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November 15, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: SR-NASDAQ-2011-122

Dear Ms. Murphy:

This letter responds to the comments submitted on the above captioned rule filing on behalf of Business Wire, Inc., a wholly owned subsidiary of Berkshire Hathaway ("Business Wire"),[1] PR Newswire Association LLC ("PR Newswire")[2] and Issuer Advisory Group LLC[3].

Business Wire and PR Newswire each repeat prior claims that NASDAQ is unlawfully tying investor relations services to a company's listing. These claims are without merit and their attempt to re-write history by mischaracterizing past statements by NASDAQ and the Commission is misleading. Without addressing each of their mischaracterizations, the Commission did not, as these letters portray, "refuse" or "decline" to approve prior NASDAQ proposals to raise listing fees,[4] nor did the Commission "recognize" that the proposed fees would result in an inequitable allocation of listing fees.[5] Rather, the Commission had never ruled on the permissibility of an exchange subsidizing the services for certain of its listed companies until the recent approval of a rule change by the New York Stock Exchange ("NYSE").[6] In the prior rule filings noted by Business Wire and PR Newswire,

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1 Undated letter from Neil Hershberg (the "First Business Wire Letter") and October 7, 2011 letter from Jesse W. Markham (the "Second Business Wire Letter").

2 Undated letter from John Viglotti.

3 October 22, 2011 letter from Patrick Healy (the "Issuer Advisory Group Letter").

4 Securities Exchange Act Release No.55202 (January 30, 2007),72 FR 6017 (February 8, 2007) (SR-NASDAQ-2006-040) and Securities Exchange Act Release No. 61669 (March 5, 2010),75 FR 11958 (March 12, 2010) (SR-NASDAQ-2009-081).

5 Of course to the extent that NASDAQ did adopt a prior position that the Commission relied upon, the way to change that position is through a rule making process, such as the current one, which is designed for the very purpose of adopting and amending rules and interpretive positions. Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1); Rule 19b-4, 17 CFR 240.19b-4.

6 Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449 (August 18, 2011) (SR-NYSE-2011-20) (the "NYSE Product Rule"). The NYSE Product Rule, like NASDAQ's proposal, offers different products and services to companies based on their size and status (e.g., IPO or market transfer). While the NYSE Product Rule makes services available indefinitely to certain

NASDAQ removed components of its proposal and/or made commitments to the Commission about our business practices, thereby eliminating the need for the Commission to rule on these matters. In fact, in approving these NASDAQ proposals, the Commission explicitly found that NASDAQ's fees provide for the equitable allocation of reasonable fees among issuers and do not unfairly discriminate between issuers.[7] NASDAQ does not now propose to change any of those already approved fees.

Business Wire and PR Newswire describe their core concern with NASDAQ's current proposal as limiting issuer choice about service providers. As noted in NASDAQ's rule filing, no company is required to use the offered services and, to the extent they do choose to use them, the free services are provided only for a very limited time (generally two years, but never more than four years). Ironically, both Business Wire and PR Newswire favorably cite the recently adopted NYSE rule, from which they benefit, as an alternative to NASDAQ's proposal. In these self-interested arguments, they demand that NASDAQ buy their services for our issuers just as the NYSE does. However, contrary to their implication, the NYSE Product Rule does not allow issuers unfettered choice as to which service providers they can choose; they must use those providers selected by NYSE, with no transparency as to the selection process or the financial arrangement between the NYSE and the service provider. The Commission specifically considered this element of the NYSE Product Rule and concluded it was consistent with the Act.[8]

Just as NYSE selects its service providers, so does NASDAQ. However, by relying on services provided by NASDAQ OMX Corporate Solutions ("NOCS"), an affiliated entity, rather than third parties, NASDAQ gains greater control to assure it can provide the products most valued by companies in a high quality manner. The ability to select and influence the quality of service was favorably considered by the Commission in approving the NYSE Product Rule.[9] While the Commission has concluded that the NYSE Product Rule is consistent with the Act, it is not the exclusive avenue that is consistent with the Act and, as demonstrated in NASDAQ's filing and this letter, the proposed NASDAQ rule is also consistent with the Act.

