

Complaint

IN THE MATTER OF

RENT-A-CENTER, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket No. C-4716; File No. 191 0074
Complaint, May 11, 2020 – Decision, May 11, 2020

This consent order addresses Rent-A-Center, Inc.’s violation of Section 5 of the Federal Trade Commission Act by negotiating and executing reciprocal purchase and non-compete agreements that had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers. The complaint alleges that Respondent entered into a small number of reciprocal purchase agreements from June 2015 to May 2018 that explicitly required the selling party to exit and remain out of the market for a specified period. The reciprocal purchase and non-compete agreements unreasonably restrained brick-and-mortar rent-to-own retail industry in the geographic markets. The consent order requires Respondent to not enter into a reciprocal purchase agreement nor any non-competition agreement that was part of a reciprocal purchase agreement. Future franchise agreements must specifically prohibit Respondent from entering into a reciprocal purchase agreement with a competitor.

Participants

For the *Commission*: *Eric Edmondson, Stuart Hirschfeld, Joe Lipinsky, and Connor Shively.*

For the *Respondents*: *Neely Agin, Winston & Strawn.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Rent-A-Center, Inc. (“RAC”), a corporation, hereinafter sometimes referred to as “Respondent,” has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect as follows:

Nature of the Case

1. This action concerns purchase agreements of consumer rental contracts between RAC and other rent-to-own (“RTO”) companies that were executed between 2015 and 2018.

2. In the traditional brick and mortar retail RTO industry, each RTO company operates stores that compete in small geographic markets. Each store derives income through rental contracts executed with its customers. When an RTO company chooses to close a store, it must decide what to do with the store’s active consumer rental contracts. If the RTO company has a store nearby, it will transfer the closed store’s consumer rental contracts to its nearby store. However, when the RTO company does not have a store nearby, it will attempt to sell the closed store’s consumer rental contracts to a competing RTO company that has a store in close proximity

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to the closing store. This unilateral decision to sell a closed store's consumer rental contracts to a competitor is common in the RTO industry.

3. The conduct challenged in this complaint involves the instances when RAC did not make a unilateral decision to sell a closed store's consumer rental contracts to a competitor. RAC instead entered into reciprocal purchase agreements whereby RAC agreed to close an RTO store or stores and sell the closed store's or stores' consumer rental contracts to an RTO competitor, contingent on that RTO competitor agreeing to close a different RTO store or stores and sell those closed store's or stores' consumer rental contracts to RAC.

4. These reciprocal purchase agreements included reciprocal non-compete agreement clauses, whereby RAC and the RTO competitor agreed not to compete within a specified geographic market for a specific time-period, typically three years, in the area or areas where the stores were closed.

5. The reciprocal purchase agreements with reciprocal non-compete agreement clauses constitute an unfair method of trade, violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent

6. Respondent Rent-A-Center, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal address at 5501 Headquarters Drive, Plano, Texas 75024.

Jurisdiction

7. At all times relevant herein, RAC 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.

8. The acts and practices of RAC, 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.

Overview of the Traditional Brick and Mortar Rent-to-Own Industry

9. The traditional brick and mortar RTO industry focuses on renting durable goods, such as furniture, appliances, and electronic goods, to customers who lack access to traditional credit. RTOs operate large-format stores carrying a selection of new and returned merchandise.

10. The primary traditional brick and mortar RTO customers are "unbanked" individuals who have little to no access to traditional credit. Customers do not need to satisfy a credit check or have a bank account to qualify for RTO contracts. Previously rented items are typically refurbished and re-rented at the same weekly or monthly rate as new items, but for shorter contract terms.

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11. As the industry name connotes, consumers do not buy the merchandise outright, but rather take possession after entering rental contracts with the RTO firm. The contracts are formally structured as short-term contracts (typically one week or one month) that renew when the consumer makes the current lease payment. The customer only acquires ownership of the merchandise at the end of all the renewals, which is typically in 12 – 24 months.

12. Due to the nature of these at-will, short-term leases, each RTO transaction creates a stream of recurring revenue that may terminate at any time, should a customer choose to return the rented merchandise before the end of all the renewals.

13. Customers often make payments in-person at the RTO store where they entered into the consumer rental contract. When an RTO company closes a store, it must decide what to do with the recurring revenue stream from the existing rental contracts. Often, the RTO company will transfer contracts to one of its other nearby locations, but if the new location is more than a few miles away from the original store, consumers may be unwilling or unable to continue making payments, and they are likely to return the merchandise. Thus, when an RTO company does not have another store near the closing store, it will often sell the contracts to a competitor with a nearby store rather than risk losing the value of these existing contracts by attempting to transfer them to one of its own more distant stores.

14. Since the number of RTO stores has fallen significantly in the past two decades, the unilateral sale of active rental contracts to competitors through agreements, which typically include non-compete agreement clauses, has been relatively common.

The Reciprocal Purchase and Non-Compete Agreements

15. From June 2015 to May 2018, RAC entered into a small number of reciprocal purchase agreements. These agreements codified the contingent and reciprocal nature of the simultaneous sales transactions using the following (or similar) language:

Reciprocal Purchase Agreements. RAC and [] acknowledge that they have entered into a separate agreement whereby [] has agreed to purchase certain assets [active rental contracts] belonging to and used by RAC in its rental business at certain RAC locations, all as is specifically provided therein (“[] Purchase Agreement”). RAC and [] agree that the RAC Purchase Agreement and the [] Purchase Agreement are mutual and conditioned upon the other, and that [] and RAC shall simultaneously perform their obligations under both agreements on their respective Effective Dates, or not at all.

