

Complaint

IN THE MATTER OF

DRUG TESTING COMPLIANCE GROUP, LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4565; File No. 151 0048**Complaint, January 21, 2016 – Decision, January 21, 2016*

This consent order addresses Drug Testing Compliance Group, LLC's communication to a competitor in an attempt to arrange a customer allocation agreement. The complaint alleges that TC Group violated Section 5 of the Federal Trade Commission Act by inviting a competitor to enter a customer allocation agreement. Under the Order respondent DTC Group is required to cease and desist from communicating with its competitors about customers and prices. The Order also prohibits DTC Group from entering into, participating in, inviting, or soliciting an agreement with any competitor to allocate customers, to divide markets, or to fix prices.

Participants

For the *Commission*: *William Lanning*.

For the *Respondent*: *Michelle Points, Points Law, PLLC*.

COMPLAINT

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

NATURE OF THE CASE

1. Drug Testing Compliance Group, LLC ("DTC Group") invited its closest rival to enter into a customer allocation agreement. By inviting collusion, DTC Group endangered competition and violated Section 5 of the FTC Act.

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RESPONDENT

2. Drug Testing Compliance Group, LLC, is a limited liability corporation organized, existing, and doing business under and by virtue of the laws of Idaho, with its principal place of business in Meridian, Idaho.

3. DTC Group markets and sells to commercial drivers, commercial trucking firms, and other persons an array of services that facilitate compliance with various regulations administered by the Department of Transportation and the Federal Motor Carrier Safety Administration, including services relating to drug and alcohol testing, safety audits, driver qualification files, and other record keeping.

4. DTC Group primarily utilizes telemarketing and the internet to advertise and sell its services. DTC Group competes with several firms throughout the United States offering similar services.

JURISDICTION

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

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

INVITATION TO COLLUDE

7. DTC Group and Competitor A market and sell similar services in direct competition. Beginning in 2013 and continuing to date, DTC Group and Competitor A have competed for one another’s customers by offering lower prices for similar services. In some instances, one rival can induce a customer, whose contract is terminable at will, to switch service providers by offering lower prices.

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8. On or about June 27, 2014, the president of DTC Group, David Crossett, contacted Competitor A to complain about the actions of Competitor A's sales personnel that led a DTC Group customer to switch service providers. Mr. Crossett requested a meeting with Competitor A to discuss the matter.

9. On or about July 10, 2014, Mr. Crossett met with the principals of Competitor A. Mr. Crossett proposed that the firms agree not to solicit or compete for one another's customers. Specifically, Mr. Crossett proposed that DTC Group and Competitor A should reciprocally agree to refrain from selling or attempting to sell a service to a customer if the rival firm had previously arranged to sell the same service to the customer. Mr. Crossett referred to this arrangement as "First Call Wins," and explained that such agreement would allow each company to sell its services to customers without fearing that its rival would later undercut it with a lower price offer.

VIOLATION CHARGED

10. As set forth in Paragraphs 7 through 9 above, DTC Group invited a competitor to enter into an agreement to allocate customers, in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices of DTC Group, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts and practices of DTC Group will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of January 2016, issues its complaint against Drug Testing Compliance Group.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Drug Testing Compliance Group, LLC (hereinafter referred to as “Respondent”), a limited liability corporation, and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Drug Testing Compliance Group, LLC is a limited liability corporation organized, existing, and doing business under and by virtue of the laws of the State of Idaho, with its corporate office and principal

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place of business located at 217 East Pine Avenue, Suite 102, Meridian, Idaho 83642.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Drug Testing Compliance Group, LLC, and this proceeding is in the public interest.

ORDER**I.**

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

- A. “Drug Testing Compliance Group” or “Respondent” means Drug Testing Compliance Group, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Drug Testing Compliance Group, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Relevant Product” means any good or service marketed or sold by the Respondent or any other person that facilitates or assists the purchaser’s compliance with federal regulations of the Department of Transportation and/or the Federal Motor Carrier Safety Administration.
- C. “Commission” means the Federal Trade Commission.
- D. “Competitor” means any person that markets or sells, or could potentially market or sell, any Relevant Product and includes its employees, agents, and representatives.
- E. “Communicating” means any transmittal, exchange, transfer, or dissemination of information, regardless of

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the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions including, but not limited to, meetings, telephone communications, and email.

- F. “Department of Transportation” means the United States Department of Transportation.
- G. “Federal Motor Carrier Safety Administration” means the Federal Motor Carrier Safety Administration of the United States Department of Transportation.

II.