In the Second Business Wire Letter, Business Wire also claims that the proposed rule change does not meet the requirements of Sections 6(b)(4) and 6(b)(5) of the Act.[10] This claim is equally without merit. NASDAQ's proposed rule change is an equitable allocation of reasonable fees, as required by Section 6(b)(4) and does not permit unfair discrimination between customers, issuers, brokers, or dealers, as required by Section 6(b)(5). As stated in NASDAQ's rule filing, offering different services based on a company's market capitalization is appropriate given that larger companies generally will

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issuers, which pay its highest fees, the NASDAQ proposal differs in that complimentary services are generally only available for two years, and never for more than four years.

7 Exchange Act 55202, 72 FR at 6020; Exchange Act 61669, 75 FR at 11961-62.

8 After noting the potential impact of some listed companies substituting their business away from other vendors and towards those vendors selected by NYSE, the Commission discussed mitigating factors, including the current competitive environment for exchange listings and that issuers are not forced or required to utilize the complimentary products and services, and concluded the NYSE Product Rule does not harm the market for the products and services provided in a way that constitutes an inappropriate burden on competition or an inequitable allocation of fees, in a manner inconsistent with the Act. 76 FR at 51452.

9 NYSE Product Rule, 76 FR at 51452 (concluding that "[b]y offering products and services on a complimentary basis and ensuring that it is offering the services most valued by its listed issuers, the NYSE will improve the quality of the services that listed companies receive. Accordingly, the Commission believes that NYSE's proposal reflects the current competitive environment for exchange listings among national securities exchanges, and is appropriate and consistent with Section 6(b)(8) in furtherance of the purposes of the Act.").

10 15 U.S.C. 78f(b)(4) and (5).

need more and different governance, communication and intelligence services. The distinction based on market capitalization is clear and transparent. Further, offering services to newly listing companies, and not to companies already listed on NASDAQ, is appropriate given that the services offered will help ease the transition of becoming a public company and will help these companies fulfill their new responsibilities as public companies.

NASDAQ also believes it is not unfair discrimination to offer its program only to companies switching from the NYSE, and not from other exchanges or unlisted markets, or to companies already listed on NASDAQ, because the companies listed on the NYSE receive comparable services from the NYSE, which they would forgo by switching their listing to NASDAQ. Business Wire's claim that these companies do not receive comparable services is simply wrong. While the NYSE may not offer these companies the exact assortment of services that NASDAQ proposes to offer, they do offer similar services.[11] Distributing press releases and distributing other investor relation information are comparable information dissemination services and there is no basis for the Commission to distinguish among these various services.

In approving the NYSE Product Rule, the Commission ruled on the arguments now made by Business Wire and PR Newswire. Specifically, the Commission recognized that the proposed rule change may affect the purchase decisions of some listed issuers, but nonetheless found that the impact of any such effect would be limited.[12] The same is true of the impact of NASDAQ's proposal to offer certain newly listing companies services for a limited period.[13] The Commission also appropriately focused its analysis of the competitiveness issues on the competition between entities which it regulates: national securities exchanges. Effective competition among such entities promotes the Commission's core investor protection mission; competitive issues in other areas of the economy do not. Indeed, when the Commission has considered competitive concerns in the context of the entities it regulates, it previously has determined not to reach conclusions about the application of antitrust law. In one matter cited by Business Wire,[14] the Commission instituted proceedings against the exchanges that listed options. While the underlying facts related to competition between the options exchanges, the Commission's action in the matter was based on the failure of those options exchanges to enforce their own rules (including specific rules which prohibited harassment and intimidation of members who competed or sought to compete) and to comply with SEC Rule 19c-5. As such, the Commission found that the option exchanges failed to fulfill their obligations as self-regulatory organizations.[15] It was the Antitrust Division of the Department of Justice, in a parallel action, that considered the application of the Sherman Act[16] to these activities.[17]

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11 Section 907.00 of the NYSE Listed Company Manual provides that NYSE-listed companies receive market surveillance, market analytics and Web-hosting products and services.

12 NYSE Product Rule, 76 FR at 51452.

13 In considering the effect that NASDAQ's proposed rule change may have, it is worth noting that Business Wire and PR Newswire control approximately 75% of the market for press releases, based on review of press releases contained in the Acquire Media news feed, which includes all press releases issued by U.S. public companies.