16. The reciprocal purchase agreements also explicitly require the selling party to exit and remain out of the market for a specified period, using the following (or similar) language:

Non-competition. [] agrees to not engage in any rent-to-own, rental purchase, or other substantially similar business including the renting or selling of rims and tires, either directly or indirectly, for its or their own account or for another, during the

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Non-Compete Time and within the Non-Compete Territory specified in the Addendum, if any.

Non-Compete Time: [] agrees that the Non-Compete time will be Three (3) years following the Effective Date.

Non-Compete Territory: [] agrees that the Non-Compete Territory will be within a Ten (10) mile radius of the Rental Locations, except the following items shall be deemed excluded from the Non-Compete Territory and non-compete obligations of [], even if they are located within the Non-Compete Territory: (i) any existing store location of [] as of the Effective Date and (ii) any kiosk location operated by [] within a third-party retailer, whether currently existing or hereafter acquired or established.

Anticompetitive Effects of the Reciprocal Purchase and Non-Compete Agreements

17. The relevant product market or line of commerce in which to analyze the competitive effects of RAC's challenged conduct is the traditional brick and mortar retail RTO business.

18. The relevant geographic market for traditional brick and mortar retail RTO business consists of a small radius, such as two miles around an urban RTO store or ten miles for a rural RTO store.

19. RAC's conduct, as alleged herein, had the capacity, tendency, and potential effect of restraining competition unreasonably and injuring consumers and others in the following ways, among others:

- a. Unreasonably restraining brick-and-mortar RTO retail industry competition in the geographic markets impacted by the reciprocal purchase and non-compete agreements through store closures that may not have occurred absent the reciprocal purchase agreements, leading to:
 - i. Impairing quality and service competition in the affected geographic markets; and
 - ii. Reducing the number of locations and product selection available to consumers.

20. The reciprocal purchase and non-compete agreements have the effect of allocating geographic markets between existing horizontal competitors.

Lack of Procompetitive Efficiencies

21. RAC did not offer procompetitive efficiencies that outweigh the anticompetitive effects of certain Reciprocal Asset Purchase Agreements.

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22. Any legitimate objectives of RAC's conduct as alleged were achievable through less restrictive means.

Violations Alleged

23. As set forth above, RAC violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by negotiating and executing these reciprocal purchase and non-compete agreements.

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

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Acting Secretary and its official seal affixed, at Washington, D.C., this eleventh day of May 2020, issues its complaint against Respondent.

By the Commission, Commissioners Chopra and Slaughter dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Rent-A-Center, Inc. ("Respondent"), Aaron's Inc., and Buddy's Newco, LLC, and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission 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, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft 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 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

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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 Rent-A-Center, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal address at 5501 Headquarters Drive, Plano, Texas 75024.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

Order**I.**

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

- A. “RAC” or “Respondent” means Rent-A-Center, Inc., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Rent-A-Center, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Aaron’s” means Aaron’s Inc., a corporation organized existing, and doing business under and by virtue of the laws of the State of Georgia, with its headquarters and principal place of business located at 400 Galleria Parkway SE, Suite 300, Atlanta, Georgia 30339.
- C. “Buddy’s” means Buddy’s Newco, LLC, d/b/a Buddy’s Home Furnishings, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 4705 S. Apopka Vineland Road, Suite 206, Orlando, Florida 32819.
- D. “Commission” means the Federal Trade Commission.
- E. “Competitor” means any Third Party, other than a RAC Franchisee, that, directly or through a subsidiary, owns operates, is a franchisor of, or is a franchisee of, one or more RTO Retail Centers in the United States, including Aaron’s and Buddy’s; *provided, however*, this term does not include a Third Party solely engaged in a Virtual RTO Business.
- F. “Consent Agreement” means the Agreement Containing Consent Order.

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- G. “Consumer Rental Contracts” means contracts that provide a consumer with a consumer good through a leasing arrangement that terminates when the consumer acquires full ownership, returns the merchandise, or the lessor takes repossession of the consumer good prior to the lessee obtaining full ownership. Consumer Rental Contracts are also referred to as rent-to-own contracts, rental purchase agreements, or lease-to-own agreements.
- H. “Executive Team” means the CEO, President, Executive Vice President, and General Counsel of Respondent, and all vice president-level employees of Respondent with operational decision-making authority over Respondent’s RTO Retail Centers.
- I. “Non-Competition Agreement” means any agreement or covenant not to operate an RTO Retail Center within a specified geographic area for a specified period.
- J. “Third Party” means any natural person, partnership, corporation, association, trust, joint venture, or other business or legal entity other than Respondent.
- K. “RAC Franchisee” means a Third Party business owner who operates an RTO Retail Center under the RAC corporate trademark or associated brands.
- L. “Reciprocal Purchase Agreement” means an agreement, or a series of interdependent agreements, through which Respondent or a RAC Franchisee agrees to close or sell one or more of its RTO Retail Centers and sell the associated Consumer Rental Contracts to a Competitor, and that Competitor agrees to close or sell one or more of its RTO Retail Centers and sell the associated Consumer Rental Contracts to Respondent or a RAC Franchisee; *provided, however*, this term does not include transactions whereby Respondent’s, or a RAC Franchisee’s, purchase from, or sale to, a Competitor of an RTO Retail Center and associated Consumer Rental Contracts is not contractually interdependent or contingent on a reciprocal transaction.
- M. “RTO Retail Center” means a brick and mortar retail location that primarily offers consumer goods through Consumer Rental Contracts; *provided, however*, this term does not include operations associated with a Virtual RTO Business.
- N. “Virtual RTO Business” means the business of offering on-site Consumer Rental Contract purchase solutions at the point-of-sale at brick and mortar retail locations other than RTO Retail Centers.

