthful, non-misleading speech on social media. See Op. 31, 33, 36. It merely prohibits misleading commercial speech, which is not protected by the First Amendment. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (“For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.”); see also *In re R.M.J.*, 455 U.S. 191, 203 (1982) (“Misleading advertising may be prohibited entirely.”). The Order’s ban on misleading commercial speech “merely requires Respondents to follow the law,” and is tailored to apply to the types of “speech that ha[ve] been found to be deceptive.” *Daniel Chapter One*, 149 F.T.C. at 1598-99. Although Paragraph I prohibits deception concerning websites and services other than Jerk.com, “the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . [I]t must be allowed effectively to close all roads to the prohibited goal” *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). There is thus no basis for Respondents’ charge that the Final Order is an infringement of their First Amendment rights.

Finally, Respondents object to the monitoring and recordkeeping provisions in the Final Order. Fanning Mtn. to Stay 7-8. Respondents assert that these provisions are “punitive and not related to the finding of liability based solely on the finding of an implied representation concerning [the] source of website content.” Fanning Mtn. to Stay 7. That is incorrect. To begin with, the remedial provisions are not “solely” based on Jerk’s misrepresentations about the source of website content. Respondents also deceived consumers into paying “membership” fees based on false representations to consumers that they could remove or modify their Jerk.com profiles, as alleged in Count II. Moreover, all of these violations were knowing, deliberate, and serious, and such practices could be easily repeated in connection with other web-based services. See Op. 34 & n.41. The Order’s monitoring and recordkeeping requirements therefore bear a “reasonable relation to the unlawful practices found to exist,”

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FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965), because they are reasonably designed to ensure that Mr. Fanning and Jerk do not commit similar violations in the future. Federal courts routinely uphold similar monitoring and recordkeeping requirements in deception cases. See, e.g., *Dep't of Justice v. Daniel Chapter One*, --- F. Supp. 3d ----, 2015 WL 1502137, at *7 (D.D.C. Mar. 31, 2015); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000).

In sum, Respondents have identified no plausible appellate challenge to the Commission's order. That failure is a sufficient basis for denying their stay requests. In any event, for the reasons discussed below, Respondents do not satisfy the remaining stay factors either.

IRREPARABLE INJURY

Respondents bear the burden of demonstrating irreparable injury that is "both substantial and likely to occur absent the stay." *North Texas*, 141 F.T.C. at 460. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *6 (May 22, 1996). Respondents have not met this burden.⁵

Mr. Fanning's principal claim of harm is that the Commission was motivated to proceed against him and Jerk.com because it disliked the website's content and that the allegedly improper motivation somehow deprives him of First Amendment rights. Fanning Mtn. to Stay at 10. The claim does not address any actual effect on Mr. Fanning of the Final Order and does not identify any harm that would be relieved if the Final Order were stayed. It is also wrong. Our opinion makes clear that the Commission has not targeted the content of Jerk.com profiles, and the Final Order does not restrict such content. Mr. Fanning remains free to create websites that "provide[] a platform to exchange opinions in the free-flow of human relationships," Fanning Mtn. to Stay at 10, and the Final Order does not restrict any speech protected by the First Amendment. The Final Order

⁵ Although Jerk has joined Mr. Fanning's motion to stay, his motion only claims that Mr. Fanning will suffer irreparable harm, and it thus does not support any claim of injury against Jerk itself.

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does prohibit Mr. Fanning, “in connection with the marketing, promoting, or offering for sale of any good or service,” from making *misrepresentations* about the source of website contents and the benefits of website membership. As explained above, the First Amendment does not protect such misrepresentations, and Mr. Fanning thus can suffer no cognizable harm from an order restricting them. *See* Op. 30-31.⁶

Mr. Fanning also asserts that the monitoring and compliance reporting provisions will “affect my livelihood[,] . . . will infringe upon my privacy rights, will potentially infringe upon the privacy rights of my clients, and will contravene certain non-disclosure agreements.” Declaration of John Fanning in Support of Motion to Stay ¶ 6. But Mr. Fanning provides no facts to support these bare allegations, let alone to demonstrate irreparable harm. A party cannot establish irreparable harm simply by claiming that compliance monitoring will reveal sensitive or confidential information. The FTC Act, as well as the Commission’s Rules of Practice, provide Mr. Fanning with ample protection for any sensitive information that his documents might contain. *See, e.g.*, 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10.

