**[BILLING CODE: 6750-01S]**

**FEDERAL TRADE COMMISSION**

**[File No. 121 0004]**

**Marker Völkl (International) GmbH and Tecnica Group, SpA..; Analysis of Agreements Containing Consent Orders to Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreements.

**SUMMARY:** The consent agreements in these matters settle alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the draft complaints and the terms of the consent orders -- embodied in the consent agreements -- that would settle these allegations.

**DATES:** Comments must be received on or before June 18, 2014.

**ADDRESSES:** Interested parties may file comments at

https://ftcpublic.commentworks.com/ftc/skimanufacturerconsent

online or on paper, by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Write "Ski Manufacturers - Consent Agreement; File No. 121-0004" on your comment and file your comment online at

https://ftcpublic.commentworks.com/ftc/skimanufacturerconsent

by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610, (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610, (Annex D),

Washington, D.C. 20024.

**FOR FURTHER INFORMATION CONTACT:** Mark Taylor, Bureau of Competition, (202-326-2287), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreements containing consent orders to cease and desist, have been filed with and accepted, subject to final approval, by the Commission, having been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreements, and the allegations in the complaints. An electronic copy of the full text of the consent agreement packages can be obtained from the FTC Home Page (for May 19, 2014), on the World Wide Web, at http://www.ftc.gov/os/actions.shtm.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before June 18, 2014. Write "Ski Manufacturers - Consent Agreement; File No. 121-0004" on your comment. Your comment - including your name and your state - will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card

number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), and FTC Rule 4.10(a)(2), 16 CFR § 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comment online. To make sure that the Commission considers your online comment, you must file it at https://ftcpublic.commentworks.com/ftc/skimanufacturerconsent by following the instructions on the web-based forms. If this Notice appears at http://www.regulations.gov/#!home, you also may file a comment through that website.

If you file your comment on paper, write "Ski Manufacturers - Consent Agreement; File No. 121-0004" on your comment and on the envelope, and mail your comment to the following

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610, (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610, (Annex D), Washington, D.C. 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at http://www.ftc.gov to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before June 18, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at http://www.ftc.gov/ftc/privacy.htm.

**Analysis of Agreement Containing Consent Order to Aid Public Comment**

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

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

The Agreements have been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will

become part of the public record. After 30 days, the Commission will again review the Agreements and comments received, and will decide whether it should withdraw from the Agreements or make final the orders contained in the Agreements.

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

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

## I. The Complaints

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

### A. Background

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

Endorsement agreements between a ski equipment company and a ski athlete are typically of short duration, and are subject to renewal. Commonly, the ski athlete: (i) authorizes the company to use the athlete's name and likeness in promotions and in advertisements, (ii) agrees to use and promote the company's equipment on an exclusive basis, (iii) agrees to display the

company's equipment when the athlete can attract media exposure, such as by holding up the skis at the end of a race, or taking the skis to the podium when receiving a medal, and/or (iv) agrees to appear at promotional events on behalf of the company. The association of a ski equipment brand with a prominent ski athlete generates sales, goodwill, and other benefits for the company.

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

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

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

### B. The Marker Völkl/Tecnica Collaboration

In 1992, Marker Völkl began collaborating with Tecnica in the marketing and distribution of certain complementary ski equipment: Völkl brand skis, and Tecnica brand ski boots.

Initially, these companies were not competitors: Tecnica did not have a ski; Marker Völkl did not have a ski boot.

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

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

### C. The Challenged Conduct

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

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

In 2007, Marker Völkl and Tecnica agreed to expand the scope of their non-compete agreements. Marker Völkl and Tecnica agreed not to compete for the services of any employee.

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

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

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

## II. Legal Analysis

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

These agreements are appropriately analyzed under the framework articulated by the Commission in the *Polygram* case.[2] Agreements between competitors not to compete for professional services, for employees, or for other inputs, are presumptively anticompetitive or inherently suspect, if not *per se* unlawful.[3]

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

[3] *See, e.g., United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). *See also Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (stating that *per se* rule would "likely apply" to allegations of actual agreement among competitors to fix employee salaries); *Knevelbaard v. Kraft Foods, Inc.*, 232 F.3d 979, 988-89 (9th Cir. 2000) ("Most courts understand that a buying cartel's low prices are

When an agreement is deemed inherently suspect, a party may avoid summary condemnation under the antitrust laws by advancing a legitimate (cognizable and plausible) efficiency justification for the restraint.[4]

Here, the Commission finds reason to believe that the athlete non-compete agreement and the employee non-compete agreement serve no pro-competitive purpose. More specifically, these restraints are not reasonably necessary for the formation or efficient operation of the marketing collaboration between Marker Völkl and Tecnica. That the restraints are, at a minimum, overbroad is demonstrated by the fact that the agreements adversely affect competition for – and the compensation available to – athletes and employees who have no relationship with the collaboration.[5] Further, Respondents cannot plausibly claim that the restraints serve to align the incentives of the companies in a manner that promotes the cognizable

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illegal . . . . Clearly mistaken is the occasional court that considers low buying prices pro-competitive or that thinks sellers receiving illegally low prices do not suffer antitrust injury."); *NBA v. Williams*, 45 F.3d 684, 687 (2d Cir. 1995) ("Absent justification under the Rule of Reason or some defense, employers who compete for labor may not agree among themselves to purchase that labor only on certain specified terms and conditions . . . Such conduct would be *per se* unlawful."); *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal *per se*."); *U.S. v. eBay*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013) (denying defendant's motion to dismiss government's claim that an agreement between employers not to solicit or hire each other's employees was a naked restraint of trade subject to *per se* or quick look analysis).

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

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

efficiency goals of their collaboration. Rather, the ski businesses of Tecnica (the Nordica and Blizzard brands) were at all times outside of and apart from the collaboration.[6] In sum, the Respondents did not provide evidence demonstrating why Marker Völkl and Tecnica cannot cooperate in the marketing of certain ski products, yet at the same time compete for the services of endorsers and employees.

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

## III. The Proposed Orders

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

The proposed Orders enjoin Marker Völkl and Tecnica from, directly or indirectly, entering into, or attempting to enter into, an agreement with a ski equipment competitor to forbear from competing for U.S. athletes to sign endorsement contracts for the company's ski

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

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

equipment. The proposed Orders also enjoin Marker Völkl and Tecnica from entering into an agreement with a ski equipment competitor to forbear from competing for the services of any U.S. employee. A proviso to the cease and desist requirements allows reasonable restraints ancillary to a legitimate joint venture.

The proposed Orders will expire in 20 years.

By direction of the Commission.

Donald S. Clark,
Secretary.

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