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II.

IT IS FURTHER ORDERED that:

- A. Respondent shall not, directly or indirectly: (1) enter into a Reciprocal Purchase Agreement; or (2) solicit, invite, facilitate, or enable any Third Party to enter into, a Reciprocal Purchase Agreement.
- B. Respondent shall not enforce, in whole or part, any Non-Competition Agreement that was part of, or contingent on, a Reciprocal Purchase Agreement.
- C. In any future franchise agreement or any renewal of an existing franchise agreement, Respondent shall specifically prohibit the RAC Franchisee from entering into a Reciprocal Purchase Agreement with a Competitor.

III.

IT IS FURTHER ORDERED that Respondent shall establish and maintain a compliance program that sets forth the policies and procedures Respondent has implemented to comply with this Order. The compliance program shall include:

- A. Designation and retention of a compliance officer, who may be an existing employee of Respondent, to supervise the design, maintenance, and operation of the program. Respondent may appoint successive compliance officers as needed;
- B. Training the Executive Team regarding Respondent's obligations under this Order:
 - 1. Within 30 days after this Order becomes final,
 - 2. At least annually during the term of the Order, and
 - 3. Within 30 days of when an individual first becomes a member of the Executive Team;
- C. Policies and procedures for employees and representatives of Respondent to ask questions about, and report violations of, this Order confidentially and without fear of retaliation of any kind;
- D. Policies and procedures for disciplining employees and representatives of Respondent for failure to comply with this Order; and
- E. Retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III of this Order, including but not limited to records showing that employees and representatives of Respondent have received all trainings required under this Order during the preceding 2 years.

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IV.

IT IS FURTHER ORDERED that Respondent shall file verified written reports (“compliance reports”) in accordance with the following:

- A. Respondent shall submit:
1. An interim compliance report 60 days after the Order is issued;
 2. Annual compliance reports each year on the anniversary of entry of the Order for a period of 10 years; and
 3. Additional compliance reports as the Commission or its staff may request;
- B. Each compliance report shall set forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondent is complying with the Order. Conclusory statements that Respondent has complied with its obligations under the Order are insufficient. Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance:
1. The identity and job title of the compliance officer;
 2. A description of how Respondent is complying with Paragraph II.B of the Order with respect to each Reciprocal Purchase Agreement in existence prior to the date of this Order and include, if applicable, any amendments, appendices, exhibits, schedules and modifications made thereto;
 3. With each annual compliance report, provide an electronic Excel spreadsheet listing each RTO Retail Center for which either 1) Respondent or a RAC Franchisee sold an RTO Retail Center’s Consumer Rental Contracts to a Competitor, or 2) Respondent or a RAC Franchisee acquired a Competitor’s Consumer Rental Contracts and provide the following information regarding each listed RTO Retail Center:
 - a. Whether Respondent or a RAC Franchisee acquired or sold Consumer Rental Contracts and the identity of the affiliated RTO Retail Center;
 - b. The address of the RTO Retail Center;
 - c. The name of all other parties to the transaction, and if another party was a franchisee, the name of the franchisor of that party;

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- d. Whether Respondent or a RAC Franchisee has entered into a Non-Competition Agreement in connection with the transaction; and
- e. A short summary of the relevant terms of the transaction including, but not limited to: (i) the purchase price and/or valuation of assets; (ii) the closing date of the transaction; and (iii) if Respondent or a RAC Franchisee acquired or sold Consumer Rental Contracts from multiple RTO Retail Centers in the same transaction, the addresses of the other RTO Retail Centers;

Provided, however, for purposes of this Paragraph IV.B.3, RAC shall: (i) provide such requested information as related to the RAC Franchisees if RAC has custody or control or access to such information; or (ii) make good faith efforts to obtain such information from the RAC Franchisees if that information is not otherwise available.

- C. Respondent shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

V.

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

- A. The proposed dissolution of Rent-A-Center, Inc.;
- B. The proposed acquisition, merger, or consolidation of Rent-A-Center, Inc.; or
- C. 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 purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and five (5) days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified

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Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that in connection with any legal proceeding brought by the Commission against Aaron's or Buddy's alleging that Respondent or a RAC Franchisee entered illegal Reciprocal Purchase Agreements, Respondent shall:

- C. Agree to service of process of all Commission subpoenas issued under Rule 3.34 of the Commission Rules of Practice, 16 C.F.R. ¶ 3.34; and
- D. Negotiate in good faith with the Commission to provide a declaration, affidavit, and/or sponsoring witness, if necessary, to establish the authenticity and admissibility of any documents and/or data that Respondent produces or has produced to the Commission.

