

December 23, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-NASDAQ-2009-081 Listing Fee Proposal

Dear Ms. Murphy:

The NASDAQ Stock Market LLC (“Nasdaq”) has asked us, as their antitrust counsel,¹ to address Business Wire, Inc.’s comment in this docket alleging that Nasdaq’s promotional offers of press release services and other services are anticompetitive or violate the U.S. antitrust laws.² We submitted a letter in response to similar allegations on December 12, 2006 in SR-NASDAQ-2006-040, which concluded that antitrust concerns raised by Business Wire and others regarding certain aspects of Nasdaq’s listing fee proposal were misplaced. That letter is attached hereto as Attachment A. In this letter we supplement our 2006 letter to address Business Wire’s similarly flawed antitrust arguments submitted in opposition to Nasdaq’s recent listing fee proposal.

As we noted in our previous letter, and it bears repeating here, the antitrust laws “were enacted for the ‘protection of competition not competitors.’”³ Low prices, including promotional free services, are hallmarks of competition and are precisely the

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 See Letter from Jesse W. Markham, Jr., Roger Myers, and Stephen Ryerson of Holme Roberts & Owen LLP submitted on behalf of Business Wire in SR-NADAQ-2009-081 (Nov. 24, 2009) [hereinafter Business Wire Letter] .

³ *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)) (emphasis added).

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type of behavior the antitrust laws seek to foster.⁴ Accordingly, it is prudent to be suspicious of a complaint – such as Business Wire’s letter in this docket – that a competitor’s promotional offerings are unfair because they are too attractive to customers. Indeed, Business Wire’s letter, in essence, is merely a complaint that Nasdaq Corporate Services⁵ has offered attractive promotions of GlobeNewswire corporate press release services in competition with Business Wire and others. These allegations are particularly disingenuous because, as we discuss below, Business Wire and the New York Stock Exchange (“NYSE”) have entered an agreement to provide discounted press release services to NYSE-listed companies. As discussed below, and in our prior letter, this type of competitive activity is of no concern to the U.S. antitrust laws.

Business Wire alleges that Nasdaq illegally “ties” GlobeNewswire services and other so-called Information Dissemination Services to exchange listings. This is incorrect as a matter of fact and law. Nasdaq Corporate Services, LLC – a sister company of NASDAQ Stock Market LLC – has offered, and plans to offer in 2010, a limited amount of free or discounted “Core Services,” including press release services, to all companies whether the company is listed on Nasdaq or not.⁶

Illegal tying is “the seller’s exploitation of its control over the tying product [a Nasdaq listing, according to Business Wire] to force the buyer into the purchase of a tied product [press releases and other Core Services, according to Business Wire] that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”⁷ Here, there is no requirement that, as a condition of receiving the Core

⁴ 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.”).

⁵ Contrary to Business Wire’s assertion, GlobeNewswire is not a subsidiary of NASDAQ Stock Market LLC. Rather, GlobeNewswire is a subsidiary of Nasdaq Corporate Services, Inc., which is itself a subsidiary of the NASDAQ OMX Group. Nasdaq is a separate subsidiary of the NASDAQ OMX Group.

⁶ The 2009 Core Services offer from Nasdaq Corporate Services is attached hereto as Attachment B. The Core Services offer includes 2,000 free words to be used in U.S. press releases.

⁷ *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (emphasis added), *abrogated on other grounds by Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

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Services promotion, a company list on the Nasdaq exchange. Nor is there a requirement that Nasdaq-listed companies take advantage of these offers, and many do not. Moreover, there is no requirement that a company that takes advantage of the Core Services promotion purchase any additional services. Indeed, many companies that use these “trial offers” choose not to purchase additional press release services and presumably take their business elsewhere, potentially to competitors such as Business Wire. Because companies who wish to list on the Nasdaq exchange are not “forced” or “coerced” to use these free services, this Core Services offering does not constitute “tying” under the antitrust laws.⁸

Business Wire, however, glosses over the lack of a factual predicate for its “tying” theory and hypothesizes that the cost of these Nasdaq Corporate Services promotional offers are assessed through Nasdaq’s listing fees. The Core Services promotion, however, is not the basis of Nasdaq’s listing fee proposal, nor was it the basis for Nasdaq’s proposal approved by the Commission in 2006. Business Wire’s claim that the costs of the Core Services promotions are the unstated basis for Nasdaq’s listing fee proposal is pure speculation.⁹

⁸ See *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112-13 (8th Cir. 1996) (holding that a free warranty requiring the use of the manufacturer’s repair parts and service does not constitute an illegal tie where customers had the option to use competing parts and service and forego the free warranty); *Stephen Jay Photography Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 991 (4th Cir. 1990) (“[T]he seller must coerce the buyer into purchasing the tied product”); see also *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003) (“Essential to . . . a tying claim is proof that the seller coerced a buyer to purchase the tied product.” (emphasis in original)); *Aquatherm Indus. v. Florida Power & Light Co.*, 145 F.3d 1258, 1263 (11th Cir. 1998) (coercion is an “essential element” of tying claim).

⁹ Even if these promotional costs were somehow imputed to the cost of a Nasdaq listing and one ignores that companies were not “coerced” into using those services, there still could be no illegal “tie” because the effect on competition – the “foreclosure” to rivals of 2,000 words per year in press releases for companies that choose to avail themselves of this offer – is insubstantial considering that companies can and do use other press release services, such as Business Wire, for the rest of their press release needs. See Attachment A at 3-4 (addressing this argument and citing case law). GlobeNewswire estimates that public companies typically issue press releases with, on average, over 13,000 words in a given year, and we understand that the press release distribution business has few long-term contracts that would hinder a competitor from

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Business Wire also alleges that Nasdaq offers so-called Information Dissemination Services when competing for listings. While GlobeNewswire does offer its products as an incentive for companies to try its services and serve as a reference to other customers, in fact, we have been informed that not a single one of the nine companies that switched from NYSE to Nasdaq this year have chosen to use GlobeNewswire. In any event, it cannot be said that such discounted or free services are “tied” to the listing service because Nasdaq is willing to and does offer the listing service alone without discounted Information Dissemination Services.¹⁰ Accordingly, just like the promotional Core Services offer to all customers (*see* Attachment B), such a competitive offer also would not meet the “coercion” element of a Sherman Act tying case.

Indeed, these offers for discounted and even free services demonstrate healthy competition and it is a practice that other exchanges employ as well. For example, NYSE Euronext has explained that it competes by offering its listed companies “a comprehensive suite of services to increase their visibility with existing and prospective investors . . .” and that “in connection with listings, [NYSE] on occasion commit[s] to provide advertising, investor education and other services for issuers.”¹¹ Apparently as a part of this effort, NYSE Euronext has entered an agreement with Business Wire to provide discounted press release services to NYSE-listed companies.¹² Thus, Business Wire has benefitted from the NYSE offering its listed companies discounted press release services. This is precisely the same competitive behavior that Business Wire has alleged in its letter is anticompetitive. Business Wire’s comment is a blatant attempt to avoid this competition, which greatly benefits listed companies.

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winning the business for the companies’ additional press release needs. This *de minimus* amount could never present a danger that GlobeNewswire could attain market power in corporate press release services.

¹⁰ See *Jefferson Parish Hosp.*, 466 U.S. at 12 n.17 (“Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.” (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 6, n.4 (1958))).

¹¹ NYSE Euronext, Form 10-K at 8-9 (Feb. 27, 2009) (emphasis added).

¹² Press Release, Business Wire, NYSE Enter into an Affinity Marketing Partnership That Provides Corporate Issuers with Special Benefits (May 2, 2007), attached hereto as Attachment C.

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This fierce competition also demonstrates that the first element of a tying claim – that the seller have “market power” in the “tying” product¹³ (alleged by Business Wire to be listing services) – is not met here. As we noted in 2006, Nasdaq must compete vigorously for listings against the New York Stock Exchange and the American Stock Exchange (now NYSE Amex). Nasdaq’s lack of market power for listings is yet another fatal flaw in Business Wire’s antitrust analysis.

Finally, Business Wire’s tortured effort to claim that Nasdaq Corporate Services’ “predatory” promotional offers amount to attempted monopolization under Sherman Act § 2 is frivolous. Liability for predatory pricing requires proof that the below-cost pricing is capable of driving competitors from the market such that the seller has a dangerous probability of recoupment of its investment in below-cost prices.¹⁴ The promotional Core Services offers by Nasdaq Corporate Services plainly do not meet this test.

First, courts routinely hold that promotional offers cannot constitute predatory pricing.¹⁵ The promotional nature of the Core Products offering alone precludes a predatory pricing claim.

¹³ See *Illinois Tool Works v. Independent Ink, Inc.*, 547 U.S. 28, 46 (2006) (“[W]e . . . hold that, in all cases involving a tying arrangement, that the plaintiff must prove that the defendant has market power in the tying product.”). As we explained in 2006, market power is defined as the ability successfully to increase prices or reduce output without regard to the actions of one’s competitors. See Attachment A at 3 & n.13 (citing cases).

¹⁴ See *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 US. 209, 222, 225(1993) (“First, a plaintiff seeking to establish competitive injury resulting from a rival’s low prices must prove that the prices complained of are below an appropriate measure of its rival’s costs The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a . . . dangerous probability of recouping its investment in below-cost prices”); *Sterns Airport Equipt. Co. v. FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) (“[The recoupment] inquiry is really into the economic rationality of the challenged conduct. If there is no likelihood of recoupment, it would seem improbable that a scheme would be launched.”).

¹⁵ See, e.g., *Taylor Publ’g Co. v. Jostens, Inc.*, 216 F.3d 465, 478 n.8 (5th Cir. 2000) (promotional pricing could not constitute illegal predatory pricing because it “presented no risk of driving [defendant’s competitor] from the market.”); *Am. Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1322 (7th Cir. 1991) (“[P]romotional

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Second, there is no prospect that Nasdaq Corporate Services' promotional efforts pose a dangerous probability of driving competitors from the market for corporate press release services to allow it later to charge monopoly prices. Nasdaq estimates that GlobeNewswire processes only approximately 10% of corporate press releases in the U.S.. Business Wire's market share, by contrast, is near 40%. GlobeNewswire does not even possess a dominant share of the press releases issued by Nasdaq-listed companies. In fact, Business Wire states in its letter that "A significant share of [its] revenue comes from Nasdaq-listed companies (including 57 of the Nasdaq 100)"¹⁶ Thus, after three years of the alleged "predatory" behavior, GlobeNewswire has not driven Business Wire and others from the market, nor has it come anywhere close to obtaining the market power that would be necessary to charge monopoly prices for its press release services. Business Wire, with a 40% market share, is far closer to that goal.

Third, such a strategy undoubtedly would fail. As Business Wire touts on its website, "As a wholly-owned subsidiary, Business Wire is able to draw upon the substantial financial and management resources of [Berkshire Hathaway]"¹⁷ Berkshire Hathaway is number 13 on the Fortune 500 with net income approaching \$5 billion compared to NASDAQ OMX's \$320 million.¹⁸ Given Business Wire's substantial resources, GlobeNewswire could not outlast Business Wire and its parent company in a predatory pricing war. Business Wire's predatory pricing theory is simply implausible.

Business Wire's unfounded and incorrect assertions that promotional offers from GlobeNewswire are the basis for Nasdaq's proposed listing fee increase and that customers are forced to use those services form the basis for its unconvincing antitrust

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discounts raise no antitrust problems . . . though often they are below incremental cost in a superficial sense."); *Israel Travel Advisory Serv v. Israel Identity Tours*, 61 F.3d 1250, 1256 (7th Cir. 1995) (free promotional offers not predatory); *A.A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1400 (7th Cir. 1989) ("Often a price below cost reflects only the sacrifice necessary to establish a presence in a competitive market.").

¹⁶ Business Wire Letter at 18 n.28.

¹⁷ See "History" section of the Business Wire website at <http://www.businesswire.com/portal/site/home/history/> (last visited Dec. 7, 2009).

¹⁸ See Berkshire Hathaway Inc., Form 10-K at 56 (Mar. 2, 2009); NASDAQ OMX, Form 10-K at 43 (Feb. 27, 2009).

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theories. When Business Wire's antitrust theories are viewed against the facts rather than conjecture, however, it is plain that its antitrust arguments are without merit.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Mike Sohn".

Michael N. Sohn
Donna E. Patterson

Attachment A

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.