14 In the Matter of Certain Activities of Options Exchanges, Securities Exchange Act Release No. 43268 (September 11, 2000), 65 FR 57837 (September 26, 2000).

15 Id. at 57839 ("Based upon the foregoing, the Commission finds that during the relevant period the AMEX, CBOE, PCX and PHLX failed to comply with certain of their rules, including, among others, Rule 19c–5 promulgated under the Exchange Act, and, without reasonable justification or excuse, failed to enforce compliance with certain of their own rules, in violation of Section 19(g) of the Exchange Act.")

16 15 U.S.C. 1.

17 U.S. v. American Stock Exchange, LLC, et al., Proposed Order, Stipulation and Competitive Impact Statement, 65 FR 57829 (September 26, 2000).

Business Wire also incorrectly relies on Supreme Court precedent for its assertion that the Commission should consider the impact on Business Wire in considering NASDAQ's proposal. In Credit Suisse Securities (USA) LLC v. Billing,[18] the Supreme Court addresses when the securities laws preclude the application of the antitrust laws and sets forth several factors that the Court considers in making that determination. The decision does not require, as Business Wire would like, that the Commission be the adjudicator of private claims under the U.S. antitrust laws.

As stated in the Issuer Advisory Group Letter, the objection raised by Business Wire and PR Newswire "has nothing to do with fairness in the securities markets. It is little more than a self serving attempt to curb competition in the service sector." In approving the NYSE Product Rule, the Commission found that the NYSE Product Rule reflects the current competitive environment for exchange listings among national securities exchanges, and is therefore appropriate and consistent with Section 6(b)(8) in furtherance of the purposes of the Act.[19] The NASDAQ proposal, likewise, reflects that competitive environment and is also appropriate and consistent with Section 6(b)(8) in furtherance of the purposes of the Act.

Given the foregoing, NASDAQ is not specifically responding to the meritless arguments made in the Second Business Wire Letter regarding the Sherman Act. However, NASDAQ has addressed these issues in the past[20] and it bears repeating that the antitrust laws "were enacted for the protection of competition not competitors."[21] Low prices, including promotional free services, are hallmarks of competition and are precisely the type of behavior the antitrust laws seek to foster.[22] Furthermore, NASDAQ does not require that companies use the free services it offers and thus, there is no tying arrangement. In fact, our experience has been that some companies will choose not to use services, even though they are offered free. Finally, the Second Business Wire Letter is incorrect in saying that the cost of the free services is included in NASDAQ's listing fee. NASDAQ is not seeking to increase its fees in this rulemaking and the Commission has previously found that all of NASDAQ's listing fees represent an equitable allocation of reasonable fees, without regard to the complimentary services we now seek to provide.

NASDAQ also disagrees with Business Wire's assessment of the IPO market. In looking nostalgically to the size of the market in 1999, and even in 2006 and 2007, Business Wire ignores the widely reported tectonic shift that has occurred in the capital markets, resulting in the IPO market being seen as "broken."[23] The cause of the decline in IPOs has been blamed on many issues, including increased regulatory burdens and costs, market structure changes, changes in the

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18 551 U.S. 264 (2007).

19 NYSE Product Rule, 76 FR at 51452. The Justice Department also recently noted the intense competitive environment for exchange listings. See "NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit" (May 16, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/271214.htm.

20 See Letter from Arnold and Porter, dated December 12, 2006, attached as Exhibit 1. While that letter was written in connection with a proposed fee increase to accompany a product offering, it is still relevant and is hereby incorporated by reference.

21 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

22 See United States v. Microsoft Corp., 253 F.3d 34, 68 (D.C. Cir. 2001) ("The rare case of price predation aside, the antitrust laws do not condemn even a monopolist for offering its product at an attractive price, and we therefore have no warrant to condemn Microsoft for offering [Internet Explorer] . . . free of charge or even at a negative price.").

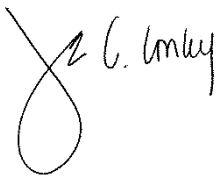
23 See, e.g.,Rebuilding the IPO On-Ramp, issued by the IPO Task Force to the U.S. Department of Treasury, October 20, 2011.

underwriting and research businesses, and the growth of alternative capital raising structures, among others. While NASDAQ looks forward to working with the Commission to address these issues, and improve the environment for IPOs, it is unrealistic at this point to expect a return to prior IPO levels.