IT IS FURTHER ORDERED that in connection with the sale of any Relevant Product in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Communicating with any Competitor regarding customers or prospective customers, prices or rates, or prospective prices or rates, of Respondent or any Competitor; *provided, however*, that for purposes of this Paragraph II.A, Communicating does not include the transfer or dissemination of information to the public through websites or other widely accessible methods of advertising such as newspapers, television, signage, direct mail or online and social media.
- B. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, encouraging, offering or soliciting any agreement or understanding, express or implied, between or among Respondent and any Competitor:
 - 1. To allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories;

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2. To raise, fix, maintain, or stabilize prices or price levels, rates or rate levels, or payment terms, or to engage in any other pricing action; or
 3. To set, change, limit or reduce service terms or service levels.
- C. Exhorting, requesting, suggesting, urging, advocating, encouraging, advising, or recommending to any Competitor, either publicly or privately, that such Competitor:
1. Allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories;
 2. Set, change, raise, fix, stabilize or maintain its prices or price levels, rates or rate levels, or payment terms, or engage in any other pricing action; or
 3. Set, change, reduce, limit, maintain, or reduce its service terms or service levels.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final, provide to each of Respondent's officers, directors and employees a copy of this Order and the Complaint.
- B. For a period of four (4) years from the date this Order becomes final, provide a copy of this Order and the Complaint to any person who becomes a director, officer, or employee of Respondent, and provide such copies within thirty (30) days of the commencement of such Person's employment or term as an officer or director.

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- C. Require each person to whom a copy of this Order is furnished pursuant to Paragraph III.A. and III.B. above to sign and submit to Respondent within thirty (30) days of the receipt thereof a statement that (1) represents that the undersigned has read and understands the Order, and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Respondent to penalties for violation of the Order.
- D. Retain documents and records sufficient to record Respondent's compliance with its obligations under Paragraph III of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall file a verified written report within sixty (60) days from the date this Order becomes final, annually thereafter for four (4) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

- A. A copy of the acknowledgement(s) required by III.C. of the Order; and
- B. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its principal address or place of business within twenty (20) days of such change in address; and

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- B. At least thirty (30) days prior to:
1. Any proposed dissolution of Respondent;
 2. Any proposed acquisition, merger, or consolidation of Respondent; or
 3. Any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VI.

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

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

VII.

IT IS FURTHER ORDERED that this Order shall terminate on January 21, 2036.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing consent order (“Consent Agreement”) from Drug Testing Compliance Group, LLC (“DTC Group”). The Commission’s Complaint alleges that DTC Group violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting a competitor to enter a customer allocation agreement.

Under the terms of the proposed Consent Agreement, DTC Group is required to cease and desist from communicating with its competitors about customers and prices. The Consent Agreement also prohibits DTC Group from entering into, participating in, inviting, or soliciting an agreement with any competitor to allocate customers, to divide markets, or to fix prices.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Consent Agreement again and the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the accompanying Decision and Order (“Proposed Order”).

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

I. The Complaint

The allegations of the Complaint are summarized below:

DTC Group markets and sells an array of services to commercial drivers, commercial trucking firms, and other persons that facilitate compliance with various regulations administered by the Department of Transportation and the Federal Motor

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Carrier Safety Administration, including regulations relating to drug and alcohol testing, safety audits, and driver qualifications.

DTC Group primarily utilizes telemarketing and the internet to market and sell its services. DTC Group competes with several firms throughout the United States offering similar services.

DTC Group and Competitor A market and sell similar services in direct competition. Beginning in 2013 and continuing to date, DTC Group and Competitor A have competed for one another's customers by offering lower prices for the services they sell. In some instances, one firm can induce a customer, whose contract is terminable at will, to switch service providers by offering lower prices.

On or about June 27, 2014, the president of DTC Group, David Crossett, contacted Competitor A to complain that Competitor A's sales personnel had induced a DTC Group customer to switch service providers. Mr. Crossett requested a meeting with Competitor A to discuss the matter.

Mr. Crossett met with the principals of Competitor A on July 10, 2014. Mr. Crossett proposed that the firms agree not to solicit or compete for one another's customers. Specifically, Mr. Crossett proposed that DTC Group and Competitor A should reciprocally agree to refrain from selling or attempting to sell a service to a customer if the rival firm had previously arranged to sell the same service to the customer. Mr. Crossett referred to this arrangement as "First Call Wins," and explained that such agreement would permit each company to sell its services to customers without fearing that its rival would later undercut it with a lower price offer.

