Ms. Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington DC 20549-1090

RE: Securities and Exchange Commission Release No. 34-57959
File No. SR-DTC-2006-16, Notice of Filing of Proposed Rule
Change Amending FAST and DRS Limited Participant Requirements
For Transfer Agents

Dear Ms. Morris:

I am writing to you on behalf of Continental Stock Transfer & Trust Company ("CST") to strongly object to the above-referenced proposed Rule (the "Proposal") filed by The Depository Trust Company ("DTC"). CST is a medium-sized stock transfer agent which has been in business since 1964. We currently represent more than 1,000 public issuers, aggregating more than 1.5 million shareholder accounts. We write to you to augment the comment letter filed by the Securities Transfer Association ("STA") of which we are a member.

It is our position that DTC, the only depository in the United States, seeks through this filing to extend its 30 year pattern of anti-competitive behavior by mandating eligibility rules which will have the effect of evicting from the transfer agent industry scores of small transfer agents which provide valuable, cost effective services to thousands of smaller issuers around the country. In so doing, DTC, which is a Self Regulatory Organization ("SRO"), is both usurping the congressionally-granted exclusive authority of the SEC, and attempting to make SRO eligibility rules and compliance rules, not for its own members, but for transfer agent non-members, which are direct competitors of DTC. DTC seeks, through this Rule filing, unfettered authority and discretion to mandate what services transfer agents must provide to DTC and its members, while at the same time refusing to pay for such mandated services.

In summary, DTC is a monopoly engaged in predatory, anti-competitive conduct with respect to its direct competitors. The effects of this anti-competitive behavior are far-reaching as to price and mandated services; and it may result in scores of small transfer agent competitors being forcibly evicted from the marketplace. Finally, in filing these proposed Rules, DTC is usurping the SEC's exclusive jurisdiction to regulate transfer agents.

BACKGROUND

There are currently more than 150 commercial stock transfer agents around the United States, including commercial transfer agents and mutual fund agents. While 30 years ago there were scores of large bank transfer agents providing these services, consolidation and the effects of DTC expansion have reduced the number of large commercial agents to but a handful. In 1970, the commercial transfer agent industry kept on its books approximately 70% of all shareholder records, and DTC's positions represented approximately 30% of all beneficial shareholder records. In the past 30 years, as a result of market conditions and actions taken by DTC, there has been a dramatic shift so that now more than 70% of all publicly-traded shares are represented by DTC positions, and 30% or less are kept in registered form on the books of transfer agents. These changes have been deftly orchestrated by DTC as outlined in the annexed Declaration of Dr. Susan Trimbath, a former insider at DTC, in a recent lawsuit filed by Olde Monmouth Stock Transfer Co., Inc., against Depository Trust & Clearing Corporation and Depository Trust Company (07CV0990 (SDNY)), in which Olde Monmouth Stock Transfer Co., Inc. ("Olde Monmouth") sought to enjoin implementation of DTC's proposed Rules, which Rules would have the effect of closing Olde Monmouth because they are anti-competitive and exclusionary. Olde Monmouth is only one of the small agents which has been threatened by DTC and who are together facing the prospect of being put out of business by DTC's proposed Rules.

DTC is an SRO, which is owned and operated by a conglomerate of banks and brokers which together own 100% of DTC and run it through Board representation. DTC is registered as a clearing agency with the SEC and clears virtually all equity securities in the United States. DTC performs similar recordkeeping and related functions for its broker-dealer and bank members as transfer agents perform for registered shareholders. Dr. Trimbath demonstrates that over the past 30 years or more DTC has single-mindedly attempted to expand its assets under management and shareholder accounts overseen at the expense of transfer agents, which are its direct competitors. While DTC continually says that they are not competitors of commercial transfer agents, the wording of its Charter* and the history of the last 30 years belies that claim; and Dr. Trimbath, a former Director of Transfer Agent Services at DTC, makes clear that DTC has always looked on transfer agents as competitors and has repeatedly designed ways to take business away from transfer agents through dematerialization, and now through mandatory DRS Rules.

While transfer agents originally proposed DRS –- the Direct Registration System –- it worked too well, in that it allowed shareholders to sell small share positions directly through transfer agents on a low-cost basis, thereby obviating the need for shareholders to use brokers to effect such transactions using their high minimum charges. Not surprisingly, the brokerage community was not pleased. But, DTC designed a DRS alternative, the result of which was to allow registered shareholder positions on transfer agent books to be transferred to brokers electronically to enable broker-originated sales.

The most recent outgrowth of this decades-long process -- mandatory DRS -- is seeking to move millions of registered shareholder accounts from transfer agents, and place the shares they represent in the DTC System for the benefit of DTC and its broker owners. DTC’s proposed DRS eligibility requirements take this one step further by trying to eliminate transfer agent competition and give DTC complete control of the DRS System. These rules give DTC virtually unfettered discretion to decide which agents are in the mandatory DRS System, and which agents are out. Moreover, DTC has, over the past year or so, orchestrated mandatory DRS Rules which have been enacted by the New York Stock Exchange (“NYSE”), the American Stock Exchange (“AMEX”), and NASDAQ. These Rules require that all publicly-traded issues on these three Exchanges must, as of January 1, 2008, be handled by a DRS eligible transfer agent, i.e., they must be in the DTC controlled FAST/DRS Electronic System.

The result of this confluence of DTC-orchestrated events is that small transfer agents, such as Olde Monmouth, and scores of others like them, must either become DTC FAST eligible, or they must exit the transfer agent business, unless they are satisfied with handling only “Pink Sheet” companies which are not yet covered by mandatory DRS Rules.

*DTC‘s own Organization Certificate provides that DTC “shall exercise the general corporate powers” to be a transfer agent.

DTC'S USURPATION OF THE SEC'S CONGRESSIONALLY-GRANTED EXCLUSIVE AUTHORITY TO REGULATE TRANSFER AGENTS

It is clear that Congress vested in the SEC exclusive authority to regulate and register transfer agents. The SEC has routinely made transfer agent regulations, and routinely audits compliance with those regulations for each and every SEC registered transfer agent. For the past 6 years or more, the SEC has been engaged in drafting and adopting new transfer agent rules, including insurance and capital requirements, enhanced record-keeping and processing requirements, annual mailing of statements to registered shareholders, business continuity rules, etc. In this regard, it should be noted that while large brokerage firms and banks have been continually in the news as being responsible for repeated fraud and billions of dollars in shareholder losses, the transfer agent community has rarely been involved in such problems. There have been virtually no shareholder losses attributable to the misconduct or insolvency of transfer agents.

Accordingly, while the SEC properly attempts to exercise its authority by updating the regulatory requirements for transfer agents in light of market changes and technological advances, DTC has no such regulatory authority. Nevertheless, it is currently attempting to define and mandate the insurance, auditing and eligibility requirements of transfer agents.

It is against this backdrop that DTC, a competitor SRO, seeks to become a de facto regulator of the entire transfer agent industry, eventhough transfer agents are not members of DTC (or its SRO). In essence, they are trying to fill the vacuum left by the SEC's failure to finalize the SEC's proposed transfer agent rules. However, Congress did not authorize DTC to regulate transfer agents -- it authorized only the SEC to do so. Moreover, since DTC is a competitor which is seeking to require under these Rules that transfer agents provide to DTC and its participants enhanced DRS services and products, while at the same time refusing to pay for same, the entire process becomes that much more impermissible.

TRANSFER AGENTS ARE NOT CUSTODIANS FOR DTC

We will comment below on each of the specific FAST and DRS limited participant requirements contained in the Proposal but first will address a point of confusion that appears to be the Proposal's guiding principle: its flawed assumption that transfer agents are custodians for DTC by virtue of the fact that transfer agents maintain securities records that may include records of securities that are registered to DTC or its nominee Cede & Co. The Proposal relies heavily on the concept of custody in several places. A custodian, as the term is commonly understood in financial services, is a financial institution that holds securities or other financial assets on behalf of its customers. DTC apparently believes that transfer agents are custodians for DTC and therefore assumes it has standing as a customer to its vendor to make demands of transfer agents. However, a transfer agent is not a custodian for DTC, but serves as the appointed agent of the issuer, under appointment documents executed by the issuer and the transfer agent setting forth the duties and obligations of the transfer agent.

First, a transfer agent is the agent of the issuer and has one customer, the issuer. The transfer agent has discretion whether to serve a particular issuer and to negotiate with the issuer mutually acceptable terms for that service. The transfer agent does not have any such discretion regarding whether to maintain a record of a particular security holder's position; if the security holder is a direct owner of the issuer's securities, the transfer agent must maintain a record of that position. The security holder does not have any standing to require any operational or other standards of the transfer agent. This is the prerogative of the issuer in its written agreement with the transfer agent, and, of course, the transfer agent's regulators.

Second, transfer agents are recordkeepers; they do not actually hold securities as a custodian for a registered holder. Their vaults generally hold only blank or cancelled stock certificates. Certificates reflecting actual ("live") securities are held by the registered shareholder.