Business Wire also recycles its prior, ill informed assertion that the mere fact that NASDAQ and GlobeNewswire have a common corporate parent results in a conflict of interest in respect of NASDAQ's self-regulatory functions. The Commission has previously considered and rejected this argument,[24] which flies in the face of the Commission's longstanding approach of recognizing that, even within a market center, business and regulatory conflicts may exist and are to be addressed by appropriately distinguishing the regulatory functions from the influence of business considerations.[25] NASDAQ achieves that separation by housing its regulatory functions, including the Listing and Market Watch Departments, in a regulatory group that is organizationally and institutionally separate from its business lines. That structure, its effectiveness in managing conflicts, and the effectiveness of the regulatory program in practice, are of course subject to periodic Commission examination. In addition, any change to NASDAQ's rules to increase or decrease the amount of information that a company must publicly disclose, or the manner of doing so, would require Commission approval. Considered within that structure, Business Wire's fanciful assertions of conflicts remain as much without merit today as they were when the Commission previously rejected them.

As noted in the filing, and above, NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act, in general, and with Sections 6(b)(4) and 6(b)(5) of the Act, in particular.[26] Accordingly, the Commission should approve the proposed rule change. If you have any further questions concerning our proposal, please feel free to contact me or Arnold Golub at (301) 978-8075.

Very truly yours,



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[24] Exchange Act Release No. 6166,75 FR at 11962 ("The Commission believes that Nasdaq's assurances concerning the separation of its business and regulatory functions adequately address the conflict of interest concerns raised by Business Wire. The Commission also notes that it oversees Nasdaq as a national securities exchange, including the performance of its regulatory functions in a manner consistent with the Act.")

[25] See, e.g., Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the NASDAQ Market (August 8, 1996).

[26] NASDAQ notes that the Issuer Advisory Group Letter suggests that the Commission consider alternative listing fee arrangements. This suggestion is beyond the scope of the proposed rule change.

Exhibit 1

ARNOLD & PORTER LLP

202.942.5000
202.942.5999 Fax
555 Twelfth Street, NW
Washington, DC 20004-1206

December 12, 2006

Nancy M. Morris
Secretary
Securities and Exchange Commission
Station Place
100 F Street NE
Washington, DC 20549-0609

Re: SR-NASDAQ-2006-040 Listing Fee Proposal

Dear Ms. Morris:

The NASDAQ Stock Market LLC ("Nasdaq") has asked us, as their antitrust counsel,[1] to provide a comment in this docket addressing assertions by other commenters that certain aspects of Nasdaq's proposed listing fee changes might be anticompetitive or violate the antitrust laws of the United States.[2] For the reasons set out below, those assertions are unsupported and inaccurate. As the Supreme Court has stated, the antitrust laws are designed for "the protection of competition not competitors,"[3] and Nasdaq's proposal will enhance competition.

As we understand it, Nasdaq has proposed to increase its listing fees, based upon the increased costs that it has incurred in implementing enhancements to its world-class regulatory programs and trading systems. At the same time, Nasdaq has indicated that it will provide additional benefits and value to those companies that list on Nasdaq.[4] Those new benefits consist of a variety of services designed to assist companies listed on Nasdaq in fulfilling their disclosure and regulatory obligations and shareholder communications. While the new benefits are being offered to Nasdaq listed companies,

[1] The authors are partners in Arnold & Porter LLP's antitrust practice group. Michael Sohn is a former General Counsel of the Federal Trade Commission. Donna Patterson is a former Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice.

[2] Nasdaq will file its own response to the comments in this proceeding.

[3] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)

[4] All listing exchanges provide a variety of services to their listed companies, and not all companies take advantage of each of those benefits and services.

there is no *requirement* that companies use them. Nasdaq listed companies will remain free to choose not to use those benefits. Some commenters have suggested that the addition of some of those new benefits may be anticompetitive because they are "bundled" with or "tied" to the listing fee.[5] Other commenters seem to believe that they will be required to use the benefits, or to pay for them whether or not they use them. Those suggestions reflect a lack of understanding both of the facts and of the requirements of the antitrust laws.

