**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Maureen K. Ohlhausen, Acting Chairman**
**Terrell McSweeny**

**In the Matter of**

**The J.M. Smucker Company**
**a corporation,**

**and**

**Conagra Brands, Inc.**
**a corporation.**

**Docket No. 9381**

**REDACTED PUBLIC VERSION**

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents The J.M. Smucker Company ("Smucker") and Conagra Brands, Inc. ("Conagra") have executed an asset purchase agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

## I.

## NATURE OF THE CASE

1. Crisco, which is owned by Smucker, and Wesson, which is owned by Conagra, are by far the two dominant brands of canola and vegetable oils sold in the United States. Pursuant to an Asset Purchase Agreement, Smucker plans to acquire the Wesson brand, including intellectual property, inventory, and some manufacturing equipment, from Conagra for $285 million (the "Acquisition"), paying nearly [redacted] more than any other bidder offered. Smucker is not acquiring the Memphis, Tennessee plant where Conagra produces Wesson products today or hiring any Conagra employees.

2. Respondents' own documents show that the effect of the Acquisition "may be substantially to lessen competition, or to tend to create a monopoly" in violation of the Clayton Act, and harm U.S. consumers. In a document submitted with Smucker's Hart-Scott-Rodino filing, which means that it was created by or for corporate officers or directors to evaluate the Acquisition, Smucker stated that a "strategic rationale" for the Acquisition is that it "[t]akes [a]

competitor [Wesson] out of the marketplace and allows us to more effectively manage pricing/trade." This statement clearly acknowledges that Smucker would have the power and incentive to increase prices on Crisco and Wesson products post-acquisition. Put simply, by "taking out" Wesson as a competitor, Smucker would be able to eliminate the price discounts that each Respondent has been forced to offer as a result of their vigorous head-to-head competition. Year after year, Respondents have internally complained about each other's use of price discounts as "irresponsible" and "irrational". In Smucker's view, this price competition is a "race to the bottom" that "unnecessarily tak[es] dollars out of the category." Retailers and consumers have and continue to benefit from the discounts that head-to-head competition between Crisco and Wesson has generated.

3. Smucker's documents go further, including a model showing that the company recognizes that raising prices on both Wesson and Crisco products would be profitable even though price increases would decrease the brands' overall sales volume. In fact, Smucker admits that it will increase prices: "Once we close the deal, our plan would be to execute a price increase on Wesson consistent with our latest Crisco pricing action." These quintessential anticompetitive effects are rarely so clearly touted by merging parties as intended consequences of a merger or acquisition.

4. Conagra also recognizes that the Acquisition will enable Smucker to increase prices, ultimately harming U.S. consumers. Ordinary course documents make clear that the presence of an independent Wesson constrains Crisco's prices today. In trying to persuade a retailer to resume carrying Wesson products, Conagra's broker stated:

> [P]art of Wesson's reason-to-be is that we keep Crisco 'honest'. Without another National Brand, [Crisco] play[s] off the fact that they will be highest priced Cooking Oil and will appeal to the Consumer looking for a National Brand and willing to pay a little more for it. The drawback is that they don't have to get 'ultra' aggressive with their pricing to meet that objective.

5. Respondents sell their Crisco and Wesson products to retailers—including grocery stores (such as Giant), mass merchants (such as Target), club stores (such as BJ's Wholesale Club), and convenience stores—who, in turn sell to consumers, the end customers. Crisco and Wesson each have a national price list that they provide to all retailers. Crisco and Wesson incentivize retailers to purchase their products by offering trade funds (sometimes called "promotional funds"), which serve as a discount off of the list price and lower the prices that retailers pay to procure Crisco and Wesson products. The amount of trade funds is determined in individual negotiations between Crisco or Wesson and each retailer. Crisco and Wesson set their list prices and the amount of trade funds offered to specific retailers with the goal of setting the on-the-shelf price that retailers charge to consumers.

6. Over the last several years, Smucker and Conagra each attempted to raise its list prices on canola and vegetable oils, expecting the other brand to follow its lead. But each attempt to increase prices has been undermined when the other brand did not follow and also raise its list prices. Instead, the other brand took advantage of its now comparatively lower prices to win sales and market share away from its competitor—in other words, choosing to

compete vigorously. Without Wesson following Crisco's lead, and vice versa, each brand has had to "invest[] back" by offering additional discounts to retailers in an attempt to regain lost sales and customers resulting from its price increase attempt.

7. This dynamic played out most recently in early 2017, when Smucker announced a list price increase on Crisco products of approximately 12.5%. Conagra declined to follow the price increase for its Wesson products—indeed, it still has not done so, [redacted]. As a result, Wesson's sales of canola and vegetable oils increased and Crisco's decreased. To combat the decline, Smucker was forced to provide additional trade funds to retailers—that is, to lower its prices on Crisco.

8. On May 26, 2017, a few months after Wesson upset the Crisco list price increase, Smucker agreed to acquire Wesson for a premium of nearly [redacted] more than any other bidder. With control of both Crisco and Wesson, Smucker can stop Wesson's "irresponsible" pricing strategy and ensure that a price increase on one brand will never be disrupted by the other brand again, resulting in retailers and their end consumers paying higher prices.