In the case of DTC's position held as a registered holder under its FAST system, there is no certificate except in the most nominal sense--a legended certificate referencing the transfer agent's systems for the number of shares, which has no separate value distinct from the transfer agent's records. The number of securities represented by that registered position changes daily, in only one place: the systems of the transfer agent. Thus, the value is nothing more than a systems record. As the clearance and settlement system moves rapidly away from physical stock certificates toward a book-entry model, this fundamental attribute of transfer agents' limited role as recordkeeper (and not as custodian) becomes increasingly unmistakable.

Yet DTC states that the advent of mandatory book-entry eligibility for listed securities is the triggering event that prompts its need to have dominion over an entire industry. In fact, the long list of proposed "custody" requirements (*e.g.*, insurance deductibles and minimum coverage amounts, the weight and fire-rating of safes) becomes *less* appropriate at this point in time, *not more*, as securities certificates become supplanted by book-entry positions. Similarly, DTC as a registered holder lacks standing to impose any of its proposed regulatory related requirements (*e.g.*, access to Commission regulatory examination reports, annual auditor attestation reports, notice and inspection rights for DTC, or registered holder statement requirements). DTC's attempt to impose this new authority over the transfer agent industry, while never appropriate for one commercial participant in the financial services industry to impose on another participant, is especially untimely now, as the appropriate regulatory body, the Commission, readies a series of rulemaking releases covering similar subject matter.

As if all of the above were not enough, the Proposal also contains specific provisions that would block fees that transfer agents can charge DTC, for work uniquely performed for DTC, despite the additional costs and burden imposed on transfer agents by the Proposal, and that would insulate DTC from acts or omissions caused by its own negligence, while imposing a higher liability standard for transfer agents.

Although we believe that DTC lacks authority to impose any of its proposed requirements on the transfer agent industry, we have specific objections to each of them, which we discuss below.

Insurance Requirements

Continental and the STA object to the costly and onerous insurance requirements of the Proposal, particularly as they relate to smaller agents. For this class of agent in particular, the premiums, if obtainable, will be significantly increased over current levels. Perhaps there could be more gradations or levels of coverage which reflect the size and number of transactions of particular agents. For some smaller transfer agents, the large minimum coverage amounts proposed will actually exceed the value of the DTC's securities on the books of the agent, and may not be available at affordable rates. Although the Proposal would allow a waiver of the required levels, as this would be at DTC's sole discretion, the potential for waiver offers no real relief to transfer agents.

Finally, we object to all of the proposed notice requirements to DTC, including notification to DTC in the event of the issuance of a new or substitute policy, an actual lapse in coverage, and proof of new or substitute policies. Importantly, it is the STA's belief that DTC and other registered holders have sustained virtually no economic losses as a result of under-insured transfer agent activities, and, accordingly, the proposed insurance requirements are unnecessary, onerous to some and overly broad. DTC has failed to establish any relevant loss history or potential risk (particularly with regard to book-entry securities) to justify such onerous and costly requirements.

Safekeeping Requirements

Continental and the STA believe that DTC should have no authority to dictate the physical security levels maintained by transfer agents, such as the nature of their alarm systems and so on. As stated above, DTC is not a transfer agent's customer. Moreover, 17Ad-12 already requires transfer agents to hold securities in a manner reasonably free of risk of theft, loss or destruction. The Commission Rule is sufficient and renders this proposal superfluous.

Execution of DTC's Documentation

The Proposal requires that all FAST transfer agents execute a new Balance Certificate Agreement and agree to DTC's Operational Criteria and other documentation. The STA and CST oppose DTC's practice of establishing self-serving boilerplate agreements and procedures and refusing to negotiate their terms with transfer agents. Under the Proposal, DTC would have the ability to be completely inflexible with a transfer agent over a six-month period and then in its "sole discretion", to terminate or to continue the agent's FAST status. DTC's forms remain largely unchanged from the original documents dating back to the 1980s, despite the movement to book-entry recordkeeping and other changes in securities processing that would permit eliminating the outdated use of physical certificates representing DTC's position.

Additionally, DTC's operational requirements state that transfer agents must maintain a physical balance certificate for each issue. In a world moving to book entry positions and mandatory DRS, this anachronism leads to needless work and exposure, and makes no sense. Indeed, some issuers, in adopting DRS, have made certificates unavailable to their shareholders, rendering this requirement unworkable.

Auditor Reports

The Proposal would require transfer agents to provide to DTC the annual independent accountant's audit of internal controls required by Rule 17Ad-13 of the Securities Exchange Act of 1934. Moreover, those agents who commission a SAS 70 audit report would be required to furnish it to DTC. DTC as a registered holder, and not a transfer agent's customer, has no right to impose such requirements on a transfer agent.

The Commission, as the regulatory authority for transfer agents, performs examinations and requires a specific auditor report under its rules. This existing regulatory framework should be sufficient to satisfy any of DTC's stated concerns. In any event, the Commission, not DTC, is the appropriate party to impose audit report requirements on transfer agents and should be the sole recipients of such reports.

Services Rendered to DTC Without Compensation

Based on the language of the Proposal, DTC apparently expects transfer agents to provide DRS/FAST related services (as well as other enhanced services that DTC may mandate from time to time in its sole discretion) without compensation. This is clearly not acceptable to transfer agents and would not be allowed in any other commercial relationship. If one commercial party requests another to provide services to it, the service provider may decline to do so unless it receives acceptable compensation. If DTC refuses to pay transfer agents for services rendered, transfer agents should be entitled to refuse to provide such services without the threat that DTC could throw them out of FAST (thereby threatening their very existence). DTC may argue that transfer agents should simply pass these costs along to issuers, and indirectly their shareholders, but the STA maintains that neither of these parties should have to bear the cost of services provided to DTC. DTC should not be permitted to require more and more from transfer agents without the discipline of bearing the cost for its demands.

Shareholder Statements

The Proposal would require transfer agents to send transaction advices to shareholders for DRS withdrawal-by-transfers as well as an electronic file to DTC (as requested by DTC). While the concept of sending such statements is not objectionable, the STA maintains that DTC has no authority to mandate notifications to shareholders with DRS shareholdings. This authority lies solely with the Commission, should it choose to propose and adopt rules to this effect. Moreover, to the extent that transfer agents are required to send electronic files to DTC, they should be paid for such services.

Regulatory Reports and Inspections

The Proposal would require transfer agents to supply DTC with copies of Commission examination reports, notifications of regulatory action and immediate notification of "any alleged material deficiencies documented by the Commission." The last of these items is a new requirement added from previous draft versions of the rule filing. It would also give DTC the right to visit and inspect a transfer agent's facilities, books and records.

Transfer agents rarely if ever offer such privileges to their customers. Since DTC is not even a customer, these proposed rights are completely out of line. The disclosure and access rights appear to be based on the faulty assumption that transfer agents are acting as DTC's custodian, which as previously discussed, is not the case. Most importantly, DTC is not entitled to this confidential information under applicable law and regulation and has failed to demonstrate any need for it.

DTC's Training Program

The Proposal requires transfer agents to complete DTC's training program on DRS and Profile. However, many new small transfer agent FAST applicants report that DTC has failed to provide the required training, even when asked repeatedly. This is injurious to these new DRS agents and demonstrates that DTC does take seriously this training requirement.

Standard of Care

The Proposal would also absolve DTC from liability "for the acts or omissions of FAST Agents or other third parties, unless caused directly by DTC's gross negligence, willful misconduct, or violation of Federal securities laws for which there is a private right of action." This standard would permit DTC to avoid responsibility for its own errors and force transfer agents to "carry the bag" if a third party (*e.g.,* a broker-dealer, or registered shareholder) were to suffer a loss caused by an error at DTC in its interactions with a transfer agent. DTC's exculpatory language would in almost all circumstances force the injured party to seek recovery from the transfer agent alone. DTC wishes to escape liability for even its own ordinary negligence, so that losses might be borne by a transfer agent that is at no fault whatsoever. In a dispute between DTC and a transfer agent, each party should bear responsibility for its own processing errors. There is no legitimate policy purpose that would be served in absolving one party of responsibility for its own errors and such a unilateral waiver would not be in accordance with standard practice or public policy. In addition, the effect of this position would be, similar to that described with respect to insurance above, to favor DTC and its constituency, street name holders, over record holders, again with no rationale beyond DTC's particular commercial interests. We submit that the standard of care in the commercial relationship between a transfer agent and DTC should be the same for both parties and DTC has no right to unilaterally impose such an unfair standard.