In order to constitute impermissible "tying," a company must be able to force its customers to take a product they do not want, or would prefer to purchase elsewhere (the "tied" product), as a condition of purchasing a product that they do want (the "tying" product).[6] Except under certain stringently defined conditions, selling multiple products or services as a bundle, or providing a package of products and services, does not constitute a violation of the antitrust laws.[7] The United States Supreme Court has acknowledged that such packaged offerings often "have procompetitive justifications that make it inappropriate to condemn without considerable market analysis."[8] Indeed, such bundled or packaged offerings are common forms of competition.[9]

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[5] *See, e.g.*, Letter from Holme Roberts & Owen to Edward Knight at 2 (Oct. 24, 2006); Comment of PR Newswire (Nov. 3, 2006); Comment of Robert Falconi (Nov. 27, 2006); Comment of Shannon H. Burns, Gander Mountain Company (Dec. 1, 2006); Comment of Margaret R. Blake & Mark R. Paul, Baker McKenzie LLP on behalf of PR Newswire (Dec. 11, 2006).

[6] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated on other grounds*, *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).

[7] *See, e.g., id.* at 11-12; *N. Pac. R. Co. v. United States*, 356 U.S. 1, 7 (1956) ("[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar, it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself.").

[8] *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984) (citing *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 11-12).

[9] For example, car stereo systems are "bundled" with the sale of an automobile, beverages are provided with the sale of an airline ticket, etc.

In traditional tying violations, the seller forces its customers to purchase an unwanted product in order to be able to purchase the desired product.[10] That is not the situation here. Nasdaq's proposed fee schedule is fully justified by the improvements it has made in its trading systems. Nasdaq is not requiring customers to use the additional benefits it intends to provide, such as press releases. Rather, it will be the customer's option, as it is with some current benefits, whether or not to take advantage of what Nasdaq has made available. Accordingly, commenters' allegations of illegal tying or bundling are misplaced.

In any event, a necessary precondition of any tying violation is that the company has market power (in a properly defined market) in the tying product, which commenters allege is the Nasdaq listing.[11] Far from a simple measure of a company's size or regulatory status as one commenter proposes,[12] market power is the ability successfully to increase prices or reduce output without regard to the actions of one's competitors.[13] That is not the case here. As the Commission has noted, Nasdaq is engaged in fierce competition for listings with a number of other exchanges, including the New York Stock Exchange, NYSE Arca, and the American Stock Exchange.[14]

If the Commission were to assume erroneously that the new listing fee is "tying" *and* that Nasdaq has market power in a properly defined product market, that would not end the inquiry. Contrary to the comments filed yesterday by PR Newswire's counsel, the law requires a showing that competitors would be foreclosed from a substantial portion of the market in which they conduct business and that there is an anticompetitive effect in the "tied market." *See, e.g., Carl Sandburg Vill. Condominium Ass'n v. First*

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[10] *See Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 12.

[11] *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 13-14.

[12] *See* Comment of Margaret R. Blake & Mark R. Paul, Baker McKenzie LLP on behalf of PR Newswire at 10 (Dec. 11, 2006).

[13] *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 14; *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992).

[14] Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 2 and 3 Thereto Relating to the Nasdaq Market Center, Exchange Act Release No. 34-54155, 71 Fed. Reg. 41,291, 41,298 (July 14, 2006).

Condominium Dev. Co., 758 F.2d 203, 210 (7th Cir. 1985) (requiring "a substantial danger that the tying seller will acquire market power in the tied product market").[15] The complaining competitors here cannot make such a showing. For example, Nasdaq is proposing to make available four press releases per year to each of its listed companies. Although we do not know the precise number of press releases issued by companies in the United States each year, we do know that Business Wire and PR Newswire, the two leading competitors, claim to issue about 1,000 press releases daily.[16] The four annual press releases issued for Nasdaq's 3,193 listed companies, assuming that all companies listed on Nasdaq decided to avail themselves of this benefit, would comprise only a small percentage of the hundreds of thousands of press releases issued on behalf of American public companies each year. That small percentage could not constitute a sufficient percentage of the total available market to hamper the viability of highly successful companies such as Business Wire and PR Newswire.