Finally, Mr. Fanning objects to the Final Order’s requirement that, for the next ten years, he notify the Commission when becoming affiliated with a new business or employment or when discontinuing any such affiliation. Mr. Fanning asserts that this reporting requirement is “unduly burdensome, as I conduct business with a large number of companies on a regular basis.” Fanning Decl. ¶ 7. But Mr. Fanning fails to explain how reporting even a large number of business affiliations could cause him “irreparable harm,” especially given the protections offered by the FTC Act and Rules of Practice for commercially sensitive information.

Of course, equitable relief will always impose at least incidental burdens on a person found to violate the law through

⁶ Mr. Fanning incorrectly claims that the Final Order prohibits him from making true statements. Declaration of John Fanning in Support of Motion to Stay ¶ 5. As discussed, the Order prohibits only commercial misrepresentations.

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deception, and Mr. Fanning is no exception. But he has provided no concrete facts showing that the Final Order will cause irreparable harm.

DEGREE OF INJURY TO OTHER PARTIES AND THE PUBLIC INTEREST

The remaining stay factors concern whether the stay would harm other parties and whether it is in the public interest. The FTC considers these factors together because Complaint Counsel are responsible for representing the public interest by enforcing the law. *Daniel Chapter One*, 149 F.T.C. at 1600; *California Dental*, 1996 FTC LEXIS 277, at *8. We conclude that granting Respondents a stay would risk harm to consumers and therefore is not in the public interest.

The Final Order's prohibitions on misrepresentation, restrictions on the use of consumers' personal data, and required monitoring and recordkeeping measures are necessary to protect consumers. Respondents have injured numerous consumers by (1) creating Jerk.com profiles using information derived from Facebook while passing off such profiles as if they were created by actual Jerk.com users; and (2) offering profiled persons the right to dispute their profiles for a fee and then failing to honor that commitment. *See Op.* 33-34. These practices triggered hundreds of complaints with the Commission and state law enforcement agencies. *Id.* 13, 34 & n.15. Respondents' misrepresentations were knowing, and their violations of the FTC Act were serious, deliberate, and capable of repetition. *See id.* 34.

Mr. Fanning argues that a stay creates "no possible risk of harm" because Jerk.com is "not currently operating." Fanning Mtn. to Stay 12. But the risks to consumers continue even if Jerk.com does not.¹ As we noted in our Opinion, Respondents have a history of making similar misrepresentations and transferring consumers' personal data across various websites. *See Op.* 34 ("When Respondents lost the Jerk.com domain name they moved the content to Jerk.org and continued making the

¹ Although Mr. Fanning claims that Jerk.com is inoperative, Complaint Counsel note that, as of May 1, 2015, Jerk.com remains an active website.

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same misrepresentations. . . . Similarly, Respondents used automatically generated profiles on the reper.com website when they began the next iteration of their business in 2010.”). Such practices may continue unless the Final Order becomes effective. Issuing a stay would therefore disserve the public interest.

CONCLUSION

Having considered the factors set forth in Commission Rule 3.56(c), we conclude that John Fanning and Jerk, LLC have not met their burden for showing that a stay of the Final Order pending judicial review is warranted. Accordingly,

IT IS ORDERED THAT Respondents’ Motions to Stay Enforcement of the Commission’s Order Pending Review by the United States Court of Appeals for the First Circuit are **DENIED**.

By the Commission.

ECM BIOFILMS, INC.

Docket No. 9358. Order, May 29, 2015.

Commission order requesting both parties to file briefs with the Commission, limited to specific issues, that supplement the parties’ respective statements made during oral argument.