VIII.

IT IS FINALLY ORDERED that this Order shall terminate on May 11, 2040.

By the Commission, Commissioners Chopra and Slaughter dissenting.

Concurring Statement

**STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND
COMMISSIONER NOAH JOSHUA PHILLIPS**

Today, the Commission votes to place a proposed settlement out for public comment to settle charges that three rent-to-own companies—Buddy’s, Aaron’s, and Rent-A-Center—entered into anticompetitive reciprocal purchase agreements, which in short hand have been referred to as store “swap” agreements. After a nearly ten-month investigation, agency staff identified a series of swap agreements that allegedly had the effect of allocating geographic markets among rent-to-own store competitors. Staff also found that these swap agreements contained non-compete provisions that prohibited the party transferring the contracts from reentering the market for three years. The proposed settlement would, if finalized, (i) prohibit these companies from swapping any more stores, (ii) abrogate related non-compete agreements among the companies, freeing them to compete more aggressively, and (iii) ban any individual associated with either Buddy’s or Aaron’s from serving on the board of directors of the other company. We believe this relief, which is tailored to both the nature of the challenged conduct and the governing law, would remedy the legal violation and prevent its recurrence.

Commissioner Chopra argues that proposed settlements in this matter are inadequate. We disagree. The settlements fully resolve the competitive concerns identified by staff and impose a significant margin of “fencing-in” relief.¹ A few points merit comment:

- Although staff only found a few swaps that they alleged were anticompetitive, the Commission’s settlements bar the parties from entering into *all* such swap agreements among the three largest rent-to-own companies in the United States.² This outcome saves the agency resources that would be required to examine each individual future swap agreement to determine its competitive intent and effect.
- Because we only have evidence that a few swap agreements were anticompetitive, notifying all customers and employees affected by any swap agreement would be over- inclusive because a majority of those notified likely would not have been affected by any anticompetitive conduct.
- Unlike situations involving ongoing safety concerns, ongoing health concerns, hidden lack of performance, exposure to recurring charges, and preventing further dissemination of deceptive claims, where notice works to protect consumers, notice here would not protect consumers from any further harm. The settlement, which bans the parties from entering into future swap agreements, ensures that customers and employees suffer no further harm from this conduct. As a result, we believe

¹ Fencing-in relief bars a defendant from conduct beyond that which is alleged or found to be unlawful. The purpose of such relief is prophylactic, to reduce the risk that the defendant will violate the law going forward.

² Notably, the swap agreements were not of a type that so obviously raised concerns that they were hidden. Aaron’s listed store swaps in multiple SEC filings and a press release. See <http://investor.aarons.com/node/17201/html>; <https://www.prnewswire.com/news-releases/aarons-inc-reports-second-quarter-2015-results-300118252.html>; <https://sec.report/Document/0000706688-15-000156/>.

Concurring Statement

publicizing the settlement and putting it out for public comment is sufficient notice to the public.

- Although Brian Kahn, the Managing Partner of Vintage Capital Management, the private equity firm that owns Buddy's, sat on Aaron's Board of Directors, that board interlock ended four years ago when Mr. Kahn stepped down from the Aaron's board. As a result, we do not believe adding a count under Section 8 of the Clayton Act, which would typically require the offending parties to end the interlock, adds anything to the settlement. Nor do we believe a Section 5 count alleging the same fact pattern is warranted.

As Commissioner Chopra notes, many customers of rent-to-own stores are among those least able to defend themselves against anticompetitive and illegal commercial practices. That is why the Commission has a long history of addressing harmful practices in this industry.³ The Commission continues to be aggressive in rooting out anticompetitive conduct, and it will impose remedies where necessary to prevent future anticompetitive conduct and redress harms. We think the Commission's proposed orders strike the right balance by barring potentially anticompetitive conduct and conserving the Commission's resources to investigate other conduct.

³ See e.g., *In re Aaron's Inc.*, Docket No. C-4442 (March 11, 2014) (prohibiting use of surreptitious tracking software on computers rented by RTO retail chain); James M. Lacko, Signe-Mary McKernan & Manoj Hastak, *Survey of Rent-to-Own Customers: Fed. Trade Comm'n Bureau of Econ. Staff Report* (April 2000), available at <http://www.ftc.gov/reports/renttoown/renttoownr.pdf>; *Rent-to-Own Transactions, Before the Subcomm. on Fin. Inst. and Consumer Credit, Comm. on Fin. Serv.* (July 26, 2011) (prepared statement of the Fed. Trade Comm'n), available at <https://www.ftc.gov/public-statements/2011/07/prepared-statement-federal-trade-commission-rent-own-transactions>; Fed. Trade Comm'n, *Rent-to-Own: Costly Convenience* (March 2015), <https://www.consumer.ftc.gov/articles/0524-rent-own-costly-convenience>.

Dissenting Statement

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA**Summary**

- The FTC uncovered evidence that three major rent-to-own players engaged in a market allocation scheme to close down stores that suppressed competition, but the agency is *not* asserting that this conduct was per se unlawful.
- The proposed settlement deprives affected families of direct notification by the companies of their wrongdoing. This goes against a core element of competitive markets: the dissemination of truthful information.
- There is clear evidence that a senior executive served on the board of a competitor. The Commission's complaint should have charged this was unlawful.