Similarly, the claims of Nasdaq's listed customers that the provision of the new benefits and services constitute anticompetitive bundling are misplaced. For the reasons stated above, Nasdaq does not have the requisite market power to support a finding of a violation of the antitrust laws based on the mere fact of bundling several services at one price. And while it will be offering new benefits to its listed companies, it will not require companies to use those benefits.

Contrary to the suggestions that Nasdaq's offering is anticompetitive, these benefits will lead to procompetitive outcomes for its customers, and many of those customers have commented as such.[17] Just as no listed company is required to use

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[15] *See also Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57-58 (2d Cir. 1980); *United Farmers Agents Ass'n v. Farmers Ins. Exch.*, 89 F.3d 233, 237-38 (5th Cir. 1996); *cf. Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 16 ("[W]e have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby.").

[16] *See* "Buffet seals the deal: Business Wire is latest addition to billionaire investor's portfolio," *San Francisco Chronicle*, Jan. 18, 2006 ("The two companies [Business Wire and PR Newswire] spar over who moves more press releases each day, with each claiming about 1,000.").

[17] *See, e.g.*, Comments of Willa M. McManmon, Dir. Investor Relations, Trimble (Dec. 9, 2006); Comments of Roland Sackers, CFO, QIAGEN N.V., (Dec. 11, 2006); Comments of David H. Chun, CEO, Equilar, Inc. (Dec. 8, 2006); Comments of Matthew J. Pfeffer, CPA, CFO and SVP, Finance and Administration (Dec. 11, 2006); Christopher

Footnote continued on next page

existing benefits such as investor conferences, reports and market opening ceremonies, Nasdaq listed companies will not be required to use the proposed new benefits. Nasdaq has determined to provide those benefits to assist its listed companies with their investor communications obligations, but it will not force companies that would prefer to obtain such services elsewhere to use the services provided by Nasdaq as part of the listing. The evidence in the record demonstrates that Nasdaq's offering will infuse badly needed competition into a market for press releases currently dominated by only two companies.[18]

Listed companies benefit from this competition. Indeed, there is nothing to stop Nasdaq listed companies from using the fact that Nasdaq has provided a number of press releases as part of its listing fee as a lever to bargain with their current providers of such services for a discount.[19] We have been told that one method by which Business Wire and PR Newswire compete today with other providers of press release services is by use of volume discounts. While we do not have available to us the data concerning profitability of press release services, we do know that both Business Wire and PR Newswire earn considerable profits.[20] There is no basis to conclude that those companies could not profitably compete with the press release services offered as a part of the Nasdaq listing by altering their discounting program.[21] This is precisely the sort of procompetitive activity the antitrust laws are designed to encourage because the law

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Footnote continued from previous page
S. Keenan, Dir. Investor Relations, Cytokinetics (Dec. 11, 2006); Gale Blackburn, Corporate V.P. of Investor Relations, AmCOMP Inc. (Dec. 11, 2006).

[18] *See infra* note 16.

[19] Indeed, most courts would also consider whether such competitors have the ability to compete profitably with the services provided by Nasdaq by offering a discount to customers who might consider using the services provided by Nasdaq. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000).

[20] *See* "Buffet seals the deal: Business Wire is latest addition to billionaire investor's portfolio," *San Francisco Chronicle*, Jan. 18, 2006 ("Business Wire's 2005 revenue of $127 million makes it smaller, financially, than its chief rival, PR Newswire...which reported revenue of $173.5 million in 2004.").

[21] These companies' opposition to the new services Nasdaq intends to offer comes as no surprise as it will force them to compete more vigorously, but such competition is to the benefit of customers.

protects competition, not competitors.[22] Accordingly, there is no basis to conclude that the decision to offer additional benefits is anticompetitive or would harm Nasdaq's customers.

Of course, no customer likes increased prices. But the fact remains that Nasdaq's listing fees, even with the proposed increases, generally are below the listing fees of its competitors. The proposed increases in the listing fees are fully justified by the enhancements that Nasdaq already has made to its world-class regulatory programs and trading systems and the additional benefits Nasdaq intends to provide will lead to procompetitive outcomes for its customers.

Thank you for the opportunity to express our views. Please contact us if you have any questions.

Sincerely,

Michael N. Sohn
Donna E. Patterson

cc: Alex Kogan, Esq.

[22] *See Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977).