Implementation of Program Changes

The Proposal would require transfer agents to implement program changes related to DTC systems modifications and to support and expand DRS processing capabilities. Although the changes related to DRS processing would have to be approved by the DRS Ad Hoc Committee*, of which transfer agents are members, there is no similar requirement for changes related to DTC systems modification. The Proposal fails to address the reasonableness and necessity of changes and the attendant costs that may be incurred by transfer agents. The STA objects to DTC unilaterally determining what changes to make to FAST and DRS, and requiring transfer agents to make changes to their operations and systems to implement the same without any agreement upon the necessity of changes and costs incurred. There is absolutely no justification presented in the Proposal for the "blank check" that DTC is requesting. As the Proposal itself makes abundantly clear, DTC left to its own devices can inflict tremendous harm on transfer agents through unilateral rule changes concerning DRS and FAST requirements. In this regard, we note that the Commission is considering new SRO Rules which would make SRO filings self-effectuating within 30 days of filing. This would allow DTC to unilaterally require DRS enhancements without payment to transfer agents for the infrastructure costs they would be required to absorb.

The Proposal Gives DTC Unfettered Discretion

The Proposal, in various provisions, gives to DTC what amounts to unfettered discretion to decide which transfer agents are eligible for DRS (now made mandatory by the three Exchanges), to terminate any agent at any time if it suits DTC, and to impose significant changes to both the FAST System and expanded DRS, regardless of the cost to transfer agents. As the relationship between transfer agents and DTC is a commercial relationship, we submit that it is improper for this SRO (in which transfer agents are not members) to retain unfettered discretion over our business.

Failure to Satisfy the Regulatory Flexibility Act of 1980

One of the main goals of the Regulatory Flexibility Act of 1980 (the "RFA") is to ensure that small business are given due consideration when agencies promulgate regulations. There is no evidence that any assessment has been done by DTC to examine the economic impact to small transfer agents or small issuers to ensure compliance with the requirements of the RFA. We urge the Commission to perform such an examination in its review of the Proposal.

DTC's Usurpation of the Commission's Jurisdiction

Perhaps the most objectionable aspect of DTC's Proposal is that it will have the effect of making DTC a supervising regulator of the entire transfer agent industry. Congress did not vest DTC with this authority; instead, it vested exclusive authority for regulating and overseeing transfer agents solely with the Commission. Moreover, DTC is an SRO which, through the Proposal, is seeking to regulate conduct and pricing for non-members. The STA and CST submit that the Proposal presents a major structural problem in this regard, as SROs should not be provided such authority over non-members, and that the Commission needs to consider this irregularity in its review of the Proposal.

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*Moreover, the use of the DRS Ad Hoc Committee as the ultimate arbiter of disputes is highly objectionable. In the first instance, that Committee is dominated by DTC and its members. Additionally, it has no governing by-laws or rules with respect to who can vote, etc. Ultimately, therefore, DTC would likely control the implementation of costly programmatic changes and huge infrastructure investments by transfer agents under the Proposal as written. This is unacceptable.

Conclusion

Adoption of the Proposal would be disastrous. If the Proposal is not substantially revised to address the concerns urgently raised by transfer agents, it would amount to an abdication by the Commission of its authority to regulate the transfer agent industry, handing this authority to a private sector monopoly whose ultimate goal is not the protection of investors but the protection of its own commercial interests. In addition, as the Commission is aware, DTC has a long history of streamlining its own operations by pushing additional service requirements on transfer agents while refusing to pay for almost all of these services despite the concerted efforts of the STA to enlist the Commission's assistance in urging DTC to bargain with transfer agents in good faith. Furthermore, the advent of mandatory book-entry eligibility would give transfer agents no choice but to adhere to DTC rules, lest DTC in its sole and unfettered discretion throw them out of FAST and DRS and, therefore, out of business. DTC's naked attempt by this Proposal to extend it's 30 year pattern of anti-competitive behavior must not be permitted by the Commission.

We thank you for the opportunity to comment once again on the Proposal and would welcome the opportunity to discuss our concerns further.

Very truly yours,

Steven G. Nelson
President and
Chairman of the Board

SGN/ecs

Enc.

VIA FEDERAL EXPRESS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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OLDE MONMOUTH STOCK TRANSFER CO., INC., :

N N N N N Plaintiff, N :

N N -- against -- N N N N : 07 CV 0990 (CSH)

DEPOSITORY TRUST & CLEARING N N N :
CORPORATION and DEPOSITORY TRUST
COMPA Y, N N N N N N :

N N N N N Defendants. N :

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DECLARATION OF SUSANNE TRIMBATH, PH.D.

SUSAN E TRIMBATH, PH.D, hereby declares pursuant to 28 U.S.C. § 1746 as follows:

1.N I hereby submit this brief in support of Plaintiff's Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss.

2.N I am the Chief Executive Manager and Chief Economist of STP Advisory Services, LLC, which is located at 2118 Wilshire Boulevard, Suite 596, Santa Monica, California 90403.

3.N I was employed by Defendant Depository Trust Company (NDTC") from August 1987 through August 1993. DTC is now a wholly-owned subsidiary of Defendant Depository Trust and Clearing Corporation (NDTCC"). My title at DTC was Director of Transfer Agent Services. I held day-to-day responsibility for maintaining positive relationships between DTC and the corporate trust community (NCTC") in the United States and Canada. CTC includes transfer agents (NTAs") and registrars, i.e., those companies that maintain the ownership records for public companies. I also managed a staff of about six (6) employees who maintained the contact databases used to ship securities and mail correspondence to TAs. As DTC's liaison, I served on transfer agent industry association committees, attended quarterly and annual meetings and conferences, and was a frequent speaker at TA industry events.

4.N Prior to joining DTC, from August 1985 through July 1987 I was employed by the Pacific Clearing Corporation (NPCC") and the Pacific Securities Depository Trust Company (NPSDTC"), now defunct subsidiaries of the Pacific Stock Exchange. My initial title with PCC was Operations Analyst, and I was responsible for reviewing

operations for improvements and defining new business products. In about September 1986 I was promoted to Vault Manager at PSDTC, and was made responsible for managing the day-to-day operations of the vault, which held securities valued at approximately $49 billion. I remained in this position until the PSDTC was reorganized, at which point I was hired by DTC in New York.

5.N In addition to my employment experience with DTC and PSDTC, following my tenure at DTC I was a Senior Advisor on a project funded by the United States Government to develop stock trade clearing and settlement and depository operations in Russia in 1993 and 1994. This work occasioned discussions with DTC senior management subsequent to my tenure at DTC. In my capacity as Senior Advisor to the Russian project, I created system specifications for stock trade clearing, settlement and depository operations. These specifications often were reviewed by DTC management prior to implementation in Russia.

6.N In May 2000, I was awarded the degree of Ph.D. in Economics from New York University.

7.N I have thoroughly reviewed the documents submitted by Defendants in connection with the matters presently before the Court, and believe (for the reasons delineated below) that certain assertions contained therein are demonstrably false.

8.N While I was employed by DTC, my industry-liaison role exposed me to a broad range of DTC activities, not only with the CTC, but with bank and broker-dealer participants (each, a NParticipant," and collectively, the Participants") activities. Many of the same companies that were TAs were also banks (e.g., US Trust, Bank of New York, Chase, Citibank) that maintained Participant accounts at DTC. The necessity of working with DTC departments and companies on these two complementary sides of the securities business gave me a strategic perspective that was not afforded to most operations managers at DTC.

9.N When I first arrived at DTC in the fall of 1987, the relationship between DTC and the transfer agents (TAs) was quite strained. The TAs believed that DTC was making unreasonable demands for everything from increased

automation to decreased fees. In fact, DTC had the power to control prices charged by TAs for their services. Even in 1987, DTC's holdings of many issuing companies were as much as 75% of all shares outstanding. Through Defendants' on-going and vigorous efforts at Nimmobilization" (maintaining physical custody of all stock certificates only at DTC) and Ndematerialization" (making shares exist only in the form of electronic files, rather than as physical pieces of paper), DTCC can now claim to be the registered shareholder of 100% of many issuers' stocks and bonds (through its nominee name, Cede & Co). This makes Defendants the largest registered shareholders of the clients of the TAs (the stock issuers).

10.N **Notwithstanding Defendants' frequent claims to the contrary in their brief, Defendants and Plaintiff Olde Monmouth Stock Transfer Co., Inc. (EOlde Monmouth") are indeed competitors.** As DTC's liaison to the TAs, I served on industry committees, including the NT+3 Direct Registration Subcommittee" (the NSubcommittee") associated with the International Group of Thirty Clearance and Settlement Project, which was known as the NG30." G30 was formed in the 1990s by top financial industry

representatives from 30 industrialized nations in an effort to improve efficiency in international capital markets by recommending standards for their respective 30 national markets. On the Subcommittee, I worked beside representatives of the Securities Transfer Association ("STA") and the American Society of Corporate Secretaries ("ASCS").

11.N The Subcommittee viewed a new Direct Registration System initiative developed by the TAs (NDRS-TA") as offering investors an additional choice of stock ownership in the form of an account statement, in which the shares would be registered in the name of the investor and maintained on the books of the issuer in a book-entry format. After consideration, the G30 decided that the complete elimination of certificates was not necessary at that time, and thus did not endorse DRS-TA.