I dissent from the Commission's vote regarding three no-money, no-fault proposed orders with the big three major players in the rent-to-own business: Rent-a-Center, Inc. (NASDAQ: RCII), Aaron's, Inc. (NYSE: AAN), and Buddy's Newco, LLC. While I am pleased that we have uncovered difficult-to-detect misconduct, I am concerned our remedy is insufficient, that the analytical basis of the proposed settlements is flawed, and that the Commission is doing little to deter similar misconduct by others.

Background

Rent-a-Center, Aaron's, and Buddy's typically target low-income families seeking items for their homes, such as furniture or electronics. Unlike traditional installment sales contracts, rent-to-own companies "rent" an item to a consumer, who can then take ownership if all the required payments are made after a certain period of time. If the consumer is unable to make payments, they must return the good. Due to this unusual structure, rent-to-own companies have actually threatened customers who fail to make their payments with criminal theft.¹ The companies can even profit when a customer fails to complete the term, because the total price paid by the consumer over time may be far higher than the retail price for the goods.²

This business model has resulted in consumers paying significantly high prices. Making matters worse, the industry has tended to prey on vulnerable populations, especially military families.³ The industry has been on the FTC's radar for at least two decades, though the agency

1 Brian Highsmith & Margot Saunders, NATIONAL CONSUMER LAW CENTER, THE RENT-TO-OWN-RACKET: USING CRIMINAL COURTS TO COERCE PAYMENTS FROM VULNERABLE FAMILIES (Feb. 2019), <https://www.nclc.org/images/pdf/criminal-justice/report-rent-to-own-racket.pdf>.

2 This is because the total cost of ownership is often far greater than the cash price of the merchandise. While the monthly payments may be low, a consumer only acquires ownership at the end of all scheduled payments, which typically last 12 to 24 months. When a consumer makes many payments but fails to complete the term, the rent-to-own company keeps the goods.

3 See Written Testimony of Assistant Director Hollister K. Petraeus on behalf of the Consumer Financial Protection Bureau, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Nov. 3, 2011),

Dissenting Statement

has struggled to address the risks posed by this business model.⁴ Given the pre-existing concerns about abuse in the rent-to-own industry, it is even more worrisome that dwindling competition might further diminish the limited leverage that families have when signing a contract.

The Scheme Alleged in the Complaint

The FTC's investigation uncovered evidence of a market allocation scheme between rent-to-own chains with competing stores in multiple geographic markets: one competitor would agree to close a store and sell customer contracts in one geographic market in exchange for a competitor closing one of its stores and selling its customer contracts in another geographic market. The companies did not hold an open auction to sell off stores or inventory.

As noted in the Commission's Analysis to Aid Public Comment, the agency has evidence to suggest that there were stores that would not have otherwise been closed, including stores that were profitable. The companies also added non-compete provisions to the agreements to prevent a competitor from re-emerging in a local market for three years.

While not a primary focus of the agency's investigation, there was another troubling element with respect to Buddy's and Aaron's in this matter. Vintage Capital Management, a private equity outfit with a controlling interest in Buddy's, also was, at one time, a very large shareholder of Aaron's.⁵ Mr. Brian Kahn, the managing partner and founder of Vintage Capital Management, served as a member of the board of directors of Aaron's at the same time his fund controlled Buddy's.⁶ Some of the alleged market allocation schemes took place during the time of Mr. Kahn's service on Aaron's board.⁷

Analysis of Complaint and Remedy

When competitors agree to close stores in ways that lead to a division of local markets, this will typically be profitable for the companies and harmful to the consumers and employees whose

<https://www.consumerfinance.gov/about-us/newsroom/testimony-of-hollister-k-petraeus-before-the-senate-committee-on-banking-housing-and-urban-affairs/>.

4 See James M. Lacko et al., FED. TRADE COMM'N, BUREAU OF ECON. STAFF REP'T: SURVEY OF RENT-TO-OWN CUSTOMERS (Apr. 2000), <https://www.ftc.gov/reports/survey-rent-own-customers>. The FTC even caught Aaron's illegally spying on consumers via rental computers. See Press Release, Fed. Trade Comm'n, Aaron's Rent-To-Own Chain Settles FTC Charges That it Enabled Computer Spying by Franchisees (Oct. 22, 2013), <https://www.ftc.gov/news-events/press-releases/2013/10/aarons-rent-own-chain-settles-ftc-charges-it-enabled-computer>.

5 Press Release, Aaron's Inc., Aaron's, Inc. Reaches Agreement With Vintage Capital Management; Brian R. Kahn and Matthew E. Avril to Join Aaron's Board of Directors (May 13, 2014), <http://investor.aarons.com/news-releases/news-release-details/aarons-inc-reaches-agreement-vintage-capital-management>.

6 *Id.* See also MORRISON & FOERSTER LLP, *Aaron's Inc. and Vintage Capital Management, Inc.: Chronology of Events Surrounding Unsolicited Offer* at 4 (2014), <http://media.mofo.com/files/uploads/Images/UV-Aarons-Vintage-Capital.pdf>.