9. Ordinary course documents show that Respondents have competed vigorously for many years, resulting in lower prices on Respondents' Crisco and Wesson canola and vegetable oils paid by retailers across the United States and U.S. consumers. The Acquisition, if consummated, would eliminate this vigorous head-to-head competition between Crisco and Wesson, leading to higher prices on canola and vegetable oils for retailers and their U.S. customers, the end consumer.

## II.

## BACKGROUND

### A.

### Jurisdiction

10. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

11. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

### B.

### Respondents

12. Respondent Smucker is a publicly traded corporation organized under the laws of Ohio with headquarters in Orrville, Ohio. Smucker manufactures and sells a diversified portfolio of branded food products, including baking mixes, cooking oils, coffee, peanut butter, and jellies. Smucker's Crisco brand includes canola oil, vegetable oil, corn oil, peanut oil, shortening, and

cooking sprays. Crisco produces all its cooking oil and shortening products at its plant in Cincinnati, Ohio. Smucker purchases crude oil from the commodities market, refines it, and then packages it in the bottles found on retailers' store shelves. In calendar year 2016, retail sales of Crisco products totaled approximately $379 million, including approximately $225 million from sales of Crisco canola and vegetable oils.

13. Respondent Conagra is a publicly traded corporation organized under the laws of Delaware with headquarters in Chicago, Illinois. Conagra manufactures and sells a broad portfolio of food products to retail, foodservice, and industrial customers. Conagra's Wesson brand of cooking oils includes canola oil, vegetable oil, and corn oil. Conagra produces all Wesson products at its plant in Memphis, Tennessee. Conagra both refines crude oil that it purchases on the commodities market and buys refined oil from large agri-businesses. Conagra then packages refined oil in the bottles sold to retailers. In calendar year 2016, retail sales of Wesson products totaled approximately $198 million, including approximately $185 million from sales of Wesson canola and vegetable oils.

### C.

### The Acquisition

14. On May 26, 2017, Smucker and Conagra signed an Asset Purchase Agreement pursuant to which Smucker will acquire assets relating to the Wesson brand, including intellectual property, inventories, and packaging equipment, for approximately $285 million. The Acquisition does not include the refining and bottling plant in Memphis, where Conagra currently produces all Wesson oils. Smucker eventually plans to manufacture all Wesson and Crisco products at its plant in Cincinnati although it will not do so for up to one year after the Acquisition closes, with Conagra continuing to manufacture Wesson on Smucker's behalf.

## III.

## BACKGROUND

15. Smucker and Conagra each produce and sell canola oil and vegetable oil; Smucker under its Crisco brand and Conagra under its Wesson brand. The basic ingredient used to produce canola oil is rapeseeds and for vegetable oil it is soybeans. Large agri-businesses grow and crush rapeseeds and soybeans to produce crude canola and vegetable oils, respectively. Some suppliers of canola and vegetable oils, including Respondents, purchase crude oil from these agri-businesses and refine, bleach, and deodorize it to make the finished oil that is packaged and labeled. Other suppliers of canola and vegetable oils purchase refined oil from agri-businesses and merely package and label it at their own facilities. Both Respondents refine crude oil and purchase some refined oil to produce their canola and vegetable oils.

16. Respondents do not sell their products directly to end consumers. Instead, both Respondents sell their branded canola and vegetable oils to retailers, including grocery stores (such as Giant), mass merchants (such as Target), club stores (such as BJ's Wholesale Club), and convenience stores. Retailers purchase canola and vegetable oils at wholesale from suppliers such as Smucker and Conagra and sell them at retail to their in-store customers, the end consumers.

17. Each Respondent establishes the prices paid by retailers for canola and vegetable oils in two stages. First, each Respondent publishes a list price that generally applies to all retailers. Second, each Respondent negotiates trade funding (sometimes called "promotional funds") individually with each retailer. Trade funding acts as a discount off the list price. Retailers frequently play Respondents against each other to induce them to offer more trade funds during these negotiations. Retailers then apply a markup and set the shelf price paid by end consumers. Retailers, often in consultation with Respondents, commonly use trade funding in ways designed to encourage sales of Respondents' products, including reduced everyday shelf prices, temporary reductions in shelf prices, promotional prices (e.g., buy-one-get-one-free), features in promotional and advertising materials, prominent shelf space, and placement on in-store displays (e.g., "endcap" displays at the end of a grocery aisle). Some retailers take a consistent, "every-day-low-price" ("EDLP") approach to pricing, while other retailers (called "hi-lo" retailers) vary prices through in-store promotions, coupons, and other vehicles.

18. Depending on the retailer (e.g., grocery stores, mass merchants, club stores), different retailers procure different sizes of canola and vegetable oils to offer to their end consumers. Grocery stores and mass merchants generally offer canola and vegetable oils in a wide variety of sizes, including 16-, 32-, 48-, 96-, and 128-ounce (i.e., one-gallon) bottles. The highest selling, and therefore most important, sizes of canola and vegetable oils for grocery stores are 48- and 128-ounce bottles. Club stores, including Costco, Sam's Club, and BJ's Wholesale, tend to carry larger package sizes such as 160-ounce (i.e., five-quart) bottles.

19. In addition to buying canola and vegetable oils from the national brands, retailers also frequently sell canola and vegetable oils under their own label. Most retailers that have "private label" canola and vegetable oils typically price it at a lower retail price than the national brands, usually 10-20% below the brand price. Retailers generally contract with a third-party oil producer, such as Cargill or Stratas, to manufacture their private label oils. The process by which retailers supply themselves with private label canola and vegetable oils is separate, and different, from the way retailers buy and sell branded canola and vegetable oils.