12.N The TA community, nevertheless, continued its work to develop DRS-TA. In 1992, the TA community formed the Investor Registration Option Implementation Committee ("IRO/IC") to make DRS-TA a reality. I served as DTC's representative to IRO/IC. This work eventually led the

Securities and Exchange Commission (NSEC") to solicit comments on the policy implications of, and the regulatory issues raised by, DRS-TA in a release dated December 1, 1994. (Annexed hereto as NExhibit A" is a true and correct copy of SEC Release No. 34-35038, which contains further details regarding the events leading to the development of DRS-TA.)

13.N DRS-TA was based on dividend-reinvestment programs where, at the shareholders option, a company would use dividend payments to purchase additional shares for the shareholder rather than disbursing the dividend as a cash payment to the shareholder. Some issuers extended the concept to the point where an individual investor could open an account with the company that issued the stock (or the company's TA) into which a shareholder could make additional cash contributions that the issuer would then use to purchase additional shares of the company's stock for the shareholder.

14.N Shareholders participating in DRS-TA would deal directly with the company that issued the stock (or the company's TA) to buy, sell and transfer shares of stock.

The issuers accumulated the stock transactions of all of the shareholders together before executing buy and sell trades so that any transaction fees the issuer paid were divided among a great number of shareholders. Therefore, stock issuers were able to offer DRS-TA services at virtually no cost to shareholders.

15.N Before I left DTC in 1993, I proposed and enhanced a service for the direct mailing of certificates by agents to shareholders at the request of financial intermediaries through DTC. I also proposed, developed and tested automated direct withdrawals and deposits at custodians. Both programs are complementary services to DRS-TA, in that these were the refinements necessary to make DRS-TA compatible with DTC services. After I left DTC, I was told by TAs and former co-workers who remained at DTC that the relationship between DTC and the TAs deteriorated almost immediately upon my departure, despite the fact that the department that I headed and developed, Transfer Agent Services, was expanded significantly in the number of staff assigned to the function. I mention this because I believe it places in context the events that follow.

16.N Subsequent to the development of DRS-TA, DTC began a program to develop a depository operated book-entry registration system (NDRS-DTC") whereby DTC would come into *direct competition* with the TAs. On October 3, 1996, DTC filed with the SEC a proposed rule change to establish Na new service called the Direct Registration System" (NDRS-DTC"). In SEC Release No. 34-37778 (a true and correct copy of such Release is annexed hereto as NExhibit B"), which was incorrectly cited in Defendant's Memorandum of Law as the rule where SEC approved DTC's FAST Program, DTC states that DRS-DTC would allow an investor Nto transfer its DRS position in the security to a *financial ntermediary* in order to sell or pledge the security or to receive a certificate representing the security" (emphasis added). In contrast, DRS-TA would allow an investor to *directly* sell, pledge or transfer the shares.

17.N Therefore, DRS-DTC was not a program intended to accommodate the DRS-TA business of the TAs; in fact, as I describe above, that work was completed before I left DTC in 1993. Instead, DRS-DTC was a new service. This is clearly demonstrated in SEC Release No. 34-37778 where

Plaintiff references separate documents to describe the separate services: SEC Release 35038 (December 1, 1994) in footnote 2 to describe DRS-TA; and DTC Important Notice B# 1368-96 (July 15, 1996) in footnote 3 to describe DRS-DTC. Defendant's new product was distinctly advantageous to DTC and its Participants and *specifically intended to compete with the TAs.*

18.N There are clear reasons why DTC would take such steps to compete with the TAs through DRS. DTC is tantamount to a cooperative owned by its Participants, with such Participants given the right to purchase voting shares of DTC stock in proportion to the quantity and value of services they use at DTC annually. The voting shares are then used to elect Participants' officers to the Board of Directors of DTC. (Annexed hereto as NExhibit C" is Note 1 (entitled NBusiness and Ownership") to DTCC's Consolidated Financial Statements, dated December 31, 2006, which unequivocally demonstrates such Participants' ownership of DTC.)

19.N Likewise, as clearly demonstrated in Note 9 (entitled NShareholders' Equity") to DTCC's Consolidated

Financial Statements, dated December 31, 2006 (a true and correct copy of which is annexed hereto as NExhibit D"), the Participants also have ownership interests in DTCC with concomitant DTCC voting rights and directorships. Moreover, many DTCC Board members are employed by Participants that either are FAST-approved transfer agents or closely affiliated with companies that are FAST-approved transfer agents. For example:

- DTCC Director Ellen Allemany is the Chief Executive N Officer of Global Transaction Services for Citigroup N Corporate and Investment Bank. Citigroup is N associated with Computershare Investor Services, which N is a transfer agent approved for the FAST Program. N
- DTCC Director J. Charles Cardona is the Vice Chairman N of The Dreyfus Corporation, which is now owned by N Chase Mellon, which in turn owns ChaseMellon N Shareholder Services, which is a FAST Program approved N transfer agent. N
- DTCC Director Art Certosimo is the Executive Vice N President of the Bank of New York, which is a FAST-N approved transfer agent. N

- DTCC Director David Weisbrod is Senior Vice President N of Risk Management, Treasury & Securities Services for N JP Morgan Chase & Co., which owns ChaseMellon, a FAST-N approved transfer agent. N

It is also worthy of emphasis that Mellon Financial recently announced merger plans with Bank of New York.

20.N Furthermore, some of the Participants were worried that DRS-TA would take business away from them. They expressed such concerns during the development of DRS-TA. If an investor could buy, sell and transfer shares of stock without a Nfinancial intermediary," then the TAs would be in direct competition with the Participants, who own Defendants DTC and DTCC.

21.N In fact, DRS-TA was offered at a significantly lower cost to investors than the buy and sell services of DTC's Participants. Many DRS-TA programs charged no fees to buy shares, only minimal fees to sell shares and no account maintenance fees. (It is important to bear in mind that this was in the 1990s, before online trading pushed

many brokerage fees to less than $10 per trade.) Therefore, since the TAs seemed to be competing with the Participants, it only made sense for such Participants, especially those with employees on DTC's Board of Directors, to have DTC compete with the TAs.

22.N Furthermore, in 2006, DTCC filed proposed rule SR-2006-16 with the SEC which is entitled NProposed Rule Filing to Update the Requirements Pertaining to the FAST and DRS programs of DTC." (A true and correct copy of DTCC proposed rule SR-2006-16 is annexed hereto as NExhibit E"). Although eventually withdrawn by DTCC for revision, SR-2006-16 represents a particular burden on smaller transfer agents like Plaintiff Olde Monmouth.

23.N I first became aware of SR-2006-16 on October 17, 2006 when it was brought to my attention by the STA along with the STA's members' concerns that DTC's proposal was deeply flawed and presented an onerous burden to TAs (especially because of the extraordinary insurance requirements). I am told that the STA held meetings and discussions with DTC and the SEC in order to secure changes to many of the most onerous provisions of SR-2006-16. The

STA argued that the proposed rule exceeded the permissible scope of DTC's authority over TAs. This is made especially clear by Defendants in their Memorandum of Law when they state that, in addition to appointing FAST agents, Defendants must incur costs associated with Nmonitoring the agents' performance." According to the SEC, however:

> There is no SRO that governs transfer agents. The SEC therefore has promulgated rules and regulations for all registered transfer agents, intended to facilitate the prompt and accurate clearance and settlement of securities transactions and that assure the safeguarding of securities and funds. The rules include minimum performance standards regarding the issuance of new certificates and related recordkeeping and reporting rules, and the prompt and accurate creation of security holder records and the safeguarding of securities and funds. The SEC also conducts inspections of transfer agents.

(See www.sec.gov/divisions/marketreg/mrtransfer.shtml, a true and correct copy of which is annexed hereto as Exhibit F.")

24.N I respectfully submit that DTCC's filing of proposed rule SR-2006-16 with the SEC is part and parcel of a carefully orchestrated plan by DTCC and DTC to force some TAs (especially small TAs such as Olde Monmouth) out of business. In this regard, in October 2006, at the annual

meeting of the STA, a DTCC Managing Director publicly announced a timeline for the complete elimination of any transfer business that handles physical stock certificates, that is, the elimination of any stock transfer business that was not enrolled in FAST and DRS-DTC. Specifically, as clearly demonstrated in the attached DTCC PowerPoint slide dated, October 20, 2006 (a true and correct copy of such PowerPoint slide is annexed hereto as NExhibit G"), such Managing Director stated that by 2008, DTC wanted to be the self-proclaimed NRoach Motel" of stock certificates, in that certificates get deposited to DTC but they never come out. The wording on the slide states that NAll withdrawals will be done via full DRS," referring to DRS-DTC.