7 Aaron's Compl. ¶15.

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lives are disrupted by store closures. I acknowledge that agencies like the FTC do not have unlimited resources. We cannot always investigate every detail of potential misconduct.

However, in this matter, the Commission did not analyze customer contract performance after the store closures, or analyze employee terminations and other critical information that would help to determine the harm inflicted on the public and the companies' ill-gotten gains. The investigation did not focus on whether the companies made any misrepresentations to employees about the rationale for the store closures or other details about closures and layoffs. We also do not know whether customers were deceived when told why they could no longer make payments at the original location where they signed their contract. It is reasonable to assume that some customers faced financial hardships from the market allocation scheme, but we cannot know precisely given the scope of our investigation.

With all of these unknowns, the Commission should not jump to a conclusion that the alleged unlawful conduct was victimless. Instead, we must approach a resolution that takes into account this uncertainty. There are several aspects here worth briefly discussing.

Notice to Victims. The Commission is not seeking any notifications to the employees or customers affected by potentially illegal store closures. Requiring a notice to employees and customers, even if it includes those that may not have been harmed, has important benefits, especially if any employee or customer was deceived or harmed in ways that we were unable to uncover.

A core benefit of notice is the dissemination of truthful information, which helps instill proper incentives in the marketplace. This is especially important in no-money, no-fault settlements like the ones here, because it allows market forces to impose some degree of accountability on wrongdoing firms: harmed consumers may prefer to do business with law-abiding companies instead of ones that flout the law.

Promoting the dissemination of truthful information is foundational to functioning markets and has been a bedrock of FTC policy for decades. Fulfilling that policy goal in a case like this one requires virtually no effort on the Commission's part – it is standard practice for lawbreakers to be ordered to conduct the notifications themselves,⁸ with virtually no public resources. The statement by Chairman Simons and Commissioner Phillips appears to go against this principle, by advocating that the Commission deprive customers and employees from being notified directly by the companies about their misconduct, out of fear of being “overinclusive.”

Overlapping Control. When a senior executive can sit on the board of a competitor and learn about its business strategy, this can lead to significant anticompetitive effects. For example, if a senior executive learns about the locations of planned store openings of a competitor through an affiliation on that competitor's board, she may advise the other company she is affiliated with

⁸ See e.g., *Fed. Trade Comm'n v. Cure Encapsulations, Inc.* FTC File No. 1723113 (Feb. 19, 2019); *Fed. Trade Comm'n v. Applied Food Sciences Inc.*, FTC File No. 1423054 (Sept. 10, 2014); *In re Henry Schein Practice Solutions, Inc.*, Docket No. C-4575 (May 23, 2016).

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to open locations in different markets to avoid competition. This is precisely the rationale behind the ban on interlocking directorates in Section 8 of the Clayton Act.

While the proposed orders against Buddy's and Aaron's ban overlaps on their boards, neither Mr. Kahn nor Vintage Capital Management are subject to these requirements. It is not clear whether the relief is adequate. While I appreciate that there is a ban in overlapping boards,⁹ the Commission should have pursued a count charging Buddy's and Aaron's with engaging in an unfair method of competition in violation of the Section 5 of the Federal Trade Commission Act, pursuant to the Commission's 2015 Statement of Enforcement Principles.¹⁰

There is uncertainty in the market about compliance with the ban on overlapping boards.¹¹ Some may argue that limited liability companies (LLCs) are not bound by the Clayton Act's ban that applies to corporations. By not pleading a count condemning this overlap, the FTC has missed an opportunity to demonstrate that these overlaps are unlawful.

Per Se Liability. The Commission is not asserting that the store closure scheme was per se unlawful. Instead, the agency analyzed the scheme in a way that allowed the companies to attempt to justify why the conduct was not anticompetitive. While there is fairly limited case law guiding the appropriate legal analysis of the specific fact pattern here, the conduct has the same competitive effect as a straightforward market allocation scheme, which courts treat as per se unlawful. As the FTC and Department of Justice's Antitrust Guidelines for Collaborations Among Competitors describes, agreements to "share or divide markets by allocating customers, suppliers, territories or lines of commerce. . ." have been held per se illegal.¹²

9 I view the proposed order's ban on future interlocks as the bare minimum the Commission could possibly include in a remedy. Although the ban is broader than what Section 8 requires, since it applies regardless of the Section 8 statutory exemptions that would apply, the order would otherwise merely require Aaron's and Buddy's to abide by the law.

10 While our investigation did not make a conclusive determination as to whether Mr. Kahn's actions were a violation of Section 8 of the Clayton Act's ban on interlocking directorates, the conduct meets the standards outlined in the Commission's 2015 Statement of Enforcement Principles on the use of the agency's 'stand alone' authority to prohibit unfair methods of competition under Section 5. See <https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition>.

11 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Keynote Address at Fordham University School of Law, Antitrust in the Financial Sector: Hot Issues and Global Perspectives (May 1, 2019) (noting that "[t]he use of the term 'corporation' in the statute has raised many questions about whether Section 8 applies to non-incorporated entities such as [LLCs] or other structures. Section 8 pre-dates the use of LLCs, and certainly predates the widespread acceptance of structures like limited liability corporations as an alternative corporate form to a traditional 'corporation.' To date, courts have not directly addressed this question, although we believe the harm can be the same regardless of the forms of the entities."), <https://www.justice.gov/opa/speech/file/1159346/download>.