20. The private label supply process generally differs from the branded supply process. It does not involve negotiations over trade funds, but instead begins with a request-for-proposal in which the retailer sets forth its requirements in terms of oil type, degree of refinement, package size, and terms of delivery and payment. Private label suppliers submit bids and the retailer selects the winner, generally choosing the lowest-cost option. The price that the retailer pays for private label oil is closely tied to the cost of the input product (for example, crude canola oil) on the commodities market. The prices retailers pay their private label suppliers tend to be substantially lower than the price they pay for national-brand oils, despite the fact that private label suppliers do not offer trade funds. The winning private label supplier that the retailer selects produces and bottles the oil with the retailer's label, and ships it to the retailer.

21. Smucker and Conagra do not participate in or bid to supply private label to retailers. While one of the rationales for the Acquisition is to fill excess capacity at Smucker's Cincinnati plant by buying the Wesson brand and its corresponding volume, Smucker has elected not to increase its capacity utilization through a less anticompetitive alternative. For example, Smucker could supply private label oils to retailers or produce private label oils for a private label supplier that lacks sufficient capacity itself, which Smucker recently did for Cargill.

22. Other than retailers, there are two other major groups of customers to which suppliers of canola and vegetable oils sell their products: foodservice customers and industrial customers. Food service customers include restaurants, distributors that resell to restaurants, and other institutional entities that use canola and vegetable oils as an input into food they cook and serve to their customers. Industrial customers include food manufacturing companies and others that use canola and vegetable oils as an input into their packaged food products.

23. Sales of canola and vegetable oils to foodservice and industrial customers differ in at least two ways from sales to retailers. First, foodservice and industrial customers buy canola and vegetable oils in much larger package sizes than retailers. A 35-pound "jug-in-a-box" is a popular size in foodservice and industrial channels. Second, foodservice and industrial customers also buy different types of canola and vegetable oils, many of which are formulated specifically for the demands of large-scale commercial cooking and which are not even available to retail customers. Respondent Smucker sells canola and vegetable oils only to retailers, though it licenses the Crisco brand to a third party for sales to foodservice customers. Respondent Conagra supplies canola and vegetable oils to retailers, foodservice customers, and industrial customers.

24. Canola and vegetable oils fall into the category of cooking oils. The cooking oils category is made up of several subcategories: base oils, olive oil, and specialty oils. Base oils, which include canola oil, vegetable oil, corn oil, and peanut oil, generally are produced by crushing the seeds of different types of plants. Vegetable oil and canola oil are, by far, the two best-selling types of base oils sold to retailers in the United States. Vegetable oil alone accounts for around half of all retail base oil sales, while canola oil accounts for roughly one-quarter of sales. Olive oil is made from olives, which are pressed rather than crushed. Because of its means of production, the cost of inputs, and the cost of freight (most olive oil originates in Europe), olive oil generally is much more expensive than base oils. Specialty oils are oils with niche uses such as coconut oil, avocado oil, grapeseed oil, sunflower oil, and other flavored oils. Specialty oils also tend to be much more expensive than base oils.

## IV.

## RELEVANT MARKET

25. The relevant market in which to evaluate the effects of the Acquisition is no broader than the sale of canola and vegetable oils ("CV oils") to retailers in the United States.

### A.

### Relevant Product Market

26. The sale of CV oils to retailers is a relevant product market.

27. Canola and vegetable oils have similar physical properties and are suitable for similar uses. They have relatively high smoke points (i.e., the temperature at which an oil burns). Both oils appear light in color and are odorless and flavorless. Because of these properties, canola and vegetable oils are suitable for—and consumers use them for—a wide range of cooking applications, including baking, frying, and sautéing, as well as using them in marinades and vinaigrettes.

28. Canola and vegetable oils are typically the least expensive cooking oil types, sitting at the bottom of the price spectrum among all cooking oils. Canola and vegetable oils are similarly priced and are often included in the same promotions and advertisements. Each Respondent's list price for canola oil is similar to its list price for vegetable oil. Retailers also generally price canola oil and vegetable oil similarly. Respondents and retailers promote canola and vegetable oils at the same time, often discounting them at the same time and including both in the same promotions and advertisements.

29. Even if canola and vegetable oils are not sufficiently interchangeable to compose a single relevant market, the sale of CV oils to retailers can be analyzed as a cluster market. The competitive conditions for the sale of canola oil to retailers and the sale of vegetable oil to retailers are similar. The set of competitors and their market shares for the sale of each oil to retailers are similar, as are the customers to which they are sold.

30. Retailers could not switch their purchases of CV oils to other oils, or non-oil cooking agents, in sufficient numbers to render unprofitable a small but significant non-transitory increase in price ("SSNIP") on CV oils.

31. The sale of branded CV oils to retailers is also a relevant product market. Retailers would not switch their purchases of branded CV oils to other products in sufficient numbers to render unprofitable a SSNIP on branded CV oils. Differences in the prices that retailers pay to procure branded and private label CV oils reflect their perception of meaningful product differentiation between branded and private label CV oils. Differences in shelf prices for branded and private label CV oils reflect end consumers' perception of meaningful product differentiation between branded and private label CV oils. End consumers who buy branded CV oils generally pay a significantly higher price for a branded CV oil than for a private label CV oil.