COMMISSION ORDER SCHEDULING SUPPLEMENTAL BRIEFING AND
DENYING CORRECTION REGARDING STATEMENTS MADE DURING
ORAL ARGUMENT

This matter having been heard by the Commission upon the appeal of ECM Biofilms and the cross-appeal of Complaint Counsel and upon the respective briefs and oral arguments in support of their positions, the Commission has determined that supplemental briefing would assist it in resolving the issues presented. In accordance with Commission Rule 3.54, the

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Commission directs supplemental briefing limited to the following issues:

- A. Can the survey evidence in the record be interpreted as causal or experimental surveys with appropriate test and control groups? Would it be appropriate to do so? If so, please explain what inferences can be drawn from such an interpretation in light of relevant legal authority and statistical methods. If not, please explain why not.
- B. In light of relevant legal authority and statistical methods, what weight should the Commission give to the results of descriptive surveys, which measure an attitude, characteristic, or belief that survey respondents hold, relative to the results of causal surveys or experimental surveys, which use test and control groups to measure the effect of a specific variable?
- C. Is it possible to quantify the degree of convergence among the consumer surveys in the record in this case (APCO, Synovate, Frederick, and Stewart) or within any single survey? If so, please calculate the degree of convergence, if any, of these surveys. If not, please explain the significance of the inability to quantify convergence to an issue or issues on appeal.

Accordingly,

IT IS ORDERED THAT:

- 1. On or before June 22, 2015, ECM and Complaint Counsel shall file briefs, not to exceed 4,000 words (excluding any attachments), addressing *only* the foregoing issues;
- 2. On or before 14 days after service of the briefs described in Paragraph 1, ECM and Complaint Counsel may file responding briefs not to exceed 2,500 words (excluding any attachments); and

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3. Attachments to briefs may include declarations from any experts who testified in this proceeding.

No extensions of time or word limits will be granted.

Additionally, we note that following oral argument, Complaint Counsel submitted a filing entitled Complaint Counsel's Correction Regarding Statements Made During Oral Argument. Respondent thereafter filed an Opposition arguing that Complaint Counsel's filing is not authorized under the Commission's Rules of Procedure. Given the Commission's order for supplemental briefing, the Commission finds Complaint Counsel's submission to be moot and has determined not to consider it.

Therefore,

IT IS FURTHER ORDERED THAT Complaint Counsel's Correction Regarding Statements Made During Oral Argument shall not be considered.

By the Commission.

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LABMD, INC.

Docket No. 9357. Order, June 15, 2015.

Commission order denying respondent's motion to disqualify Chairwoman Ramirez based upon statements made to members of Congress regarding the matter during adjudication before the Administrative Law Judge.

COMMISSION ORDER DENYING MOTION TO DISQUALIFY
CHAIRWOMAN EDITH G. RAMIREZ
AND STATEMENT OF CHAIRWOMAN RAMIREZ

By Commissioner Joshua D. Wright, for a unanimous Commission:¹

Respondent LabMD, Inc. has moved that the Commission, pursuant to 16 C.F.R. § 4.17, disqualify Chairwoman Ramirez from further participation in this administrative proceeding. See Motion to Disqualify Commissioner Edith Ramirez (Apr. 27, 2015). Having considered all arguments and exhibits in support of, and in opposition to, the Motion, we deny the Motion.² We have also considered Chairwoman Ramirez's May 20, 2015

¹ The Commission approved this Order and Opinion on June 15, 2015. Chairwoman Ramirez did not participate, in accordance with Rule 4.17(b)(3)(ii). Commissioner Brill did not take part in the consideration or decision herein.

² Complaint Counsel filed an opposition to the Motion on April 30, 2015. On May 6, 2015, LabMD filed a "Motion to Strike Complaint Counsel's Opposition to Respondent's Motion to Disqualify Chairwoman Edith Ramirez or, In the Alternative, Motion for Leave to File Reply in Support of Motion to Disqualify Commissioner Edith Ramirez." LabMD argues that the Commission's Rules of Practice do not permit Complaint Counsel to file the Opposition because Rule 4.17 does not contain an express provision allowing responses to a disqualification motion. However, the plain language of the Commission's Rules of Practice provides otherwise. Complaint Counsel's Opposition was properly filed pursuant to Rule 3.22(d), which governs responses to "any written motion" and operates in conjunction with Rule 4.17 and other rules relating to specific motions. See 16 C.F.R. § 3.22(d). Accordingly, LabMD's motion to strike is denied. Although Rule 3.22(d) does not provide the moving party with the right to reply, the Commission grants LabMD leave to file a reply and has reviewed its Reply. The Commission also grants LabMD's Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD, Inc.'s Motion to Disqualify Commissioner Edith Ramirez (May 15, 2015) and has carefully considered the attachments therein.

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statement declining to recuse herself from further participation in this administrative adjudication.³ As explained below, Chairwoman Ramirez’s limited involvement in the agency’s responses to an inquiry from a congressional oversight committee has in no way compromised her ability to participate objectively in this proceeding.

LabMD bases its Motion on two grounds. First, LabMD alleges that Chairwoman Ramirez’s involvement in responding to an inquiry from the U.S. House of Representatives Committee on Oversight and Government Reform (“Oversight Committee”) has “irrevocably tainted and compromised” her decision-making process in this adjudication. Motion at 1, 7-8. Second, LabMD claims there is a “reasonable suspicion” that Chairwoman Ramirez has prejudged this case. *Id.* at 8-9.

I. INQUIRY FROM THE OVERSIGHT COMMITTEE

The Oversight Committee’s former Chairman Darrell Issa sent letters to the agency regarding Tiversa, Inc., an evidentiary source in the Bureau of Consumer Protection’s investigation of LabMD. Chairwoman Ramirez was involved in responding to certain of those letters. LabMD argues that both the Committee’s letters and the Chairwoman’s participation in the Commission’s response to them require disqualification. *See* Motion at 7-8.

A congressional inquiry can taint an adjudicative proceeding when it “focuses directly and substantially upon the mental decisional processes” of the Commission in a pending case, subjecting a commissioner to a “searching examination as to how and why he reached his decision.” *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966). Thus, when a party alleges that a congressional inquiry has tainted an adjudicative proceeding, courts examine not the mere fact of the inquiry, but whether there is a direct connection between the congressional involvement and the adjudicator’s decision-making process. *ATX, Inc. v. U.S. Dep’t of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994); *see also Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011).

³ Chairwoman Ramirez’s statement is hereby placed on the public record as Attachment A to this opinion (“Statement”).

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Courts typically engage in this analysis only after an agency has reached a merits decision in an adjudication and a party seeks to invalidate it for improper congressional interference. However, the same standard also provides a useful guidepost for assessing a claim that a congressional inquiry threatens to taint a decision an agency may render in the future. In both circumstances, the underlying principles are the same. See *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 169-71 (D.C. Cir. 1983) (holding that lower court erred in enjoining a pending adjudicative proceeding because congressional communications did not clearly taint the proceeding). Thus, recusal would be required only if the congressional communications posed a serious likelihood of affecting the agency decision maker's ability to act fairly and impartially in the matter before it.

LabMD's allegation does not meet this standard. Unlike *Pillsbury*, the Oversight Committee's letters did not "directly and substantially" focus upon—or even address—Chairwoman Ramirez's decisionmaking process on the merits of the adjudication. Rather, the letters concerned an evidentiary source in the Bureau of Consumer Protection's investigation of LabMD. LabMD infers a connection between the two by speculating that because the Oversight Committee has "questioned [the] FTC's competence . . . only a judgment against LabMD will rescue [the] FTC's reputation[.]" Motion at 8. If that were the case, however, no agency adjudication could ever proceed if there were any congressional involvement that arguably could be seen as calling agency action into question.

LabMD's reliance on *Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), is unavailing. In that case, the court found that a congressional letter criticizing the agency's initial determination and urging the Secretary of the Interior to postpone a final decision in the adjudication had "compromised the appearance of the Secretary's impartiality." *Id.* at 610 (quoting *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971)). There, however, the letter from Congress requested specific action by the Secretary of the Interior, and the Secretary rendered a decision on the merits consistent with the congressional request a mere two days after receiving the letter. *Id.* No such facts are present here.

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Indeed, Chairwoman Ramirez has taken appropriate steps to limit her involvement in responding to the Oversight Committee. As the Chairwoman notes in her Statement, her only role (and that of the staff in her office) was to ensure that the Oversight Committee received full and prompt cooperation from the agency. As her Statement and the exhibits attached to LabMD's Motion and supplemental filings demonstrate, no evidence shows that she took part in addressing the substantive questions raised by the Oversight Committee or the merits of this case. To the contrary, she carefully restricted her role to the appropriate one of ensuring agency cooperation with Congress. The circumstances provide no basis to believe that the Oversight Committee's inquiry has impaired Chairwoman Ramirez's (or the Commission's) ability to render a fair and impartial decision in this case. *See ATX*, 41 F.3d at 1529 (finding that congressional involvement did not taint an adjudication where agency officials were "non-committal in their reactions to the congressional contacts" and did not "discuss the merits of the case with the congressmen").