12 FED. TRADE COMM'N, & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 3 (Apr. 2000) (citing *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market allocation)), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

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The reason per se liability applies to these types of agreements is simple: certain agreements are so likely to harm competition and have no significant benefits that they do not warrant the time and expense necessary for a detailed rule of reason inquiry into their effects.¹³ A rule of reason analysis is much costlier than a per se analysis, typically requiring expert testimony and evidence measuring anticompetitive effects. The level of detail in the analysis varies depending on the nature of the agreement and market circumstances.¹⁴

For defendants, the difference between per se and rule of reason analysis is enormous, since under a per se analysis only the existence of an agreement need be proved by a plaintiff – no justifications are allowed. Applying the wrong analysis to an allegedly illegal agreement can wreak havoc on our legal system and lead to poor outcomes.

For example, if companies sense that certain conduct is no longer likely to be treated as per se unlawful, they are more likely to engage in the conduct. Well-resourced companies can concoct justifications for their alleged conduct after they've been caught, with a net low risk of sanctions, creating an incentive for behavior that is almost always anticompetitive. This gives them an advantage over smaller and newer businesses that may not have the same guile and can also harm consumers and the companies' own employees in the process. Using a bright-line rule relying on per se liability in this case provides clear guidance to firms subject to that rule and also limits the transaction costs of enforcement.¹⁵

Conclusion

The proposed settlements are clearly inadequate. Because the Commission has voted to place the proposed orders on the public record for comment, I too look forward to any input the public may have on how the agency can improve the proposed orders and prevent repeating similar mistakes.

When wrongdoers wish to end an investigation by settlement, the FTC must be mindful of all of the potential harms inflicted on the public, rather than simply assuming there were none. When uncertainty is always analyzed in favor of the wrongdoer, this is a recipe for weak enforcement that does little to deter market distortions and undermines fair competition.

13 See *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n. 16 (1977).

14 See *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").

15 See Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 31 (2015).

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order with Aaron’s, Inc. (“Aaron’s”), an Agreement Containing Consent Order with Buddy’s Newco, LLC (“Buddy’s”), and an Agreement Containing Consent Order with Rent-A-Center, Inc. (“RAC”) (“Consent Agreements”). The proposed Consent Agreements are intended to remedy anticompetitive effects resulting from reciprocal purchase agreements made between Aaron’s, Buddy’s, and RAC, and certain of their competitors in the brick-and-mortar rent-to-own (“RTO”) industry.

Pursuant to the reciprocal purchase agreements, Aaron’s, Buddy’s, and RAC sold consumer rental contracts to nearby competitors contingent on Aaron’s, Buddy’s, or RAC acquiring that competitor’s consumer rental contracts in another geographic area. These reciprocal purchase agreements, called swap agreements (“Swap Agreements”) by the RTO industry, also included non-competition agreements whereby Aaron’s, Buddy’s, or RAC and the nearby competitors each agreed to close stores associated with the consumer rental contracts being sold and to not open new stores within a specified distance for a limited amount of time. Not all swap agreements violate the antitrust laws. Swap agreements between competitors that generate significant procompetitive benefits for consumers, such as more efficient distribution or creation of a new product, may not violate the law. The Swap Agreements and ancillary non-competition agreements at issue in the present case, however, likely reduced competition between Aaron’s, Buddy’s, RAC, and their competitors in the RTO industry in several local markets in the United States, reducing consumer choice and depriving consumers of the benefits of price and quality competition.

Under the Consent Agreements, Aaron’s and Buddy’s agree that they will no longer enter into Swap Agreements and will not take any steps to enforce any non-competition agreements associated with the Swap Agreements. The proposed Decision and Order (“Order”) in each Consent Agreement preserves competition in the RTO industry by prohibiting such Swap Agreements and enforcement of ancillary non-competition agreements.

II. The Parties**A. Aaron’s, Inc.**

Aaron’s is headquartered in Atlanta, Georgia. As of December 2018, Aaron’s, the second largest operator of RTO stores, has 1,689 stores, comprised of 1,312 company-operated stores and 377 independently owned franchised stores operating in 47 states. Aaron’s estimates its 2018 fiscal year revenues were roughly \$3.8 billion with over \$196 million in net earnings.

Analysis to Aid Public Comment

B. Buddy's Newco, LLC

Buddy's, doing business as Buddy's Home Furnishings, is a limited liability company headquartered in Orlando, Florida. Buddy's operates approximately 300 franchised and corporate stores throughout the Continental United States.

C. Rent-A-Center, Inc.

Rent-A-Center, Inc. is a corporation headquartered in Plano, Texas. RAC has approximately 2,800 company-owned stores and 225 RAC franchised stores throughout the United States.

III. The Complaints**A. Background**

In the RTO business, consumers do not buy merchandise outright, but rather take possession after entering into rental contracts with an RTO company. The contracts are short-term contracts (typically one week or one month) that renew when the consumer makes the lease payment. The rental contracts are at-will; consumers may terminate the contracts and return the merchandise without penalty. The rental contracts create a recurring revenue stream for the RTO company. If an RTO store closes, the RTO company will either transfer the store's rental contracts to another of its own stores, or sell them to a nearby competitor.