***Other Products Are Not Substitutes for CV Oils***

32. Retailers and end consumers do not view other base oils—in particular, corn oil and peanut oil—as substitutes for CV oils. Consumers who buy CV oils perceive other base oils to be of lower quality than CV oils, as imparting distinctive flavors to food, as appropriate for only limited applications, such as deep frying, or possessing a combination of all three of these characteristics. These oils also typically have higher prices than CV oils because they have higher ingredient and refining costs. For example, corn oil is typically at least 10% more expensive than canola and vegetable oils, and peanut oil is typically twice as expensive as canola and vegetable oils. For these reasons, retailers could not switch their purchases of CV oils to other base oils in response to a SSNIP on CV oils.

33. Retailers and end consumers do not view olive oil as a substitute for CV oils. Extra virgin olive oil ("EVOO"), the most common type, has a dark green color and a strong, distinctive flavor. It also has a relatively low smoke point. These features render EVOO unsuitable for many of the most common oil applications, including baking and deep frying. There are other types of olive oil that are highly refined and share some physical properties with CV oils, but retailers and end consumers do not consider them as substitutes for CV oils. All types of olive oil are much more expensive than CV oils (on average, three to four times the price of CV oils). For these reasons, retailers could not switch their purchases of CV oils to olive oil in response to a SSNIP on CV oils.

34. Specialty oils such as coconut oil, avocado oil, grapeseed oil, sunflower oil, and other flavored oils, are not substitutes for CV oils in the eyes of retailers or end consumers. These oils often are heavily flavored and used for specific cooking applications and recipes. They also tend to be priced at a substantial premium—even higher than olive oil. For these reasons, retailers could not switch their purchases of CV oils to specialty oils in response to a SSNIP on CV oils.

35. Non-oil cooking agents, such as pan sprays, shortening, and lard, are not substitutes for CV oils in the eyes of retailers and end consumers. These products are very limited in application. Pan sprays, for example, are suitable only for greasing pans and light sautéing, and consumers generally view shortening as unsuitable for uses other than baking or (in the southern United States) frying. Retailers could not switch their purchases of CV oils to non-oil cooking agents in response to a SSNIP on CV oils.

## B.

## Relevant Geographic Market

36. The relevant geographic market is no broader than the United States.

37. Smucker and Conagra each produce and package all of their CV oils at a single facility. They each have a national distribution network to transport their CV oils to retailers.

38. Smucker and Conagra, as well as other suppliers of branded CV oils, have list prices for their CV oils that apply nationally.

39. Many large retailers have locations across multiple regions of the United States.

40. Smucker and Conagra negotiate trade funds separately for each retail customer. The relevant market may be evaluated as a cluster of retailers for which competitive conditions for suppliers of CV oils are sufficiently similar.

41. There are no major non-United States-based suppliers of CV oils in the United States. A foreign supplier would need to establish a distribution and sales network in the United States to be a significant competitor in the U.S. market.

## V.

## MARKET STRUCTURE AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

42. Smucker and Conagra, through their Crisco and Wesson brands, are the two largest suppliers of branded CV oils to retailers in the United States.

43. Other branded suppliers of CV oils, including Mazola, LouAna, 1-2-3, and Spectrum, are significantly smaller than Respondents and have limited competitive significance.

44. Mazola focuses on corn oil and has limited competitive significance in CV oils outside of the western and southwestern United States, Florida, and parts of New York.

45. LouAna focuses on peanut oil and has limited competitive significance outside of the southeastern United States and small parts of the northeastern United States.

46. Typically, retailers also offer private label CV oils on their shelves. At most, suppliers of branded CV oils compete for the business of a retailer against that one retailer's private label (i.e., Walmart could not use Kroger's private label as leverage to get more trade funds and better pricing from either Crisco or Wesson). From the perspective of a retailer buying CV oils, private label is one competitor to branded oils. Respondents also treat private label as a single competitor in the ordinary course of business.

47. Combined, Crisco and Wesson would account for at least 35% of the market for the sale of CV oils to retailers in the United States. Based on ordinary course documents, Crisco has approximately [redacted] share of sales of CV oils, while Wesson has approximately [redacted].

48. In a market for the sale of branded CV oils to retailers in the United States, Crisco and Wesson, combined, would account for at least 70% of the market, with Crisco accounting for more than [redacted] and Wesson accounting for more than [redacted].

49. The 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (the "Merger Guidelines") and courts typically measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

50. The Acquisition would result in a post-acquisition HHI exceeding 4,000, with an increase of more than 700, in a market for the sale of CV oils to retailers in the United States.

51. The Acquisition would result in a post-acquisition HHI exceeding 6,000, with an increase of approximately 3,000, in a market for the sale of branded CV oils to retailers in the United States.

52. The Acquisition would result in market shares and concentration levels beyond what is necessary to establish a presumption of competitive harm.

53. Evidence showing that the Acquisition would substantially lessen competition and result in significant anticompetitive effects bolsters the presumption of competitive harm.