Furthermore, the FTC has followed, and will continue to follow, its rules of practice in this administrative adjudication. The Administrative Law Judge is conducting an evidentiary hearing in this adjudicative proceeding and will issue an Initial Decision. Any appeal from that decision will be determined by the Commission based on its consideration of the administrative record in this matter.

II. PREJUDGMENT

LabMD also argues that disqualification is required because there is a "reasonable suspicion" that Chairwoman Ramirez has prejudged this case. Motion at 8-9. In particular, LabMD asserts that the agency's use of the deliberative process privilege to withhold certain documents in response to a Freedom of Information Act ("FOIA") request regarding the Oversight Committee's inquiry creates a "presumption" of prejudgment. *Id.* at 8.

Agency officials are "presumed to be objective and 'capable of judging a particular controversy fairly on the basis of

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its own circumstances.”” *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Even if LabMD could show a “reasonable suspicion of unfairness,” Motion at 8, which it has not, that would not overcome the presumption of decision-maker objectivity. “Reasonable suspicion” is not enough. A party asserting prejudgment must show that the agency official has “*demonstrably* made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence.” *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (emphasis added) (internal quotation marks omitted). Disqualification based on prejudgment is required only where “a disinterested observer may conclude that [the decision maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”” *Id.* at 1164-65 (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

LabMD’s Motion does not meet this standard. The agency’s reliance on the deliberative process privilege in a FOIA response does not raise a “reasonable suspicion,” let alone a “demonstrable” showing of prejudgment. The deliberative process privilege applies to many types of agency deliberations from officials at various levels within the agency, including recommendations for responding to congressional inquiries. *Judicial Watch Inc. v. U.S. Dep’t of Homeland Sec.*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010) (holding that the privilege applies to deliberative documents used for responding to congressional inquiries); *see also Odland v. FERC*, 34 F. Supp. 3d 3, 16-18 (D.D.C. 2014) (affirming use of the privilege to withhold “emails among lower level agency staff”). Therefore, the agency’s invocation of the deliberative process privilege provides no basis for a finding of prejudgment.

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III. CONCLUSION

Accordingly,

IT IS ORDERED THAT LabMD's Motion to Disqualify Chairwoman Edith Ramirez is **DENIED**.

By the Commission, Chairwoman Ramirez and Commissioner Brill not participating.

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ATTACHMENT A

Statement of Chairwoman Edith Ramirez

The administrative proceeding regarding the complaint against respondent LabMD, Inc. has been pending before Administrative Law Judge D. Michael Chappell since August 2013. In June 2014, the U.S. House of Representatives Committee on Oversight and Government Reform (“Oversight Committee”) began an inquiry regarding Tiversa, Inc., an evidentiary source in the Bureau of Consumer Protection’s investigation of LabMD. By motion filed on April 27 and supplemented on May 15, LabMD seeks to disqualify me from further participation in this matter, arguing that I have been “irrevocably tainted and compromised by” my involvement in the Federal Trade Commission’s response to the Oversight Committee’s requests for information.¹ The charge is without merit. As I explain below, nothing transpired during the course of the Oversight Committee’s inquiry that would warrant my recusal.

The Oversight Committee’s review of the role Tiversa played in the Bureau of Consumer Protection’s investigation has not compromised in any way my ability to participate objectively in this matter. To the contrary, because the Oversight Committee’s requests for information bore some relationship to issues that are being adjudicated in the administrative proceeding before the ALJ and may come before the Commission on any appeal of the ALJ’s decision, I was very careful to limit my involvement in the FTC’s response to the Oversight Committee’s inquiry. My only role (and that of the staff in my office) was to ensure that the Oversight Committee received full and prompt cooperation from the agency. As part of that effort, I was involved in responding to correspondence from the Oversight Committee’s then-Chairman Darrell Issa. However, I took no part in addressing the substantive

¹ See Respondent LabMD, Inc.’s Motion to Disqualify Commissioner Edith Ramirez (Apr. 27, 2015) at 1; *see also* Motion to Strike Complaint Counsel’s Opposition to Respondent’s Motion to Disqualify Chairwoman Edith Ramirez, or, In the Alternative, Motion for Leave to File Reply in Support of Motion to Disqualify Commissioner Edith Ramirez (May 6, 2015); Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD, Inc.’s Motion to Disqualify Commissioner Edith Ramirez (May 15, 2015).