A large percentage of RTO customers travel to the RTO store associated with their rental contract to make their weekly or monthly payments. If an RTO company seeks to close a store and transfer the store's contracts to another, more distant store, the consumer may terminate the rental contract rather than traveling to the more distant store. The greater the distance between the receiving store and the closing store, the greater the likelihood that the consumer will terminate the contract. Therefore, if an RTO company does not have another store near the closing store, it may opt to sell its rental contracts to a competitor that has an RTO store in close proximity to the closing store.

B. The Challenged Conduct

Between 2015 and 2018, Aaron's, Buddy's, and RAC entered into several Swap Agreements with one another and with other RTO operators. These agreements typically covered stores in multiple different markets. Each Swap Agreement consists of two related transactions. In one transaction, a competitor closes one or more RTO stores and sells the closing stores' consumer rental contracts to Aaron's, Buddy's, or RAC, which have RTO stores near the competitor's soon-to-close stores. In the other transaction, the facts are reversed: Aaron's, Buddy's, or RAC closes one or more of its RTO stores and sells the soon-to-close stores' consumer rental contracts to the competitor which has RTO stores nearby. The sales of the rental contracts by Aaron's, Buddy's, or RAC is explicitly contingent on the purchase of the competitor's rental contracts. Parties to the Swap Agreement also sign non-compete agreements, usually for a three-year period, for the areas in the immediate vicinity of the closed stores.

Analysis to Aid Public Comment

C. Effects of the Challenged Conduct

The Commission's Complaints do not allege that Swap Agreements are *per se* illegal because the circumstances surrounding their formation and execution indicate that these are not naked market allocation agreements. However, the evidence indicates that at least some of the Swap Agreements entered into by Buddy's, Aaron's, and RAC, had the purpose and effect of facilitating each party's ability to induce its competitor to exit a market. Such agreements are a form of restraint that reduces competition and creates a clear threat of consumer harm. Consumers in the affected geographic areas lost any benefits of price and quality competition resulting from the closing of RTO stores and had fewer options for rental merchandise. Moreover, the evidence indicates that Aaron's, Buddy's, and RAC closed stores that might not have been closed but for the Swap Agreements. Aaron's, Buddy's, and RAC failed to produce sufficient evidence to rebut the presumption that the Swap Agreements are unreasonably anticompetitive. As a result, the FTC has issued its Complaints and entered into the Consent Agreements, which remedy the harm to competition.

IV. The Agreement Containing Consent Order

The proposed Orders fully address Aaron's, Buddy's, and RAC's past actions and contain important fencing in and notification provisions. The Orders prohibit Aaron's, Buddy's, and RAC from entering into any future Swap Agreements and from enforcing any non-compete clauses that are still in effect from past Swap Agreements. The Orders also prohibit any Aaron's or Buddy's representatives from serving on the Board of Directors of any of their competitors, or any competitor's representatives from serving on the Aaron's or Buddy's Board. RAC's Order does not contain this prohibition because, unlike Buddy's and Aaron's, there is no evidence that a RAC representative has previously served on a competitors' Board of Directors. The Orders require Aaron's and Buddy's to establish antitrust compliance programs, while RAC must establish a compliance program related to its Order. Finally, all the Orders impose reporting requirements, and the Orders will terminate in 20 years.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Orders or to modify their terms in any way.

Complaint

IN THE MATTER OF

FEDERAL-MOGUL MOTORPARTS, LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket No. C-4717; File No. 172 3102
Complaint, May 12, 2020 – Decision, May 12, 2020

This consent order addresses Federal-Mogul Motorparts LLC's acts and practices alleged to constitute unfair or deceptive concerning its Wagner OEX brake pads. The complaint alleges that Respondents violated Section 5 of the Federal Trade Commission Act by disseminating advertisements, packaging, and promotional materials that represented its Wagner OEX brake pads would stop a pickup truck, SUV (sport utility vehicles), or CUV (crossover utility vehicles) up to 50 feet sooner than competing brake pads. The Respondents also indicated that the Wagner OEX brake pads significantly reduce the risk of collisions compared to competing brake pads when a driver is trying to stop in the shortest distance possible. The consent order prohibits the Respondents from making any representation about the braking benefits, performance, or efficacy of any aftermarket brake pads branded and/or marketed by Respondents for use as replacement brake pads.

Participants

For the *Commission*: *Matthew D. Gold, Sydney Knight, and Evan Rose.*

For the *Respondents*: *Matt Reilly, Ross Weisman, and Ray Woodring, Kirkland & Ellis LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Federal-Mogul Motorparts LLC, a limited liability company ("Respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware limited liability company with its principal office or place of business at 27300 W. 11 Mile Rd., Southfield, MI 48034.
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to consumers, including Wagner OE^X brake pads. The brake pads are aftermarket products that can be purchased and installed at automobile repair shops.
3. The acts and practices of Respondent alleged in this Complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Since at least 2015, Respondent has manufactured, advertised, labeled, marketed, promoted, offered for sale, sold, and distributed Wagner OE^X aftermarket replacement brake pads to the public for use on categories of vehicles known as CUVs (crossover utility vehicles), SUVs (sport utility vehicles), and pickup trucks. Wagner OE^X brake pads represent a "premium" price