54. The Acquisition is presumptively illegal under relevant case law.

## VI.

## ANTICOMPETITIVE EFFECTS

55. The Acquisition would eliminate substantial direct competition between Crisco and Wesson, resulting in increased prices for retailers and end consumers. In fact, that is Smucker's intent and rationale for the Acquisition.

### ***The Acquisition Would Eliminate Vigorous Competition and Result in Higher Prices for Retailers and End Consumers***

56. The Acquisition would end the pro-consumer and pro-competitive environment that exists today and has allowed retailers to pit Crisco and Wesson against each other to get lower prices. With all pricing, strategy, and competition brought under one roof and one management, Crisco would be able to "take out" Wesson and its pricing strategies that have undermined Crisco's attempts to increase prices. Thus, after the Acquisition closes, Smucker would have the power and incentive to increase prices on Crisco and Wesson CV oils. In fact, Smucker's analysis of the Acquisition and its go-forward plans for Wesson and Crisco show that Smucker recognizes that it will have the power to profitably increase prices.

57. Respondents have internally complained about the other brand's competitive behavior that has led to lower prices and the need to provide more trade funding to stay competitive with each other:

a. In [redacted], Smucker's Region Sales Manager for [redacted] described a Wesson advertisement for [redacted] gallons of canola, vegetable, and corn oil as "downright irresponsible trade spending by our friends at Con Agra." [redacted], Smucker's Director of [redacted], responded, "that's clearly irresponsible trade spending," and stated, "if you feel some of the recent Wesson tactics are going to materially impact your fiscal year projections, we'll want to talk about it sooner than later. Again, we're hopeful that our tactical spending and innovation will help offset any of Wesson's targeted tactics."

b. In [redacted], Smucker described Wesson's $[redacted] and $[redacted] retail price points for [redacted] bottles as "plain irresponsible" because Smucker would prefer avoiding having to offer additional trade funds to compete with Wesson.

c. In August 2016, Conagra's recaps from a meeting about the Wesson brand included: "Crisco is running deeper price points at major retailers (i.e. [redacted]); Crisco's pricing strategy is irrational; Crisco did not follow [Wesson's list] price increase; [and] Tom is asking to grow share having lost volume [by] pulling out trade [funding]."

58. Crisco believes that price competition with Wesson amounts to a "race to the bottom" and results in low retail prices for end consumers that "unnecessarily tak[e] dollars out of the category."

59. Over the last several years, Conagra and Smucker have each increased list prices on their CV oils. In each instance, whenever one increased its list prices on CV oils, the other opted against following the increase, forcing the price-increasing brand, in effect, to walk back much of its list price increase by offering more trade funding to retailers.

60. In spring 2016, Conagra announced a list price increase on Wesson, but after the new list prices became effective, "Wesson lost more volume than expected" because "Crisco decreased price as Wesson increased, creating significant [price] gaps on [the] shelf." As a result of the Wesson list price increase, "[s]ome retailers responded by awarding Wesson promotion events to Crisco." To reverse the sales decline, Conagra offered more trade funding to key retailers, including, among others, [redacted]. For example, Conagra approved additional trade funding, so that [redacted] could reduce retail prices on one-gallon bottles by $0.70, "Wesson is 10.69 versus Crisco's 9.99; I've attached a [planning scenario] to see what it would take to get to 9.99 for parity." Following its 2016 list price increase and the resulting loss in sales to Crisco, Wesson internal documents state that Wesson's profit-maximizing price is to [redacted].

61. Similarly, Smucker was forced to increase the amount of trade funding it offered to retailers when Conagra did not follow the Crisco list price increase Smucker announced in January 2017. [redacted], Smucker's Director of [redacted] for Crisco, anticipated this action, "if Wesson doesn't move [on list prices] or it's not to the extent that Crisco moved, we will be in a position to execute our [redacted] promotions."

62. If the Acquisition is consummated, Crisco and Wesson will no longer undermine each other's attempts to raise prices. Indeed, Smucker seeks to acquire Wesson precisely because it believes that the Acquisition will allow it to increase list prices, and reduce trade fund spending, on both Crisco's and Wesson's CV oils.

63. Smucker decided to acquire Wesson—for which it paid $285 million, beating the second-place bidder by nearly [redacted]—after determining that the Acquisition would allow it to profitably raise prices on both Crisco and Wesson oils.

64. One of Smucker's four "strategic rationales" for the Acquisition is that it "[t]akes [a] competitor out of the marketplace and allows [Smucker] to more effectively manage pricing/trade." Smucker's [redacted] President of [redacted] admitted that this particular rationale referred to "remov[ing] Conagra from the oil business."

65. In another document analyzing the Acquisition, Smucker listed "[i]nherent trade synergies [from] removing non-productive 'head-to-head' spending" as one of the Acquisition's "benefits," showing that Smucker expected it would save money because Crisco and Wesson would no longer be "beating each other up" on price.

66. In March 2017, Smucker executives created a financial model to show the effects of a 6% post-acquisition list price increase on Wesson, followed by a 7% increase on Crisco. That model also included Smucker reducing Wesson trade funding. [redacted], Vice President of [redacted], concluded that these price hikes would result in a massive *reduction* in Crisco's and Wesson's annual sales volume, as measured in pounds, but an *increase* in gross profits of nearly [redacted] million per year.