II. Analysis

Mr. Crossett's communication to Competitor A is an attempt to arrange a customer allocation agreement between the two companies. The invitation, if accepted, would be a *per se* violation of the Sherman Act.¹ The Commission has long held

¹ *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372 (6th Cir. 1988) ("[A] horizontal agreement between two competitors to refrain from

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that invitations to collude violate Section 5 of the FTC Act, and this is unaltered by the Commission’s recent Statement on Section 5. In that Statement, the Commission explained that unfair methods of competition under Section 5 “must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.”² Potential violations are evaluated under a “framework similar to the rule of reason.”³ Competitive effects analysis under the rule of reason depends upon the nature of the conduct that is under review.⁴

An invitation to collude is “potentially harmful and . . . serves no legitimate business purpose.”⁵ For this reason, the Commission treats such conduct as “inherently suspect” (that is, presumptively anticompetitive).⁶ This means that an invitation to

seeking business from each other’s existing accounts . . . is plainly a form of customer allocation and, hence, is the type of ‘naked restraint’ which triggers application of the *per se* rule of illegality.”); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (10th Cir.), *cert. denied*, 437 U.S. 903 (1978).

2 Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (Section 5 Unfair Methods of Competition Policy Statement), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. Commissioner Ohlhausen dissented from the issuance of the Section 5 Unfair Methods of Competition Policy Statement. *See* <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>.

3 Section 5 Unfair Methods of Competition Policy Statement.

4 *See, e.g., California Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999) (“What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”).

5 *In re Valassis Commc’ns, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment); *see also* Address by FTC Chairwoman Edith Ramirez, Section 5 Enforcement Principles, George Washington University Law School at 5 (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

6 *See, e.g., In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 668 (2011) (noting that inherently suspect conduct is such that can be “reasonably

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collude can be condemned under Section 5 without a showing that the respondent possesses market power.⁷

The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.⁸ First, unaccepted solicitations may facilitate coordination between competitors because they reveal information about the solicitor's intentions or preferences. Second, it can be difficult to discern whether a competitor has accepted a solicitation. Third, finding a violation may deter similar conduct that has no legitimate business purpose.⁹

characterized as 'giv[ing] rise to an intuitively obviously inference of anticompetitive effect.'") (citation omitted).

⁷ See, e.g., *In re Realcomp II, Ltd.*, 148 F.T.C. 137, Docket No. 9320, 2009 FTC LEXIS 250, at *51 (Oct. 30, 2009) (Comm'n Op.) (explaining that if conduct is "inherently suspect" in nature, and there are no cognizable procompetitive justifications, the Commission can condemn it "without proof of market power or actual effects").

⁸ See, e.g., *In re Valassis Commc'ns, Inc.*, 141 F.T.C. 247 (2006); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re Precision Moulding*, 122 F.T.C. 104 (1996). See also *In re McWane, Inc.*, Docket No. 9351, *Opinion of the Commission on Motions for Summary Decision* at 20-21 (F.T.C. Aug. 9, 2012) ("an invitation to collude is 'the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5'") (citing the Statement of Chairman Leibowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int'l, Inc.*, 150 F.T.C. 1, 53 (2010)). This conclusion has been endorsed by leading antitrust scholars. See P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶ 1419 (2003); Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST, Spring 2000, at 69. In a case brought under a state's version of Section 5, the First Circuit expressed support for the Commission's application of Section 5 to invitations to collude. See *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

⁹ *In re Valassis Commc'ns, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment).

Analysis to Aid Public Comment

III. The Proposed Consent Order

The Proposed Order has the following substantive provisions:

Section II, Paragraph A of the Proposed Order enjoins DTC Group from communicating with its competitors about rates or prices, with a proviso permitting public posting of rates.

Section II, Paragraph B prohibits DTC Group from entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

Section II, Paragraph C bars DTC Group from urging any competitor to raise, fix, or maintain its price or rate levels, or to limit or reduce service terms or levels.

Sections III-VI of the Proposed Order impose reporting and compliance requirements on DTC Group.

The Proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

ARCLIGHT ENERGY PARTNERS FUND VI, L.P.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket No. C-4563; File No. 151 0149
Complaint, December 28, 2015 – Decision, February 4, 2016

This consent order addresses the acquisition by ArcLight Energy Partners Fund VI, L.P. of Gulf Oil Limited Partnership. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition for gasoline and distillate terminaling services in relevant geographic markets within Pennsylvania. The consent order requires ArcLight to divest Gulf's terminals in Altoona, Pittston Township, Mechanicsburg, and Williamsport.

Participants

For the *Commission*: Michael E. Blaisdell and Jennifer Milici.

For the *Respondent*: Kay Lynn Brumbaugh, Andrews Kurth LLP and Deborah Garza, Covington & Burling LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent ArcLight Energy Partners Fund VI, L.P. ("Respondent" or "ArcLight") has agreed to acquire 100% of the interest in Gulf Oil Limited Partnership ("Gulf") from Cumberland Farms, Inc. in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 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: