Exhibit E

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Antitrust Law

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3D
Equitable Relief

¶325. Nature, Objectives, and Scope

325a. Generally. Although private antitrust suits are numerous and significant, government equity suits occupy a central role in antitrust enforcement. They are explicitly undertaken in the public interest, addressed to more significant violations, and backed by substantial resources. Apart from the narrow category of offenses justifying criminal prosecution, the suit in equity is the preferred Justice Department vehicle for adjudicating antitrust violations.[1] Its advantages are obvious. Because it controls future behavior rather than punishing past acts, the equity action has proved an admirable vehicle for the development of antitrust law. Its main purpose is to restore competitive conditions rather than to penalize conduct or compensate injured parties.[2] However, equity relief may include, where appropriate, the disgorgement of improperly obtained gains.[3] The burden of showing the appropriateness of any particular

¶325. n.1. On criminal sanctions, see ¶303b. In the Federal Trade Commission (FTC) the "cease and desist" order, which is typically the equivalent of prospective equitable relief, is the preferred vehicle for antitrust enforcement. See ¶302d, e.

2. *See, e.g., International Salt Co. v. United States*, 332 U.S. 392, 401 (1947):

> In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.

See also Schine Chain Theatres v. United States, 334 U.S. 110, 128–29 (1948), saying purpose of decree is threefold:

> (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act.

And see United States v. Aluminum Co., 91 F. Supp. 333, 346 (S.D.N.Y. 1950) (decree "must provide against the reasonable expectation of the resumption of future unlawful conditions").

Then in *United States v. Microsoft*, 253 F.3d 34, 103 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001), the court had this to say:

> The Supreme Court has explained that a remedies decree in an antitrust case must seek to "unfetter a market from anticompetitive conduct," to "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future. . . ."

(Citations omitted.)

3. *See FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999) (disgorgement of monopoly profits is one type of relief authorized by 15 U.S.C. §53(b), even though that statute does not expressly mention damages). See ¶302e.

type of relief rests on the plaintiff, whether government or private, although in the case of a government suitor the burden may not be severe.[4]

Sherman Act §4[5] and Clayton Act §15[6] confer jurisdiction on the federal courts "to prevent and restrain violations" of the antitrust laws, and direct the government "to institute proceedings in equity to prevent and restrain [antitrust] violations." From the outset, the Supreme Court has understood its power under these statutes to embrace "such orders and decrees as are necessary or appropriate" to enforce the statute.[7] This means, first of all, that the court will forbid the consummation or continuation of an unlawful act. But the mission of devising an appropriate remedy "does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved."[8]

What is necessary to undo the illegality varies with the circumstances. In the case of unilateral conduct or conduct having a significant structural component, divestiture or dissolution may be necessary to "deprive[] the antitrust defendants of the benefits" of their violation.[9] Otherwise the defendants "could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors."[10]

4. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (placing burden of showing need for an injunction on the government but requiring it to show only that there was more than a "mere possibility" that the condemned conduct would recur); *United States v. Dairy Farmers of Am., Inc.*, 2004 WL 1084551, 2004-1 Trade Cas. ¶74,364 (E.D. Ky. Apr. 13, 2004) (government could challenge a merger even though it had declined to challenge a very similar merger in a different geographic market ten years earlier; because of fact-specific nature of antitrust inquiries, government must have wide latitude to exercise its prosecutorial discretion). *See United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6th Cir. 2005).

5. 15 U.S.C. §15.

6. 15 U.S.C. §25.

7. *Northern Sec. Co. v. United States*, 193 U.S. 197, 344 (1904) (decree enjoined holding company from exercising any control over competing railroads and enjoined the railroads from paying any dividends to the holding company). *See also Mylan, supra*, 62 F. Supp. 2d 25 (approving disgorgement).

Cf. United States v. Microsoft, 165 F.3d 952 (D.C. Cir. 1999) ("publicity in taking evidence act," 15 U.S.C. §30 means that depositions of witnesses in an antitrust suit in equity brought by the government must be made available to the public — in this case, the press — except for redacted matters; rejecting Microsoft's contention that in 1913, when statute was drafted, the term "deposition" referred to an extraordinary form of taking evidence in order to preserve it in the event of a witness's death or anticipated lack of availability).

8. *United States v. Paramount Pictures*, 334 U.S 131, 171 (1948).

9. *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948). *Cf. Mylan, supra*, 62 F. Supp. 2d 25 (disgorgement deprives defendant of benefits of wrongdoing); *United States v.* Microsoft, 253 F.3d 34, 103 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001) ("deny to the defendant the fruits of its statutory violation"). See ¶653.

10. *Schine, supra*, 334 U.S. at 128.