67. Smucker considered this modeling in its post-acquisition planning for Wesson and Crisco. Knowing that the two list price increases would be profitable, [redacted] told the [redacted], "[o]nce we close the deal, our plan would be to execute a price increase on Wesson consistent with our latest pricing action." Additionally, while planning the capital expenditures that Smucker would make to enable the production of Wesson oil at the Cincinnati plant, [redacted] told the [redacted] that there was no need to spend money on certain equipment to increase processing capacity because the planned price increases "could cause a volume loss on Wesson of approx. [redacted], or [redacted] lbs" in the first year, and "a volume decline on both brands of approx. another [redacted] lbs" in the second year. Smucker's analysis and post-acquisition plans reflect Smucker's understanding that it will have the power and incentive to increase prices on Wesson and Crisco as a result of the Acquisition.

68. Smucker's strategy of pursuing higher prices and lower output is not new. In September 2016, [redacted] recalled that Smucker stopped trying to get [redacted] to include Crisco instead of [redacted] private label in [redacted] display because "it required significant investment spending to secure the space." Instead of competing with private label, [redacted] remarked, "We're better off making money and selling less units[.]"

***<u>Crisco and Wesson Are Close Competitors on Price</u>***

69. The Acquisition would eliminate close price competition between Crisco and Wesson. Respondents' close price competition is reflected by their continuous monitoring of each other's everyday retail prices, promotional prices, and list prices for CV oils. The following are but a few recent examples of Respondents' continuous monitoring of each other's everyday retail and promotional prices:

a. In August 2016, Smucker's distributor reported that "Wesson has given [redacted] deals through the end of the year on 48 oz and they are below $[redacted] unit every day. . . . [I]f they are [redacted] $[redacted], we will not get any ads at [redacted] with our current program even with the additional ad pull that we have been giving them (which puts us at $[redacted] unit)." As this news was reported up the chain at Smucker, Smucker employees commented, "[w]e continue to see the hard court press from Wesson in [redacted]" and "Wesson is putting some serious pressure on us."

b. In September 2016, Conagra reported that there was a 20 million "CSU [Conagra Sales Unit]" decline at [redacted], noting "Crisco investing to lower everyday price to $2.69. Wesson 48oz. up +$0.20 vs. [Year Ago] driving wider gap to Crisco."

c. On December 13, 2016, Smucker saw that Wesson had invested in everyday pricing at [redacted] "to reduce their everyday pricing on [redacted] and [redacted] oz. items to be in-line with our current Crisco pricing (i.e. $[redacted] on [redacted], $[redacted] on [redacted] oz.)." Upon seeing Wesson's new pricing, Smucker immediately delayed by several weeks the list price increase it had planned to announce the next day, so that it could "evaluate the scope of Wesson's investment (is it beyond [redacted]?), and ultimately, understand the volume implications if Wesson doesn't follow our [list price] increase."

d. In May 2017, a Conagra spreadsheet prepared for the employees who would be assuming responsibility for the oil and sprays business instructed, for all Wesson customers, "Let teams know to keep you in the loop on what they hear about any competitors but Crisco most of all – June/July/Aug are holiday planning months and we should know quickly if we are competitive or getting beat."

70. Conagra's current pricing strategy for Wesson demonstrates the closeness of Respondents' price competition. [redacted]

71. Respondents also closely track each other's list prices. Unlike retail prices, list prices are not publicly available and change infrequently. Nevertheless, Respondents' ordinary course documents show that they monitor each other's list prices because doing so provides important competitive information about the other's cost structure and (by comparing the list price to the shelf price) the amount of trade funding offered to retailers. Respondents adjust their own pricing strategy in response. For example:

a. In July 2016, Smucker learned that Wesson had recently increased its list prices, which a Smucker analyst conveyed to Smucker's [redacted]: "Wesson Pricing Action [redacted][:] List Price increased to same level as before Price Decline ([redacted]) which Crisco never followed."

b. Conagra obtained a copy of Smucker's January 2017 list price increase on Crisco within days of the announcement to customers. When Conagra's broker for Wesson recirculated this information a month later, the broker wrote, "Attached is a Crisco Oil price list with new pricing; definitely compare to your Wesson Lists and see where we fall!" and "[l]everage where we can."

***<u>Head-to-Head Competition Between Crisco and Wesson Leads to Increased Trade Funding, and, Thereby, Lower Prices, Offered to Retailers</u>***

72. Vigorous head-to-head competition between Respondents has led to increased trade funding offered to retailers. The following examples show that Respondents have provided additional trade funding to retailers as a competitive response to one another:

a. Conagra approved an additional $[redacted] in trade funding for [redacted] in July 2016 "to help [Wesson] through the Holiday season considering our price to Crisco will be ~$1.50 higher."

b. In October 2016, Conagra's team handling the [redacted] account submitted a request for $[redacted] in trade funding, noting that "Crisco rarely sits at retail at full list/white tag [price] so [Conagra's] [redacted] team prepared the incremental plan based on the best situation after Holiday and current Crisco promotions." [redacted], Conagra's Manager of Customer Strategy Planning, approved the requested trade funding and stated, "[w]e are making these select changes as part of a strategic decision to become more competitive with competing brands."

c. In a February 2017 email discussing buy-one-get-one ("BOGO") promotions at [redacted] for [redacted]-ounce canola and vegetable oils, Smucker recognized that "[t]hese BOGO's have traditionally been in the plan for several years at [redacted]. There is [a] significant impact on Share/[equivalent units]/Trade if we walked away from these events. In addition [redacted] would immediately ask Wesson to support the BOGO ad if we pulled out."

d. In May 2017, Conagra approved [redacted] in additional trade funding for [redacted] with the understanding that "[Wesson] just secured being the sole branded oil at [redacted] and [redacted] will be kicking out Crisco."

