**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT**
***In the Matter of Dick's Sporting Goods, Inc., File No. 071 0196***

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Dick's Sporting Goods, Inc. ("Dick's" or "Respondent"). Dick's, through its wholly-owned subsidiary Golf Galaxy, operates a chain of golf superstores in the United States. The agreement settles charges that Dick's violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with a potential competitor to allocate markets. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

## I. The Complaint

The allegations of the complaint are summarized below:

Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting. The founders of Golf Town Canada Inc. ("Golf Canada") wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores.

In June 1998, Golf Canada and Golf Galaxy entered into a consulting agreement (the "1998 Agreement"). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company's board of directors, and cash payments.

Certain provisions of the 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

In October 2004, Golf Galaxy sold its shares of Golf Canada and the parties terminated all consulting obligations effective immediately. Golf Galaxy and Golf Canada entered into a new contract (the "2004 Amended Agreement") that, *inter alia*, extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement. The 2004 Amended Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008).

## II. Legal Analysis

There are two distinct sets of restraints in this matter.

One set was agreed upon by Golf Galaxy and Golf Canada in 1998 when their consulting relationship was launched. These restraints appear to have been reasonably necessary to the formation and/or efficient operation of the parties' collaboration. For example, Golf Canada's commitment not to compete in the United States during the term of the consulting relationship (and for five years thereafter) may have been necessary in order to induce Golf Galaxy to share with Golf Canada certain valuable, confidential, and proprietary information.[1] The Commission therefore does not challenge these 1998 restrictions.

The parties entered into a second set of restraints in 2004, contemporaneous with the decision to terminate their collaboration. The 2004 restraints provide for a division of markets well beyond the term contemplated in the 1998 Agreement, and are the subject of the Commission's claim in this matter. Under the 1998 Agreement, Golf Canada's undertaking to forgo competing in the United States would have expired five years after termination of the consulting relationship; since the consulting relationship ended in 2004, the noncompete would have expired five years later in 2009. With the 2004 Amended Agreement the noncompete was extended from 2009 until 2013 – four years longer than what was contemplated under the original 1998 Agreement.

The 2004 Amended Agreement may be analyzed under the framework articulated by the Commission in the *PolyGram* case.[2] Agreements between competitors to divide markets are treated by the courts as presumptively anticompetitive, or inherently suspect. *E.g., Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is unlawful per se); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (same); Timothy J. Muris, *The Rule of Reason After California Dental*, 68 Antitrust L. J. 527, 536 (2000) ("[C]ourts already consider price fixing and market division to be inherently suspect."). When an agreement is deemed inherently suspect,

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[1] *See e.g., Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985).

[2] *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005). *See also N. Tex. Speciality Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

the parties can avoid summary condemnation under the antitrust laws by advancing a legitimate (cognizable and plausible) efficiency justification for the restraint.[3]

Here, the Commission found reason to believe that the 2004 restraints serve no pro-competitive purpose. This second set of restraints was not reasonably necessary for the formation or efficient operation of the collaboration between Golf Galaxy and Golf Canada. Significantly, the 2004 restraints cannot be said to induce or facilitate cooperation between Golf Galaxy and Golf Canada – for the simple reason that, after 2004, no further cooperation was contemplated. These restraints served only to provide Golf Galaxy's shareholders with additional protection from competition, with no advantage to U.S. consumers. Because there is no efficiency rationale for the 2004 agreement between Golf Galaxy and Golf Canada to divide markets, such agreement constitutes an unreasonable restraint on trade, and is properly judged to be illegal.

Application of the ancillary restraints framework leads to precisely the same conclusion. The D.C. Circuit has explained:

> To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extend, not ancillary.[4]

The legitimate and competitive purpose of the consulting arrangement, in place from 1998 through 2004, was to enable Golf Canada to benefit from Golf Galaxy's experience and expertise. However, as alleged in the Complaint, the 2004 restraints did nothing to encourage, facilitate, or promote this collaboration. (Again, after 2004, no ongoing cooperation was contemplated.) Certainly, the dissolution of a collaboration does not, of itself, provide a rationale for the ex-partners to adopt new and expanded limitations upon future competition. *See Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (market division agreement adopted by lawyers following dissolution of their partnership judged per se unlawful). In short, the challenged restraints are naked rather than ancillary.

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

4 *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

## III. The Proposed Consent Order

Dick's (the parent of Golf Galaxy) has signed a consent agreement containing a proposed consent Order. The proposed consent Order enjoins the company from dividing or allocating markets for the retail sale of golf merchandise. In addition, the proposed Order will prevent Golf Galaxy from enforcing any noncompete provision beyond the date originally provided for in the 1998 Agreement. More specifically, the provision of the 2004 Amended Agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009, and thereafter. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will no longer be enforceable as of thirty (30) days from the date on which the Order becomes final and thereafter.

The proposed Order would not interfere with the company's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

The proposed Order will expire in 20 years.