25.N On page 8 of Defendants' Memorandum of Law, Defendants *brazenly and falsely* state that NThose issues that are not listed on the New York Stock Exchange, American Stock Exchange or the NASDQQ need not adopt DRS" and therefore need not be FAST approved. In this regard, the SEC not only approved that particular rule change in August 2006, but it also approved an additional and similar rule change for NYSE Arca issues in September 2006. (NYSE

Arca, formerly known as the Archipelago Exchange and the Pacific Exchange, is the second securities exchange operated by NYSE Group, Inc.) Likewise, in January of 2007, Mr. Lawrence Morillo, Managing Director of Pershing LLC and Chairman of the Securities Industry and Financial Markets Association (SIFMA), publicly stated that the Boston, Chicago and Philadelphia stock exchanges filed rule changes with the SEC in October 2006 to adopt DRS and FAST. (A true and correct copy of Mr. Morillo's PowerPoint slides, dated January 11, 2007, are annexed hereto as Exhibit H".) Mr. Morillo also stated that the National Stock Exchange (Chicago) would consider such a rule change at their next Board meeting. **Therefore, there would appear to be no limit to the business that will be denied Olde Monmouth if Plaintiff is denied access to FAST and DRS-DTC.**

26.N On page 3 of Defendants' Memorandum of Law, Defendants erroneously indicate that the FAST Program has only been available for 10 years when, in point of fact, FAST was initiated more than 30 years ago. According to footnote 3 of SR2006-16:

> DTC introduced the FAST program in 1975 with 400 issues and 10 agents. Currently, there are over 930,000 issues and approximately 90 agents.

27.N As further evidence of the anti-competitive intent of Defendant, it is worth observing that, in the 30 years since its inception, the number of issues eligible for FAST has increased 2,325 times while the number of agents eligible for FAST has increased by a factor of only 9. Furthermore, the population of small transfer agents is rapidly declining. According to my analysis of data available from SEC publications, the number of small registered TAs declined 34%, from 470 to 310 just in the 4 years since 2003. In the same period, the number of all TAs declined only 13%, from about 900 to 785 today. Clearly, the small businesses in the TA community are suffering more than the larger TAs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 17th day of March, 2007.

N
N
N
_____ N
N Susanne Trimbath, Ph.D. N
N *Chief Executive Manager and Chief Economist* N
i i i STP Advisory Services, LLC i

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N
N
Sworn to before me this
17th day of March, 2007.

_____
N otary Public

NITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLDE MONMOUTH STOCK TRANSFER CO., INC.,	:
Plaintiff,	:
-- against --	:
DEPOSITORY TRUST & CLEARING CORPORATION and DEPOSITORY TRUST COMPANY,	:
Defendants.	:
	07 CV 0990 (CSH)

PLAINTIFF'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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At orneys for Plaintiff
Olde Monmouth Stock
Transfer Co., Inc.

Dated: March 19, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITITES

FEDERAL STATUTES

FEDERAL CASES

NITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OLDE MONMOUTH STOCK TRANSFER CO., INC.,	
Plaintiff,	
-- against --	
DEPOSITORY TRUST & CLEARING CORPORATION and DEPOSITORY TRUST COMPANY,	**07 CV 0990 (CSH)**
Defendants.	

PLAINTIFF'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

E E Plaintiff Olde Monmouth Stock Transfer Co., Inc. ("Olde Monmouth") respectfully submits this Reply Memorandum of Law in support of its motion for a preliminary injunction and Memorandum of Law in Opposition to DefendantsE Motion to Dismiss the Complaint in this action.

PRELIMINARY STATEMENT

E E The ***entirety*** of DefendantsE challenge to PlaintiffEs antitrust claims and application for injunctive relief is premised solely on a single naked factual allegation. Time and time again, Defendants relentlessly intone at every opportunity that Olde MonmouthEs antitrust claims must be dismissed (and, accordingly, its requested injunctive relief denied) because the

Defendants do not compete against Olde Monmouth. This assertion is reiterated with such vigor and unflagging frequency as to suggest that Defendants believe that only by incessant repetition can it be imbued with accuracy.

E Readily obtainable public documents, however, as well as the facts set forth in the accompanying Declaration of Susanne Trimbath, Ph.D., who is a former senior employee of Defendant DTC, expose the demonstrable falsity of this critical linchpin of DefendantsE arguments, without which their attacks against Olde MonmouthEs claims lay lifeless: ***Defendants in fact do engage in direct competition with Olde Monmouth.***

E Among other unassailable indicia of such direct competition:

- The shareholder/owners of DTCC and DTC (i.e., "Participants," in DefendantsE parlance) include the largest and most influential broker/dealers in the United States; these broker/dealer Participants own outright or otherwise control stock transfer agency affiliates that vie with and compete directly against Olde Monmouth to perform stock transfer services for securities issuers. Consequently, DefendantsE shareholder/owners provide stock transfer agency services to issuing companies in direct competition with Olde Monmouth. E

E

- Fully one-half of the 36 transfer agents publicly identified as approved for DefendantsE DRS Program either are owned outright by, or are subsidiaries of, E

DefendantsE broker/dealer Participant shareholders. E

E

- The DRS and FAST Programs that Defendants E have imposed on the entire securities industry were originally conceived, developed and proposed to the Securities and Exchange Commission by the Securities Transfer Association ("STA"), the trade E group made up of stock transfer agents. E Because of concerns raised by some of DefendantsE shareholder Participants that adoption of DRS as proposed by the STA would result in the ParticipantsE loss of business and revenue, the Defendants seized control of the original DRS initiative from the STA, successfully appropriated and redirected the entire DRS proposal for DefendantsE own purposes and have made use E of their monopolistic position of complete authority over DRS for anticompetitive purposes, all of which devolves to the detriment of large segments of the stock transfer industry, securities issuers and consumers in general. E

E

- Over the last 30 years the number of FAST-eligible stock issues has increased by a factor of 2,325 (i.e., from 400 issuers to more than 930,000 issuing companies), while the number of FAST-approved stock transfer agents has increased only by a comparatively paltry factor of nine (from 10 agents to approximately 90). In recent years, the number of small stock transfer agents has decreased at a much higher rate than the rate at which the number of stock transfer agents has decreased overall. Such trends clearly reflect a significant and rapid consolidation of stock transfer services under the control of the large E

FAST-approved transfer agents that are owned by Defendants.

E E Plaintiff respectfully submits that the facts set forth above, standing alone, are more than sufficient to demonstrate that the Defendants are engaged in direct competition with Olde Monmouth and that, accordingly, each of DefendantsE challenges to the Complaint and to PlaintiffEs request for injunctive relief must be soundly and completely rejected. To the extent, however, that the Court may deem it necessary to have additional indicia of such direct competition brought before it, Plaintiff respectfully submits that limited discovery is entirely appropriate under the present circumstances and hereby renews its request for permission to conduct such inquiry of Defendants.

FACTUAL BACKGROUND

E E Strikingly absent from DefendantsE otherwise tidy exposition of the events underlying this dispute is any mention of the E*truly relevant* facts concerning the historical background that resulted in DefendantsE imposition of the present DRS/FAST Program on the entire securities industry and any information about DefendantsE actual ownership structure.[1] DefendantsE monopolistic position of complete and utter control over the nationEs predominant securities depository industry -- the position from which Defendants have been able successfully to

[1] E For a much more detailed discussion of the factual background set forth herein, Plaintiff respectfully directs the CourtEs attention to the Declaration of Susanne Trimbath, Ph.D., sworn to March 17, 2007 ("Trimbath Decl."), which is submitted herewith.

impose their DRS Program on the securities industry as a whole -- is undisputed for purposes of the pending cross-motions.

E E In preparing for the instant submission to the Court, Plaintiff has turned to Susanne Trimbath, Ph.D., for professional assistance. Dr. Trimbath has held many significant positions within the securities and stock transfer industries over the course of her career, including the position of Director of Transfer Agent Services at Defendant DTC for six years. Her employment history has provided her with a unique vantage point from which to observe the historical development of many of the factual matters here at issue.

E E Her detailed analyses of these important industry developments, as well as her careful examination of DefendantsE submissions in this lawsuit, are fully set forth in her Declaration, to which Plaintiff respectfully refers the Court. Plaintiff steadfastly holds the view that the insightful and illuminating information set forth in Dr. TrimbathEs Declaration standing alone provides more than sufficient evidence not only that Defendants are engaged in actual competition with Olde Monmouth, but also that DefendantsE motion to dismiss must be rejected in its entirety.

E E With respect to their ownership structure, Defendants have disclosed in public documents and filings that shares of DefendantsE stock are held by entities known as "Participants," all of which are financial services institutions. (The list of DefendantsE Participants as published on DefendantsE Web site is

attached as "'xhibit A" to the Reply Declaration of Edward R. Gallion, Esq., sworn to March 19, 2007 ("Gallion Reply Decl."), which is submitted herewith.) The allocation of DefendantsE shares among the Participants appears to be determined on the basis of the frequency, scope and nature of the ParticipantsE respective DTCC- and DTC-related activities. (See Trimbath Decl. ¶ 18.) The Participants, therefore, are shareholder/owners of Defendants DTCC and DTC.

E E As fully set forth in PlaintiffEs prior submissions to the Court (see PlaintiffEs Complaint, filed February 13, 2007; PlaintiffEs Memorandum of Law in Support of Motion for Preliminary Injunction, filed February 27, 2007), Defendants have imposed upon the entire securities industry a registration/ transfer regimen known as DRS, which is under the exclusive control and administration by Defendants. Compliance with DRS has been made a requirement for listing on the national securities exchanges, and will soon be a listing requirement for most of the regional exchanges in the United States, including those located in Philadelphia, Chicago and Boston. (See Trimbath Decl. ¶ 25.)

E E Therefore, despite DefendantsE disingenuous suggestions to the contrary, admission to the FAST Program will be required in all instances to serve as transfer agent even for those presumably smaller issuers seeking only regional exchange registration. Consequently, the universe of listing choices for non-DRS-compliant issuing companies will continue to shrink

quickly at DefendantsE hands and the concomitant opportunities for non-DRS-compliant transfer agents such as Olde Monmouth to continue in business in any meaningful manner in all likelihood will evaporate in a similarly short period of time.

E E As a prerequisite to participation in DefendantsE DRS Program, transfer agents must be approved by Defendant DTC -- in DTCEs sole and unfettered discretion -- as eligible for DTCEs FAST Program. While Defendants unreasonably and unlawfully have withheld such approval from Olde Monmouth despite PlaintiffEs best efforts and its clear demonstration of full compliance with all published criteria, the publicly available Web site list of the 36 transfer agents that have been approved for the DRS Program discloses that fully one-half of those approved agents are owned by or affiliated with DefendantsE Participants.[2] (See Gallion Reply Decl., Exh. B.) Of equal if not greater significance, senior executive representatives of DefendantsE most important Participants hold positions on Defendant DTCCEs Board of Directors. (See Gallion Reply Decl., Exh. C.)

[2] E lsewhere, Defendants have publicly stated that "approximately 90" transfer agents have been approved for FAST Program participation (see Trimbath Decl. ¶ 26.), although Plaintiff has been unable to locate any such list of FAST-approved transfer agents even after the exercise of considerable due diligence. Olde Monmouth therefore is of the view that discovery on this critically important issue, among many others, is not only entirely appropriate but necessary, given the great evidentiary weight Defendants have placed on the statistics concerning the percentages relating to the approval and denial rates of applications for FAST eligibility. (See, e.g., Defs. Mem. at 7.) E It therefore would appear that basic fairness requires that Plaintiff, at a bare minimum, be permitted to discover the identities of those transfer agents that have applied for acceptance into the FAST Program, as well as the ultimate dispositions of their applications at DefendantsE unsupervised and unrestrained hands.

E Accordingly, it is quite evident that DefendantsE shareholder/owner Participants compete directly against Plaintiff Olde Monmouth to provide stock transfer agent services to securities issuers and that these competitor-Participants bear ultimate responsibility for DefendantsE unlawful exclusion of Olde Monmouth from the FAST Program, in clear violation of the federal and state antitrust statutes under which PlaintiffEs causes of action are brought.

E E Additional indications of such direct competition are revealed upon inspection of the historical development of the DRS Program. As explained in greater detail by Dr. Trimbath, the original seminal idea that gave rise to the present DRS Program was developed independently by the Securities Transfer Association; in fact, the STAEs proposals, which came to be known within the securities industry as "DRS-TA," were sufficiently developed that the Securities and Exchange Commission was prompted to solicit comments on the policy implications and regulatory issues raised by DRS-TA in a release issued by the Commission dated December 1, 1994. (See Trimbath Decl. ¶ 12 & xh. A thereto.) Among other innovations envisioned by DRS-TA, this initiative contemplated the complete elimination of physical paper stock certificates in favor of stock ownership records that would be reflected and maintained on the records of the issuer in a book-entry format.

E E Realizing the potentially ruinous long-term implications for its stock depository facilities and related

functions that would be occasioned by acceptance of DRS-TAEs proposed total elimination of paper stock certificates, on October 3, 1996, Defendants filed with the SEC their own proposed rule change to create a new service called the Direct Registration Service ("DRS-DTC").[3] (See Trimbath Decl. ¶ 16 & xh. B thereto.) The critical differences between the competing DRS systems focused on investor autonomy: DRS-TA would have allowed investors to sell, pledge or transfer their shares directly, whereas DRS-DTC requires an investor "to transfer its DRS position in the security to a financial intermediary in order to sell or pledge the security or to receive a certificate representing the security." (Id.)

E E Thus, upon sensing the possibility that the Securities and Exchange Commission might permit the adoption by the securities industry of DRS-TA as developed by the STA, with its attendant adverse effects on their primary roles as financial intermediaries and depository facilities, Defendants moved swiftly and decisively to wrest developmental control over the DRS initiatives from the STA where they originally were created and nurtured, and instead commandeered the development of the DRS Program to serve the needs of Defendants to the direct benefit of their broker/dealer shareholder Participants and to the direct detriment of the stock transfer agents that are not affiliated

[3] E It bears emphasis that DefendantsE initial submissions to the Securities and Exchange Commission on behalf of its DRS-DTC initiative specifically refer to and incorporate the STAEs prior DRS proposals, thereby subsuming and redirecting the STAEs original creation to meet DefendantsE own competitive objectives. (See Trimbath Decl. ¶¶ 16-18.)

with DefendantsE Participants. Such turf-protecting actions undertaken by Defendants to counteract and co-opt perceived competitive threats from the stock transfer agentsE proposed DRS program constitute classic textbook illustrations of direct competition.[4]

E E Yet additional cognizable indications of direct competition between Defendants and unaffiliated stock transfer agents such as Olde Monmouth can be found by examining the irrefutable and unmistakable trend toward complete ownership of all issuersE outstanding shares in the name of DefendantsE nominee, Cede & Co. As noted in PlaintiffEs prior submissions, Defendants are now in a position to claim nominal ownership of upwards of fully 75 percent of all outstanding shares of issues listed on the major national stock exchanges, and the three largest stock transfer agents, Computershare Investor Services, ChaseMellon Shareholder Services and the Bank of New York -- each of which not surprisingly is a DRS-approved transfer agent subsidiary of DefendantsE most prominent shareholder/owner

[4] E The true nature and scope of the intent on the part of DefendantsE Participants in resolving to commandeer and redirect DRS-TA for their own self-protective purposes are issues of critical importance to PlaintiffEs claims, particularly as regards its causes of action under Section 1 of the Sherman Act and the corresponding New Jersey antitrust statute, which sound in illegal conspiracy and/or combination.

E Plaintiff respectfully submits that such significant issues are properly susceptible to review only after development on the record through discovery, and Plaintiff therefore is of the view that these claims should not be dismissed and, instead, remain *sub judice* until Plaintiff has been afforded ample opportunity adequately to explore relevant communications between Defendants and their Participants concerning their self-protective intentions with respect to the DRS-TA proposal and any potentially suspect collusive agreements among them concerning related competitive issues.

Participants -- now provide transfer agent services to 70 percent of shareholders.

E E Dr. Trimbath has set forth even more detailed statistical information about the alarming rate of consolidation in the hands of the relatively small number of DRS-approved Participant-owned transfer agents and the corresponding decline in the number of unaffiliated stock transfer agents as DefendantsE DRS requirements become more and more pervasive throughout the securities industry. (See Trimbath Decl. ¶¶ 24-27.) The pace of such consolidation under DefendantsE nominal ownership through Cede & Co., and of course, through DefendantsE ParticipantsE stock transfer agent subsidiaries, continues to accelerate and by all accounts will continue to escalate unabated. (Id.)

E E Indeed, senior executive representatives of DTC include as part of their regular Powerpoint presentations to the securities industry a self-description of DefendantsE stock depository as the "Roach Motel," i.e., "the shares go in but they never come out." (See Trimbath Decl. ¶ 24 & Exh. G thereto.)

E E This exponential increase in DefendantsE nominal ownership of publicly traded shares is accompanied by the concomitant escalating concentration of transfer agent services for such issuers in the hands of the few DRS/FAST-approved transfer agents that are specifically hand-selected for inclusion in the program by Defendants. Not surprisingly, virtually all of these specially selected DRS/FAST-approved transfer agents that

are involved in the financial services industry are owned by or affiliated with the shareholder/owners of the DefendantsE Participants.

E E Moreover, just as DefendantsE have abused their monopolistic position of total control over DRS/FAST to the direct benefit of their shareholder/owner Participants and to the direct detriment of unaffiliated transfer agents such as Olde Monmouth, DTCC and DTC have improperly appropriated unto themselves total ***regulatory and supervisory authority*** over the transfer agents -- in contravention of the clear and express Congressional mandate that such regulatory and supervisory authority shall be vested exclusively with the United States Securities and Exchange Commission. (See also Trimbath Decl. ¶ 23.) As just one example of such overreaching in this regard, Defendants trumpet their self-appointed supervisory role by informing the Court that they must bear the costs associated with "monitoring the [transfer] agentsE performance." (See Defs. Mem. at 7.)[5]

E E DefendantsE sweeping misappropriation of regulatory authority that is reserved exclusively for the Securities and xchange Commission, as well as the alarming and apparently

[5] E Plaintiff notes also that DefendantsE frequent invocations of the many laudable goals and public protections embodied in various Congressional mandates to the Securities and Exchange Commission ring somewhat hollow emanating, as they do, from parties who have blatantly violated those mandates by misappropriating unto themselves regulatory authority reserved exclusively for the Commission and who, Plaintiff firmly believes, have abused their unique status vis-à-vis the Commission to engage in and perpetrate unlawful collusive and conspiratorial conduct in contravention of the antitrust laws.

irreversible consolidation of nominal stock ownership in DefendantsE hands, have caused widespread and justifiable consternation among the smaller unaffiliated stock transfer agents who justifiably fear for their very survival in the face of DefendantsE seemingly unstoppable onslaught, as evidenced by, for example, a recent front-page article from the STAEs official trade publication. (See Gallion Reply Decl., Exh. D.)[6]

E E In light of the foregoing, Defendants no longer should be heard disingenuously to obfuscate the issues before this Court by continuing to eschew any competitive status vis-à-vis Olde Monmouth and similarly situated small unaffiliated stock transfer agents. Because such direct competition unquestionably has been demonstrated, each of DefendantsE attacks on PlaintiffEs claims must fail. PlaintiffEs request for preliminary injunctive relief should be granted and DefendantsE motion to dismiss should be rejected in its entirety.

ARGUMENT

Defendants Have Misrepresented Olde Monmouth's So-Called Concessions."

E E Before proceeding to PlaintiffEs detailed legal analysis demonstrating its entitlement to injunctive relief as well as an Order denying DefendantsE motion to dismiss in all respects, it is imperative that Olde Monmouth, as a threshold matter, correct any number of the frequent misstatements and

[6] E Plaintiff previously provided a copy of the STA newsletter article to the Court by letter on February 16, 2007. An additional copy is hereby submitted as Exhibit D to the Gallion Reply Declaration for the convenience of the Court.

mischaracterizations that Defendants brazenly label as "concessions" and proceed carelessly and repeatedly to bandy about. Among DefendantsE freewheeling misstatements:

- Olde Monmouth has E***ot*** "conceded" that there E is no competition between it and Defendants. Indeed, given the lengthy exposition set forth above and the accompanying statements of Dr. Trimbath in this regard, nothing could be farther from the truth and, in fact, Plaintiff has alleged DTCEs status as a competitor (see, E e.g., Complt. ¶ 47(c)). Consequently, the very heart of each of DefendantsE E arguments, as well as the corollaries arising therefrom (Defs. Mem. at 16-24), are of no effect and properly should be disregarded by this Court as irrelevant and inapplicable to the facts underlying this action. E

E

- It is by no means "undisputed that DTCEs current market share of the market for E transfer agent services is zero," as E Defendants disingenuously would have this Court believe. (See Defs. Mem. at 20.) E Quite to the contrary, DefendantsE market share can be properly calculated only by taking into account the ever-increasing market positions held by DefendantsE shareholder/owner ParticipantsE transfer agent captives, which, as Plaintiff has demonstrated elsewhere herein, aggregate well in excess of 70 percent. E

E

- Olde Monmouth has not "withdrawn" its application for injunctive relief under Section 1 of the Sherman Act. Rather, as clearly stated in its prior submissions, Olde Monmouth merely has determined to E

await further factual development during discovery as to the existence of unlawful conspiracies or collusive combinations, as contemplated by Section 1, in order ultimately to demonstrate its entitlement to injunctive relief thereunder.

- Olde Monmouth has not conceded that it is unable to specify the injury that it has suffered and will continue to suffer as the direct result of DefendantsE anticompetitive conduct and, in fact, clearly has alleged such antitrust injury. In light of the unquestionable consolidation that is taking place within the DRS-eligible stock transfer agency industry and DefendantsE continuing unreasonable exclusion of Olde Monmouth from participation therein, PlaintiffEs current and future injuries are effectively self-evident. Similarly, because Olde MonmouthEs exclusion from DRS/FAST undoubtedly has deterred and will continue to deter innumerable prospective customers from doing business with Plaintiff, Olde MonmouthEs injuries do not constitute financial loss that is susceptible to quantification. **U**

When Plaintiff's Allegations Are Viewed in a Light Most Favorable to Olde Monmouth, and All Reasonable Inferences Are Drawn in Favor of Plaintiff, Defendant's Motion to Dismiss Should Be Denied.

E In adjudicating a motion to dismiss, it is well established that a district court must construe the allegations contained in the complaint in a light that is most favorable to the plaintiff and "must deny the motion unless it appears beyond a doubt that the plaintiff can prove no set of facts in support

of [its] claim that would entitle [it] to relief." Hochroth v. William Penn Life Ins. Co., No. 03 CIV 7286, 2003 WL 22990105, at *1 (S.D.N.Y. Dec. 19, 2003) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957)); see also In re Natural Gas Commodity Litig., 337 F.Supp.2d 498, 508 (S.D.N.Y. 2004) ("A court may dismiss a complaint only if '"it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief."'") (citing Resnik v. Swartz, 303 F.3d 147, 150-51 (2d Cir. 2002) (quoting Harris v. City of New York, 186 F.3d 243, 247 (2d Cir. 1999))). "[A] court must [also] accept the material facts alleged in the complaint as true and construe all reasonable inferences in a plaintiffEs favor." Solutia Inc. v. FMC Corp., No. 04 Civ. 2842, 2005 WL 711971, at *3 (Mar. 29, 2005) (citations omitted); see also Williams v. City of New York, No. 03 Civ. 5342, 2005 WL 901405, at *7 (Apr. 19, 2005) ("In considering a motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., the Court construes the complaint liberally, 'accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiffEs favor[.]E") (citations omitted).[7]

E E Olde Monmouth respectfully submits that accepting its factual allegations as true, and construing all reasonable inferences in PlaintiffEs favor, one may easily and reasonably

[7] E It bears observation that in Conley, the Supreme Court stated that "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley, 355 U.S. at 48, 78 S. Ct. at 103 (citation omitted).

conclude that Defendants have engaged in, and continue to engage in, willful anticompetitive behavior in bad faith; accordingly, DefendantEs motion to dismiss should be denied.

Antitrust Complaints Should Be Dismissed Only Very USparingly."

E E Antitrust actions implicate additional unique concerns that caution against precipitous dismissals before the opportunity for adequate discovery has been provided: "In the context of antitrust cases, motions to dismiss 'prior to giving the plaintiff ample opportunity for discovery should be granted [only] very sparingly.E" American Express Travel Related Servs. Co. v. Visa U.S.A., No. 04 Civ. 8967, 2005 WL 1515399 (S.D.N.Y. June 23, 2005) (quoting Geroge Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998) (internal quotations omitted)); Mon-Shore Mgmt., Inc. v. Family Media, Inc., No. 83 Civ. 2013, 1984 WL 2867, at *5 (S.D.N.Y. Sept. 5, 1984) (declining to dismiss antitrust claims; "In considering a defendantEs motion to dismiss an antitrust claim, we must keep in mind the Supreme CourtEs admonition that in antitrust cases 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly[.]E") (quoting Hosp. Bldg. Co. v. Rex Hosp. Trs., [1976-1 TRADE CASES ¶ 60,885], 425 U.S. 738, 746 (1976)).

E E District courts frequently underscore and uphold the necessity of affording plaintiff an opportunity for discovery to substantiate its antitrust claims. "The issue is not whether a

plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Mon-Shore Mgmt., Inc.,1984 WL at *5 (S.D.N.Y. Sept. 5, 1984). See also Daniel v. American Bd. of Emergency Med., 988 F.Supp. 112, 122-23 (W.D.N.Y. 1997) ("[B]ecause of the conspiratorial nature of certain antitrust claims, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.") (internal quotation omitted).

E E Such admonishments counseling against premature dismissal of antitrust allegations are particularly apt under the present circumstances. Olde Monmouth properly has alleged, *inter alia*, the existence of an unlawful conspiracy involving Defendants that contravenes Section 1 of the Sherman Act and the corresponding New Jersey statute. The identities of third parties with whom Defendants have entered into such collusive agreements remain undetected to date, although it hardly strains credulity to suspect that DefendantsE own shareholder/owner Participants with DRS-approved transfer agency facilities might well have conspired with Defendants improperly to apportion unto themselves an ever increasing share of the market for transfer agency services, especially as the aforementioned market consolidation progresses unabated.