73. Retailers, as Respondents' customers, benefit directly from the increased trade funding that Respondents' vigorous head-to-head competition generates, which results in lower prices, increased advertisement and promotional funding, and corresponding increases in sales. Increased trade funding also benefits end consumers because those funds often are used to reduce everyday shelf prices, offer deeper and more frequent promotional discounts, and build more in-store displays and provide more advertisements—with the latter making the shopping experience more convenient and increasing product and price awareness.

***Retailers Use Trade Funds To Lower Everyday Shelf Prices***

74. Head-to-head competition between Respondents has led to lower everyday shelf prices on CV oils. The following examples from Respondents' ordinary course documents are just some of the many instances in which competition with one another has led to lower everyday shelf prices:

a. In fall 2016, Conagra "[a]sked teams for plans that meet two objectives: [redacted] Conagra approved the plans and increased trade funding to achieve these objectives at five key retailers. The following table is reproduced from an internal ordinary course Conagra document and shows the amount by which Wesson's retail price would decrease as a result of this initiative:

| **Summary of Changes ([redacted])** | | |
|---|---|---|
| **Customer** | **From** | **To** |
| [redacted] | Gallon: $7.74 | Gallon: $6.98 |
| [redacted] | Gallon: 1wk @ $4.99 | Gallon: 2wks @ $5.99 |
| [redacted] | Gallon: $10.39 | Gallon: $9.99 |
| [redacted] | 48oz.: $4.19 | 48oz.: $3.99 |
| [redacted] | 48oz.: $2.79 | 48oz.: $2.50 |

b. In a March 2017 email, [redacted], Smucker's Director of National Accounts for [redacted], reported, "[a]t the same time we announced the [list price increase], Wesson had come back in and increased their investments with [redacted] to gain a [price] Lead position. The projected impact was a [redacted] [equivalent unit] volume loss or [redacted]% of base oil business." To maintain its price lead position, Smucker effectively refunded [redacted] of its Crisco list price at [redacted] "We are spending back [redacted] of [the list price increase] on [redacted] oz. and Gallons."

c. In August 2017, Smucker reduced a "[redacted]" $1 retail price gap to Wesson on [redacted]-ounce and [redacted]-sized bottles at [redacted] by providing [redacted] with $[redacted] in trade funds. Smucker noted that this investment in retail pricing would "eliminate the gap and get our baselines back to healthy."

75. Retailers often use increased trade funding that results from head-to-head competition between Respondents to reduce their everyday shelf prices.

***Retailers Use Trade Funds To Offer Deeper and More Frequent Promotional Discounts***

76. Competition between Respondents has led to deeper and more frequent promotional discounts on CV oils. The following examples from Respondents' ordinary course documents are just some of the numerous instances where head-to-head competition led to deeper and more frequent promotional discounts:

a. In June 2016, a Conagra employee who manages the [redacted] account reported that [redacted] "called me and told me that [Wesson's] program is now at risk of being pull [sic] because Crisco is offering $1.97." To save the program, which was a one-week promotional price on 48-ounce canola and vegetable oils, Conagra reduced its unit price to [redacted] from $2.13 to $2.07. Conagra lowered [redacted] unit price because it recognized that "we need to put our best offer on the table now with Crisco's offer being $1.97."

b. In August 2016, Conagra observed that Crisco's shelf price for 48-ounce was $2.69 at [redacted], while the price for Wesson was $3.99. To be more competitive, Wesson "approved a $1 mega and 2/$5" promotion.

c. In October 2016, Conagra approved more than $240,000 in incremental trade funding for various promotions at [redacted] to compete with Crisco. For example, Conagra approved over $[redacted] in incremental trade funding for [redacted] to "Secure Holiday event instead of Crisco." [redacted] received about $[redacted] in trade funding to "Defend Wesson versus Crisco." And [redacted] received over $[redacted] in trade funding because Conagra wanted to "Steal Crisco business."

d. In June 2017, Smucker approved incremental trade funding to run a four-week promotion on 128-ounce bottles of canola and vegetable oils at [redacted], to respond to Wesson's pricing. Wesson canola oil was priced at $[redacted], while vegetable oil was priced at $[redacted]. Smucker's promotion temporarily reduced pricing on Crisco canola oil from $10.98 to $8.48 and on vegetable oil from $10.48 to $7.98, or $[redacted] better than Wesson's shelf prices.

77. Retailers often use increased trade funding resulting from head-to-head competition between Respondents to offer larger and more frequent promotional discounts that result in lower prices for end consumers.