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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

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.

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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*

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).

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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

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

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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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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.

ARNOLD & PORTER LLP

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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).

Attachment B

2009 NASDAQ Core Services Offering

Visit www.nasdaq.net to register for core products and services through NASDAQ Corporate Services:



- Four Audio Webcasts per year (1 per quarter)
- Dynamic Annual Report including proxy material (1 per year)



- 2,000 Word Bank to be used for Press Releases in 2009 - U.S. Circuit only, no quarterly restrictions
- Four 8K or 6K EDGAR Filings* per year (1 per quarter)
- One photo included in any GlobeNewswire press release (1 per year)



- 30% off first placement, 20% off second placement and 10% off third placement
- Customized Board Account and Succession Planning Search



- 3 months use of Directors Desk or 25% discount off purchase




- 2008 Carpenter Moore Peer Benchmarking Study
- Customized Board D&O Insurance Education & Policy Review

* For EDGAR Filings associated press release must be distributed through GlobeNewswire

NASDAQ

Attachment C



May 02, 2007 03:30 PM Eastern Time 

Business Wire, NYSE Enter into an Affinity Marketing Partnership That Provides Corporate Issuers with Special Benefits

NEW YORK--([BUSINESS WIRE](#))--Business Wire and the NYSE today announced that they have entered into an affinity marketing partnership that provides all Big Board-listed companies with a broad range of special benefits and added-value services.

“As markets consolidate and companies reach out to the international investor community, Business Wire is well positioned to work with NYSE-listed companies on a global basis and provide a full range of IR services.”

The marketing arrangement provides all NYSE issuers with a special Business Wire membership package that includes complimentary [EDGAR](#) regulatory filings, incentive pricing on select products and services, and co-sponsored educational conferences and webinars on topical investor relations themes.

"Business Wire is proud to align itself with the world's largest and premier financial market," said Cathy Baron Tamraz, president and CEO. "As markets consolidate and companies reach out to the international investor community, Business Wire is well positioned to work with NYSE-listed companies on a global basis and provide a full range of IR services."

Business Wire is a wholly owned subsidiary of Berkshire Hathaway (Fortune 12), a NYSE-listed company.

About [Business Wire](#)

Business Wire, a [Berkshire Hathaway](#) company, is utilized by thousands of member companies and organizations to transmit their full-text news releases, regulatory filings, photos and other multimedia content to journalists, news media, trade publications, institutional and individual investors, financial information services, regulatory authorities, Internet portals, information web sites, business-to-business decision-makers and consumers worldwide. With a [news distribution](#) network spanning 150 countries and 45 languages, Business Wire's multi-channel delivery network has access to some 60 international and national news agency networks throughout the Americas, Europe, Asia, the Middle East and Africa.

The Business Wire news network is powered by its patented NX high-speed data platform and supports XML, XHTML and XBRL code to deliver the most sophisticated news file to enhance news release interactivity, customization and search engine optimization. Business Wire has [30 bureaus](#) in cities including New York, San Francisco, Los Angeles, Chicago, Boston, Miami, Paris, Frankfurt, London, Brussels, Tokyo and Sydney with reciprocal offices throughout the world. Business Wire was founded in 1961 by Chairman [Lorry I. Lokey](#), veteran journalist and public relations executive. [Cathy Baron Tamraz](#) is president and CEO.

About [NYSE Euronext](#)

NYSE Euronext, a holding company created by the combination of NYSE Group, Inc. and Euronext N.V., commenced trading on April 4, 2007. NYSE Euronext (NYSE/New York and Euronext/Paris: NYX) operates the world's largest and most liquid exchange group and offers the most diverse array of trading products and services. NYSE Euronext, which brings together six cash equities exchanges in five countries and six derivatives exchanges, is a world leader for listings, trading in cash equities, equity and interest rate derivatives, bonds and the distribution of market data. Representing a combined \$28.5 trillion/€21.5 trillion total market capitalization of listed companies and average daily trading value of approximately \$118.8 billion/€89.9 billion (as of February 28, 2007), NYSE Euronext seeks to provide the highest standards of market quality and integrity, innovative products and services to investors, issuers, and all users of its markets.

Cautionary Note Regarding Forward-Looking Statements

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