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questions raised by the Oversight Committee, as the exhibits LabMD submitted in support of its motion demonstrate.

In the absence of any evidence that I have been influenced by the Oversight Committee's inquiry or have prejudged this matter, LabMD first suggests that the very fact of the Oversight Committee's inquiry has served to taint my ability to render an objective decision. Specifically, LabMD argues that because the Oversight Committee has "questioned [the] FTC's competence," "only a judgment against LabMD will rescue [the] FTC's reputation."² But if that were the case, no administrative adjudication could proceed in the face of congressional involvement in any issue that could arguably be seen as calling into question agency action. That is too thin a reed on which to base recusal, and not surprisingly, there is no legal authority supporting LabMD's position.

LabMD next argues that there is a "reasonable suspicion" that I have prejudged this matter because the FTC withheld certain documents on the basis of the deliberative process privilege in responding to a Freedom of Information Act request about the Oversight Committee's requests for information. This assertion is equally unfounded. Recusal is required only where "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."³ A party seeking disqualification must show that the official has "demonstrably made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence."⁴ LabMD's claim of prejudgment falls far short of this standard. The deliberative process privilege applies to many types of agency determinations reached by officials at various levels within the agency, including recommendations for responding to Congressional inquiries.⁵

² Motion to Disqualify at 8.

³ *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

⁴ *Id.* at 1165 (internal quotation omitted).

⁵ *Judicial Watch Inc. v. United States Dep't of Homeland Security*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010).

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Accordingly, the FTC's invocation of that privilege provides no basis whatsoever for any claim of prejudgment.

The facts indicate nothing more than that I properly oversaw the FTC's response to the Oversight Committee's requests for information. I therefore decline to recuse myself from participation in this matter.

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SYSCO CORPORATION, USF HOLDING CORPORATION,
AND US FOODS, INC.

Docket No. 9364. Order, June 30, 2015.

Commission order dismissing administrative complaint issued against respondents in light of respondents' decision to abandon the proposed transaction and to withdraw their Hart-Scott-Rodino filings.

COMMISSION ORDER DISMISSING COMPLAINT

On February 19, 2015, the Federal Trade Commission issued the administrative Complaint in this matter, having reason to believe that the merger agreement between Sysco Corporation ("Sysco") and Respondents USF Holding Corp. and US Foods, Inc. (collectively, "USF Holding Corp."), pursuant to which Sysco would acquire all of the shares of USF Holding Corp., violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and which, if consummated, would have violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act. Complaint Counsel and Respondents now jointly seek dismissal of the Complaint, on the ground that Respondents have abandoned their proposed merger and withdrawn their Hart-Scott-Rodino Notification and Report Forms.¹

The Commission has determined to dismiss the Complaint without prejudice, in light of Respondents' decision to abandon the proposed transaction and their withdrawal of their Hart-Scott-Rodino Notification and Report Forms. Respondents would not be able to effectuate the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms. The Commission has therefore determined that the public interest warrants dismissal of the Complaint in this matter.² Accordingly,

¹ See Joint Motion To Dismiss Complaint (June 29, 2015), at 1.

² See, e.g., *In the Matter of Verisk Analytics, Inc., et al.*, Docket No. 9363, Order Dismissing Complaint (Dec. 19, 2014), available at <https://www.ftc.gov/system/files/documents/cases/141219veriskeaglevieworder.pdf>; *In the Matter of Visant Corp., et al.*, Docket No. 9362, Order Dismissing Complaint (May 7, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140507vaisantjostensorder.pdf>.

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IT IS ORDERED THAT the Complaint in this matter be,
and it hereby is, dismissed without prejudice.

By the Commission.