***Retailers Use Trade Funds To Offer More In-Store Displays and Advertisements***

78. Head-to-head competition between Respondents has led to more in-store displays and advertisements. In-store displays benefit retailers because they allow them to use their shelf and floor space effectively. Retailers benefit from advertisements because they help attract additional end consumers. End consumers benefit from in-store displays and advertisements because they provide greater convenience and product and price awareness. The following are some examples from Respondents' ordinary course documents showing that competition between Crisco and Wesson can result in more prominent and convenient product placement inside of retailers' stores, as well as more frequent promotional advertisements:

a. In [redacted], Smucker's National Account Manager for the [redacted] account reported that "[redacted] has requested a [Crisco] [redacted] oz BOGO ['buy-one-get-one-[free]'] ad on [redacted]," but noted that one of his "concerns" was "Does the company

NEED any volume for F[redacted] or should I simply reject the request and stay with my plan to run the [redacted] event? However, rejecting this request would mean that Wesson would get the BOGO. Also, my [redacted] BOGO could be at risk."

b. In May 2017, Wesson pursued an "[o]pportunity to kick out crisco [sic] in [redacted] if we can deliver a display ready pallet to them."

79. Retailers often use increased trade funding resulting from head-to-head competition between Respondents to provide more in-store displays and advertisements of Respondents' CV oils.

***<u>Competition from Other Brands or Private Label Will Not Replace the Competition Eliminated by the Acquisition</u>***

80. Competition from other branded CV oils sold in the United States would not replace the competition eliminated by the Acquisition. Although there are other branded CV oils available in the United States, their presence would not prevent a price increase post-acquisition, as they have far lower market shares and brand recognition in CV oils than Respondents. For example, despite its more than 100-year history, Mazola's national market share of CV oils is significantly below [redacted] even in a market that includes only branded CV oils. Other brands, including LouAna, have an even smaller share of the CV oils market than Mazola. These low sales figures reflect the fact that end consumers do not see the other brands as equivalent to Crisco and Wesson and that, therefore, they provide limited leverage to retailers in their price negotiations with Crisco and Wesson.

81. Competition from private label CV oils would not replace the competition eliminated by the Acquisition. For many retailers, a substantial portion of their end consumers demand branded CV oils, especially Crisco or Wesson. Many of these end consumers perceive branded CV oils to be superior in quality to private label, while others prefer branded CV oils because of the brands' tradition and familiarity. Accordingly, many retailers offer branded CV oils because, if they did not, end consumers would shop elsewhere for branded CV oils, especially Crisco and Wesson, and likely other products at another store.

82. Traditional grocers, as opposed to club stores or discount retailers, have an especially strong need to offer branded CV oils. Traditional grocers' business model is to offer a wide selection of products that includes well-known brands in each product category, including cooking oils. Dropping brands is not a viable option for these retailers, as they need to meet their end consumers' demands.

83. In recent years, retailers that have attempted to switch from a strategy of offering branded and private label CV oils to a strategy of offering only private label CV oils have restored their brand offerings. For example, [redacted] reverted to offering branded CV oils during the holiday baking season after its decision to eliminate branded CV oils resulted in significant sales declines. In March 2017, Smucker's [redacted] reported that, "the Base Oils business at [redacted] seems to be trending very low since they made the decision to take branded oil out of the category. . . . [redacted]

[redacted] After seeing its private label strategy fall short of expectations, [redacted] solicited bids from Smucker and Conagra because it wanted to offer Crisco or Wesson during the 2017 holiday season. Smucker and Conagra submitted bids, and Conagra won after offering a lower price on Wesson than Smucker offered on Crisco.

## VII.

## LACK OF COUNTERVAILING FACTORS

84. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, and sufficient to offset the anticompetitive effects of the Acquisition. Entry by another private label supplier would be insufficient to replace the competition lost between the branded products offered by Respondents.

85. Brand equity is the most significant barrier to entry. Brand equity is the premium that a company generates from a product's recognizable name compared to a generic equivalent. Crisco's and Wesson's brand equity permit a price premium over private label of approximately 10% to 20%. A new entrant seeking to supply CV oils to retailers, or an existing firm seeking to expand its sales of CV oils to retailers, would face significant challenges in convincing retailers to purchase its CV oils because retailers want to offer consumers the strongest brands. Building sufficient brand equity would require substantial investment and take at least several years.

86. A firm seeking to enter or expand would face significant difficulty getting its products placed on store shelves. Post-acquisition, retailers would have minimal shelf space to offer another brand for two reasons: first, retailers prefer offering their customers only the strongest brands of CV oils, which are Crisco and Wesson; and second, Smucker plans to maintain both Crisco and Wesson on store shelves after the acquisition closes.

87. Facing these and other impediments to entry, existing suppliers of CV oils are unlikely to expand in the CV oils market to replace the competitive significance of Wesson today.

88. Respondents cannot demonstrate cognizable and merger-specific efficiencies that rebut the strong presumption and evidence that the Acquisition likely would substantially lessen competition in the relevant market.

## VIII.

## VIOLATION

### COUNT I—ILLEGAL AGREEMENT

89. The allegations of Paragraphs 1 through 88 above are incorporated by reference as though fully set forth.

90. The Acquisition constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

## COUNT II—ILLEGAL ACQUISITION

91. The allegations of Paragraphs 1 through 88 above are incorporated by reference as though fully set forth.

92. The Acquisition, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

## NOTICE

Notice is hereby given to the Respondents that the seventh day of August, 2018, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

## NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as Smucker and Conagra were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Smucker and Conagra that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Smucker and Conagra provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Conagra as viable, independent competitor in the relevant market.

**IN WITNESS WHEREOF**, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this fifth day of March, 2018.

By the Commission.

Donald S. Clark
Secretary

SEAL: