Project Manager / Chairman of the Inquiry Group – Mr. Phil Evans
Reckitt Benckiser / K-Y Brand merger inquiry
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD
Email: ReckittBenckiser.K-YBrand@cma.gsi.gov.uk

Dear Mr. Evans,

Combe Incorporated – Submission in response to CMA's Notice of Possible Remedies in anticipated acquisition by Reckitt Benckiser Group PLC of the K-Y brand in the UK (22 May 2015)

I am writing on behalf of Combe Incorporated ("**Combe**") in reference to the CMA's Notice of Possible Remedies in the Anticipated Acquisition by Reckitt Benckiser Group PLC ("**RB**") of the K-Y brand ("**K-Y**") in the UK (together the "**Transaction**") which was published on 22 May 2015.

In this submission, I would like to first introduce Combe to the CMA (see below ***I.***), before addressing the remedy options considered (see below ***II.***) and making some observations with regard to the potential remedy process (see below ***III.***).

I. Information on Combe

Combe is a U.S.-based, privately owned manufacturer and marketer of branded personal care products, over-the-counter drugs, and medical devices with over [✂] in global retail sales.[1] The company was founded in 1949 by Ivan D. Combe, a visionary sales and marketing entrepreneur. In 1950, Ivan created Clearasil, the world's first over-the-counter acne medication introduced specifically for teenagers, a previously unfilled consumer need. Since then, Combe has had a long and successful history of identifying and serving unfilled consumer needs with well-known, respected and successfully branded products such as Odor-Eaters, Lanacane, Just For Men, Vagisil, Scalpicin, SeaBond, and other iconic brands. Today, Combe has leading category positions with Just For Men men's hair colour products, Vagisil women's intimate health products, and Sea-Bond denture adhesive products. Specifically, the Vagisil brand is one of the leading global brands that provide women's intimate health solutions addressing itch, dryness, and irritation with a range of medicated creams, wipes, moisturizers, washes, sprays, and douches. Combe has over 40 years' experience in the intimate health category and as a result understands the lubricant category and the positioning and strategy of the Durex and K-Y brands very well and, in particular, the consumer needs in this category.

Combe is headquartered in White Plains, NY, USA and is 100% owned and controlled by the Combe family. Combe has approximately 500 employees, two manufacturing plants (located in Illinois (USA) and Puerto Rico) that have the capacity to manufacture close to [✂] units of products, four R&D facilities, and seven international offices in the UK, Italy, Spain, Australia, Brazil, Mexico and Argentina, in addition to the United States. Combe products are sold in over 100 countries. In addition, Combe has supply agreements in place with numerous third party manufacturers, [✂]. Combe uses its [✂] for supplying its UK business.

Under the guidance of the current management, Combe is in the midst of a strategic expansion effort via new product launches, new geographic market entries, and acquisition of strategically relevant brands and technologies.

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1 Company website: http://www.combe.com/.

[✂]

Combe has been active in the UK market for over 40 years, operating as Combe International Limited ("***CIL***"). CIL currently markets, sells and produces the brands Just For Men (hair colouring), Vagisil (women's intimate health), and Sea-Bond (oral care). CIL's internal team oversees the Management, Marketing, Operations and Regulatory functions in the UK, and has strategic partnerships with [✂] in the UK.

II. Substantial comments on remedy options

Combe agrees with CMA's articulation of the potential remedies and its preferences between those remedies. More specifically, Combe agrees that a full divestiture of the KY brand in the UK (as outlined further below) is the preferred option for remedying the SLC provisionally found by the CMA. Neither a full prohibition nor a licensing option would offer similarly effective and pro-competitive results.

With respect to the CMA's least preferred remedy of a complete prohibition, Combe would like to add that Johnson & Johnson ("***J&J***") has executed a multi-year strategy to exit the women's health business. In addition to the K-Y divestiture, J&J in recent years has also divested the Monistat brand (the largest OTC anti-fungal brand for yeast infections in the U.S.) and the Stayfree/Carefree brands (tampons and pads in the U.S.). A remedy of prohibition would not be ideal from a consumer standpoint, as J&J would have limited strategic or financial incentive to allocate sufficient resources to compete against RB/Durex. The K-Y UK business is simply not financially or strategically material enough for J&J to continue to support it. Accordingly, the UK K-Y business under J&J would no longer compete effectively against RB's range of personal care lubricants and would therefore exacerbate the SLC provisionally found by the CMA.

Combe agrees that a UK divestiture, in particular, would be most likely to provide a comprehensive solution to the SLC the CMA has provisionally found and has the fewest risks in terms of effectiveness. Combe believes that a permanent divestiture of the UK K-Y business by J&J to a party other than RB is the ideal remedy to create the most effective level of competition and consumer choice in the future, and to mitigate some of the market power of RB/Durex. Any divestiture should include an assignment of all relevant assets necessary to compete effectively with RB/Durex in the UK (e.g., IP, customer lists, market research, creative and marketing plans, sales presentations and data, product formulations, manufacturing know-how, and supply contracts). In addition, to maintain competitiveness, the purchaser should have all rights to the K-Y brand in the UK, as RB would have to the K-Y brand in other markets.

The rights to the K-Y brand in the UK should be transferred on a permanent basis, as only the K-Y brand will carry the customer recognition required for obtaining sufficient shelf-space for competing effectively in the market for personal lubricants sold to grocery retailers and national pharmacy chains in the UK. Equally, RB (or J&J) should not be allowed to actively promote any sales of its K-Y products outside the UK into the UK. To that end, safeguards should be taken (such as, for example, a referral of UK-registered internet users to the purchaser's UK website) to enhance the purchaser's position as an effective competitor in the UK.

This form of divestiture of all assets in the UK with unrestricted ability to use the transferred assets would be the optimal way to provide a competitor with the appropriate level of rights to compete effectively and justify investing in the business. This type of remedy has the potential to create a competitive force on a lasting and stand-alone basis by making the brand transfer exclusive, irrevocable, non-terminable and royalty-free. The purchaser's ability to maintain and enhance its competitive position in the UK would not be the same under a license that might be time-limited or subject to the controls of RB's creditors. Further, the purchaser should be allowed to use the brand for cross-branding with other products and other brands to exploit the brand recognition of K-Y and ensure a viable competitor. In fact, RB currently uses a cross-branding strategy for Durex as pleasure enhancing products.

Moreover, by structuring a permanent divestiture instead of a license, the purchaser will be greatly incentivized to invest in the brand and grow the business for itself instead of having the goodwill and equity of the brand and business otherwise inure to the benefit of RB at the end of the license period. To structure the remedy in any other fashion will inherently result in the purchaser otherwise winding down its investment and commitment to the brand as the end of the license period draws near. However, whether the purchaser builds a powerful K-Y brand during the licensing period, or allows it to greatly weaken toward the end of that period, either result will ultimately re-create the SLC at that time because RB will then either add incremental market share from the enhanced K-Y personal lubricant brand to its existing Durex personal lubricant brand, or potentially allow the weak K-Y brand to continue to die, thereby leaving the consumer with only the Durex brand. Neither option will provide the consumer with lower prices, higher quality, greater choice of goods or greater innovation.

A divestiture package should also include measures to ensure that the market position of the K-Y brand in the UK is actually being transferred and maintained. As the CMA found provisionally, market entry is not so much hampered by know-how, production facilities or costs or the like, but rather by the prerequisite to obtain a certain brand recognition that makes it necessary for grocery and national pharmacy chains to stock the entrant's products. It is therefore essential that existing customer contracts for K-Y products are being transferred to the purchaser. We therefore submit that the CMA should insist on such safeguards, including (but not limited to) the assignment of all existing customer contracts regarding K-Y branded products in the UK (if contractually possible), and, where not possible, a best efforts clause obliging RB/J&J to negotiate a transfer of existing customer contracts to the purchaser.

We would furthermore suggest that the divestiture package should – at the purchaser's option – include:

(i) Transitional arrangements that allow the purchaser of the K-Y brand in the UK to purchase the K-Y lubricants from either RB or J&J directly, or through toll manufacturing services, at cost level <u>until its own manufacturing and production process</u> has been set up. Such a transitional period should be around one year, but subject to earlier notice by the purchaser; or

(ii) Alternatively (if the purchaser <u>did not want to set up its own manufacturing and production process</u>), RB and/or J&J should be obliged to assign third-party manufacturing agreements that J&J currently have in place with regard to the continued production of K-Y lubricants for the UK for as long as the purchaser deems necessary.

Finally, Combe agrees with the CMA insofar as that the lubricant market does not lend itself to behavioural remedies. Price caps or similar would on the one hand require constant oversight by the CMA. On the other hand, price caps would not solve the SLC discovered by the CMA in its provisional findings – only a permanent divestiture of the K-Y brand will enable a purchaser to develop a long-lasting and viable competitor that can constrain RB post-transaction.

III. Observations on the potential remedy process

Combe submits that the CMA should follow the usual divestiture process as outlined in its Remedies Guidelines[2]. More specifically, Combe expects that RB will have to hold the K-Y UK assets that will form part of the divestiture package separate and ring-fenced during the divestiture period, supervised by a Monitoring Trustee. The divestiture period itself should not have to be too long, given that scope and content of the package are comparatively clear; in any case, it should not exceed six months. Should the regular divestiture period not lead to a successful divestiture, the CMA should institute a Divestiture Trustee whose task it would be to sell the divestiture package at any price.

Given the fact that the divestiture package will consist of a number of assets, but will not be a stand-alone business, we would urge the CMA to define the suitable purchaser criteria in such a way that only a player with prior experience in the intimate wellbeing and sexual health segments will be considered as purchaser. While a general presence in the UK as such is not indispensable (given, for example, the availability of third party manufacturers and the possibility to transport lubricants across greater distances), it would certainly not be detrimental to the success of the divestiture. In light of these

[2] Merger Remedies: Competition Commission Guidelines (CC 8), November 2008, adopted by the CMA ("***Remedies Guidelines***").

considerations, Combe would expect the CMA to also insist on an up-front buyer solution to safeguard a successful divestiture of the K-Y brand in the UK.

Thank you very much for considering our comments carefully. We remain at your disposal should you require any additional insight or have any further questions.

Kind regards,

Akshay A. Shetty
Co-Chief Executive Officer,
Combe Incorporated