E E As demonstrated elsewhere in PlaintiffEs submissions to the Court, the three largest stock transfer agents, each of which is a DRS-approved transfer agent subsidiary of DefendantsE most prominent shareholder/owner Participants, now provide

transfer agent services to 70 percent of shareholders. Given this rather remarkable market concentration in the hands of just three of DefendantsE shareholder/owners, discussions of such improper collusive arrangements between Defendants and their Participants seem nearly probable.

E E DefendantsE numerous transparent attempts to deny its domination of the market are simply belied in their entirety by the actual facts. Among many other clear indicia of DefendantsE tight control of the market: (1) Defendants alone enjoy the unfettered and unsupervised authority to define, determine and grant eligibility; (2) Defendants have complete control over market access; and (3) Defendants indeed possess the authority to set prices for transfer agency services within the market, as clearly evidenced by, for example, the recent letter Plaintiff received from DefendantsE counsel in which DTC **demanded** that Olde Monmouth **immediately reduce its fees**, baldly announcing to Plaintiff that it "will no longer accept" PlaintiffEs fee schedule.[8]

E E Surely, dismissal of PlaintiffEs claims would be improvident before Olde Monmouth has been permitted to take discovery on such a crucial yet limited issue. See Daniel, 988 F.Supp. at 122 ("This [motion to dismiss] standard is even more stringent when evaluating anti-trust claims, where the proof often is in the hands of the alleged conspirators, and dismissals prior to giving the plaintiff ample opportunity for merit-based

[8] E A copy of this letter, dated February 22, 2007, from DefendantsE attorneys is submitted as Exhibit E to the Gallion Reply Declaration.

discovery should be granted sparingly.") (citing Hosp. Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 746, 96 S.Ct. 1848, 1853, 48 L.Ed.2d 338) (1976) (citing Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962)); cf. Fengler v. Numismatic Americana, Inc., 832 F.2d 745, 747 (2d Cir. 1987) ("On a motion for preliminary injunction, where 'essential facts are in dispute, there must be a hearing . . . .E") ((quoting Visual Scis., Inc. v. Integrated CommcEns, Inc., 660 F.2d 56, 58 (2d Cir. 1981)). In a similar vein, PlaintiffEs allegations with respect to its remaining antitrust claims are pleaded with sufficient precision to warrant discovery. DefendantsE motion for dismissal should be rejected.

Plaintiff Has Adequately Defined The Relevant Market.

E E The Second Circuit has emphasized that market definition is almost invariably a fact-driven inquiry. See, e.g., Hayden Pub. Co. v. Cox Broadcasting Corp., 730 F.2d 64 (2d Cir. 1984); see also, e.g., IntEl Audiotext Network, Inc. v. American Tel. & Tel. Co., 893 F.Supp. 1207, 1214 (S.D.N.Y. 1994) (Market definition is a question of fact to be determined only "after a factual inquiry into the commercial realities faced by consumers." (internal quotations omitted)), affEd, 62 F.3d 69 (2d Cir. 1995). Accordingly, motions to dismiss for failure to allege adequate market definition are to be granted only in cases where "the alleged market makes 'no economic sense under any set of facts.E" Pepsico, Inc. v. Coca-Cola Co., No. 98 Civ. 3282, 1998 WL 547088, at *6 (S.D.N.Y. Aug. 27, 1998) (quoting NatEl

CommcEns AssEn v. American Tel. & Tel. Co., 808 F.Supp. 1131, 1134 (S.D.N.Y. 1992)). Despite DTCCEs and DTCEs assertions to the contrary, Olde Monmouth is not required to include among its pleadings any extensive analyses of "reasonable interchangeability" or "cross-elasticity of demand." See Pepsico, 1998 WL 547088, at *5; Envirosource, Inc. v. Horsehead Res. Dev. Co., No. 95 Civ. 5106, 1997 WL 525403, at *3 (S.D.N.Y. Aug. 21, 1997) ("'xtensive analyses of reasonable interchangeability and cross elasticity of demand, however, are not required at the pleading stage."); see also Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc., 795 F.Supp. 639, 647 (S.D.N.Y. 1992).

E E Although Defendants expend a considerable amount of energy in their attempt to muddy this otherwise straightforward issue, Plaintiff has not alleged the existence of a particularly complex or nebulous relevant market that is difficult to define. Rather, the Complaint contains allegations that more than adequately describe the easily comprehensible and well-defined market for the services of stock transfer agents. Simply put, such services are provided to the issuers of securities by stock transfer agents. The relevant market alleged herein is appropriately described and withstands scrutiny because, as alleged by Olde Monmouth, it is a market in which "there is reasonable interchangeability in use between a [service] and substitutes." See Bogan v. Hodgkins, 166 F.3d 509, 516 (2d Cir.), cert. denied, 528 U.S. 1019, 120 S. Ct. 526 (1999); Hayden

Publ., 730 F.2d at 70-71; Cool Wind Ventilation Corp. v. Sheet Metal Workers IntEl AssEn, 139 F.Supp.2d 319, 326 (E.D.N.Y. 2001). Because the economic and commercial realities are such that the relevant market is susceptible to straightforward description and Plaintiff adequately has alleged the existence and description of that market, DefendantsE Rule 12(b)(6) motion on market definition grounds should be denied.[9]

Plaintiff Has Adequately Alleged Antitrust Injury.

E E Allegations regarding Olde MonmouthEs injury and the injuries suffered by issuing companies and the consuming public at large by DefendantsE anticompetitive conduct are pleaded with sufficient clarity (see, e.g., Cmplt. ¶¶ 49-50) and are precisely of the nature the antitrust laws are designed to prevent. See Freeland v. AT&T Corp., 238 F.R.D. 130 (S.D.N.Y. 2006); Mathias v. Daily News, L.P., 152 F.Supp.2d 465 (S.D.N.Y. 2001). The scope of choice available to consumers of transfer agency services has been and will continue to be improperly restricted by the unlawful restrictions Defendants have placed on small

[9] E However, to the limited extent that the Court might be inclined to grant DefendantsE dismissal motion even in part, Plaintiff would seek leave to make an application under Rule 15 of the Federal Rules of Civil Procedure, which permits amendment of a complaint at any stage of the litigation and requires that such leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). The United States Supreme Court has held that Rule 15Es "mandate is to be heeded" and leave to amend freely given. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1963). "Leave to file an amended complaint is therefore granted freely absent bad faith, undue delay or prejudice to the opposing party." District 65, UAW v. Harper & Rowe, Publishers, Inc., 576 F. Supp. 1468, 1474 (S.D.N.Y. 1983) (citation omitted).

unaffiliated stock transfer agentsE ability to vend their services.

E E Moreover, as evidenced by, among other things, the statement of concerns about DefendantsE activities contained in the STA Newsletter, the injury of which Olde Monmouth complains is not limited to Plaintiff itself, but rather is shared by all similarly situated unaffiliated transfer agents. In similar fashion, Olde Monmouth can show antitrust injury under these circumstances because its loss is occasioned by DefendantsE acts that reduce consumer choice. See Volmar Distribs., Inc. v. New York Post Co., Inc., 825 F.Supp. 1153, 1160 (S.D.N.Y. 1993). Accordingly, it would appear to be beyond dispute that Plaintiff has more than adequately alleged that DefendantsE conduct has directly resulted in competition-reducing effects. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990); see also Mathias v. Daily News, L.P., 152 F.Supp.2d 465 (S.D.N.Y. 2001). DefendantsE motion to dismiss for failure to allege antitrust injury should be firmly rejected.

Plaintiff's Tortious Interference Claim Should Not Be Dismissed.

E E Olde Monmouth need say little to negate DefendantsE misguided argument that PlaintiffEs New Jersey law claim for tortious interference should be dismissed. As pointed out in PlaintiffEs prior submissions, DefendantsE fundamental misapprehension of the required elements for this claim under New Jersey law is fatal to DefendantsE challenge. Although DTCC and DTC obviously would prefer that it were otherwise, there is no

requirement that Plaintiff allege that DefendantsE improper conduct was motivated *solely* by malice. See, e.g., Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 563 A.2d 31, 37 (1989); Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 201 F.Supp.2d 236, 239 (S.D.N.Y. 2002) (applying New Jersey law) (citing Varallo v. Hammond, Inc., 94 F.3d 842, 848 (3d Cir. 1996)). Because DefendantsE request for dismissal of PlaintiffEs tortious interference claim is based entirely on this basic misinterpretation of the relevant and controlling New Jersey common law precedents, DefendantsE motion should be denied.

CONCLUSION

E E For the foregoing reasons, (i) Plaintiff Olde Monmouth is entitled to the issuance of a preliminary injunction requiring Defendants to approve PlaintiffEs application for participation in the FAST Program and (ii) DefendantsE motion to dismiss the complaint in this action should be denied in all respects.

Dated: March 19, 2007

E E E E E Respectfully submitted,

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